CIVIL APPEAL NO. 14/63

UNITED DOMINIONS CORPORATION (JA.) LTD. APPELLANTS

V.

MICHAEL M. SHOUCAIR RESPONDENT

HENRIQUES, J.A.,

The first question which falls for consideration is whether the learned trial judge was correct in his conclusion that the proper and reasonable inference to be drawn from the evidence of the parties was that there was an agreement between them that so long as the plaintiff paid interest at the rate of 11%, and also at the same time paid the sum of £150 a week, that the United Dominions Corporation would forbear from demanding the loan. It was upon this finding that he had held that the plaintiff had established the fact of consideration for the agreement to pay the increased rate of interest. In spite of the very able and persuasive arguments which have been addressed to us by learned counsel for the appellants, I am satisfied that the learned judge was correct in his conclusion, and I see no reason for disturbing it.

The other question which was much canvassed on this appeal was whether the new agreement which was intended to vary only one term of the mortgage agreement, and as it was unenforceable, was ineffective in law to vary the original agreement, which remained enforceable. In support of this ground of appeal, reliance was placed on a number of cases commencing with Noble v. Ward, 1867 L.R. Exch. 135, decided under sections 4 and 17 of the Statute of Frauds and under section 4 of the Sale of Goods Act, 1893, and submissions were made that the principle of these cases ought by analogy to apply to contracts unenforceable under section 8 of the Moneylending Law. Despite the attractive form of the argument, I am of the view, however, that the principles in those cases do not apply to section 8 of the Moneylending Law. In the case before us the result of the agreement to pay interest at the rate of 11% was to vary the loan agreement so as to make it a loan at 11%, thereby

....removing/

removing it from the exemption provisions of section 13(e) and bringing it within section 8. The contract as varied is unenforceable for want of compliance with the provisions of that section, and the plaintiff was entitled to succeed.

The appeal should, in my view, be dismissed with costs.

(Sgd.) C.G.X. Henriques
Judge of Appeal

CIVIL APPEAL NO. 14/63

BETWEEN UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED APPELLANT

AND MICHAEL M. SHOUCAIR RESPONDENT

LEWIS, J.A.,

This appeal raises two interesting questions. The appellant corporation (hereinafter referred to as U.D.C.) lent the plaintiff-respondent substantial sums of money on mortgage security at a fixed rate of interest of nine per cent per annum, repayable on demand. This loan was outside the operation of the Moneylending Law, Cap. 254, by virtue of section 13. Subsequently U.D.C. demanded interest at the rate of eleven per cent per annum and the plaintiff agreed to pay it. The first question raised is whether there was consideration to support the new agreement. Has the respondent proved that he agreed to the new rate of interest in return for forbearance on the part of U.D.C.? Secondly, the agreement for the new rate being admittedly unenforceable by virtue of section 8 of the Moneylending Law, and the payment of interest being only one of several terms of the mortgage agreement, was the new agreement effective to vary the mortgage so as to make the loan one at 11% and so unenforceable; or were the parties left to their original rights under the mortgage?

First, as to consideration. The learned judge found that the only reasonable inference to be drawn from the conduct of the parties was that it was agreed that U.D.C. would not demand payment while the plaintiff paid interest at 11% and, in addition, while he paid £150 per week on his account. Upon this finding he held that the plaintiff had established that there was consideration for the agreement to pay the increased rate of interest.

Learned counsel for U.D.C. submitted that the learned judge erred in so holding because the evidence did not establish that any forbearance on the part of U.D.C. was due unequivocally

to the.../

to the plaintiff's promise to pay increased interest, or, alternatively, that notwithstanding the arrangement for weekly payments, U.D.C. would probably have called in the loan if the plaintiff had not agreed to the demand for increased interest.

In my opinion, the learned judge's decision on this point was right. As he said, "the thing must be looked at in a business way, taking into account, so far as they are known, the normal usages of commercial life."

The plaintiff was a business man who had mortgaged all he had for repayment of a large loan. He found himself in difficulties in making payments satisfactory to his creditor. From March 1961, he had paid nothing. He had been told that further advances which he had expected and for which he had immediate need would not be made to him. His efforts to get the parent company to intervene had been unsuccessful and had only resulted in a stern letter from the general manager, Mr. Neale, ending with the statement that his failure to pay certain instalments "hardly tends to inspire confidence." All this at a time when credit restrictions imposed by Government and by U.D.C. had had the effect of reducing sales in the motor trade in which the plaintiff was engaged. It is no doubt possible to criticise as extravagant the learned judge's reference to the plaintiff as a "debtor *in extremis*", but that his financial situation was critical and that he was under pressure, polite but firm, to meet his commitments in a manner more satisfactory to U.D.C. there can be little doubt.

