IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 178 of 2018

BETWEEN

ROGELIO ANTONIO HAWKINS

Plaintiff

AND

ABARBANEL LTD

Defendant

OPEN COURT

Appearances:	**Mr. H.O. Merren IV, attorney for the Plaintiff** **Mr. Tom Lowe KC instructed by Mr. Nicholas Dixey and Mr. Colm Flanagan of Nelsons for the Defendant.**
Before:	**Hon. Justice Margaret Ramsay-Hale**
Heard:	**23 and 24 November 2021**
Written Closing submissions From the Plaintiff:	**14 December 2021**
Draft Circulated:	**5 December 2022**
Decision Delivered:	**16 December 2022**

HEADNOTE

Contracts - illegal and void - contract to lend money - whether defendant carrying on business without being licensed - whether contract prohibited by statute - whether contract unenforceable on the ground of public policy

JUDGMENT

Introduction

1. The Plaintiff is Mr. Rogelio Hawkins, a local businessman. The Defendant, Abarbanel Ltd., is a company registered under the laws of Cayman ("Abarbanel"). The sole shareholder of Abarbanel is Bardi Financial Ltd. ("Bardi"), a Cayman exempted company owned by Dr. David Barker and his brother James of Iowa, USA.

2. On 19 February 2014, Mr. Hawkins and Abarbanel agreed that Abarbanel would lend certain funds to Mr. Hawkins pursuant to the terms of a document headed Commitment to Lend ("the Agreement"). The sum agreed to be loaned was US$357,000 at an interest rate of 18% per annum, discounted to 16% if payments were kept up. The first 6 months' interest on the full line of credit in the sum of US$30,964 was to be prepaid, that is to say, deducted from the sums advanced at closing. The term was for one year, extendable month to month thereafter. The Agreement also provided for initiation, registration and legal fees as well as stamp duties to be paid by Mr. Hawkins.

3. The interest rate provisions allowed for the rate of interest to be compounded in the event of default, that is to say calculated on both the principal and the accumulated interest from previous periods.

4. The terms of the Agreement included the registration of a first charge in favour of Abarbanel over property owned by Mr. Hawkins by way of security for the loan. On 14 March 2014, Mr. Hawkins executed two charges over property owned by him ("the Charges") and submitted them to the Land Registry whereupon Abarbanel advanced the first tranche of the Loan.

5. A further US$50,000 - unsecured - was advanced on 1 April 2014 bringing Mr. Hawkins' total indebtedness to Abarbanel to US$407,000.

6. Mr. Hawkins subsequently fell into arrears and, on 26 January 2018, Abarbanel gave him notice of its intention to enforce the Charges to recover the monies which it claimed were now due and owing.

7. There followed a lengthy period of negotiation with respect to the payment out of the debt which Abarbanel asserted was now in excess of US$875,000. Mr. Hawkins raised issues with respect to Abarbanel's account of the monies which had been paid by Mr. Hawkins and the interest rates applied. On 13 September 2018, Mr. Hawkins, through his attorneys, gave his own account of the loans and made settlements offers which were rejected by Abarbanel.

8. During the course of those negotiations, Mr. Hawkins discovered that Abarbanel did not hold certain licenses required under the **Local Companies Control Act (2007 Revision) (LCCA")** or the **Trade and Business Licensing Act (2007 Revision)**[1] **("TBLA")**. When the negotiations failed, Mr. Hawkins commenced these proceedings in which he alleges that the Agreement was illegal as Abarbanel was carrying on business as a money lender in breach of the licensing provisions in the statutes and seeks declarations that Abarbanel is not entitled to the interest reserved under the Agreement and that the security given for the loan is unenforceable.

[1] The Plaintiff pleaded later Revisions of the Acts in error

9. Mr. Hawkins also avers that the Agreement was an unconscionable bargain which should not be enforced in that the interest rate was exorbitant and a non-negotiable term of the Agreement which he had signed without having the benefit of legal advice.

10. Pursuant to the terms of a Consent Order dated 28 September 2018, Mr. Hawkins paid to Abarbanel the sums advanced to him by Abarbanel net of the interest reserved under the agreement in the amount of US$376,036.00 and paid into Court the sum US$40,504.73 as and for interest. Abarbanel discharged its charge over Mr. Hawkins' residence leaving the other charge over his rental properties in place.

The Claim

11. Mr. Hawkins seeks certain declarations and orders which may be summarised as follows:

    (i) A Declaration that the Agreement is illegal and void on the grounds that Abarbanel was carrying on business as a money lender without being duly licensed to do so under various provisions in the **LCCA** and the **TBLA;**

    (ii) An Order that no interest is due to Abarbanel under the Agreement; and

    (iii) An Order that the remaining charge over his property be discharged.

The Defence

12. In its pleaded Defence, Abarbanel accepts that it was not licensed under either law, but denies that it was carrying on business as a moneylender and was not required, for that reason, to be licensed.

13. Abarbanel states further that even if a license were required and Abarbanel was in breach of the provisions of the local statutes as pleaded, such a breach would not render the Agreement and the supporting security unenforceable.

14. In response to the allegation that the bargain was unconscionable, Abarbanel avers that the Mr. Hawkins was aware at all material times that this was a private short-term loan with a private lender, that he had entered freely into the arrangement and had had the benefit of legal advice.

The Facts

15. At the time the Agreement was made, Mr. Hawkins was in default of two bank loans with lenders, Royal Bank of Canada and Fidelity Bank, secured by charges against his personal residence and a residential rental property comprised of several apartments. He was, for various reasons, unable

to refinance these loans with a commercial bank to forestall the sale of his properties by the banks. He was introduced to Mr. Kelvin Latta, a Director of Abarbanel, as someone who made private loans.

16. At a subsequent meeting between them, Mr. Latta presented Mr. Hawkins with the Agreement which set out the terms on which Abarbanel was prepared to lend him money at a rate of interest which Mr. Hawkins contends was unconscionable. Mr. Hawkins says that Abarbanel presented the loan terms on the basis that he could "*take it or leave it",* knowing that he had no alternative means of refinancing his properties and averting the sale of his personal residence and rental properties which he was desperate not to lose. He says further that Mr. Latta failed to draw his attention to a clause in it which read: *"the Borrower is advised to seek legal counsel before signing this document."* He relies on these facts to support the allegation that the Agreement was unconscionable bargain which should not be enforced by the Court.

