

Statutory rights and duties of the parties under the Malaysian moneylenders law

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This article will consider the aspects of reform brought by the Malaysian Moneylenders (Amendment) Act 2003 in regard to the statutory rights and duties of the borrower and the moneylender under the moneylending transaction. Such rights and duties, which are derived from the moneylenders law and the moneylending agreement will be analysed to determine whether they are adequate to protect the interest of the borrowers, and whether the reform under the 2003 Act has addressed the weaknesses under the old law in strengthening the position of the borrowers in the moneylending transaction.

Field of research: Consumer Lending

1.0 Introduction

The Moneylenders Act 1951¹ 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 2003² ("MLA 2003") was gazetted on 29 May 2003 while enforcement took effect on 1 November 2003.³ 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 reform of the moneylenders law has, among other things, brought the implementation of the prescribed agreement in moneylending contracts. The agreement and the moneylending laws have laid down statutory rights and duties for both parties in the moneylending transactions. There are general rights and duties which apply to both parties, and also specific rights and duties which concern only one particular party to the contract. This article aims to examine whether they are sufficient to protect the interest of borrowers in the moneylending transaction.

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1.1 The borrower's rights and duties

1.1.1 Right to information

This article takes the view that borrowers in moneylending transactions need protection, not because they are members of a vulnerable group such as the poorly educated or the low-income earners, but because as consumers, they are systematically unable to process the information they need to make good decisions.⁴ Thus, it is important that borrowers obtain the right information before they embark on a moneylending transaction and when they actually enter into the transaction.⁵

The importance of receiving valid information about details of moneylending transactions cannot be denied, and the moneylenders must provide clear, fair and truthful details in the advertisement to allow the borrower to be aware of the commitment he might be taking on.⁶ This is the role of moneylending advertisements. A moneylending advertisement lists the details of the moneylender as well as the interest rates. In order to ensure that the public receive correct information from moneylenders, advertisement permits have been introduced under the new law to control moneylending advertisements.⁷

The absence of information may result in a borrower entering an agreement without understanding his rights and obligations.⁸ Thus, attestation of moneylending agreements by qualified professionals should provide explanation to borrowers on the terms and conditions of the moneylending agreement.⁹ For example, the borrower should know how many instalment payments are to be completed, the principal and interest due without demand on a monthly basis, as well as the interest rate.¹⁰ It should also be made clear to him that in the event of default, he would be charged simple interest at the rate of eight per centum per annum on the unpaid sum of instalment on a day-to-day basis from the date of default until the instalment is paid.¹¹

1.1.2 Right to receive a copy of the moneylending agreement

The importance of receiving a copy of the moneylending agreement may be two-fold; first, as a warning of the borrower's risk and commitment, and second, as a record for future reference.¹² Therefore, the borrower has an absolute right to receive a complete set of the moneylending agreement, including all annexures, if any, from the moneylender.¹³ The copy of the moneylending agreement to be supplied to the borrower must be a genuine copy so that the borrower will not be misled as to the effect of the document on him.¹⁴ The moneylender has no right to charge any fees or demand payment for providing the agreement to the borrower, as provided by regulation 10(3) of the MCLR. However, this ruling has been criticised for not really providing consumer protection, as members of the lower-income groups and ethnic minorities may not understand the document and/or simply fail to retain it for future reference.¹⁵ In the moneylending case, this

comment may possibly be refuted, as the compulsory attestation of the agreement, if properly monitored, could avoid any ignorance as to the terms of the agreement.¹⁶ However, it is agreed that some borrowers may have problems with the language of the document if it is in English. The law also specifies that the borrower is entitled to a complete set of the agreement before execution of the agreement.¹⁷ It is believed that the intention of the legislature is to ensure that the borrower is given the opportunity to examine the terms of the agreement before the contract is concluded. The agreement is only enforceable once it is duly signed by all parties to the contract and a copy of the agreement duly stamped is delivered to the borrower by the moneylender before the money is lent.¹⁸

After discussing the rights of borrowers, it is appropriate to investigate their obligations. The following paragraphs discuss the duties of borrowers.