It was in these circumstances that the plaintiff received on August 22nd, the demand for payment of increased interest. What was he to do? Had his financial situation been secure he might have protested on the ground that his mortgage agreement contained no provision for a change in the interest rate. But with his loan payable on demand, his interest payments months in arrear and his creditor patently dissatisfied, he could be under no illusion as to the probable consequences if he refused. Nor does it appear from the phraseology

of the letter.../

of the letter, as learned counsel for the plaintiff pointed out, that U.D.C. contemplated a refusal. It stated -

> "As a result, interest on your loan will be computed at 4% above the Bank of England rate which is at present 7%. This change will take effect as from 26th July 1961."

The request to "confirm by signing and returning the attached copy" was almost a formality dictated by legal necessity.

Within a week of the receipt of this letter the plaintiff was called in by Mr. Neale for an interview about his account. Mr. Neale had returned from holiday to find a new commitment - an advance of £1,800 in fulfilment of a previous undertaking to Barclays Bank, D.C.O. The plaintiff had earlier been informed that this advance would bear interest at 11% and would "be added to the existing mortgage loan." Mr. Neale was disturbed by this new commitment and "thought it was time for a heart to heart talk with plaintiff to see if we could get the thing put on a proper basis." Whether the plaintiff actually signed the confirmatory copy of the letter before or after this talk is not clear, for it was not delivered to U.D.C. (he says, by hand) until September 7th, one day after payment of the first weekly instalment of £150 agreed upon at the interview. But the discussion clearly took place against the background of U.D.C.'s demand for the increased interest rate. Having made this demand U.D.C. was now calling for a fixed weekly payment. Could the plaintiff refuse either?

There can be little doubt that the promise to make weekly payments was made under pressure and, as subsequent events showed, with little real prospect of its being honoured.

The plaintiff gives his reason for agreeing to pay the increased rate. He says -

> "I signed it" (the letter) "because I had no choice. If I hadn't signed it they would have pressed for payment. I was not then able to repay the £55,000 and outstanding interest."

The learned judge accepted this, in my view rightly. I am clearly

of opinion.../

of opinion that the demand for increased interest, in the circumstances in which it was made, constituted pressure upon the plaintiff in connection with the payment of his loan. The plaintiff's acceptance of the demand can only be explained on the basis that he hoped thereby to avoid the loan being called in - an implied request to U.D.C. to forbear from calling for payment.

Learned counsel for U.D.C. submitted that the plaintiff must show that notwithstanding the agreement as to payment of fixed weekly instalments U.D.C. would probably have called in the loan had the plaintiff refused to pay the new rate. Looking at the facts in a business way I think it is a reasonable inference that had Mr. Neale received on September 7th a letter of refusal instead of an acceptance he would probably have moved promptly to call in the loan. It is unlikely that U.D.C. would have been content to allow the money to remain at the lower and unremunerative rate with a debtor in whom they had lost confidence and whose account they considered unsatisfactory. But in my opinion, once the connection between pressure, promise to pay the increased rate of interest and forbearance is established, it is not neccessary for the plaintiff to exclude any possible effect that the promise of weekly payments may have had concurrently. That connection is sufficient to establish consideration for the agreement and I can see no reason in principle why the presence of some other factor should deprive it of its legal effect.

I think that this part of the case is really concluded by the reasoning in The Alliance Bank v. Broom (1864) 34 L.J.Ch. 257, where Kindersley V.-C. says :

> " Now, what is the effect of the letter written by the defendants? It appears to me that when a creditor demands payment of a debt, and the debtor, in consequence of that application, agrees to give a certain security, although there is no promise by the creditor to abstain from suing for any given time, yet the effect is that the creditor does in fact give, or must be assumed to give, and the debtor receives, or must be assumed to receive, the benefit of some degree of forbearance, although for no

definite.../

> " definite or fixed period. If the debtor had refused to give any security at all, the creditor might, of course have taken immediate steps to enforce payment, but in consequence of the promise to hypothecate, the debtor does receive some degree of forbearance."