17. Abarbanel refutes that allegation. Dr. Barker who gave evidence on behalf of Abarbanel, described the agreement as a mutually advantageous, personal and private arrangement under which Mr. Hawkins would receive funds which he needed and could not borrow from a commercial lender, on a short-term bespoke basis and Abarbanel would, in turn, receive a favourable rate of return for a relatively short-term investment.

18. He contended that Mr. Hawkins was an experienced businessman who, at various times, has held significant shareholdings in commercial enterprises and was, in the circumstances, well able to understand the terms of the Agreement. Further, Mr. Hawkins had entered the arrangement on an entirely voluntary basis having solicited the help of Abarbanel.

19. He also asserts that, contrary to his assertions, Mr. Hawkins had legal advice.

20. This advice was tendered by Mr. Hawkins' attorney, Mr. Orren Merren III, who said that when he looked through the draft copies of the Charge documentation, noted what appeared to him to be some very complicated interest provisions and was prompted to remark to Mr. Hawkins that,

> "*You'd need a Philadelphia lawyer to figure out what all this means, in order to know what your effective interest rate will be, but I see that 18% per annum nominal interest rate and that it may be compounded which means your principal would increase if you don't pay on time. This is very high, the sort of interest rate you would pay for a credit card, but not for a normal commercial loan secured with local real estate. Are you sure you are ok with this?"*
>
> *"This could be jumping from the frying pan with two bank loans in default and into the fire on even harder terms with a private lender that you could well end up in default again and leave you in a worse position."*

21. He offered to try and negotiate better terms with Abarbanel, but Mr. Hawkins refused his help, stating that the terms were non-negotiable and that he had to sign the Charge documents to save his properties.

22. These facts do not support a claim that the Agreement was an unconscionable bargain. Among the matters which must be proved for the claim to be established is that unfair or unconscientious advantage was taken of a disadvantaged position: see *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944, 961 per Peter Millett QC. One party must have been at a serious disadvantage to the other, whether through poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken. Additionally, as Peter Millett QC stated, there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, which in the traditional phrase, "*shocks the conscience of the court."*

23. The fact that Mr. Hawkins was cash-strapped at the relevant time did not put him at any relevant disadvantage. He was certainly neither poor nor ignorant. He was a business owner and operator. While the bargain might have been improvident it was not unconscionable in that Abarbanel did not act in a morally culpable manner.

24. Despite his reliance on it, nothing turns on the fact that the clause advising the borrower to get legal advice was not pointed out to Mr. Hawkins as he was able to read the Agreement for himself and received legal advice before concluding the transaction.

25. Mr. Merren sought to rely on the extra-judicial writing of Peter Applegarth J of the Supreme Court of Queensland,[2] to support the submission that Mr. Hawkins' financial weakness and desperation to save his house and the rental property made him a vulnerable borrower as he was "*a financially insecure borrower"* who could not obtain credit from a commercial lender.

26. He relies, in particular, on the following passages from the judgment of Justice Edeleman in *ASIC v Kobelt,* (2019) 267 CLR 1 at 281 which are cited by Applegarth,

> "*a transaction would be set aside by the Courts of Chancery unless that other party could prove that that transaction was reasonable…. There would be a taking of an "unfair advantage" or a breach of "the rule of reasonableness" if any substantial undervalue, sometimes described as a "hard bargain" could be proved. The same approach, requiring fairness and reasonableness to be proved by the other party, was taken to transactions entered without independent legal advice by the poor and "imperfect[ly] educat[ed], or the poor and illiquid or the elderly."*

[2] *Credit and Unconscionability - the Rise and Fall of Statutes* 19 November 2020

27. Edelman J made the point, however, which Mr. Merren appears not to have appreciated, that times had changed at [282] and that,

> *"By the mid-twentieth century, the conscience of equity hardened so that mere "unfairness" or "unreasonableness" was not sufficient in any of the various categories. Claimants had to be subject to some "special" disadvantage - a disadvantage that must* ***seriously affect their ability to make a judgment about their own interests*** *… In England, in addition to these descriptions the courts also described equity* ***as requiring conduct that is "morally reprehensible***" *or conduct that "shocks the conscience of the court". With some exceptions in application, these various epithets established* ***a high bar for the vitiation of transactions in twentieth century equity on the ground of unconscionable conduct.*** [my emphasis]

28. I am not sure what was intended by the term "*financially insecure borrower",* but it is difficult to see how it applies to a man of property who owns and operates a business and is able to meet his ordinary expenses.

29. In any event, Mr. Hawkins did not have any special disadvantage that affected his ability to make a judgment about his own interest. He took a calculated risk: Abarbanel set out the terms on which it was prepared to lend money to Mr. Hawkins and Mr. Hawkins, a sophisticated borrower, decided to conclude the Agreement by executing the Charges in the face of advice that the interest rates were high and that he might be unable to service the debt.

30. It appears from the evidence, that in assessing that risk, Mr. Hawkins placed some emphasis on Mr. Latta's assurance that Abarbanel would help him with the loan through a gold trading arrangement which would allow Mr. Hawkins to pay off the loans with the profits he stood to make. Under that agreement, Mr. Hawkins would facilitate the purchase of gold from Honduras and Nicaragua for a repository associated with Abarbanel for which service Abarbanel would pay him.

31. I note for completeness, that Mr. Hawkins gave evidence at some length[3] with respect to the putative breach of this gold trading arrangement which resulted in him not receiving the anticipated profits to help pay off the loan. No point of controversy arises for the Court's consideration given that no relief is sought in respect of that breach. In any event, as Dr. Barker said in his evidence on behalf of Abarbanel, there was nothing to suggest that the repayment terms which were agreed were in any way contingent upon the outcome of the gold trading venture.

[3] First Affidavit dated 18 September 2018.

32. I return to the narrative and to the facts relied on by Mr. Hawkins to establish that the Agreement was illegal and unenforceable, which is the central issue to be resolved on the pleaded case. Mr. Hawkins invites the Court to draw the inference from fact that Abarbanel had made several secured loans to local residents and had instituted proceedings to enforce its security in respect of at least one of them that it was carrying on business as a moneylender. He also relies on the fact that Mr. Latta was appointed Manager in June 2012 and that a Mr. Ray Percival was appointed Assistant Manager in September 2013 to support the inference that Abarbanel was carrying on a business. He also regarded it as a matter of some significance that Dr. Barker is a self-described *"private property anarchist"* who is in the business of making commercial loans in the United States.

