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) LIMITED
(Defendant) Appellant

- and -

MICHAEL MITRI SHOUCAIR (Plaintiff) Respondent

C A S E FOR THE RESPONDENT

RECORD.

1. This is an Appeal brought by leave from the Judgment and Order of the Court of Appeal, Jamaica dated the 18th April 1966 dismissing the Appellant's Appeal against the Judgment of Mr. Justice Douglas dated the 13th May, 1963.

2. This Action was brought by the Respondent as Plaintiff in the High Court of Justice of Jamaica against the Appellant as Defendant on the Twenty-fourth day of January, 1962, for the following relief :- p. 1.

(a) A Declaration that the mortgage made between the parties on the 22nd day of April 1961 and varied in writing on the 31st day of July 1961 is unenforceable having regard to Sec.8 of the Moneylending Law Cap.254 of the Revised Laws of Jamaica.

(b) Cancellation and delivery of the Instrument of Mortgage dated the 22nd day of April 1961 and of the letter dated the 31st day of July varying the Mortgage.

(c) An Injunction to restrain the Defendant from taking any steps to take possession of, sell or otherwise dispose of the lands of the Plaintiff mortgaged to the Defendant and more

RECORD.

particularly described in the Instrument of Mortgage mentioned above.

(d) An Order for the Discharge of the Certificates of Title to the Plaintiff's lands of the Mortgage in favour of the Defendant endorsed on them.

3. The substantial questions arising on this Appeal are :-

(a) Was the Agreement to vary the rate of interest payable under the mortgage nudum pactum for want of consideration?

(b) Is the Appellant entitled to enforce the original loan and mortgage as it existed prior to the variation of the Agreement on the ground that since the the Agreement as varied is unenforceable therefore the original loan and Mortgage remains unaffected?

4. The provisions of the Moneylending Law Cap.254 of the Revised Edition of the Laws of Jamaica relevant to this Appeal are as follows:-

Section 8.

(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 loan expressed in terms of a

RECORD.

rate per centum per annum.

Section 13.

(1) This Law shall not apply to -

(a) Any Friendly Society, or to any Building Society, registered under the Friendly Societies Law or the Building Societies Law respectively or any Law amending or substituted for the same,or to any loans made by any such Society; or

(b) any Society registered under the Industrial and Provident Societies Law or any Law amending or substituted for the same, or to any loans made by any such Society; or

(c) any body corporate, incorporate or empowered by a Law of the Legislature of this Island to lend money in accordance with such Law; or

(d) any Banker, or person bona fide carrying on the business of insurance, in the course of whose business and for the purpose whereof he lends money; or

(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.

(2) For the purposes of this section the expression "Banker" means a company incorporated by charter, or under the authority of an Act of Parliament or a Colonial Statute, or a Law of this Island, carrying on the business of banking."

5. The facts of the case appear from the pleadings the oral and documentary evidence given and tendered at the trial of the action and the Judgment of Mr.Justice Douglas and the Judgments in the Court of Appeal. So far as material they may be summarised as follows :- pp.2 - 53 pp.63 - 99 pp.103-121

(a) Between December 1959 and April 1961 the Plaintiff borrowed in various sums at different times a total of £55,000.from the Defendant Appellant. p.14 l. 2-120

RECORD.

pp.103 - 107

(b) On the 22nd of April, 1961 the Plaintiff executed a mortgage on three parcels of land in favour of the Defendant to secure the said sum of £55,000. The Instrument of Mortgage for a rate of interest of £9. per centum per annum and further provided that the said sum was repayable on demand.

p.115

(c) By letter dated 31st July 1961 the Defendant-Appellant wrote to the Plaintiff as follows:- "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%. Please acknowledge receipt and confirm by signing and returning the attached copy." This letter was received by the Plaintiff-Respondent on or about the 22nd August 1961 and was signed and returned by him to the Defendant-Appellant's Office on or about the 7th September 1961. The interest on the Plaintiff's loan was calculated and charged to him at the rate of £11. per centum per annum as of the 26th July 1961.

p.40 l.23

p.7. l.28

p.41 l.34

(d) At or around the end of August or early September 1961 there was a meeting between the Plaintiff and the General Manager of the Defendant Company at which the state of the Plaintiff's account which was then considerably in arrears was discussed and the Plaintiff-Respondent agreed to make regular payments to the Defendant-Appellant of £150. per week and also assigned to the Defendant-Appellant all amounts discounted on Hire Purchase transactions introduced by the Plaintiff-Respondent.

p.41 l.43

(e) On the 6th of September the Respondent paid £150. and on the 15th or 16th of September the Defendant-Appellant retained to the Plaintiff's credit sums in respect of Hire Purchase transactions amounting to £350. Thereafter nothing was paid by the Plaintiff in respect of either interest or principal.

p.118

(f) By a written Notice dated 5th October 1961 the Defendant-Appellant demanded payment of £58,005.18.5. (being the amount of the loan

RECORD.

together with accrued interest up to that date) by the 14th of October and in default of payment threatened to exercise their powers of sale under the mortgage.

