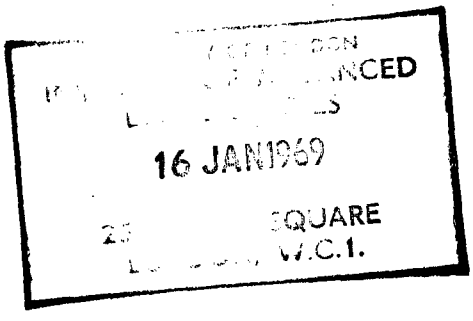
13, 1968

IN THE PRIVY COUNCIL No. 37 of 1966

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :



UNITED DOMINIONS CORPORATION (JAMAICA) LTD. (Defendant) — Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) — Respondent

CASE FOR THE APPELLANT

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INTRODUCTION

1. This appeal is from a Judgment and Order of the Court of Appeal of Jamaica dated 18th April, 1966, and is brought pursuant to the Order of that Court dated 23rd September, 1966, granting the Appellant final leave to appeal to Her Majesty in Council. p.100 p.102

2. The action was begun by the Respondent by Writ of Summons in the Supreme Court of Jamaica (Suit No. C.L.258 of 1962) and claimed that by reason of Section 8 of the Moneylending Law of Jamaica, Chapter 254, an Instrument of Mortgage made between the parties on the 22nd April, 1961, as varied in writing on the 31st July, 1961, was unenforceable. The Respondent succeeded in the Supreme Court at first instance (Douglas, J.) and was granted the relief prayed in his Statement of Claim and the costs of the action. The Appellant's appeal to the Court of Appeal of Jamaica was dismissed with costs by a majority (Lewis and Henriques, J.J; Duffus, J., the President of the Court, dissenting). p.1 p.103 p.114/5

THE PRINCIPAL FACTS

3. The Respondent was at all material times the Managing Director of Michael M. Shoucair Ltd., a company which shortly after the events herein related went into liquidation but which was formerly engaged in the motor trade and which from about December, 1959, had borrowed money

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from and discounted hire purchase agreements with the Appellant. Between May, 1960 and April, 1961, the Respondent on his own behalf borrowed various sums of money from the Appellant for the purpose of purchasing lands at Orange Street Kingston, Jamaica, and erecting a building thereon, and also for use in the business of the company. The Appellant is a limited liability company incorporated under the Companies Law of Jamaica and engaged, inter alia, in the business of money-lending.

4. By April, 1961, the total sums loaned by the Appellant to the Respondent amounted to £55,000 and on the 22nd April, 1961, the parties entered into an Instrument of Mortgage under the
p.103 Registration of Titles Law, by which the Respondent mortgaged three parcels of land to the Appellant. The Mortgage provided, inter alia, for the payment on demand of the principal sum secured and for the payment of interest at the rate of £9 per centum per annum, together with the usual mortgagor's covenants and the mortgagee's power of sale upon default in the payment of the loan monies or interest.

5. A payment of interest by the Respondent
p.113 amounting to £543.15.0. was due on the 15th April, 1961, under the terms of the promissory notes which, prior to the execution of this Mortgage, formed the Appellant's only security for the £55,000 advanced. This instalment was not paid, nor did the Respondent make any further payments in respect of such advances until 6th September, 1961.

p.114 6. On the 22nd August, 1961, a circular letter
p.115 bearing the date 31st July, 1961, and an attached copy of the letter, was despatched by the Appellant to all persons who had loan accounts with them. The letter was in the following form :-

"Dear Sir/Madam,

Owing to the increase in The Bank of England rate by 2% we have to advise you that we also will have to increase our rate of interest by a corresponding amount. 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. Record

We trust that this will only be a temporary measure.

Please acknowledge receipt and confirm by signing and returning the attached copy.

Yours faithfully,

UNITED DOMINIONS CORPORATION (Ja) LTD.

(Signed) Lennon

for I.H. Sinclair

Secretary."

One of such circular letters with attached copy was despatched to the Respondent and on the 7th September, 1961, the copy signed by the Respondent was returned to the Appellant.