33. In his evidence Dr. Barker explained that Abarbanel came to lend money to divers persons on Island because business associates would, from time to time, introduce Mr. Latta to individuals who wanted to borrow money. In June 2012, Mr. Latta was introduced to two Cayman Islands residents who wished to borrow money and Abarbanel was incorporated as a vehicle to hold a mortgage to secure their loan. Both he and Mr. Latta were directors.

34. The monies loaned through Abarbanel were advanced by him and he decided to stop the lending activity in order to conserve capital. Dr Barker also said - which is not accepted by Mr. Hawkins - that as a result of this decision, Mr. Latta was never employed by Abarbanel, despite him being recorded as Manager. Instead, Mr. Latta remained employed to Bardi under a SEZ Employment Certificate[4] from 2013 and 2018.

35. Dr. Barker stated further that, during the period when the Abarbanel was considering doing business within the islands, Mr., Latta became seriously ill. For this reason, as a precaution, Mr. Percival was appointed as a Director and Assistant Manager. Despite being recorded as an Assistant Manager, he did not carry out any managerial functions and was not employed by the company as such. Indeed, Mr. Percival was resident in the UK throughout the relevant period. He also asserted that neither Mr. Latta nor Mr. Percival were remunerated as manager or assistant manager.

36. Dr. Barker said that Abarbanel was not in the business of providing commercial mortgages or carrying on any business for which it required to be licensed. He stressed the fact that Abarbanel had no employees, no business premises and was not trading and that it did not advertise any services. Rather, Mr. Hawkins had solicited them for a loan.

37. Over the course of 2 ½ years beginning in June 2012, Abarbanel made the six agreements to lend. I set out the loans and highlight some of their terms below:

[4] An employment certificate for non-Caymanians working in Companies in the Special Economic Zone

(i) $156,250 for a term of 2 years to an individual under an agreement to lend dated 21 June 2012 (exhibited) which provided for a first charge over real property, for the payment of legal and registration fees as well as a "loan establishment" fee calculated at 3% of the principal sum, interest of 15%, blended payments of interest and principal, provisions for extending the agreement and for terminating the agreement including the seizure and sale of the property provided as collateral for the loan.

(ii) $650,000 for a term of 2 years to an individual under an agreement to lend dated 24 July 2012 (not exhibited) which provided for a first charge over real property and interest of 15% per annum with a further sum of $300,000 being loaned to the same party on the same terms and conditions under an agreement dated 12 November 2013 (not exhibited)

(iii) $75,000 for a term of 5 months at 16% per annum to an individual under an agreement dated 12 February 2013 (exhibited) which provided for the payment of legal and registration fees as well as a "loan establishment" set at 3% of the loan amount, interest only payments of $1000 a month for 3 months and two balloon payments of $38,000 each in months 4 and 5, secured by a promissory note and a guarantee.

(iv) $300,000 for a term of 3 years at a rate of 15% per annum to a company under an agreement to lend dated 12 April 2013 (not exhibited) secured by a debenture and a collateral charge over real property.

(v) $68,750 for a term of 12 months at an interest rate of 16% per annum under an agreement dated 21 January 2014 (exhibited) which provided for the payment of fees of $4,813 (7% of the loan amount) fixed payments at the rate of $1,875 per month for 12 months and for all outstanding interest, "accrued charges" and the remainder of the principal outstanding to be paid at the end of 12 months unless the agreement were extended, secured by a first charge over real property.

(vi) $407,000 loaned to Mr. Hawkins on 19 February 2014 on the terms set out above.

The Issues

38. The primary issue for resolution is whether Abarbanel was carrying on business in the Islands.

39. If yes, then the issue for resolution is whether, Abarbanel carrying on business without being licensed to do so, the Agreement under which the monies were loaned to Mr. Hawkins is illegal and void and the security for the loan unenforceable.

40. The secondary issue raised is whether the Agreement was an unconscionable bargain which should not be enforced.

The Statutory Framework

41. The **LCCA** provides at section 4(1) as follows:

> *"4 (1) Subject to subsection (3), no company shall carry on business in the Islands unless it is so empowered by its Memorandum of Association and*
>
> *(a) it is a local company which, at the relevant time, is complying with section 5 or is a wholly owned subsidiary of such a company;*
>
> *(b) it is licensed under this Law and under the Trade and Business Licensing Law (2007 Revision) and, at the relevant time, is carrying on such business in accordance with the terms and conditions imposed in such licence and not otherwise;*
>
> *(c) it is licensed under the Banks and Trust Companies Law (2007 Revision); or*
>
> *(d) it is a company operating under a franchise granted by the Government.*
>
> *(2) Any company which contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of two hundred dollars for each day the offence continues and on conviction on indictment to a fine of one thousand dollars for each day the offence continues.*
>
> *"5 (1) For the purposes of section 4(1)(a) a local company is complying with this section if-*
>
> *(a) it is Caymanian controlled;*
>
> *(b) at least sixty per cent of its shares are beneficially owned by Caymanians; and*
>
> *(c) at least sixty per cent of its directors are Caymanians.*"

42. It is a criminal offence for any company to carry on business in contravention of those provisions and the statute at section 4 (2) provides for a continuing penalty for any breach of a fine, on summary conviction, of two hundred dollars for each day the offence continues, and on conviction on indictment, a fine of one thousand dollars for each day the offence continues.

43. The **TBLA** provides under section 12 that,

> *"Every person carrying on a trade or business mentioned in the Schedule shall, unless exempted under section 3, take out an annual license in respect thereof in accordance with this Law in respect of each place where such trade or business is carried on."*

44. The law makes a breach of section 12 a criminal offence for which a fine of up to $5000 or imprisonment for 12 months may be imposed.

45. Although moneylending was not a business activity mentioned in the Schedule to the 2007 **TBLA**, any such business activity would be swept up by the provision which stated that the Schedule applied to *"any other business or trade not specified*."