(g) On the 3rd November 1961 the Defendant-Appellant caused a Notice to appear in the press advertising the mortgaged premises for sale under the powers of sale in the Mortgage Instrument. p.15 l.27

(h) On the 6th November 1961 the Solicitors for the Plaintiff-Respondent wrote to the Defendant-Appellant pointing out that the mortgage loan did not comply with the provisions of the Moneylending Law and was unenforceable. This action was subsequently commenced and no further step was taken by the Appellants to attempt to enforce their alleged rights under the Mortgage pending the determination of the suit. p.119

(i) There was no note or memorandum in existence required by Section 8 of the Moneylending Law either in respect of the original loan at 9% or in respect of the loan as varied to the new rate of 11%.

6. At the trial the Defendant-Appellant's Counsel conceded that "the only fact in issue is that of consideration" and relied on the following submissions :- p.20 l.1

(a) The original loan being at the rate of 9% was not subject to the provisions of the Moneylending Law.

(b) The letter of 31st July which sought to vary the loan to 11%, which would be a loan governed by the Moneylending Law, was of no effect because there was no consideration for the Respondent's promise to pay interest at 11%.

(c) Section 8 (1) of the Moneylending Law is analogous to Section 4 of the Statute of Frauds and Section 4 of the Sale of Goods Law. In the case of contracts governed by both of these latter statutes the courts have held that an attempted variation which does not itself comply with the provisions of the Statutes is ineffective and leaves the original contract in existence. By a parity of

RECORD.

reasoning therefore the attempted variation in this case is of no effect and the original loan remains in existence as a loan at 9% which is valid and enforceable.

7. At the trial which took place on the 5th, 6th, 7th and 9th November 1962 and in respect of
pp.37 - 53 which judgment was delivered on the 13th May 1963 the trial judge Mr.Justice Douglas found against the Appellants on both points.

With respect to the question of consider-
p.47 l.33 ation he said:

"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 understanding between the parties was that which was argued for. I would only add that in weighing the evidence, the thing must be looked at in a business way, taking into accourt, so far as they are known, the normal usages of commercial life.
In the instant case, it must be borne in mind that the loan was payable on demand. When U.D.C. requested the Plaintiff to pay interest at £11%, nobody was under the illusion as regards U.D.C.'s power to call in the loan. To say that the Plaintiff had the option of deciding whether or not he would agree to pay the increased interest is hardly realistic. By the letter of the 16th June, U.D.C. had been pressing for the payment of instalments which in July and August remained unpaid. Further the Plaintiff had been told that his failure to pay instalments did not inspire confidence. The Plaintiff was a debtor in extremis so far as his ability to meet his obligations went, and for him it was a matter of complying with his creditor's requirements or having his loan called in. For U.D.C. it is said that the forbearance shown by U.D.C. was directly 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

RECORD.

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." p.48 l.23

With respect to the Appellant's alternative submission he said :

"I cannot think that the Statute of Frauds and the Moneylending Laws 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 moneylenders. 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- Nugent 5 B & Ad.58 at page 66 p.51 l.25

> "But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of land, and that any contract which is sought to be enforced must be proved in 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.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.52 l.14

RECORD.

pp.55 - 62

8. By Notice of Appeal dated 21st June 1963 the Appellant appealed to the Court of Appeal. Grounds 1 to 6 (inclusive)of the Grounds of Appeal dealt with the issue of consideration, alleging that the trial judge had misdirected himself in a number of respects and had drawn the wrong inferences from the evidence. Ground 7 alleged that the trial judge was wrong in rejecting the evidence of Mr.Neale one of the witnesses for the Defendant-Appellant. Ground 8, alleged that the trial judge was wrong in Law in rejecting the argument based upon the analogy of the Statute of Frauds.

pp.63-99

9. The appeal was heard by the Court of Appeal on the 25th, 26th, 27th and 29th of January and on the 2nd and 3rd of February 1965 and judgment delivered on the 18th April 1966. The Court of Appeal by a majority dismissed the Appellant's Appeal.