1.1.3 Duty to make repayments regularly

Along with his rights in the moneylending transaction, the borrower is also required to perform his duties under the said contract. The borrower is obliged to honour the terms of the moneylending agreement and comply with the monthly instalment payments as provided in the First Schedule, consistently.¹⁹ If the repayments are not observed regularly, the borrower may find himself in default of instalment payments.²⁰ However, if the borrower fails to rectify the default, the moneylender is entitled to terminate the agreement and claim the balance outstanding from the borrower.²¹

1.1.4 Duty to discharge expenses and charges

Both item 5 of Schedule J and item 7 of Schedule K explicitly provide that all stamp duties and attestation fees shall be borne by the borrower. Therefore, the borrower may be required to pay the fees payable by law.²² However, no claim for service charges shall be directed to the borrower.²³ Further, if the transaction involves lawyers, the ability to charge legal fees is limited to the scale of fees set down in the Solicitors' Remuneration Order 1991. Rule 4 of Order 1991 states that the fees "shall include charges for normal copying and stationery and all other similar disbursements" in respect of any sale, purchase or other form of conveyance for completing any transaction. Thus, there is no possibility of inflating the legal fees. The law is also clear that the borrower is not liable to pay any extra fee or charges in regard to the moneylending agreement.²⁴

Like borrowers, the moneylenders have rights and obligations under the moneylenders law. In fact, moneylenders are required to comply with eleven duties, which will be further investigated below.

2.0 The rights and duties of the moneylender

2.1.1 Right to charge simple interest in cases of default

The law provides that if the borrower defaults in the repayment of instalments in regard to principal or interest upon the due date, the moneylender is entitled to charge simple interest on the unpaid sum of instalment, which shall be calculated at the rate of eight per centum per annum from day to day from the date of default until the sum of instalment is paid.²⁵ This new provision restricts any exploitation of the borrower through charging of high interest rate. The following formula is adopted in calculating the interest:

$$R = \frac{8}{100} \times \frac{D}{365} \times S$$

- R - represents sum of interest to be paid.
- D - represents the number of days in default.
- S - represents the sum of monthly instalment which is overdue.

2.1.2 Right of action

There are two circumstances that enable a moneylender to terminate a moneylending agreement under the MCLR. The first instance is failure on the borrower's part to repay any instalment amount and interest in excess of twenty-eight days after its due date.²⁶ The second is when the individual borrower is declared bankrupt or enters into composition or arrangement with his creditors.²⁷ In cases where the borrower is a company, the moneylender may terminate the agreement when the company enters into liquidation, whether compulsorily or voluntarily.²⁸ The borrower is then given fourteen days to rectify the contract or the agreement is deemed to be annulled.²⁹ Once an agreement is terminated, the moneylender has the right to claim the balance outstanding from the borrower.³⁰ It may be deduced from the above that under the MLA 2003, the right of a moneylender to take action in cases of default is clear and evident.

Where a moneylending agreement involves a security, there are two methods to claim the balance outstanding. If the security is an immovable property, charge actions over the property shall be dealt with in accordance with Order 83 of the Rules of the High Court 1980.³¹ In cases of movable property, the moneylender may dispose of the asset by auction.³² He is also entitled to bid for and purchase the security at the auction.³³ If there is any surplus from the proceeds of sale of the security, the moneylender must pay the amount to the borrower within thirty days after the auction.³⁴

After discussing the rights of moneylenders, it will now deal with their duties.