Carrying On Business

46. The primary issue for resolution is whether Abarbanel was carrying on business when it made the loans to Mr. Hawkins. The phrase has been described by Lord Jessel MR in *Smith v Anderson* [1880], as being of "*extensive use and indefinite signification.*" It is used in in common law jurisdictions in a number of statutory contexts that require the carrying on of a trade or business to be licensed or taxed and has been the subject of much consideration by the Courts and been defined judicially, though not prescriptively, in the several cases to which Mr. Lowe QC has referred the Court.

47. Mr. Merren submits, however, that it would be *"misplaced and inappropriate"* for the Court to rely on the dicta in those cases. He submits, further, that any attempted reliance on those cases would fly in the face of the specific statutory definition to be found in section 2(2) of the LCCA and may also fly in the face of the requirement in the **Interpretation Act (1995 Revision)** to give the words their plain meaning. He relies on section 3(2) of the law which states that:

> *"Every local law of the Islands shall be carried out and applied according to the plain reading and not according to any private construction, and any private construction influencing a decision in any case shall be deemed a sufficient cause for appeal or new trial or counter prosecution*."

48. He concludes his submissions on this point with the caveat that any construction imported from decisions in other jurisdictions interpreting provisions of statutes not in effect in the Cayman Islands would amount to an impermissible "*private construction"* of the statutory language.

49. Section 2(2) of the LCCA does not, in my respectful view, provide any definition of the phrase save the limited extent to which it describes certain activity such as transacting banking business and dealing in shares as falling within that rubric. The section states as follows:

> *"(2) The expression "carry on business in the Islands" in relation to a company, includes carrying on business of any kind or type whatsoever by that company, either alone or in partnership or otherwise, except*

(a) carrying on, from a principal place of business in the Islands, business exterior to the Islands;

(b) doing business in the Islands with any person, firm or corporation in furtherance only of the business of that company carried on exterior to the Islands;

(c) buying or selling or otherwise dealing in shares, bonds, debenture stock, obligations, mortgages or other securities, issued or created by any exempted company, a foreign partnership or a resident corporation incorporated abroad;

(d) transacting banking business in the Islands with and through a licensed bank;

(e) effecting or concluding contracts in the Islands and exercising in the Islands all other powers, so far as may be necessary for the carrying on of the business of that company exterior to the Islands;

(f) the business of an exempted company with another exempted company, a foreign partnership or a resident corporation incorporated abroad;

(g) the administration of mutual funds by a person licensed as a mutual fund administrator under the Mutual Funds Law (2007 Revision); or

(h) business carried on by a mutual fund, as defined by the Mutual Funds Law (2007 Revision), in the course of the acquisition, holding, management or disposal of investments."

50. The phrase *'carrying on business'* is not defined in the TBLA either.

51. While it is correct to say that the words must, as a matter of law, be given there ordinary (plain) meaning, it is a question of fact whether the conduct of Abarbanel is within the meaning of the phrase "*carrying on business*." The point was better made by Lord Simon of Glaisdale in *Ransom v Higgs* [1974] 1 WLR 1594 who said this at 1618:

> *"The meaning of a word or phrase in an Act of Parliament is a question of law not fact; even though the law may then declare that the word or phrase has no statutory meaning beyond its common acceptance and that it is a question of fact whether the circumstances fall within such meaning (Cozens v. Brutus [1973] A.C. 954). But many words and phrases in English have many shades of meaning and are capable of embracing a great diversity of circumstance. So the interpretation of the language of an Act of Parliament often involves declaring that certain conduct must as a matter of law fall within the statutory language (as was the actual decision in Edwards v. Bairstow [1956] A.C. 14); that other conduct must as a matter of law fall outside the statutory language**; but that whether yet a third category of conduct falls within the statutory language or outside it depends***

on the evaluation of such conduct by the tribunal of fact. This last question is often appropriately described as one of 'fact and degree.'" [emphasis mine]

52. Whether the conduct in issue amounts to the carrying on of business is a question of fact and degree and the Court is is entitled to have recourse to the decisions of the '*tribunals of fact*' in other jurisdictions, construing the same statutory language in different factual contexts in deciding this primary issue.

53. There is limited local jurisprudence on what conduct would amount to carrying on business. In *Ebanks v Symmes* [1980-83] CILR 110, on which Mr. Merren relies, Somerfield CJ considered whether a plaintiff could recover commission on a sale of real property if he were carrying on business as a real estate agent without being licensed to do so under the **Trade and Business Licensing (Revised) Law**. It was submitted on behalf of the plaintiff that this had been a one-off transaction not amounting to the carrying on of business. The learned Chief Justice at pp 118-119 observed (*obiter* as he had already found against the plaintiff on as matter of fact):

> *"Although only one piece of land was involved, the plaintiff made a number of attempts to find a purchaser for it. It was a continuing activity over several months resulting in several introductions of prospective purchasers and I am inclined to the view that this activity amounted to engaging in the business of a real estate agent.As this is specifically made an offence by s.14 of the trade and Business Licensing Law (Revised) I do not see how one can accept that the plaintiff can claim commissions for what was an illegal activity on the ground that the Law is a primarily a revenue Law."*

54. The key phrase in the learned Chief Justice's dictum is *"a continuing activity over several months,"* that is to say, business activity which was sustained for a period of time.

55. This is consistent with the enunciation of the principle by Brett LJ in *Smith v Anderson* [1874-8-] All ER 1121 which is relied on by Abarbanel. That case was concerned with the question of whether trustees who made an investment were an association required to be registered under the English **Companies Act**. At p 1130 Brett LJ said this:

> *"The words "for the purpose of carrying on a business" exclude the case of an association for doing one particular act which is never to be repeated. "Carrying on" implies a repetition of acts, or a series of acts, and the series of acts must be such as to constitute a business…."*
>
> *"There are many things which everybody understands to be a business. There may be new businesses which at the present time are not known. But the word "business" might, in a grammatical sense, have been made to include something which no ordinary person would call a business, and inasmuch as the legislature did not desire to use the word in so*

large a sense, and did not wish to recapitulate in terms every kind of business, they used words confining the meaning of that large word, "business" to a certain style of business, viz, that which has for its object the acquisition of gain. Gain is to be the result of the business - not of one particular act, but of a series of acts which forms a business"

56. In *Erichsen v Last*, (1881) 8 Q.B.D. 414 the Court of Appeal again considered the phrase in deciding whether a trade was exercised in the UK and the profits liable to tax. Cotton LJ stated at page 420, that:

"...in my opinion, when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business."

