IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E 60/96

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| BETWEEN | IVOR HEADLEY DAVIDSON | PLAINTIFF |
| A N D | DONA VENESSIA DAVIS | 1st DEFENDANT |
| A N D | JAMAICA NATIONAL BUILDING SOCIETY | 2nd DEFENDANT |

H.H. Haughton Gayle & Miss Karen Grey
for plaintiff

Miss Nancy Anderson instructed by
Messrs. Crafton Miller & Co.
for 1st defendant.

Miss Sharon Usim instructed by
Messrs. Grant, Stewart, Phillips
& Co. for 2nd defendant.

In Chambers

Heard: 24th, 25th and 26th September, 1996
2nd October, 1996 and 13th and 14th
November, 1996.

HARRISON, PAUL J.

By an originating summons dated the 20th day of February, 1996 the plaintiff seeks an order under section 535 of the Civil Procedure Code for, inter alia, the sale of the said premises and consequential orders, the the delivery by the second defendant/first mortgagee of the duplicate certificate of title for the purpose of such sale and an order for foreclosure, in default of such sale.

The plaintiff transferred to the fist defendant premises 10 Earls Court, St. Andrew registered at Volume 942 Folio 244, which transfer was received on the 24th August, 1994.

The first defendant mortgaged the said premises to the second defendant to secure the sum of $4,760,000 payable towards the purchase price; this mortgage was effected on 24th August, 1994.

The plaintiff granted to the 1st defendant a 2nd mortgage to secure the sum of $1,300,000 at a rate of 40% per annum. This latter sum

was for the payment of the balance of the purchase price. This mortgage loan was for a period of one (1) year - from 1st September, 1994 and payable on thirty first August, 1995. On 6th September, 1994 the plaintiff lodged a caveat on title to the said premises.

This said 2nd mortgage was never registered. By letter dated 27th December, 1995 the plaintiff's attorney requested the 2nd defendant to loan to them the duplicate certificate of title in order to register the said 2nd mortgage.

The plaintiff contends that the first defendant is in default under the said 2nd mortgage agreement and that up to the end of the period 26th February, 1996 the amounts outstanding were:

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| Principal | $1,067,485.02 |
| Interest | 183,333.35 plus added costs and fees |

Mr. Haughton Gayle for plaintiff submitted that the mortgage transaction between the plaintiff and the 1st defendant was not a money-lending transaction under the Moneylending Act, because it was not one of substantial moneylending, in that its primary object was to sell his house and secondary object was to secure the outstanding purchase price; that a single transaction did not make it a money-lending transaction; that the plaintiff was not a moneylender under the Act - as he was not a person lending money at a rate of interest exceeding 12½% in a transaction that is substantially one of money-lending; that the presumption that arises under section 3 of the Act where the rate of interest exceeds 20% has been rebutted by the plaintiff. He relied on, inter alia, Lanarshine Loans Ltd. v. Black [1934] 1KB 380, Reading Trust Ltd. v. Spero [19300 1 KB 492, Oakes v. Green 23 TLR 327 and Carringtons v. Smith [1906] KB 79.

Miss Anderson for the 1st defendant argued that, once the interest rate exceeds 12% and the transaction is one of moneylending it falls within the Act; that a single transaction can be brought under the Act and if this rate of interest exceeds 20%, section 3 raises a presumption that the interest is excessive and the said transaction is harsh and unconscionable; the plaintiff has not rebutted this presumption because on the evidence the

the security is good, and the 1st defendant has ample assets; that the Court should re-open the transaction under section 2 of the Act, refuse the order for sale and relieve the 1st defendnat of the amount paid excess, and order her to pay t he amount found to be due. Miss Anderson relied on authorities in support of her arguments.

Miss Usim for the 2nd defendant argued that, the 2nd defendant by the terms of the mortgage contract dated the 4th August, 1994 between the 1st defendant and itself is obliged not to release the said certificate of title to the said premises to the plaintiff unless so authorised by the 1st defendant, that no such authority was given to the 2nd defendant and therefore the 2nd defendant does not wrongfully withhold the certificate of titel; that without such authority on handing over the said certificate the 2nd defendant would be in conversion and may prejudice its right to be fully repaid, in the event of a sale by the plaintiff.

A moneylender is not defined in the Moneylending Act. This Act, unlike the United Kingdom Moneylenders Act, has as its prime legislative base the transaction and not the person who lends money. The United Kingdom Moneylending statutes of 1900 and 1927 contemplate the registration of a moneylender, i.e. a person whose prime business is that of money lending.

There is no such persona defined in the Jamaican statute. The Moneylenders Act of 1900 (U.K.) did not establish an interest rate limit to classify acceptable or excessive lending. In the case of Michaelson vs. Nichols [1910] TLR 327, 60% interest rate was regarded as reasonable. This limiting was introduced by the 1927 Act and therefore the cases reflect this development; see Reaing Trust v. Spero [1929] 1 KB 492.