With respect to the question of consideration Mr.Justice Lewis was of the 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 and that the acceptance of the demand involved an implied request to U.D.C. to forbear from calling for payment. He thought that looking at the facts in a business way it was a reasonable inference that had Mr.Neale the Appellant's manager received a letter of refusal to pay the increased interest he would have moved promptly to call in the loan. He was of the opinion that this aspect of the case was really concluded by the reasoning in the Alliance Bank -v- Broom (1864) 3 L.J.Ch.257.

Mr.Justice Lewis further held that Section 8 of the Moneylending Law was not analogous to the provisions of the Statute of Frauds and the Sale of Goods Act. The latter he said prescribed procedural provisions which, if not complied with, affected the ability of the parties to prove the contract for the purpose of enforcing it; on the other hand the formalities set out in the Moneylending Law are outside of the ambit of proof of the contract and are imposed upon the Money Lender for the protection of the borrower. He therefore concluded that the distinction established by the line of cases under the Statute of Frauds on which the Appellant was relying, had no application to Section 8 of the

Moneylending Law.
Mr.Justice Henriques agreed with the findings and reasoning of the learned Trial Judge.
Mr.Justice Duffus (dissenting) was of the opinion that on the facts of the instant case it would be wrong to draw the inference that there was any forbearance shown to respondent attributable to his agreement to pay interest at the increased rate and hence the loan had remained a loan at 9%, there being no consideration for the agreed variation. He further was "persuaded" that the prohibition against the enforceability of contracts under the Moneylending Law is analogous to the prohibition contained in the Statute of Frauds and Sale of Goods Act, that the cases on these latter Statutes set out principles of Law which are equally applicable to Moneylending contracts and that since there was no intention to rescind the original contract the attempted variation being unenforceable left the original contract of loan unaffected and enforceable.

10. The Respondent respectfully submits that the question of whether there was consideration to support the promise to pay 11% interest is a question of fact and there was evidence to support the finding of the learned trial Judge. The Respondent's loan was repayable on demand. The only reasonable interpretation of the letter dated 31st July is that the Respondent was beind told that the Appellant was only prepared to allow the loan to remain outstanding if the Respondent agreed to pay 11%. The Respondent having agreed thereto and the Appellant having in fact permitted the loan to remain outstanding thereafter the Respondent was plainly bound to pay interest at the rate of 11%. The fact that the Appellant subsequently imposed an additional condition is irrelevant.

The Respondent also submits that the Appellant's argument based upon the alleged analogy between the Statute of Frauds and the Moneylending Law is misconceived because the object and effect of the two statutes are entirely different.

The Statute of Frauds is a procedural Statute and is concerned with the method of proving specified classes of contracts. On the other hand the Moneylending Law imposes sanctions on a moneylender who has failed to comply with certain specific formalities when entering into contracts within the ambit of the Law. A party seeking to enforce a parol contract for the sale of land fails

RECORD.

because he cannot prove the contract. A money-lender seeking to enforce a moneylending contract entered into without the formalities fails because, the contract having been proved, it is shown that the formalities have not been complied with. The distinction established by cases such as Morris -v- Baron (1918) A.C.1. and Noble -v- Ward (1867) L.R. 2 E.E. Ch.135 between a parol variation and a parol rescission can have no application since they rest entirely on the special nature of the Statute of Frauds.

11. The Respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this appeal should be dismissed with costs both here and below for the following amongst other reasons :-

R E A S O N S

1. Because, on the evidence there was consideration to support the agreement to vary the original loan to a loan at 11% and the agreement as varied thereby superseded the original agreement.

2. In any event the question of whether there was such consideration is a question of fact on which there are concurrent findings.

3. Because the agreement as varied fell within the ambit of the Moneylending Law and the provisions thereof had not been complied with.

4. Because the distinction between the effect of a parol variation and a parol rescission in respect of contracts within the ambit of the Statute of Frauds and the Sale of Goods Law has no application to the Moneylending contracts, the object and effect of the former Statutes being quite different from the latter.

5. Because the Judgments of Mr.Justice Douglas at first instance and of Mr.Justice Lewis and Mr.Justice Henriques in the Court of Appeal are right and ought to be confirmed.

DAVID H. COORE, Q.C.
RICHARD MAHFOOD, Q.C.
ROBERT ALEXANDER

No.37 of 1966

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL
OF JAMAICA

B E T W E E N

UNITED DOMINIONS CORPORATION (JAMAICA) LIMITED (Defendant)
Appellant

- and -

MICHAEL MITRI SHOUCAIR
(Plaintiff) Respondent

C A S E FOR THE RESPONDENT

DRUCES & ATTLEE,
82, King William Street,
E.C.4.

Respondent's Solicitors.