57. In *South Behar Ry v IRC* [1920] AC 476 is another case where the issue was whether a company carrying on a trade or business and therefore liable to corporation profits tax. The facts are that the railway company in question lent funds to develop a railway which entitled it to receive a share of the profits. It relinquished its contract after the railway was built and, under a supplemental agreement, it received a fixed annuity in lieu of the share of profits and distributed dividends to its shareholders.

58. On appeal from the decision of the Court of Appeal that it was liable to tax, the company argued, *inter alia,* that the receipt of an annuity did not of itself constitute the carrying on of a trade or business and that it did not follow that, if a business object is carried out, therefore a business is being carried on. Rather, carrying on business involved the habitual doing of acts capable of producing profit and for the purpose of producing profit. Counsel for the company relied on the dicta in *Erichsen v. Last* and *Smith v. Anderson* to which I have already referred.

59. Sumner LJ held at p 487 that,

"…the operation of receiving and thus discharging the annuity payments goes on continuously, and, however simple, it is not a mere passive acquiescence. It is the transaction of business between debtor and creditor resulting periodically in the discharge of a debt. The present is not the case of a company existing to do one act only and once for all. Not only did the company make the agreement of 1896, but it plays its recurring part in every payment and receipt of gains, and there is here, therefore, that "repetition of acts" which Brett L.J. says is implied in "carrying on business." carried on…"

60. The same line of reasoning was followed in the context of statutes concerned with moneylending as a business such as the *Moneylenders Act of 1900.* Walton J in *Newton v Pyke (*1908) 25 T.L.R. 128 at stated that

"*It is not enough to show that a person has on several occasions lent money at remunerative rates of interest; there must be a certain degree of system and continuity about the transactions*".

61. The principle was applied by McCardle J in *Edgelow v McElwee* [1918] 1 KB 205 who said this at p 206:

> *"A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindliness are not the bases of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition, and continuity: see Newton v. Pyke…"*

62. The learned Judge also observed that,

> *"The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree. But if it appears that the transactions are sufficiently numerous to require the inference that a system and business of money-lending is carried on, then the requirements of the definition in s. 6 of the Act of 1900 are fulfilled."*

63. The dictum in *Pyke* was also applied to a question of Hong Kong moneylending by Langley J in *Fortune Hong Kong Trading Ltd. v Cosco-Feoso (Singapore) Pte. Ltd. (The 'Freja Scandic')* [2002] All ER. In that case, the defendant alleged that a financing agreement was an illegal money lending transaction. The evidence was that the lender caused three letters of credit to be issued and made one loan to a company. Langley J found that the purpose of the loan was to help a friend and to obtain information about, and an introduction to, oil trading as a potential source of business and held that the facts were insufficient to establish that the lender was a carrying on business as a moneylender.

64. In summary, the conduct in issue must occur on a repeated or continuous basis. The cases do not establish a threshold as to how many activities - here the making of loans - would constitute a sufficient *"repetition of acts"* or for how long a period the activity must go one for it to be characterised as *"continuous."* That is a question to be determined on the facts of each case.

Application to the Facts

65. In his skeleton, Mr. Lowe relies on the following features of this case to say that Abarbanel was not carrying on business as a moneylender:

(i) Abarbanel had, and has, no employees. It has never had a business premises, a website, or engaged in any advertisement of services;

(ii) The Company was incorporated because one of its directors, Mr. Latta, had been approached by two individuals seeking to borrow money;

(iii) Two loans were made in 2012 of US$156,250 and US$950,000 which did not amount to the "*carrying on of business*" as they were one-off transactions to persons to whom Mr. Latta was randomly introduced;

(iv) There were two loans in February and April 2013 for a total of US$375,000 but there were no further loans made for the ensuing period of 8 months.

(v) The loan made to Mr. Hawkins in February was almost contemporaneous with the earlier modest loan of US$68,750 made in January 2014:

(vi) The loan made to Mr. Hawkins was the largest loan which had been made since 2012 and no transactions postdated that loan.

66. Having considered the totality of the evidence and taken in to account the submissions of Counsel, I have concluded that Abarbanel was carrying on business. The facts I rely on are these:

(i) Six loans were made over the period;

(ii) They were all based on a template designed by Abarbanel;

(iii) Security was required for each loan;

(iv) The loans were bespoke, with different terms agreed with the borrowers for the repayment of the principal sums and the interest reserved under the agreements and security for the loans.

(v) The loans were administered by Abarbanel over the whole period which prepared the loan agreements, ensured that borrowers were eligible in that they had adequate security, monitored the loans, extended them and instructed attorneys to enforce the security where the borrowers fell into arrears.

(vi) Whilst there was a period of 8 months between the 2013 and 2014 loans, as emphasised by Mr. Lowe in his submissions, the 2013 loan transactions were not concluded before the 2014 loans were made. Abarbanel continued to administer the loans and collect interest.

Further, in November 2013, it increased its lending to the second of the 2012 borrowers, two months before it made the first of the 2014 loans.

(vii) The loans were not informal loans to friends or family but were loans made to persons unknown to Mr. Latta or Dr. Barker. These persons were introduced to Abarbanel by persons, including a banker, because they knew Abarbanel would be willing to lend money to persons who for whatever reasons could not, or chose not to, borrow on the commercial market.

(viii) Abarbanel was set up to for the express purpose of making the loans and holding the security.

67. In my judgment, these facts establish that degree of system and continuity that the decided cases say must be present: Once approached, Abarbanel determined what security the applicant could offer and how much it was able to lend and created bespoke loan agreements. It then monitored the loans, collected interest on them, extended them on application by the borrower and instructed lawyers to recover monies not repaid.

68. Although the carrying on of business in this context does not require evidence of a number of loans at interest, that six loans were made, through a vehicle established expressly for that purpose, supports the conclusion at which I have arrived.

Statutory Illegality

Was the Contract prohibited by the statutory provisions?

69. The question which arises for resolution is whether LCCA or the TBLA prohibit contracts made in breach of the statutory provisions which require companies carrying on business to be licensed. The resolution of the issue is a matter of statutory construction, that is to say, whether the LCCA and the TBLA, properly interpreted, might be said to have intended to prohibit a contract made in breach of the licensing provisions.