By Section 13 (1)(e) of the Moneylending Act, the Act does not apply to,

> "Any loan or contract or security for the repayment of money lent at a rate of interest not exceeding 12½% per annum."

Even a single transaction by any person may therefore be examined and maybe found to be within the Act.

Section 3 of the said Act raises a presumption that "the interest charged is excessive" and "that the transaction is harsh and unconscionable", where the interest charged exceeds 20%. This presumption maybe rebutted by evidence.

This Court finds that the said transaction is a moneylending transaction, falls within the provisions of the Moneylending Act and is governed by section 3 of the said Act. On the evidence, the plaintiff made a loan to the 1st defendant at a rate of interest of 40%.

The presumption therefore arises under Section 3. This interest rate is excessive and the transaction harsh and unconscionable; see also Suit No. C.L. 1994/C42 Ciboney vs. Crown Eagle et al delivered 18th November, 1994 and U.D.C. vs. Shoucair. The onus is on the plaintiff to show that it was not excessive, see Reading Trust, supra.

In order to discharge this onus, the plaintiff may prove, inter alia, that no mis-statement by him, no undue pressue nor deception was practiced on the borrower, the 1st defendant, nor that there was any weakness nor lack of understanding. In addition, if the security is inadequate, a high cost of interest to make up for the risk can be deemed acceptable - Reading Trust (supra).

Lord Loreburn L.C. in Samuel vs. Newbold [1906] A.C. 461, referring to the approach of the Court to the rate of interest being excessive, said, at page 467;

> "What the court has to do in such circumstances is, if satisfied that and the interest or charges are excessive, to see whether in truth and fact according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence and particularly if it is unexplained."

This was said before the Amending Act of 1927, and at a time when there was no limit to the rate of interest.

In the instant case, by section 13 the fact that the interest is above 12½% the transaction attracts the scrutiny of the Moneylending Act.

The author in 30 Australian Law Journal at page 131, in relation to the reasonableness of interest, quoting the author in Stone and Meston (The law relating to Moneylenders 4th Edition (1925) at page 161) said,

> "the test is formulated as follows:-
> Renumeration is excessive when it goes beyond what is reasonable, having regard to the risk and the circumstances generally."

If the security is good or reasonably safe interest which is high and therefore excessive as be seen as harsh and unconscionable - **Carrington v. Smith** (1906) 75 KB 49.

In the instant case, the plaintiff sold the said premises to the 1st defendant for $7,000.00. The first mortgage was to secure an amount of $4,760,000. The plaintiff's loan of $1,300,000 was therefore adequately covered by the value of the property at the stated purchase price.

There was no risk, in respect of the security, despite the plaintiff's fear.

> ".... should the borrower not take good care of the property...."

On the evidence - the affidavit of Dellamay Davidson dated 31st May, 1996, the 1st defendant had sought a mortgage of $6,000,000, found that she could only get a mortgage of $4.75M and having been promised by the plaintiff to give her, the 1st defendant a mortgage of $1,000,000- had to return to ask the plaintiff for a mortgage of $1,300,000.

The first defendant presented an image of a necessitous borrower and therefore the Court finds the rate of 40% interest harsh and unconscionable. Furthermore with a rate exceeding 12½% attracting the scrutiny of the Act, a rate exceeding 20% raising a presumption of excessiveness and a rate of 23% interest on the mortgage from the National Building Society, in all the circumstances, 40% is, in the view of this Court, harsh and unconscionable.

The plaintiff has not discharged the burden placed upon him under section 3 of the Act.

It is instructive to note that section 2 is disjunctively worded in that if the Court finds that:

> "... there is evidence that the interest charged ... is excessive .... or that in any case the transaction is harsh or unconscionable, then the Court may re-open the transaction....."

I hold, having found that the interest is excessive and that the transaction is harsh and unconscionable, that this transaction may be re-opened- see Samuel et al v Newbod [1906] A.C 461.

The mortgage interest on the 1st mortgage by the Jamaica National Building Society is 23% per annum. In all the circumstances a reasonable interest rate in the said transaction is 20%. On a computation of the out-standing debt at 20% the amount for principal and interest as owing up to 31st August, 1996 is $930,269.58 this latter amount was agreed on by the parties.

This Court finds that the 2nd mortgagee was not obliged in law nor authorised to hand over its security, the said certificate of title, to the plaintiff as requested.

Application for orders an Originating Summons dated 20th February, 1996 for sale or foreclosure of the said premises is refused. The 1st defendan shall pay to the plaintiff the sum of $930,269.58 for principal and interest due to 31st August, 1996 plus interest on 20% and the balance of unpaid principal to date.

The plaintiff shall pay the cost of the second defendant. The amount of $719,447.43 paid into Court by the first defendant to be paid out to the plaintiff's attorney-at-law.

Cost of summons to plaintiff to be agreed or taxed. Certificate for counsel.