IN THE FIJI COURT OF APPEAL
Civil Appeal No. 88 of 1985.

Between: ASHNI KUMAR Appellant

- and -

HASID ALI Respondent

B.C. Patel and H. K. Nagin for the Appellant.
S. R. Shankar for the Respondent.

Date of Hearing : 11th November, 1986

Delivery of Judgment: 14th November, 1986

JUDGMENT OF THE COURT

Speight, V.P.

This appeal arises from a decision of Kermode J. delivered in the Supreme Court on 23 August 1985 wherein he made a declaration that certain contracts for the repayment of moneys lent by the Appellant (then the Defendant) to the Respondent (Plaintiff) were unenforceable by virtue of the Money Lenders Act Cap. 234.

We say at once that we endorse the opening remarks by the learned Judge that the Statement of Claim was a confused one and the evidence of both parties did not help dispel that confusion. We would go further and say that lack of candour on their part, and the confused, incomplete

and sometimes contradictory nature of the documentation made it almost impossible to unravel the truth of the financial dealings between them. But we can add that in this Court we have been fortunate that, with the contradictions so well pointed out in the learned Judge's decision, we have been much assisted in our understanding by the logical and helpful analysis of the material on the part of counsel, Mr. B. C. Patel and Mr. S. R. Shankar.

The Statement of Claim alleged that the Respondent had borrowed some money from the Appellant and in consequence had signed certain mortgage documents and Bills of Sale which purported to secure greater sums of money than had been lent. It was also alleged that the Appellant was an unregistered money lender and that the interest rate he had been charging was forty percent per annum.

In particular it was alleged:-

(a) That a mortgage no. 195484 dated 21.10.82 purporting to secure an advance of $52,000 at 13% in fact related to a sum of $37,500 and (inferentially) the balance represented capitalised interest at 40%.

(b) That a variation of mortgage no. 198495 dated 24.1.83 for further advances of $38,000 at 13% was fraudulent, and that the true amount advanced was $18,000 and that the balance again represented interest.

(c) That a variation of mortgage no. 201502 dated 2.5.83 was executed by the Appellant unilaterally reducing the previously stated interest rate from 13% to 10% in an attempt to avoid the prohibition in the Money Lenders Act, and was only registered after the Respondent had issued proceedings against Appellant, invoking that Act.

(d) That a variation of Mortgage no. 207953 dated 13.12.83 was signed and registered for a further advance of $10,000 which it was claimed had never been advanced.

Now the Appellant filed a very comprehensive Statement of Defence denying the allegations, and putting forward specific information to counter the details alleged. The Appellant also produced a number of documents at the hearing tended to confirm his claims - and the Respondent had been cross-examined on these matters and made a number of concessions.

In his decision the learned Judge did not base his reasoning on a detailed examination of all this material, confusing as it was, but on a conclusion that the Appellant was carrying on the business of a money lender and that in several respects, particularly on a finding that excessive interest was being charged, the Appellant could not avail himself of the exemptions in section 29 of the Act.

However the learned Judge's observations on the defective nature of the accounts and the lack of credibility, particularly of the respondent are sufficient to justify this Court in accepting Mr. Patel's submissions that most of the allegations set out in the Statement of Claim were ill founded.

In a case such as this, where so much documentary evidence not depending on witness credibility is available, an Appeal Court is in as good a position as the trial Judge to make findings of fact - especially upon matters not earlier pronounced upon.

Looking at the summary of allegations set out above we think it is clear that:-

(a) $52,000 was owing by Respondent to Appellant at the time of the original mortgage. Something in excess of $38,000 was advanced by the Appellant to enable the Respondent to pay off a mortgage to a Third Party. $12,200 was outstanding by Respondent to Appellant on a Court judgment - a matter which he at first denied, but was forced to concede - and he apparently agreed to pay interest in excess of Court interest when the $52,000 sum was agreed upon. In so far as this sum included a small amount for interest which later attracted further interest it could be

said that there was an ingredient of compounding. This is relevant to section 17 if charged by a money lender. The learned trial Judge, as an experienced draftsman, was rightly critical of the recital of the principal sum in the wording of the mortgage document - but that does not affect the validity of the amount secured.

(b) The Respondent's claim of not having received the full additional $38,000 was demonstrated to be quite untrue. Cheques and receipts were produced which established that Appellant's defence pleadings were correct.

(c) It cannot be resolved whether the Respondent was aware of the variation witnessing the reduction of interest rate. Under section 66 of the Land Transfer Act 131 execution by the mortgagor is not obligatory.

(d) The further advance of $10,000 is debatable. Certainly the Respondent's denial of receiving any money is untrue - he received at least $4,000 - the question of the balance of $6,000 is less clear.

Now it was not absolutely necessary for conclusions to be reached on the foregoing matters if there was clear proof from elsewhere that Appellant was a money lender.

Indeed a high interest rate of itself is not probative, but if the lender is within the definition set out in section 2 the Court must then move to the question of whether he is entitled to the benefit of Section 29. However in view of the initial confusion injected into the case by the Respondent we believe an understanding of their dealings, as far as the papers will allow, helps put the matter in perspective.