70. The decision of Buckley J in the well-known case of *Victorian Daylesford Syndicate Limited v. Dott* [1905] 2 Ch. 624 approved by the Court of Appeal in *Bonnard v Dott* [1906] 1 Ch. 740 which Mr. Merren cited in his submissions, is an exemplar of the approach to the construction to be adopted by the Courts in order to determine whether a contract is prohibited by statute.

71. In that case, the learned Judge was considering the validity of money-lending agreements made in breach of the requirement in section 2 (1) **of the Money Lending Act 1900** to register as a

money-lender. The Act imposed a penalty for breach of a fine on first conviction and, in the case of a second or subsequent conviction, provided for imprisonment or a fine or both.

72. Buckley J's approach to the construction of the statutory provisions is set out in the judgment at p 629 -30 as follows:

> *"The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose, statutes may be grouped under two heads - those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of Cope v. Rowlands (1) and Fergusson v. Norman (2) Parke B. in the former case (3) says the question to determine is whether the Act is "meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? Or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?"*
>
> *"If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. I desire to point out that the present case is one that is upon this point abundantly plain.* ***There is no question of protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name obviously and notoriously for the protection of those who deal with him.*** *The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal. The short effect of the statute, as it seems to me, is this - that it provides that a money-lender's contract must be in that money-lender's registered name; otherwise, a penalty is imposed upon him, the result being that the act done is an act forbidden by statute, and is illegal. There is another consideration. Not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act.* ***Now here the penalty is imposed every time the act is done.*** *Further, the Act goes on to provide that on a second or subsequent conviction a man may be imprisoned with or without hard labour for a term not exceeding three months. The act is an illegal act."* [my emphasis]

73. The principles to be drawn from the decision are that where a statute expressly or impliedly prohibits the contract, the contract is illegal and void and will not be enforced by the court. Where

there are not express words of prohibition in the statute, the Court may find an implied prohibition by invoking the rule of public policy, to wit, the protection of the public. Where the purpose is the protection of the revenue, no such prohibition will be implied. As a further aid to construction, the Court may consider the nature of the penalty imposed by the statute for the breach.

74. In *St. John Shipping Corp. v. Joseph Rank Ltd.* [1956] 3 All E.R. at 687 in which Devlin J clarified this area of the law and the criteria for deciding whether a contract was implicitly prohibited by statute, the learned Judge cautioned that,

> *"… the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear."*

75. The question of whether contracts made in breach of the licensing requirements in the LCCA and TBLA are expressly or impliedly prohibited by the statutes has already been considered by the Grand Court in *Esso Standard Oil SA Ltd v Jose's Ltd* [1999] CILR 51.

76. In the *Esso* case, the defendant sought to avoid his obligations under a sales agreement and lease on the ground, *inter alia*, that the agreements were illegal contracts in that the plaintiff held no valid LCC licence or trade and business licence at the time the agreements were made.

77. Murphy J, in what was described as a comprehensive judgment by the Court of Appeal, examined the relevant authorities at some length and drew from them the following principles at p 96:

> *"(a) the principal issue is whether, on a proper construction, the legislature intended to prohibit the making or performance of the contract;*
> *(b) a contract expressly or impliedly prohibited by statute is void and unenforceable;*
> *(c) the question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes;*
> *(d) whether the statute is passed for the protection of the public is only one test of whether it was intended to vitiate the contract;*
> *(e) another test is whether the statute already contains a penalty. If the penalty is a pecuniary sum for each day of violation, irrespective of the number of contracts the corporation may make in a day, that is an indication that the legislature did not intend to prohibit each contract made in the course of the business, but only to penalize the carrying on of the business without authority;*
> *(f) courts must consider whether the avoidance of the contract would cause grave inconvenience to innocent members of the public without furthering the object of the statute."*

78. Applying those principles to the facts in front of him, Murphy J held that in making the contract the parties had not done, or contracted to, do anything which was expressly forbidden by the LCCA, distinguishing *Victoria Daylesford* on the ground that the contract was, in that case, expressly prohibited by the relevant statute.

79. He also held that the LCCA did not impliedly prohibit any contract for the reasons the statute was "*…aimed at screening foreign aspirants wishing to do business in the Cayman Islands. Thus, the s. 11(3) criteria focus on the nature of the applicant and the needs of Caymanians and the Cayman Islands. What the LCCL does not do…is to regulate the carrying on of business by foreign companies once in the Cayman Islands in the sense of regulating their commercial activity and their contractual relations."*

80. He held further at p. 99 that the daily fine imposed by the statute for breach of the licensing requirements supported the inference that the business which was being carried on could continue and noted that the statute had its own scheme for enforcement to achieve its objective.

81. The public policy concern that vitiating contracts made in breach of the LCCA would harm the public interest was also a deciding factor.

82. Murphy J also referred to section 23 of the LCCA which states:

> *"For the avoidance of doubt it is hereby declared that no business transaction shall be void or voidable by reason only that, at the relevant time, any party thereto is in breach of this Law."*

83. The learned judge held that, as an illegal contract is void, the section operated to save a contract made in breach of the licensing provisions.

84. He concluded at p. 100 that his observations applied *a fortiori* to the failure to obtain a trade and business license, noting that the TBLA is a purely revenue statute.

85. Taken to the decision of Summerfield C.J. in *Ebanks v. Symmes* (*supra* para 53) on which Mr. Merren has relied in this case, Murphy J stated,

> "*Summerfield, C.J. there expressed (obiter) an opinion that the lack of a licence under the TBLL might disentitle a real estate agent to a commission. I respectfully regard this conclusion as erroneous. Had the former Chief Justice had the benefit of full argument and the leading recent authorities, as I have had, I have little doubt that the point would have been decided differently. I have no hesitation in concluding that on the assumption that the plaintiff did not hold valid licences at the material time, the 1988 agreements were not vitiated in any way by illegality..."*

86. In the appeal, Georges JA agreed with the learned Judge's findings though he distinguished *Victorian Daylesford* on the basis that there the statute provided for a penalty to be imposed each time a contract was made in breach of the provisions, which demonstrated the intention on the part of the legislature to prohibit each contract made in the course of the business, as distinct from the fine imposed by the LCCA for every day a business is carried on without a licence.

