



## Cayman Court of Appeal confirms unlicensed lender may enforce loan

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The Cayman Islands Court of Appeal has confirmed that an unlicensed lender may enforce its loan agreement and the accompanying security against a borrower in default. The borrower had sought to have the loan agreement declared illegal and void so as to be relieved of any obligation to pay interest to the lender as originally contemplated.

In dismissing an appeal from the order of Justice Ramsay-Hale (the **Judge**), who is now the Chief Justice of the Grand Court, the Cayman Islands Court of Appeal (the **Court**) agreed with the Judge that a lender who did not have the licences it was required to have by the Local Companies (Control) Act (Revised) (the **LCC Act**) and the Trade and Business Licensing Act (Revised) (the **T&B Licensing Act**) was still entitled to enforce its loan agreement with the borrower and the accompanying security.

### Why did the lender have to be licensed?

Before the Judge, Abarbanel Limited (**Abarbanel**) argued that it was not carrying on business in the Cayman Islands and was therefore not required to be licensed. While it was not in dispute that the lending activity occurred “in the Islands”, Abarbanel argued that it was not carrying on the “business” of moneylending. The Judge held that it was carrying on such a business. On appeal, Abarbanel accepted the Judge’s decision.

In giving reasons, the Judge summarised in the following terms the relevant test of when a lender is carrying on a business:

“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 on for it to be characterised as ‘continuous’. That is a question to be determined on the facts of each case.”

While a person who makes occasional loans to relations, friends, or acquaintances, whether interest be charged or not, is unlikely to be carrying on the business of moneylending, the Judge held that a lender will be carrying on such a business, even in respect of the making of a single loan, if the facts establish a sufficient degree of system and continuity. As it happens, Abarbanel made six loans during the period examined. That fact and the conduct of Abarbanel in agreeing to and monitoring the loans caused the Judge to conclude that Abarbanel was carrying on the business of moneylending.

In a further contrast to the domestic situation, the Judge considered it significant that Abarbanel was established for the express purpose of making loans at interest.

## **Why did the Court agree with the Judge?**

Why did the Court agree that there is no implied prohibition against an unlicensed lender enforcing its loan? Neither the LCC Act nor the T&B Licensing Act expressly prohibits the enforcement of contracts made by an unlicensed person. Despite this, the borrower argued that Abarbanel was unable to enforce its loan agreement and security because such enforcement was impliedly prohibited by those Acts. After exhaustive consideration of Caymanian, English and Commonwealth authorities, Sir Jack Beatson with whom the other members of the Court agreed rejected this argument for the following reasons.

- Echoing an earlier decision of the Court, the purpose of the LCC Act is “to control the level of participation in business by persons who were not Caymanian” and not “to protect a particular section of the public who would be liable to exploitation”. The T&B Licensing Act does not alter that position.
- The LCC Act and the T&B Licensing Act have their own mechanisms for dealing with breach.
- The judges of England, Australia and Canada have consistently warned that courts should be slow to infer prohibition where the legislation contains no express prohibitions and contains its own mechanism for dealing with breach. Or, putting the principle another way, courts have been reluctant to hold that non-compliance with statutory requirements impliedly render contracts made by a party in breach void or unenforceable.

His Lordship also rejected an argument that one can look to the Special Economic Zone Act (Revised) and the Proceeds of Crime Act (Revised) to infer an intention on the part of Parliament to change the policies under the LCC Act and T&B Licensing Act, or that amendments to the LCC Act in 2007 demonstrated a change in policy.

## **What protections are available to borrowers under Cayman law?**

Cayman does not have legislation that confers statutory protections, such as the English Moneylending Act 1900 (which was replaced by the Consumer Credit Act 1974) or the Jamaican Moneylending Law 1938. In his decision, Beatson JA noted that “[t]he question whether protection beyond equitable “unconscionability” should be available in Cayman is one for the legislature”.

Borrower protections under Cayman law are limited. The principle of equitable unconscionability is restricted to a circumstance where a lender takes unconscionable advantage of a borrower’s special disadvantage. As the Judge noted at first instance, the borrower “did not have any special disadvantage that affected his ability to make a judgment about his own interest”.

The take-home point is that, before entering into a substantial loan, a borrower should take advice from an attorney experienced in the field. However, even this will not assist if (as in the present case) the borrower is desperate to accept the loan on offer (to, say, preserve property) in the belief that his fortunes will turn around to enable him to repay the loan. In the present case, this resulted in the borrower accepting a loan at a default interest rate of 18% per annum that was compounded at regular intervals. As a result, loans in early 2014 totalling US\$407,000 resulted in the lender claiming US\$1,109,910.13 in September 2023.

The decision of the Judge is *Rogelio Antonio Hawkins v Abarbanel Limited* (Unreported, Ramsay-Hale J, 16 December 2022), while that of the Court is *Rogelio Antonio Hawkins v Abarbanel Limited* (Unreported, CICA, 11 January 2024).

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