2.1.3 Duty to have a valid moneylender's licence

The most important obligation of a moneylender is to possess a valid moneylending licence before he can engage in any moneylending business.³⁵ In the event of non-compliance, the moneylender will run the risk of incurring criminal sanctions.³⁶ Further, the validity of the moneylending agreement and also any security offered will also be affected.³⁷ The first loan shark prosecuted under section 5(2) of the MLA 2003 was found guilty of the offence of carrying on a moneylending business without licence and fined RM30,000 or six months imprisonment.³⁸ The loan shark was discharged by the court after he had paid the fine.³⁹

2.1.4 Duty to provide a moneylending agreement in a prescribed form

As mentioned earlier, moneylenders must now provide a moneylending agreement in a prescribed form.⁴⁰ If it is a secured agreement, it should conform to Schedule J, and if it is unsecured, it should follow Schedule K.⁴¹ Failure to abide by this rule may render the agreement void and unenforceable, and if convicted, the moneylender may also liable to a maximum fine of RM50,000 or imprisoned for five years.⁴² A subsequent offence will invoke the punishment of whipping.⁴³ Further, any addition, omission or alteration to the agreement without the consent of the Registrar is not permissible, and may render the agreement void and unenforceable.⁴⁴

2.1.5 Duty to display licence at all times

It is the statutory duty of a moneylender to display the moneylending licence in a conspicuous place at the business premise at all times.⁴⁵ Since it is not clearly stated where the licence must be displayed, it may be assumed that the discretion is left to the moneylender to determine what is a conspicuous place at his premises. Indeed, this is a commendable rule, as it is believed that the intention of law is to inform prospective borrowers that they are dealing with licensed moneylenders. Since this is a legal requirement, a breach of this condition will incur criminal sanction.⁴⁶

2.1.6 Duty to keep accounts accurately

Every moneylender is obliged to keep a regular account of each loan made in a paged and bound book.⁴⁷ It is important that the moneylender keep a clear account of each transaction, since such account must be produced in court in the event of recovery of any money lent or enforcement of any moneylending agreement or security made in respect of the loan.⁴⁸ This duty must be strictly observed as failure to do so would prevent the moneylender from enforcing any claim in regard to any default in the moneylending transaction.⁴⁹ Apart from that, the moneylender would also be liable to criminal penalties.⁵⁰

2.1.7 Duty to supply information

The law on the obligation to supply information as to the state of loan was provided in the original version of the Act, which has been retained in the MLA 2003.⁵¹ The only difference between the earlier and the latter provision is the amount payable for expenses for supplying information on the borrower's demand. Throughout the tenure of a moneylending agreement, the moneylender is obliged to supply information to the borrower in the form of account statements and loan or security documentation.⁵² This duty should only be discharged upon receiving a reasonable demand in writing and on tender of the sum of three *ringgit* and five *ringgit* respectively for expenses.⁵³ The statement of account shall conform to the First Schedule of the moneylending agreement and contain the following particulars:⁵⁴

- “Date of loan, amount of the principal of the loan and rate per centum per annum or the amount of interest charged;
- The amount of any payment already received by the moneylender in respect of the loan and the date on which it was made;
- Arrears on the principal amount and interest; and
- The amount of every sum not yet due which remains outstanding and the date upon which it will become due.”

A serious consequence is borne by the moneylender if he fails without reasonable excuse to fulfil the statutory demand of the borrower.⁵⁵ He will be deprived of his right to sue for recovery of any sum due under the moneylending agreement while his default continues.⁵⁶ In addition, interest cannot be charged in respect of the default period.⁵⁷ Moreover, if the default continues after proceedings have ceased to lie in respect of the loan, the moneylender is liable to a fine not exceeding fifty *ringgit* for every day on which the default continues.⁵⁸ Surprisingly, the low amount of the fine was retained in the new law. This is the only amount of fine which has not been increased by the amendment.

2.1.8 Duty to charge authorised expenses only

Under the old law, the only expenses that could be legally charged to the borrower were stamp duties, fees payable by the law and legal costs relating to the loan transaction.⁵⁹ Other expenses were deemed to be illegal and any such payment was recoverable as a debt due to the borrower.⁶⁰ In cases where a loan had been completed, the sum due that had yet to be recovered could be set off against the amount actually lent.⁶¹ This provision has been suitably retained under section 23 of the MLA 2003.

