

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CHAMBERS

SUIT NO. E 112/1986

BETWEEN	FLORENCE CROOKS	PLAINTIFF
A N D	ANTHONY ELLIOTT	DEFENDANT

Summons for Declaration under the
Money Lending Act

Michael Hylton instructed by Myers, Fletcher and Gordon for the Plaintiff.
Raphael Codlin for the Defendant.

HEARD: 23rd March and 25th April, 1988

JUDGMENT

VANDERPUMP L. E. (MASTER):

The Plaintiff herein seeks the undermentioned declaration:

1. a declaration that the agreement in writing dated the 11th April, 1986, between the Plaintiff and the Defendant and Elva Keane-Dawes is unenforceable against them pursuant to the Money Lending Act.
2. alternatively, a declaration that the rate of interest provided for in the said agreement is excessive and the terms are harsh and unconscionable.

Further, the Plaintiff seeks the following orders in the event of the application being successful.

- a. an order that the Defendant immediately withdraw caveat No. 97664 lodged against the title registered at Volume 1002, Folio 84 of the Register of Titles, and
- b. an order that the Defendant immediately return to the Plaintiff duplicate certificate of title as registered above.

Mr. Hylton contended that the contract is unenforceable because it does not comply with the formalities of Section 8 of the Money Lending Act which reads thus:

"No contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Act or for payment by him of interest on the money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this Section

be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract and no such contract or security shall be enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lend or before the security was given, as the case may be." (My emphasis).

The note or memorandum shall contain all the terms of the contract and in particular shall show the date on which the loan is made, the amount of the principal of the loan and the interest charged on the loan expressed in terms of a rate per cent per annum.

It is not in dispute that the Defendant does not fall within any of the categories set out in Section 13, which are exempted from the provisions of the Money Lending Act.

Mr. Hylton contended that the contract is in breach of Section 8 of the Act and is unenforceable for any of the following grounds:

1. The memorandum in writing was not given to the Plaintiff within seven days or at all.
2. That the memorandum failed to show the date on which the loan was made.
3. The loan was made before the document was signed.
4. A true rate of interest is not stated in the document.

He relied on paragraph 21 of the Defendant's affidavit. He asserted thus "It is not true that the Plaintiff or borrower did not receive a copy of the agreement as I am informed by my Attorney-at-Law, that when the borrower Elva Keane-Dawes, returned to collect the instrument of transfer for execution, a copy of the said loan agreement was also given to her to give to the Plaintiff." Mr. Hylton cited two authorities in support of his proposition; Eldridge vs Taylor 1931 2 KBD Page 416 and John Graham vs Ingram 2 AER Page 320.

On the other hand, Mr. Codlin argued that there is nothing in the Act which imposes a duty on the sender to ensure that agreement is received by the intended recipient. If that were so it would have been so stated. He contended too, the fact that the Plaintiff said she did not receive it, is not evidence that it was not sent.

I refer now to the cases mentioned above and will deal firstly with Eldridge and Morris vs Taylor 1931 2 KBD Page 416

The head note reads thus:

"Money Lender - loan - fresh agreement by borrower - failure by Money-Lender to send note or memorandum in writing - Money

Lenders Act 1927 (17 & 18 George 5 C21) Section 6 (1)". The provisions are similar to Section 8 of our Act. It stipulates inter alia "The contract is unenforceable unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract." Emphasis mine.

"The male Defendant borrowed, by promissory note, money from the Plaintiffs, a firm of money-lenders, and agreed to repay the same by monthly instalments. In this transaction the requirements of s. 6 of the Moneylenders Act, 1927, were duly complied with. The borrower made default in paying the instalments, whereupon the Plaintiffs issued a writ to recover the amount. Negotiations then took place, and in the result an arrangement was made by which the male Defendant and the second Defendant (his wife) gave the Plaintiffs a joint and several promissory note in respect of the amount unpaid on the first promissory note, an amount for interest, and certain agreed costs. A memorandum of this contract was signed by both Defendants, but no copy was sent to them within seven days, as required by s. 6 of the Act of 1927. The amount of the promissory note not having been repaid on the due date, the Plaintiffs sued the Defendants to recover the same:-

- Held, 1. that although the contract sued on was a substituted agreement for, or a variation of, the original contract entered into by the male Defendant, it was nevertheless a contract "for the repayment by a borrower of money lent to him" within s. 6;
2. that a copy of the contract had not been sent as required by that section, the contract was unenforceable against the male Defendant;
3. that it was likewise unenforceable against the female Defendant inasmuch as it appeared that she signed the promissory note solely as a surety, and the male Defendant not being liable she also was discharged from liability."