7. On a date not precisely identified but between the 28th August and the 6th September, the Respondent was interviewed by the Appellant's General Manager, one R.A. Neal, with regard to his failure to pay since March, 1961, any interest on the £55,000 advanced to him and it was agreed at that interview that the Respondent should thenceforth pay £150 per week in repayment of the loan and interest (including arrears) and that the Appellant should furthermore retain the balance financed on any hire purchase transaction submitted by the Respondent, and credit his account with such sums.

8. On the 6th September, 1961, the Respondent paid £150. On the 16th September he paid a further £150 and on the 19th September his account was cerdited with £350 (according to the oral evidence; £320 according to Plaintiff's Exhibit 9). Thereafter the Respondent made no further payments and on the 5th October a demand note calling in the loan was sent to him. p.128 p.118

9. Although the said Neal stated in evidence that the temporary increase in interest rates by reason of the increase in Bank Rate was intended to apply only to those cases where the instrument

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(of security) entitled the Appellant to increase the rate to its borrower, and that, at the date when he signed the demand note to the Respondent (5th October)he was unaware that the circular letter dated 31st July, 1961, had been sent to the Respondent, the claim for interest in that note included a claim at the rate of 11% in respect of the period 1st August to 30th September, 1961.

10. The Respondent, having failed to comply with the demand note, the Appellant on the 3rd November, 1961, in exercise of its power of sale under the Mortgage, advertised the mortgaged land for sale at Public Auction. The Respondent alleged an infringement by the Appellant of the Moneylending Law and thereafter began his action for a Declaration and allied relief.

THE MONEYLENDING LAW OF JAMAICA, Chapter 254

11. The relevant provisions of the Moneylending Law are as follows :-

> Section 8(1) "No contract for the repayment by a borrower of money lent to him or to any agent on his behalf after the commencement of this law or for the payment by him of interest or 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

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of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum."

Section 13(1)"This law does not apply to -

.... (e) any loan or contract or security for the repayment of money lent at a rate of interest not exceeding ten per centum per annum."

THE ISSUES

12. As the Instrument of Mortgage dated 22nd April, 1961, provided for a rate of interest not exceeding 10% per annum, there is no doubt that the Moneylending Law did not apply to it at the date when it was entered into. Two issues, therefore, are raised in this Appeal, and they are the two issues which were argued by the Appellant before thy Court of Appeal.

First, was there any consideration for the Respondent's promise to pay the increased rate of interest of 11% on the principal sum? If there was no consideration, there was no binding contract to pay such increased rate of interest and the Appellant respectfully submits that the Moneylending Law was in that event irrelevant.

Secondly, if there was good consideration so as to create a binding contract to pay interest at 11% per annum, did the admitted non-compliance with the provisions of Section 8 of the Moneylending Law render such contract unenforceable and therefore ineffective to vary the original Instrument of Mortgage?

The Appellant submits that it is entitled to succeed on one or both of these issues and that, if either is determined in its favour, the Respondent's action should be dismissed.

13. The First Issue. The question whether there was good consideration for the Respondent's promise to pay interest at 11% depends, it is submitted, on whether there was sufficient evidence of a forbearance by the Appellant to call in the outstanding loan in return for the

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Respondent's promise. That promise was communicated to the Appellant on the 7th September, 1961, and it is the fact that four weeks elapsed thereafter before the issue of the demand note on the 5th October. The Respondent stated in his evidence: "I signed it (the copy circular letter dated 31st July) because I had no choice. If I hadn't signed it they (the Appellant Company) would have pressed for payment". The Appellant respectfully submits that this statement was pure conjecture on the Respondent's part and was not supported by any evidence. Later, in cross-examination, the Respondent modified the second statement to: "I signed the letter of 31st July 1961 because I felt that if I didn't sign they would press for payment." (Added italics)

(i) The Appellant had in fact already shown forbearance from April, 1961, when the Respondent had begun to fall behind in payments of interest, and such forbearance continued until the end of August or beginning of September when he was interviewed by the Appellant's General Manager, and before he had agreed to pay the increased rate of interest. Thereafter, forbearance continued to be shown while the Respondent made payments under the arrangement arrived at during that interview and it ceased only when the Respondent failed to make any further weekly payments of £150 after the payment made on the 16th September, 1961. The short period of forbearance between the 7th September and 5th October was, in the Appellant's submission, far more readily explicable as a continuation of the forbearance already shown between April and August than as a quid pro quo for the Respondent signing the copy circular letter.