And in Glegg v. Bromley (1912) 3 K.B. 474, Fletcher Moulton, L.J. said, at p. 486:

> " If there has been pressure and in response to that pressure the further assignment is made, that suffices."

I turn now to the other ground of appeal, namely, that as the new agreement was intended to vary only one term of the mortgage agreement, and as it was unenforceable, it was ineffective in law to vary the original agreement, which remained enforceable.

In support of this proposition reliance was placed upon cases decided under ss. 4 and 17 of the Statute of Frauds and s.4 of the Sale of Goods Act, 1893, especially Noble v. Ward (1867) L.R. Exch. 135, Morris v. Baron (1918) A.C. 1 and British and Beningtons Ltd. v. N.W. Cachar Tea Co (1923) A.C. 48. These cases are authority for an important distinction with respect to the effect of parol contracts unenforceable under the abovementioned sections. A contract required by law to be in writing may be rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with it or to an extent which goes to the very root of it: the court will give effect to the intention of the parties to rescind but will not enforce the new parol contract which they have attempted to substitute. But where the parol contract is intended merely to vary, and not to rescind, the written contract, the variation is ineffective to alter the rights of the parties and the original contract remains enforceable.

Learned counsel for U.D.C. submitted that the distinction established by these cases ought by analogy to be applied to contracts unenforceable under s. 8 of the Moneylending Law. This section provides:-

" (1) No.../

" (1) No contract for the re-payment by a borrower of money lent to him or to an agent on his behalf after the commencement of this Law or for the payment by him of interest on 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 aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

(2) The note or memorandum aforesaid 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 lo... expressed in terms of a rate per centum per annum."

It was argued that the words used in this section, viz: "No contract ... shall be enforceable" are the same as those used in s. 4 of the Sale of Goods Act, 1893, and are equivalent to those of the 4th and 17th sections of the Statute of Frauds as construed by the courts, and it was submitted that the distinction established under those sections is based upon a general rule of the common law and ought properly to be applied in the interpretation of a section which uses similar language. Thus in the instant case the section would operate to avoid the new agreement but would leave unaffected the original agreement.

In order to decide upon the merits of this submission it is necessary to examine the reason why a parol contract which is intended merely to vary a written contract has been held to be ineffective. In Morris v. Baron (supra), Lord Atkinson, after referring to "the well established rule that a contract which the law requires to be in writing cannot be varied by parol" goes on to say, at (1918) A.C. p. 31 -

" The foundation...

" The foundation, I think on which that rule rests is that after the agreed variation the contract of the parties is not the original contract which had been reduced into writing, but that contract as varied, that of this letter in its entitety there is no written evidence, and it therefore cannot in its entirety be enforced."

Lord Atkinson made a similar statement in giving his opinion in British and Beningtons Ltd. v. Cachar, saying at (1923) A.C., p.62:

"The fourth and seventeenth sections of the Statute of Frauds, like the fourth section of the Sale of Goods Act, require that the whole, not part of the contract, shall be evidenced by writing. Where a written contract is varied by parol, there is no writing covering both the original and the variation, hence the contract as varied is unenforceable."

He had earlier (at p. 61) cited withapproval the remarks of Lord Denman in Stead v. Dawber 10 Ad. & E. 57, 64 as follows:-

" The Contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude."

That the matter has been treated as one of evidence binding upon both parties to the contract is shown by the following citations from the judgments in Morris v. Baron.

Viscount Haldane at p. 16:

"But I think that in addition to this, a further construction is now firmly settled which bases both the 4th and 17th sections of the Statute of Frauds upon a special rule of evidence. That rule is that where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement."

And later at p. 18:

" Even if.../

"Even if Noble v. Ward can be taken as a decision confined to the 17th section, which I think it ought not to be, the authorities in equity to which I have referred established the principle clearly as regards the 4th section of the Statute of Frauds and the Sale of Goods Act. No doubt it is not to be found in the expressed words of the sections. But if the construction placed by the Courts on such words is not accepted injustice will result. For it would then be in the power of a defendant to insist that the contract to be sued on by the plaintiff must be the entire new contract comprising the old one with the parol variations, and then to defeat the plaintiff by setting up the statute. The Courts, in order to avoid this result, have read the language as implying that the original formal contract is not, in any question of evidence in proceedings, to be treated as varied by a subsequent contract which is informal, and therefore of imperfect obligation. But this reason obviously does not apply to a complete rescission by parol, which does not seek to set up a new contract to be sued on, but merely terminates existing relations."