When he attempted to enforce his securities the Appellant made various demands upon the Respondent. One of these of 26th September 1983 was for $86,585 and a statement of account prepared by Appellant for the purposes of trial appeared to show that substantial interest was being charged. As the learned Judge said, certainly not 40%, but apparently in excess of 10% - more on this later.

Section 3 in its relevant part provides that:

> "Any person who lends a sum of money in consideration of a larger sum of money being repaid shall be presumed until the contrary be proved to be a money lender."

The Judge quite properly held that the foregoing transactions brought the Appellant within the first part of the section. The case then moved on to a consideration of whether "the contrary was proved."

With the onus on the Appellant the case raised two issues which were considered by the trial Judge and were the alternative bases of Mr. Patel's submissions in this Court.

1. Was Appellant a money lender within the meaning of Section 2 definition?

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or owns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent."

2. If he was within the definition he was clearly unlicensed. Hence the contracts for repayment contained in the mortgages (and the collateral Bills of Sale) would prima facie be unenforceable by virtue of Section 15, which reads:

> "No contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable."

However, the effect of section 15 is limited by Section 29(1) which reads:-

"29.-(1) This Act shall not apply to any loan which fulfils all the following conditions, and no such loan shall be taken into consideration in determining whether or not a person is a moneylender:-

(a) the loan is secured by a registered mortgage of freehold or leasehold land with or without collateral security;

(b) the rate of interest charged does not exceed ten per cent per annum or such other rate as may from time to time be fixed by the Minister in pursuance of the power conferred upon him so to do;

(c) the rate of interest (if any) is expressed in such mortgage in terms of a rate per cent per annum;

(d) the conditions as to interest on the loan do not conflict with the provisions as to interest prescribed by section 17 in the case of loans by moneylenders:

Provided that for the purposes of this paragraph a provision for the reduction of interest on prompt payment shall not be deemed to conflict with that section;

(e) the loan is not subject to any agreement for payment by the borrower of any costs, charges or expenses other than the following:-

(i) costs, charges or expenses which are properly incurred in connexion with the negotiations for or the granting of the loan or any necessary documents incidental thereto;

(ii) costs, charges or expenses properly incurred in connexion with protecting, maintaining, preserving, varying, discharging, renewing, realizing or attempting to realize any security for the loan, or making good any default by or discharging any outgoing payable by the borrower;

(iii) any other costs, charges or expenses necessarily and properly incurred by the lender as a result of any request by the borrower;

(iv) interest at a rate not exceeding the rate permitted under this section on any such costs, charges and expenses as aforesaid if incurred by the lender.

(2) The Minister may from time to time, by notice in the Gazette, vary, in relation to loans made at any date subsequent to such notice, the rate of interest specified in subsection (1).

Now section 29 has two effects.

(a) If one is considering evidence to determine whether a person is a money lender his financial transactions will be examined - but loans which have been secured by a registered mortgage and which otherwise comply with the balance of the requirements of section 29(1) are excluded from considerations in deciding whether the lender falls within the section 3 definition.

(b) If an affirmative determination has been made on whatever evidence, the money lender's securities must comply with the section to be enforceable.

It is clear that if the question of the application of the Act is being considered solely in relation to the enforceability of a security such as a mortgage, the Court may pursue either of two approaches.

It may:

(a) look at the evidence of being in business, holding out, advertising and similar matters, and make a finding of "money lending" and then consider whether the security is nevertheless enforceable because it complies with section 29(1); or

(b) consider the section 29(1) provisions first. If the security is within the exemption then no further enquiry is needed - for, money lender or not, the Act does not apply.

In such cases, and this is one of them, the advantage of determining the Section 29 question first is obvious. Unfortunately this matter cannot be approached in that way for several reasons. First the figures produced are so confusing that it is impossible to decide what rate of interest was "charged." The learned trial Judge made a valiant attempt to come to a conclusion by analyzing the amount of the demand for $86,585 of 26.9.83, and it certainly seemed that excess interest was being claimed, i.e. above the 10% on the mortgage and above the 12% increase brought into force by Legal Notice on 19th March 1982. Even Mr. Patel in this Court conceded in the early part of his argument that he could not justify or explain an apparent overcharge of $3,000 in the statements. Later he realised that one of the 3 copies of Appellant's accounts varied from the other two by showing a sum of $2,000 as a repayment rather than a further advance. As a result of this he submitted that the Judge's assumption on interest rate was erroneous. A highly unsatisfactory situation. Further, counsel were unable to agree - and we certainly could not decipher - whether compound interest was charged.

We therefore think that the desirable course of making the section 29 decision first in cases concerning the conditions of the security cannot be followed here, and we approach the question of whether the Appellant discharged the onus of showing he was not a money lender within the definition, assuming for the purpose of this enquiry that regard can be had to the loans referred to.

Apart from the sums of $52,000, $38,000 and the questionable $10,000 lent to Respondent there was the following evidence of transactions:-

1. An attempt by the Respondent which collapsed, to have Appellant discount three cheques from Marlows Limited - these are not lending transactions and can be disregarded. (Olds Discount Company v. John Playfair Ltd (1938) 3 All E.R. 275).