(ii) The Respondent did not suggest in his evidence that at the interview with the Appellant's General Manager there had been any discussion relating to his being required to pay interest at an increased rate nor, indeed, that there had been any mention of the figure "11%". His first reference to that interview was in cross-examination, when he said: "I was in arrears with instalments and Mr. Neal called me.

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Discussions - as I don't know when. It was in presence of Mr. Carmichael, I can't remember if this was before or after I received letter of 31st July. I think it was after I got the circular letter. Yes, it was. I was to pay £150 and they would discount what stocks we would give them and they would give us credit. Between time I got letter of 31st July and 5th October, I received no communications from defendant apart from letter addressed to Michael M. Shoucair Ltd. which they were honouring an undertaking given to the bank. Meeting with Mr. Neal took place before I made payment on 6th September. It was a couple of days before the 6th September. I signed the letter of 31st July, 1961, because I felt that if I didn't sign they would press for payment." In re-examination the Respondent spoke also of a conversation with the Appellant's Secretary, one Sinclair (although it is not clear from the Notes of Evidence whether this was the same occasion as the interview with the General Manager, Neal) of which he said "There was such a conversation with Mr. Sinclair. The £150 was for interest in arrears and interest on the loan - for everything. It was to take care of interest in arrears and interest accruing. In addition they were going to appropriate sums for hire purchase agreements to bring it up. All those things were discussed at that meeting."

(iii) The Appellant submits that, had the Respondent believed that its forbearance to call in the loan depended on his agreement to pay interest at 11%, this must have been expressly referred to at the interview and, furthermore, an express reference would almost certainly have been made by the Respondent to the fact that his mortgage was at a fixed rate of 9% and contained no provision for any increase.

14. In considering this issue, the learned trial Judge, at paragraph 27 of his judgment, correctly prefaced his findings by the statement: "As I see it, it is essentially a question of evidence. As Lord Esher pointed out in Crears v. Hunter (1887) 19 Q.B.D. 341 , it was really a question of whether there was a sufficiency of evidence to entitle the jury to infer that the p.47

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understanding between the parties was that which was argued for." The Appellant respectfully submits, however, that in paragraph 28 his Lordship fell into a number of errors in assessing the evidence and deciding what inferences should be drawn therefrom.

p.113 First, his Lordship construed the Appellant's letter of the 16th June, 1961, as "pressing for the payment of instalments which in July and August remained unpaid," when in fact the letter was principally a refusal of the substantial further credit facilities for which the Respondent had recently asked. No pressure was put upon the Respondent by that letter except such, if any, as can be inferred from the last sentence (separately referred to by his Lordship and therefore presumably relied upon as evidence of pressure). But although that sentence reminded the Respondent of his arrears, its purpose was, as the Appellant submits, to explain the refusal of the further substantial credit facilities.

p.110 Secondly, his Lordship described the Respondent as "a debtor in extremis" but this was not borne out by his letter of the 3rd June, 1961, to the Appellant's Parent Company, United Dominions Trust Ltd., or by the Appellant's

p.116 letter of the 17th August, 1961, extending further credit.

Thirdly, his Lordship continued: "... and for him it was a matter of complying with his creditor's requirements or having his loan called in." There was no evidence whatever to support this conclusion.

Fourthly, his Lordship continued: "For U.D.C. it is said that the forbearance shown by U.D.C. was strictly referable to the promise to pay one hundred and fifty pounds a week and did not stem from the promise to pay interest at £11% I cannot view it in that light. I think that the only reasonable inference to be drawn from the conduct of the parties is that the agreement was that U.D.C. would not demand payment while the Plaintiff paid interest at £11 per centum and in addition, while he paid one hundred and fifty pounds per week on his account."

