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# When does lending become a licensable activity?

Was Scicluna v Ronsivalle (CA 2024) correctly decided?

Business Finance

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A lender sued his borrower for settlement of loans remaining unpaid. (Shutterstock)

This article briefly but critically reviews the Court of Appeal (CA) decision of 11 April 2024 (Rik. Nru. 1015/09/1 JRM) in the names J Scicluna et v G Ronsivalle et. .

In this case, a lender sued his borrower for settlement of loans remaining unpaid. The lender had affected various loans to the same borrower at the request of the latter who had been facing health and financial difficulties, over a period of four years.

Among other pleas, defendants claimed that the loans were invalid as the lender did not have a licence from the MFSA in terms of the Financial Institutions Act of 1994 (FIA).

They claimed that as a result, the loans had been based on an illicit cause ("imsejjsa fuq causa illeċita"). This is the issue which is of interest here. The court rejected the plaintiff's claim to recover the loans as these were vitiated by the lack of the required licence.

**The basics and the evidence**

One should perhaps start with basics. Loans are lawful. There is nothing wrong with giving a loan. A loan is a normal and valid contract which is specifically recognized and protected by the Civil Code. Loans are not in themselves sinister or controversial transactions and they serve a socially useful purpose.

Evidence showed that the loans had actually been made and that sums had passed to the lender as claimed by plaintiffs. It was the borrower who had initiated the approach to the

lender for financial assistance. There was no evidence, in this case, of usury or of abuse or exploitation of the borrower. Nor was there evidence that interests had been agreed upon.

The court decreed that it may refrain from establishing whether interests had been charged or not, seeing it had already decided that the loans were null and void. I believe that this was wrong and that the payment of interests or otherwise constitutes a vital criterion for any finding whether the loans had been made in furtherance of a business.

**The licence requirement**

The CA quoted favourably from a Criminal Appeal decision of 5 November 2004 (Police v Raymond Bajada) which had established that for the statutory licence applies "to a person who lends money in the manner and with such frequency that when you look at the transactions, you think 'this looks like a bank' ("dan qisu bank"). Moreover, the court required that the loans had to be made in the course of business ("bħala kummerċ").

The court argued that as there was no evidence that two parties had enjoyed a relationship based on family or friendship ("xi rabta familjari jew ħbiberija"), then the loans must have been made in the course of a business.

Article 3 (3) of the FIA provides that:

"In the event of reasonable doubt as to whether an activity constitutes the business of a financial institution, or whether the business of a financial institution is being transacted or otherwise in or from Malta by any person, the matter shall be conclusively determined by the competent authority."

Now, the court and the MFSA might well disagree on when lending becomes a licensable activity. Licensing is a very complex and expensive process. Today the FIA is a very complicated law and its provisions are complex, detailed and very strict. It does not seem that the opinion of the MFSA, for what it was worth, had been obtained.

Decided cases had so far more or less taken the line that loans granted limitedly to one borrower would not, by itself, pass the test of habitual and regular lending required by law. The Court itself quoted favourably that the lending activity and frequence should resemble a bank: so a bank with just one individual customer?

Many decided cases to date have dealt with usurious loans. There was no evidence of usury in this case, although the Court of Appeal stated it was inclined to suppose that there

probably had been chargeable interests.

**Public law versus private law?**

Here we try to navigate the complex subject of the private law consequences of public law provisions; or, stated differently, the effect of applying public law rules to private transactions.

Public law concerns might not also be private law concerns. The Financial Institutions Act 1994 which is administered by the MFSA, does not say that any loans are legally void and unenforceable; or that an otherwise valid loan becomes null and void depending on whether the lender required a licence or not.

Whether a lender requires a licence has to be tested on a case by case basis and the outcome is not always obvious. Relevant factors include the number of borrowers, the period of time during which habitual business was carried out, the number of transactions, their regularity, interests charged etc. The outcome of this test is often uncertain.

**Unforeseen consequences?**

This decision may now open the way for other borrowers to try to slip out of their obligations by claiming that their lender should have acquired a licence. If this is the case, then the court decision may have inadvertently rewarded immoral conduct, whereby borrowers obtain moneys by way of loan, only to later conjure up legalistic excuses (of dubious validity) to knowingly not pay back their debts. Lenders beware.

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