87. He also concurred, in Murphy J's view that the purpose of the licensing regime in the LCCA was to control the level of participation in business by persons who were not Caymanian, and not, as Georges JA observed at p 314,

> "*to protect a particular section of the public who would be liable to exploitation unless some checks and balances were put in place, or to ensure effective control of resources in times of crisis, or to protect the public generally by ensuring that professionals offering specialized services are duly qualified"*

88. Mr. Merren submits that Georges JA analysis of the public policy objectives underpinning the LCCA *''cannot now stand careful analysis…in light of the increasing move in the Cayman Islands toward a stricter and multi-faceted culture of compliance*" and considering the ss 11(1) and 11(4) of the LCCA [5] "*and the public policy objectives enshrined therein."* These, he contends, go beyond merely controlling the level of participation in local businesses by persons who are not Caymanian, and *"set forth much broader and more diversified public policy objectives."*

89. Section 11(1) provides:

> "*Subject to this Law, the Board may, in its discretion, grant a licence in respect of which application has been made under section 10, but, if the Board is of the opinion that it would not be in the public interest to grant a licence, it may refuse to grant one without giving any reason for so refusing…"*

90. Section 11(4) sets out number of matters to which the Board must have regard when deciding whether or not to grant a licence:

> *"(a) the economic situation of the Islands and the due protection of persons already engaged in business in the Islands;*
> *(b) the nature and previous conduct of the company and the persons having an interest in that company whether as directors, shareholders or otherwise;*
> *(c) the advantage or disadvantage which may result from that company carrying on business in the Islands;*

[5] ss 10(1) and (3) in the Revision before the Court in *Esso.*

(d) *the desirability of retaining in the control of Caymanians the economic resources of the Islands;*

(e) *the efforts made by the company to obtain Caymanian participation;*

(f) *The number of additional people from outside the Islands who would be required to reside in the Islands were the application to be granted;*

(g) *Whether the company, its directors and employees have and are likely to continue to have the necessary professional, technical and other knowledge to carry on the business proposed by the company;*

(h) *the finances of the company and the economic feasibility of its plans;*

(i) *whether the true ownership and control of the company have been satisfactorily established; and*

(j) *the environmental and social consequences that could result from the carrying on of the business proposed to be carried on by the company."*

91. The underlined provisions (f) through (j) were introduced in the 2007 Revision. The increased number of matters to which the Board should have regard does not lead to the conclusion that the law has any greater aim than that identified by Georges JA, which was to control the participation of non-Caymanians in business and to do so as Murphy J said by screening foreign applicants wishing to do business in the Cayman Islands. The focus of the criteria set out in section 11(4) criteria remains, as stated by Murphy J, on the nature of the applicant and the needs of Caymanians and the Cayman Islands.

92. Mr. Merren has not persuaded me that the Court of Appeal erred in its assessment of the policy behind the provisions of the LCCA and that I should depart from what is a binding precedent.

93. Applying the decision in *Esso* to these facts, I hold that the provisions of the LCCA and the TBLA prohibit Abarbanel's conduct of carrying on business without a licence but do not prohibit the contract made between Abarbanel and Mr. Hawkins with the result that the Agreement is not illegal and void, and the security remains enforceable to recover any sums due to Abarbanel under it.

94. Given the provisions of section 23 of the LCCA there is little to sustain the argument that a breach of section 4 renders the loan agreement void, and even less with respect to a breach of the TBLA, the only purpose of which is to raise revenue.

Common Law Illegality

95. Both Counsel in the course of their submissions referred to *Patel v Mirza,* the landmark decision of the Supreme Court where the issue was whether a claim, to recover money paid to the defendant under an agreement made in breach of the prohibition on insider dealing in section 52 of the Criminal Justice Act 1993, was barred by illegality. The Supreme Court held that recovery was not barred.

96. I do not consider it necessary to rely on the learning in *Patel's* case given that, as Lord Hamblen in *Henderson v Dorset Healthcare Foundation Trust* at [74]-[75] observed, it was concerned with what may be labelled common law illegality and not statutory illegality:

> "*74. First, it should be emphasised that Patel concerned common law illegality rather than statutory illegality. Where the effects of the illegality are dealt with by statute then the statute should be applied. As Lord Toulson JSC stated at para 109 of Patel: "The courts must obviously abide by the terms of any statute."*
>
> *75. In relation to contractual illegality, this is explained by Underhill LJ in Okedina v Chikale [2019] ICR 1635, para 12, drawing on the formulations set out in Burrows, A Restatement of the English Law of Contract:*
>
> > *"(1) Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute.*
> >
> > *"(2) Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct."*

97. Simply stated, where a contract is prohibited by statute and the consequences for the prohibition are set out in the statute, those consequences fall to be applied by the Court. Where no consequences of the illegality are set out, then the Court must consider what the effect of that illegality on the contract is at common law and must do so by reference to *Patel.*

98. In this case, there is no statutory illegality defence to Abarbanel's claim to interest under the contract and to enforce its security to recover what is owed to it. The illegality defence would not be available to Mr. Hawkins in any event, as the statute expressly provides that no business transaction shall be void or voidable by reason only that any party is in breach of the law.

99. Nonetheless I move to consider whether the contract would be unenforceable as a matter of common law. The question was considered by Georges JA in *Esso* who said the issue might arise in this way:

> *"Even though the contracts themselves may not be prohibited, they were concluded in the course of carrying on a business which can be characterized as being in breach of the law.*

The well-settled common law maxim of "ex turpi causa non oritur actio" should, therefore, preclude their enforcement. The maxim expresses pithily a consideration of public policy."

100. In his judgment, George JA held at p 315, that enforcement was not barred at common law as the transaction did not bear the *"hallmarks of either fraud or immorality"* nor was there any *"taint of oppression."*

101. Post-*Patel,* the answer to the question depends upon the *"trio of considerations"* elucidated by Lord Toulson, with whom the majority agreed. Lord Toulson set out the approach to be adopted at para 101: the Court would have to (a) consider the underlying purpose of the prohibition which has been transgressed, (b) consider conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keep in mind the possibility of overkill unless the law is applied with a due sense of proportionality.