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Again, there was no evidence, it is submitted, from which such inference (i.e. the inference that U.D.C. would not demand repayment while the Plaintiff paid interest at 11%), could reasonably be drawn; still less that it was "the only reasonable inference."

15. The mere fact of forbearance by the creditor would not constitute good consideration for the debtor's promise: what must be proved is forbearance as a result of an express or implied request by the debtor (Crears v. Hunter (1887) 19 Q.B.D. 341) or, at least, forbearance as a direct result of the debtor's promise so as to constitute ex post facto consideration (Wigan v. English & Scottish Law Life Assurance Association (1909) 1 Ch. 291, at pages 298 and 303). In either case the debtor must at least establish, on balance of probability, a nexus between his promise and the creditor's forbearance and the Court should not infer such a nexus where there is no evidence to support the inference.

16. The Appellant respectfully submits -

(i) that there was no evidence that it would have called in the loan had the Respondent declined to sign and return the copy circular letter;

(ii) that there was no evidence that its forbearance to call in the loan between the 7th September and the 5th October, 1961, was due wholly or in part to the Respondent having signed the said letter.

Such evidence as there was was to the contrary effect and the Appellant submits that the reasoning of the President of the Court of Appeal on this issue is correct. For the reasons already given in paragraph 14, above, it is submitted that the reasoning of the learned trial Judge was erroneous on this issue. Of the majority in the Court of Appeal only Lewis J. gave a reasoned judgment. At page 90, in dealing with this issue, p.90 he said of the receipt by the Respondent of the circular letter on the 22nd August: "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 change in the interest rate. But with his loan payable on demand, his interest payments months

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in arrear and his creditor patently dissatisfied, he could be under no illusion as to the possible consequences if he refused". But there was no reason why the Respondent should not have protested that the circular letter was not applicable to borrowers at fixed interest rates or at least have questioned its applicability to him. Had he done so, the Appellant's error in sending a copy to him would have been discovered and presumably corrected. It was not, on the evidence, a probable consequence of such protest or question that his loan would have been called in, nor would it have been a probable consequence of a refusal to accept the higher rate of interest.

His Lordship then stated that the discussion between the Respondent and Neal "clearly took place against the background of U.D.C.'s demand for the increased interest rate." But there was no evidence to show that Neal at that time knew that such demand had been made of the Respondent, or that the increased rate was discussed at the meeting, or that the agreement to pay £150 per week thereafter was in any way connected with such demand.

Even if it be accepted that the Respondent agreed to the higher rate of interest "on the basis that he hoped thereby to avoid the loan being called in" as Lewis J. surmised, the Appellant submits that -

(i) such hope did not ipso facto amount to "an implied request to U.D.C. to forbear from calling for payment" as his Lordship concluded, and

(ii) it does not follow that the forbearance in fact shown by the Appellant was related to the Respondent's private hope.

17. The Second Issue. The Respondent's agreement to pay interest at 11% was unenforceable by reason of failure to comply with the requirements of Section 8 of the Moneylending Law. The question raised by the second issue is a question of law and can, in the Appellant's submission, be postulated in this form :-

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Was it the intention of the parties, in entering into the second agreement, to rescind the original Instrument of Mortgage and substitute for it a new agreement? Or was it the parties' intention merely to vary one of the terms of the original Instrument of Mortgage but otherwise to leave that agreement in being? The Appellant concedes that, if the parties' intention was the former, the effect of the second agreement was to leave it without a defence to the action, for the first agreement having ceased to exist, the second was unenforceable. But if the parties' intention was merely to vary one of the terms of the original agreement, the next question is whether the second agreement, being itself unenforceable, was ineffective to vary the original which therefore remained in full force and effect.

Neither the learned trial Judge nor any of the Judges of the Court of Appeal concluded that rescission of the Instrument of Mortgage was intended. But while all agreed that the intention was merely to vary a term, Douglas J., (paragraph 36 of his judgment) Lewis J. (page 98) and Henriques J. (page 99) all agreed that the duty of the Court was to apply the Moneylending Law to the agreement as varied; whereas Duffus J. (page 87/8) held that the attempt at variation being itself unenforceable was wholly ineffective.