The very same point was decided in John W. Graham (English Finances Limited vs Ingram et al 1955 2 AER. It was held that the copy should have been sent to each borrower personally, the sending of the copy to an agent of a borrower being insufficient; accordingly, the Plaintiff had not complied with the requirement of Section 6 (1) and the contract was not enforceable against the Defendant.

In the instant case, although the Defendant asserted that he was informed by his Attorney-at-Law that when the borrower returned to collect the instrument of transfer the agreement was also be given to the Plaintiff. There is no evidence before me from which I can infer that the agreement was in fact handed to the Plaintiff and if he had done so, that he had done so within seven days as required by Section 8 of the Act.

GROUND 2

That the memorandum failed to show the date on which the loan was made. The agreement which is exhibited states agreement made on 11th April, 1985,

between the parties as indicated. Section 8 (2) of the Act requires that the memorandum shall contain all the terms of the contract and shall show the date on which the loan was made. Mr. Hylton cited three cases in support of his contention; Barclay v Prospect Mortgage Limited 1972 2 AER Page 672. Temperance Loan Fund Limited v Rose et al 1932 KBD Page 252 and Congressbury v Anglo-Belge Financed 1969 3 AER Page 545.

Mr. Codlin argued that even if the agreement does not show precisely on which date the loan was made, joinder or documents is permissible to ascertain when the loan was made, to look at the receipt signed by the borrower. He contended that in so doing, it is clear that there was compliance with the provisions of the Act in this regard.

All the above cases deal with failure to comply with the formalities required by Section 6 (equivalent to our Section), thus rendering the contract unenforceable.

I refer now to the case of Temperance Loan Fund Limited v Rose and Another

The headnote reads thus:

"Money lender - loan transaction - Renewal of loan - joint promissory note of borrower and surety - Memorandum in writing - omission of date when loan made liability of surety.

It was held if the transaction between a money-lender and a borrower is unenforceable against the borrower by reason of non-compliance by the money-lender with the requirements of s. 6 - for example, by the omission from the memorandum of the date on which the loan was made - it is equally unenforceable against a person who has guaranteed the payment of the debt."

In the case of Congressbury Motors Limited, it was held that the mortgage was unenforceable because it was not a sufficient note or memorandum of the contract under Section 6 (2) of the Money-Lenders Act, as it did not show the date on which loan was made.

THIRD POINT

Document should be signed before loan made.

The Defendant asserted in paragraph 12 of his Affidavit that before executing the agreement he handed over \$20,000 to borrower. This is in breach of one of the requirements of Section 8 of the Act.

In conclusion, Mr. Hylton submitted that the rate of interest has not been stated. He contended that the agreement stated a rate of 52%, but required payments which would result in the borrower paying much more, that contract does not

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properly state the true rate and is therefore unenforceable.

Mr. Codlin argued that Section 2 of the Act enables the Court to re-write the money-lending contract where it appears - there is injustice. But before this can be done there is one hurdle to be overcome. There must be compliance with the formalities of Section 8 of the Act. It is my judgment that the lender has failed to comply with the requirements for the reasons which I have outlined above.

It is hereby ordered that:

- a. the agreement in writing dated the 11th April, 1986, between the Plaintiff, Florence Crooks, and the Defendant Anthony Elliott is unenforceable against them pursuant to the Money Lending Act.
- b. the Defendant immediately withdraw caveat No. 97664 lodged against the title registered at Volume 1002, Folio 84 of the Register of Titles.
- c. the Defendant to immediately return to the Plaintiff duplicate Certificate of Title as registered.