2. The sum of $52,000 included a number of early small loans which Appellant had given to Respondent between 1975 - 1981, some of which had been repaid. In respect of these Appellant claimed he had not charged interest and Respondent did not deny this. He said he secured repayment in some cases by giving a post dated cheque. By 1981 when Appellant took proceedings the balance owing from this source was $13,200.

3. Respondent said his brother had had some "financial matters" with Appellant. Appellant was not asked about this but he said that Respondent's father and he had been neighbours and he treated Respondent "as a son" having known him since he was a young boy.

4. Apart from Respondent and his brother, Appellant said he had previously lent money to 4 or 5 people, charged interest and took mortgages - whether these complied with the requirements of Section 29 and hence are to be disregarded is unknown. He also had lent money in the last few years to one or two neighbours without charging them interest.

5. In earlier times Shiriam the bailiff had brought people in need of money to him and sometimes he had obliged with loans.

6. He had no office and he did not advertise.

7. At the time of some of these loans he had been on overdraft with the bank and paying interest.

8. He is a retired bus proprietor.

Now on this material the trial Judge concluded that the Appellant was within the definition - which in simplified term means:-

(a) his business was that of a moneylending; or

(b) he carried on that business (which seems synonymous); or

(c) he advertised or held himself out to be in that business.

Now apart from the reference to the bailiff sending a few people to the Appellant there is no evidence of (c). And it is not unknown in this and other countries that bailiffs will direct a debtor to someone who has funds available without necessarily classifying them as money lenders touts.

The question is whether the proved activities amounted to the "business of money lending." No authorities were cited in the judgment under appeal and we think that we have perhaps had the advantage of more helpful material put in front of us.

In Chow Yoong Hong v. Choong Fak Rubber Manufactory (1962) A.C. 209 Lord Devlin said:

> "To lend money is not the same thing as to carry on the business of money lending....it is necessary to show some degree of system and continuity in the transactions."

This phraseology was borrowed from the much earlier case of Newton v. Pyke 25 T.L.R. 127. A number of English and Commonwealth cases are to be found in The Digest (1983) Vol. 34 at paras. 4603 and following; in particular there are a number of New Zealand cases and Mr. Patel cited from some of these. The recurrent criteria are cited as : the number, the nature and the regularity of the transactions; the narrow or widespread nature of the field of borrowers; any evidence of frequent inflow of funds calling for reinvestment for profit; the individual's status in life - whether dependent on other activities for income. We have also examined the number and frequency of the loans in the New Zealand cases, which are quite numerous and with the Reports readily available. As Mr. Patel submits the persons there were absolved from being money lenders in cases where far more transactions were proved than here and with more evidence of system. At most here we have transaction with 8 or 9 people, 4 of whom were neighbours or friends. Apart from the Respondent with whom it was a running transaction extending over some years, the remainder appear to be single loans, spread over some 8 or 9 years. This factor together with the highly doubtful question of whether the mortgages to the Appellant are to be taken into account at all lead us to the view that the onus on the Appellant was discharged. In particular one recalls observations in many cases that Courts are often reluctant to declare persons

money lenders with the drastic and sometimes unfair consequences that follow except on clear evidence. Best v. Sutcliffe (1965) N.Z.L.R. 750.

Accordingly we are not required to move on to the question of whether Section 29 saved this transaction from the restriction imposed upon a security given to a money lender. In doing so we observe that had the trial Judge had the advantage of being told, as we were, of the error in the produced accounts, he may not have been driven to the conclusion that there was an unaccounted for $3,000, which tipped the scales in his mind, in showing an interest rate above 12%.

Accordingly the appeal is allowed and the declaration that the instruments are unenforceable is quashed.

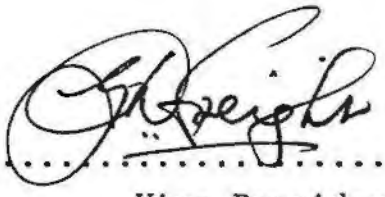
There were a number of other forms of relief sought in the statement of claim and these did not previously call for determination, except that there was an injunction restraining sale.

This decision will not necessarily conclude matters in dispute between the parties. Although the securities remain valid there is still uncertainty as to the amounts owing. The sum of $10,000 supposedly secured by the most recent variation no. 207953 is debatable and doubts concerning

the statement of accounts of 30 June 1984 leave a question concerning an entry for $2,000. Further examination may also show interest which cannot be recovered if it is in excess of permitted rate (section 22).

The parties or their advisers may be able to resolve these matters. If not there will be a retrial confined to issue (b) in the prayer for relief in the Statement of Claim for the purpose of resolving the above matters. The interim injunction will continue for 3 months or for such further time as the Supreme Court may order.

Costs on this appeal to the Appellant to be taxed if not agreed.



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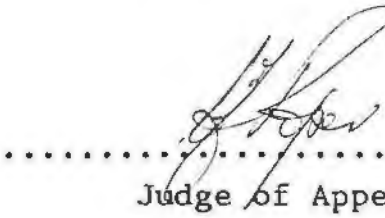

Judge of Appeal

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