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p.99
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18. The reasoning of Duffus J., which the Appellant respectfully adopts, was based on a comparison between the wording of Section 8 of the Moneylending Law(substantially based on Section 6 of the Moneylending Act, 1927) and the words of Section 40(1) of the Law of Property Act, 1925, and Section 4 of the Sale of Goods Act, 1893, before its repeal.

In each case, the effect of non-compliance with the formalities required by the respective statutory provisions is to render the particular contract unenforceable but not void, still less illegal. The learned President concluded that the principles laid down by Noble v. Ward (1867) L.R. 2 Exch. 135, Morris v. Baron (1918) A.C. 1 and British & Beningtons Ltd v. North Western Cachar Tea Company (1923) A.C.48 were applicable by analogy to the

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present case.

pp.51/2

19. At first instance, Douglas J. said in paragraphs 35 and 36 of his judgment: "I cannot think that the Statute of Frauds and the Moneylending Law are, strictly speaking, analogous. The former rests squarely on the vagaries of the rules of evidence as they applied in the seventeenth century. The latter is a penal statute in protection of persons dealing with money-lenders. What the Statute of Frauds does, as part of the law of Jamaica, is to prevent a party proving certain contracts unless there is a note or memorandum in writing. Naturally, if the agreement put forward as varying another is incapable of proof, then that other remains unaltered. It is a matter of evidence. As Denman C.J. said in Goss v. Lord Nugent 5 B and Ad. 58 at page 66

> "But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only",

Under the Moneylending Law, however, the Court will construe the contract, and having done so, will say whether it is enforceable: Eldridge and Morris v. Taylor (1931) All E.R. Rep. 542.

In my judgment, the original loan agreement between the parties was varied by the Plaintiff's promise to pay interest at £11 per centum per annum. By reason of the failure of U.D.C. to comply with the requirements of Section 8 of the Moneylending Law that agreement is unenforceable. Once that position is established, then in accordance with the statement of the law in Cohen v. J. Lester Ltd. (1938) 4 All E.R. 188 the Plaintiff is entitled to relief."

p.96/97

20. In the Court of Appeal Lewis J. after referring to Morris v. Baron and British & Beningtons Ltd. v. Cachar at page 96/97 agreed with the President that the effect of a subsequent agreement which was unenforceable by reason of non-compliance with the statutory

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requirements was to leave the parties to their rights under the original agreement. But the learned Judge then continued: "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 complied 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 Kasumu v. Baba-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 (sic) the whole of the contract as varied can be proved, and no question of evidence arises in the proceedings to prevent 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 formalities 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."... "In my judgment, the distinction established by Noble v. Ward and that line of cases

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has no application to section 8 of the Moneylending Law."

p.99

21. Henriques J. at page 99 said "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.2 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."

22. The Appellant respectfully submits that the principles enunciated in Noble v. Ward and Morris v. Baron are applicable to the present case because the result of non-compliance with the respective statutory provisions is identical, i.e. that the agreement in question "shall not be enforceable." Furthermore, the distinction which Douglas J., Lewis J. and Henriques J. sought to draw between the purpose and effect of the Statute of Frauds and the Sale of Goods Act on the one hand and the Moneylending Law (and Act) on the other is unjustifiable. It is significant that the Hire Purchase Act, 1938, Section 2(2) (prior to its amendment in 1964 and subsequent repeal in 1965) contained provisions very similar to the Moneylending Law (and Act) which were clearly intended for the protection of the hirer. Section 2(2) of the Hire Purchase Act, 1938, as originally enacted, provided as follows :-

"An owner shall not be entitled to enforce a hire-purchase agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer, and no security given by the hirer in respect of money payable under the hire-purchase agreement or given by a guarantor in respect of money payable under such a contract of guarantee as

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aforesaid shall be enforceable against the hirer or guarantor by any holder thereof, unless the requirement specified in the foregoing subsection has been complied with, and -

(a) a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement, and

(b) the note or memorandum contains a statement of the hire-purchase price and of the cash price of the goods to which the agreement relates and of the amount of each of the instalments by which the hire-purchase price is to be paid and of the date, or the mode of determining the date, upon which each instalment is payable, and contains a list of the goods to which the agreement relates sufficient to identify them, and