And Lord Atkinson, at p. 30:

"There can be no doubt that it is quite competent to the parties to a written agreement to say by parol, 'Let us put an end to this agreement,' and if that be so, it is, I think, equally competent for them to say by parol, 'Let us put an end to this agreement, start afresh, and make an agreement to a particular effect in substitution for the first.' In my view this would be so though it might happen that, owing to some statutory provision such as that contained in the 4th section of the Statute of Frauds, the parol agreement could not, by reason of its not being evidenced in a particular way, be enforced at law, provided the intention of the parties to rescind the first be clear."

The foregoing citations are, I think sufficient to show that the true position under the Statute of Frauds and the Sale of Goods Act is as follows:

Where there is in existence a contract which complies with the statutory provisions, the parties may by parol expressly or impliedly rescind it. The Court will give effect to their

intention.../

intention so to do because the new contract is relied on only for the extinguishment of the old and the statutory provisions do not require writing for this purpose. But if the parol agreement goes on to make a new contract in place of the old this cannot be enforced for want of the type of evidence of it which the statute requires. And if the parol agreement discloses an intention not to rescind but merely to vary the old contract, since the result of this is to make a new contract consisting of the old contract as varied and the whole of it cannot be proved in the manner required by the statute, the Court will not enforce the variation at the instance of either party but will treat it as ineffective and leave the parties to their rights under the original contract.

In my opinion, s. 8 of the Moneylending Law does not, like the Statute of Frauds and the Sale of Goods Act, prescribe procedural or evidentiary provisions which if not compled with, affect the ability of either party to prove the contract for the purpose of enforcing it. It prescribes certain formalities as part of the scheme for regulating the dealings of moneylenders, failure to observe which has the effect of depriving the moneylender of his right to enforce either the contract or the security. See Kasamu v. Babu-Egbe (1956) A.C. 539. These formalities are outside of the ambit of proof of the contract and are imposed upon the moneylender for the protection of the borrower. They are intended to ensure that the borrower should have in his possession a copy of a document signed by him which sets out all the terms of the loan agreement. And it is just as important that they should be observed when the contract is varied as when it is first made.

Where, then, a moneylending contract has been varied by an agreement which satisfied the terms of the Statute of Frauds the whole of the contract as varied can be proved, and no question of evidence arises in the proceedings to prevent

the original.../

the original contract from being treated as varied by the new agreement. It is this contract, consisting of the original contract as varied, which the Court will examine and if it finds that the formalitees laid down for the protection of the borrower have not been complied with it will not permit the moneylender to enforce it. Where the effect of the variation is to bring within the compass of the Moneylending Law a contract which previously was exempted from it, the moneylender must so arrange the mechanics of the transaction as to enable him to comply with the provisions of section 8. If he fails to do so, there is nothing in principle to prevent the borrower, for whose protection the section was enacted, from drawing this fact to the attention of the Court and thus avoiding the contract as varied.

Lord Haldane, in the passage cited above, thought that a construction other than that placed by the courts upon the Statute of Frauds and the Sale of Goods Act would result in injustice by permitting a defendant to insist upon a plaintiff suing on the contract as varied and then setting up the Statute to defeat him. But the cases decided under s. 6 of the Money-Lenders Act, 1927 (U.K.) - our section 8 - show that the courts have not shrunk from permitting borrowers to raise non-compliance with the section or from construing the section strictly against moneylenders even where the result of so doing may be to enable a dishonest borrower to triumph over a moneylender who perhaps has been merely negligent or has not been meticulously accurate. Indeed, once the fact of non-compliance comes to the attention of the court, it is in duty bound to give it such effect upon the rights of the parties as the law requires. The court is not at liberty to substitute its own ideas of justice in individual cases for the policy to which the legislature has given effect in section 8.

In my .../

In my judgment, the distinction established by Noble v. Ward and that line of cases has no application to section 8 of the Moneylending Law. In the instant case, the effect of the agreement to pay interest at 11% was to vary the loan agreement so as to make it a loan at 11%, thereby taking it out of the exempting provisions of s.13(e) and bringing it within s. 8. The contract as varied is unenforceable for want of compliance with the provisions of that section and the plaintiff is entitled to the relief sought.

I would dismiss this appeal with costs.

(Sgd.) A.M. Lewis
Judge of Appeal