102. At para 120 of the judgment he offered this summary:

> *"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."*

103. I adopt Mr. Lowe's submission that, applying Lord Toulson's trio of considerations to these facts, (b) and (c) taken together are about whether enhancing the regime for registering local businesses by invalidating contracts is inherently in contradiction with the public policy of promoting the validity of contracts.

104. Applying *Patel*, I would hold that the purpose of the licensing regime in the LCCA is not undermined by enforcing contracts made in the breach of the provisions. As Georges JA observed, at p 315

> *"The objective [of the licensing regime] can effectively be achieved by laying charges against entities which infringe the Law and imposing fines calculated on the basis of the number of days during which the infringement occurs."*

105. The claim for a declaration that the Agreement is illegal and void on the grounds that Abarbanel was carrying on business as a money lender without being duly licensed to do so under the various

provisions in the **LCCA** and the **TBLA** and for consequential orders is dismissed. It follows that I am satisfied and find that the remaining Charge is valid and enforceable.

106. Costs follow the event, and I order the Plaintiff to pay the Defendant costs on a standard basis. If some other order for costs is sought, the party claiming should file their application within 14 days of the date hereof otherwise the order that the Plaintiff pays the Defendants costs on the standard basis, such costs to be taxed or agreed, will be the final Order.

107. It only remains for me to thank the parties and their attorneys for their patience in awaiting the decision of the Court.

DATED THE 16TH OF DECEMBER 2022

Hon Margaret Ramsay-Hale
Chief Justice

Addendum

1. When the judgment was handed down, Mr. Merren observed that the Court had not dealt with his submissions that Abarbanel was carrying on business *ultra vires* its Memorandum of Association "(MoA")[6] and that the agreement was void as a result.

2. He pointed out that the Court had held, *inter alia*, that by virtue of section 23 the contract was not void but had not considered the effect of section 24 on the Agreement in the circumstances where Abarbanel was not empowered by its MoA to carry on the business of moneylending without a licence.

3. The relevant clauses in Abarbanel's MoA are as follows:

> "*3. The OBJECTS for which the Company is established are NOT restricted but, without limiting the generality of the foregoing, the Company shall have full power and*

[6] The submissions were that Abarbanel did not have *"the requisite power and authority"* to enforce the Charge at para 24 of the written submissions or the "*corporate power"* to make loans such that the Agreement was *"vitiated ab initio"* at paras 25 and 101.1

authority to do and carry out any and all acts exercisable by the a natural person or body corporate or any other legal entity in any part of the world in any capacity whatsoever including whether as principal, agent , contractor, broker, representative, attorney or otherwise and whether alone or jointly with others and the Company shall have full power and authority to carry out any object not prohibited by the Companies Law (2011 Revisions) or any other law of the Cayman islands or any modifications or re-enactments thereof.

…

5. Nothing in the preceding sections hereof shall be deemed to permit the Company to carry on such business as requires a license under the applicable Cayman Islands law, including without limitation,

a) The business of a Bank or Trust Company unless licensed therefor under The Bank and Trust Companies Law (2009 Revision)

b) The business of an Insurance Company, manager, Agent, Sub-Agent or Broker unless licensed therefor under the Insurance Law (2008 Revision)

c) the business of Company Management unless licensed therefor under the Companies Management Law (2003 Revision)."

4. Section 24 provides that

> "*24. Nothing in this Law or any licence shall confer on any company any power to do anything which it is not authorized to do by virtue of its Memorandum and Articles of Association or any other provision of law."*

5. In other words, if Abarbanel was in breach of section 4 for the reason that it acted outside its powers, then section 23 provided that the Agreement would not be void by reason only of that breach. However, the Agreement would still be void for being *ultra vires* as section 24 provides that nothing in the Act can confer any power on a company which it does not have.

6. In light of Mr. Merren's observations, I make this addendum to the judgment.

7. There was no pleaded allegation that Abarbanel was acting outside the scope of its Objects clause and no relief was sought on the ground that the transaction was *ultra vires*. When the issue was raised by Mr. Merren in his opening speech, Mr. Lowe took the point that *ultra vires* was not pleaded and the point was conceded.

8. The relevant paragraphs of the Statement of Claim make it plain this concession was correct:

*"118. **Without holding the requisite LCCL and TBL,** the Defendant also illegally continued (and has not ceased) to carry on its business as a commercial mortgage lending business lender and/or as a private secured money lender in the Cayman Islands.*

*118A**. As a result of such non-compliance** with the mandatory provisions of the LCC Law and/or of the TBL Law, the Defendant was under **a statutory incapacity** and/or lacked the duly authorised statutory foundation **as an unlicensed business entity** from being able to:*

(a) carry on any lawfully authorised business in the Cayman Islands (whether as a local commercial mortgage lender, as a local private secured money lender or otherwise); and/or

(b) enter into any transaction and/or take any action lawfully that would in effect constitute carrying on such unlicensed business in the Cayman Islands, including:

i. entering into the Loan Agreement and/or the Charges;
ii. registering the Charges under the RLL; and/or
iii. enforcing (or attempting to enforce) the Charges."

9. The Prayer for Relief sought a declaration at para 1 (ff) that Abarbanel had:

*"a statutory incapacity and/or lacked the duly authorised statutory foundation (under the MA[7], the TBL Law and/or the LCC Law) on which it could lawfully enter into, register and/or enforce the Charges under the RLL as an essential part of carrying on business in the Cayman Islands as **a duly licensed** commercial mortgage lender and/or as a **duly licensed** private secured money lender."* [my emphasis]

10. The only issue for resolution raised on the pleaded case was whether the Agreement was void for illegality because Abarbanel did not have the requisite licenses. The absence of such licenses was the basis for the only plea of (statutory) incapacity which did not raise any separate issue for resolution.

11. The Court cannot decide an issue not raised on the pleadings and in respect of which it has not heard full argument, nor can it grant relief not prayed. It appeared that Mr. Merren had taken this on board when he accepted that *ultra vires* had not been pleaded.

[7] A reference to the **Moneylending Act** of Jamaica.

12. It is not a fact that the transaction was *ultra vires*, as Mr. Merren seemed to suggest in his submissions. Whether it is, or not, is a question of the proper construction of the Objects clause and a matter to be determined by the Court after it has heard the parties' competing submissions. If the issue had been properly raised, the effect of section 28 of the **Companies Act** on the validity of any such transaction would also have been advanced for the Court's consideration.

20 December 2022