(c) the note or memorandum contains a notice, which is at least as prominent as the rest of the contents of the note or memorandum, in the terms prescribed in the Schedule to this Act, and

(d) a copy of the note or memorandum is delivered or sent to the hirer within seven days of the making of the agreements:"

Nevertheless, in Eastern Distributors Ltd. v. Goldring (1957) 2 Q.B. 600, at page 614, the Court of Appeal held that the effect of non-compliance with Section 2(2) of the Hire Purchase Act, 1938, was similar to the effect of non-compliance with Section 4 of the Sale of Goods Act.

23. The Appellant submits that there is nothing peculiar to the position of borrowers which invalidates the analogy between the comparable sections of the Moneylending Law and the Law of Property Act, the Sale of Goods Act, the Statute of Frauds or the Hire Purchase Act. In each case the statute requires (or required) certain formalities to be complied with for the protection of a certain class of persons. The preamble to the Statute of Frauds avowed as its object: "prevention of many fraudulent practices

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which are commonly endeavoured to be upheld by perjury and subornation of perjury". Hence, presumably, the reason for the re-enactment of sections 4 and 17 thereof as Section 40(1) of the Law of Property Act and Section 4 of the Sale of Goods Act respectively. And borrowers on hire purchase are, it is submitted, as much in need of protection as borrowers from moneylenders.

pp.51/2

24. In paragraphs 35 and 36 of his judgment Douglas J. refers to Eldridge and Morris v. Taylor (1931) 2 K.B. 416. The Appellant submits that this decision is not relevant to the present case for the reason given by Duffus J., at

pp.81/82

pages 81 and 82; viz, that the decision turned entirely on the enforceability of the second contract as the claim was not made on the first contract, so that the court there did not have to consider the situation which arises in the instant case.

25. The Appellant also submits that the case of French v. Patton, 9 East, 351, referred to by

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Douglas J. at paragraph 36 of his judgment, is plainly distinguishable from the present case because in that case the court held that the original contract had been rescinded. The vital importance of this distinction was pointed out

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by Duffus J. in his judgment at page 87 and 88, where he says :-

"In the instant case it is abundantly clear that there was never any intnntion to rescind the old contract and to substitute a new contract. The new agreement was intended to vary the old contract in respect to one of its provisions only, to wit, a temporary increase of the interest rate. Applying the principles as set forth in the aforementioned cases, I am of the view that the learned judge erred when he held that the new agreement to pay interest at 11%, which was not enforceable, was nevertheless effective to vary the original enforceable agreement and had the effect of making that also, as varied, unenforceable. I think that the agreement to pay interest at the rate of 11% had no effect on the original contract and that the same is still enforceable as written, that is, with the interest at 9% "

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The Appellant respectfully submits that this conclusion is sound both in fact and in law.

26. The Appellant therefore submits that the decision of the Court of Appeal is erroneous and ought to be reversed, that this appeal should be allowed and that judgment should be entered for the Appellant, for the following amongst other,

R E A S O N S

(1) BECAUSE there was no consideration for the Respondent's agreement to pay interest at 11%: that agreement was accordingly not a contract within Section 8 of the Moneylending Law and the rights of the parties depended only on the terms of the Instrument of Mortgage dated 22nd April, 1961, with which the Moneylending Law was not concerned;

(2) BECAUSE the Respondent's agreement to pay interest at 11%, being itself unenforceable by reason of non-compliance with Section 8 of the Moneylending Law, was ineffective to vary the Instrument of Mortgage which therefore continued to govern the rights of the parties;

(3) BECAUSE, in upholding the decision of the learned trial Judge on both the aforesaid issues, the majority in the Court of Appeal were wrong;

(4) BECAUSE the dissenting judgment of Duffus J. the President of the Court of Appeal, was right on both the aforesaid issues.

(Sgd) S.B.R. COOKE

(Sgd) R.A. GATEHOUSE

No.37 of 1966

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ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

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- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

CASE FOR THE APPELLANT

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