2.1.9 Duty to provide receipt

The moneylender has a duty to provide a receipt to the borrower after receiving payment.⁶² Any breach of this duty is an offence, and if convicted, the moneylender is liable to be fined or imprisoned or both.⁶³ This amended provision certainly removes the absurdity in the old law whereby receipts were not given as

a matter of course or right.⁶⁴ There had to be a demand by the borrower and if there was no demand, no receipt was issued.⁶⁵ It is submitted here that the amendment is timely and definitely in line with the commercial practice whereby a receipt must be issued as a proof of payment.⁶⁶

2.1.10 Duty in regard to security

It is provided that the moneylender is required to exercise the same care and diligence over the security in his custody as would a prudent owner over his own property.⁶⁷ The moneylender is also responsible for any loss or damage caused by fire, theft, negligence or otherwise that occurs during the tenure of security.⁶⁸ In cases where any security is damaged or destroyed by fire, the value of the security shall, for the purpose of compensation to the borrower, be assumed to be one quarter more than the value of the security so lodged.⁶⁹ It is also a duty of the moneylender not to encumber the security for whatever purpose.⁷⁰

2.1.11 Duty to serve documents

The moneylender is obliged to provide the borrower with a copy of an agreement that is duly signed and stamped before money is lent.⁷¹ Further, the moneylender or his solicitor is also obliged to serve any notice, request or demand under a moneylending agreement.⁷² Such duty is deemed to be fulfilled either by sending the said document by A.R.⁷³ registered post or delivered personally.⁷⁴ This amended provision is more relaxed than the old section 16, which required a copy of the memorandum authenticated by the moneylender or his agent to be delivered to the borrower. The requirement for authentication meant that not only had a signed copy of the memorandum to be delivered to the borrower but the moneylender had also to endorse it, certifying that the borrower had received the copy of the original memorandum.⁷⁵ Based on the above, it is suggested here that authentication of documents as required in the past was mainly to ensure that the borrowers received the documents safely. At present, such practice may be abandoned since proof of receipt can be determined by a ruling that documents sent by A.R. registered post shall be deemed to have been received upon the expiry of a period of five days of posting.⁷⁶ Further, A.R. registered post is a highly secured service for important documents and enables the sender to receive an acknowledgement of receipt of the items by the borrower.⁷⁷

2.1.12 Duty not to fraudulently induce any person to borrow

Section 29 of the MLA 2003 expressly provides that it is an offence to fraudulently induce or attempt to induce any person to borrow money or to agree to the terms on which money is borrowed. The law further states that false inducement may occur through any false, misleading or deceptive statement, representation or promise or, by any dishonest concealment of material facts.⁷⁸ This provision applies to an individual moneylender or his employee, a moneylending company, including the director, general manager, manager or

officer of the company, a moneylending society, including the president, vice-president, secretary, treasurer or other officer of a society, and a moneylending firm, including the partner or member, or other officer.⁷⁹

2.1.13 Duty to comply with relevant written law

The MLA 2003 and the subsidiary legislation made thereunder constitute the most important laws in regulating moneylenders' conduct in the moneylending transaction. Apart from the MLA 2003, the moneylender is also obliged to observe the provisions and requirements of any other written law affecting the moneylending business.⁸⁰

3.0 Conclusion

In concluding the discussion on rights and duties of moneylenders and borrowers in a moneylending transaction, it is envisaged that the imposition of statutory rights and duties for both moneylenders and borrowers are likely to instil awareness in both parties of their respective roles in the moneylending transaction, so that both parties are pleased with the contract they entered into. The analysis also shows that the rights and duties are derived from a blend of original provisions retained in the MLA 2003 as well as newly inserted provisions. Provisions such as the right to receive a copy of the moneylending agreement before the loan is signed,⁸¹ duty not to fraudulently induce borrowing⁸² and duty to charge lawful expenses⁸³ are suitably retained in the new law, whereas provisions such as the duty to provide moneylending agreement in prescribed form,⁸⁴ duty to charge simple interest not exceeding 8% per annum⁸⁵ and duty to provide a receipt to the borrower after receiving payment of money⁸⁶ are freshly formulated or amended to remedy the failings of the old law. Thus, it is suggested that reform under the 2003 Act has addressed the weaknesses under the old law in strengthening the rights and duties of the parties to the moneylending agreement.

¹ Act 400.

² Act A1193 of 2003.

³ <http://www.kpkt.gov.my>

⁴ Iain Ramsay, "From Truth Lending to Responsible Lending." Ins. G. Howells et al (edit) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*, Ashgate, Hants, 2005, pp. 48-51; G Hadfield, R Howse and M Trebilcock, "Information-Based Principles for Rethinking Consumer Protection Policy", (1998) 21 *Journal of Consumer Policy* 131; OFT, *Consumer Detriment under Conditions of Imperfect Information*, 1997.

⁵ Iain Ramsay, "From Truth Lending to Responsible Lending." Ins. G. Howells et al (edit) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*, Ashgate, Hants, 2005, pp. 48-49.

⁶ S. Rachagan, *Consumer Law Reform-A Report*, United Nations Development Programme and Selangor and Federal Territory Consumers' Association, Kuala Lumpur, 1992, para 3.21.

⁷ MLA 2003, s 11A.

⁸ Iain Ramsay, "From Truth Lending to Responsible Lending." Ins. G. Howells et al (edit) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*, Ashgate, Hants, 2005, pp. 48-51.

⁹ MLA 2003, s 27; *Sundaralingam v Ramanathan Chettiar* (1966) 2 MLJ 293.

¹⁰ This are the information of the First Schedule of the moneylending agreement.

¹¹ MCLR, schedule J & K; item 2.

¹² G. Howells and S. Weatherill, *Consumer Protection Law*, 2nd ed, Ashgate, Hants, 2005, p. 317.

¹³ MLA 2003, s 16(1).

¹⁴ *Chai Sai Yin v Kok Seng Fatt* [1966] 2 M.L.J. 54.

¹⁵ G. Howells and S. Weatherill, *Consumer Protection Law*, Dartmouth, Aldershot, 1995, p. 254.

¹⁶ MLA 2003, s 27.

¹⁷ MLA 2003, s 16(1).

¹⁸ *Ibid.*

¹⁹ MCLR, Schedule J & K, First Schedule.

²⁰ MCLR, Schedule J & K, item 2.

²¹ MCLR, Schedule J, item 3; Schedule K, item 5.

²² MLA 2003, s 23.

²³ *Yik Wah Trading (Pte) Ltd v Tan King Kak* [1972] 1 MLJ 94.

²⁴ For example, in the unreported housing case of *Indrani d/o Renganathan @ Indrani Singarajah & Sharmini a/p R Singarajah v Aneka Batu (M) Sdn. Bhd.* (Kuala Lumpur High Court Commercial Division No. D5-22-1535-92), the High Court confirmed the basic principle of conveyancing that it is the duty of the developer to prepare the sale and purchase agreement at its own cost. The Court held that the purchaser is not liable to pay for the printing charges for the sale and purchase agreement supplied by the developer or its solicitor.

²⁵ MCLR, Schedule J, item 2(1); Schedule K, item 2(1); see also MLA 2003, s 17(1).

²⁶ MCLR, Schedule J, item 3(1)(a); Schedule K, item 5(1)(a).

²⁷ MCLR, Schedule J, item 3(1)(b); Schedule K, item 5(1)(b).

²⁸ *Ibid.*

²⁹ MCLR, Schedule J, item 3(2); Schedule K, item 5(2).

³⁰ In cases where the balance outstanding is below RM250 000, the claim shall be in accordance with Order 45 of the Subordinate Court Rules 1980, in cases where the balance outstanding is above RM250 000, the claim shall be made under Order 79 of the Rules of the High Court 1980. Both Order 45 and Order 79 deal with moneylenders' actions.

³¹ MCLR, Schedule K, item 5(4)(a).

³² *Ibid.*, item 5(4)(b).

³³ MCLR, Schedule K, item 5(5). The lender must forward to the borrower a notice stating the particulars of the auction within seven days after the auction; MCLR, Schedule K, item 5(6).

³⁴ MCLR, Schedule K, item 5(7). Failure to do so would require the lender to pay the surplus together with liquidated damages calculated from day to day at the rate of eight per centum per annum of the surplus sum until the date the lender pays the surplus sum; MCLR, Schedule K, item 5(8).

³⁵ MLA 2003, s 5(1).

³⁶ MLA 2003, s 5(2).

³⁷ MLA 2003, s 15; the moneylending agreement shall be unenforceable.

³⁸ "Along kena denda RM30,000" (Loan shark fined RM30,000), *Berita Harian*, 8 April 2005.

³⁹ *Ibid.*

⁴⁰ MLA 2003, s 10P(1).

⁴¹ MCLR, reg 10(1).

⁴² MLA 2003, s 10P(2)

⁴³ *Ibid.*

⁴⁴ MCLR, reg 10(2); MLA 2003, s 10P(3).

⁴⁵ MLA 2003, s 5F.

⁴⁶ *Ibid.*

⁴⁷ MLA 2003, s 18(1).

- ⁴⁸ MLA 2003, s 21(2); *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55.
- ⁴⁹ MLA 2003, s 18(2).
- ⁵⁰ *Ibid.*
- ⁵¹ MLA 2003, s 19(1).
- ⁵² *Ibid.*
- ⁵³ MLA 2003, s 19(1) & (2). Under the old law, the expenses charges were only fifty cents.
- ⁵⁴ MLA 2003, s 19(1)(a-d).
- ⁵⁵ MLA 2003, s 19(3).
- ⁵⁶ *Ibid.*
- ⁵⁷ *Ibid.*
- ⁵⁸ *Ibid.*
- ⁵⁹ MLA, s 23.
- ⁶⁰ *Ibid.*
- ⁶¹ *Ibid.*
- ⁶² MLA 2003; s 19(4).
- ⁶³ *Ibid.*
- ⁶⁴ MLA, s 19(4).
- ⁶⁵ *Ibid.*
- ⁶⁶ *Daniel KC Tan & Associates v Progressive Insurance Sdn Bhd* [2001] 5 MLJ 642; *Ganad Corporation Bhd v Flobright Trading Sdn Bhd & Anor* [2000] 6 MLJ 830; *Dumpar Tinggi Sdn Bhd v Teh Swee Seng & Anor* [2000] 7 MLJ 731; *Practice Directions* [1995] 3 MLJ li.
- ⁶⁷ MCLR, Schedule K, item 4(1).
- ⁶⁸ *Ibid.*, item 4(2).
- ⁶⁹ *Ibid.*, item 4(3).
- ⁷⁰ *Ibid.*, item 4(4).
- ⁷¹ MLA 2003, s 16.
- ⁷² MLA 2003, s 29E.
- ⁷³ A.R. stands for acknowledgement receipt
- ⁷⁴ MLA 2003, s 29E; MCLR, Schedule J, item 6 and Schedule K, item 8.
- ⁷⁵ *Kartar Singh v Mahinder Singh*, (1959) MLJ 248; *Mahinder Singh v Beh Yok Nam* (1967) 1 MLJ 294; *Kehar Singh v Karuppiah* (1964) MLJ 249.
- ⁷⁶ MCLR, Schedule J, item 6 and Schedule K, item 8.
- ⁷⁷ www.pos.com.my
- ⁷⁸ MLA 2002, s 29.
- ⁷⁹ *Ibid.*
- ⁸⁰ MCLR, Schedule J, item 4; Schedule K, item 6. Such laws are for example, the Contract Act 1950 and the Penal Code.
- ⁸¹ MLA 2003, s 16.
- ⁸² MLA 2003, s 29.
- ⁸³ MLA 2003, s 23.
- ⁸⁴ MLA 2003, s 10P(1).
- ⁸⁵ MLA 2003, s 17(1).
- ⁸⁶ MLA 2003, s 19(4).

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