Privy Council Appeal No. 37 of 1966

United Dominions Corporation (Jamaica) Limited – – *Appellant*

v.

Michael Mitri Shoucair – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD GUEST
LORD DEVLIN
LORD PEARCE
LORD PEARSON

[*Delivered by* LORD DEVLIN]

This is an appeal from a decision of the Court of Appeal of Jamaica upholding a decision of the Supreme Court which declared to be unenforceable, by reason of section 8 of the Moneylending Law, a mortgage made between the parties on 22nd April 1961 and varied on or after 26th July 1961. The respondent had borrowed £55,000 from the appellant company and this was the principal secured by the mortgage in question; it was repayable on demand and bore interest at 9%.

The variation, which raised the rate of interest to 11%, was effected by means of a circular letter dated 31st July 1961 which the appellants sent out to their borrowers, including the respondent. The letter said that because of the increase of 2% in the bank rate the appellants had to raise their rate by a corresponding amount. They trusted this would only be a temporary measure and requested the borrower to confirm by signing and returning an attached copy of the letter. The respondent did as requested on 7th September 1961.

There was no provision in the mortgage entitling the appellants to raise the rate of interest to correspond with bank rate. What was proposed in the letter of 31st July was therefore a variation of the mortgage terms which the borrower might have been expected to reject if it were not for the fact that the debt was repayable on demand. Their Lordships have heard argument about whether there was good consideration for the borrower's acceptance of the increased rate. Both the courts below held that there was and their Lordships will, without deciding the point, assume this to be correct. On this assumption the matter to be determined by the Board is the effect on the whole transaction of section 8 of the Moneylending Law.

Section 8 is a provision relating to the formal requirements of the contract of a sort that is well known in the moneylending laws of the Commonwealth. It is in the same terms as section 6 of the Moneylenders Act 1927 in force in the United Kingdom and is expressed in two paragraphs as follows:

> "(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 rate per centum per annum."

In the application of this section to the transaction between the parties, three matters are agreed. First, the section had not on 22nd April 1961 any effect upon the mortgage of that date because by section 13 (1) the law does not apply to loans bearing interest at 10% or less. Secondly, the variation agreement, if looked at by itself, is rendered unenforceable by section 8 because it does not contain all the terms of the contract. Thirdly, the variation agreement cannot be saved by reading the letter of 31st July in conjunction with the original mortgage. Apart from any other difficulties, the provisions in section 8 requiring the note to be signed before the lending and a copy to be sent to the borrower within 7 days of the making of the contract, make it impossible for a later document to incorporate terms by reference to an earlier document. What it comes down to is that the only safe way of effectively altering a moneylending contract is to cancel it and start afresh.

Accordingly the appellants make no attempt to enforce a mortgage carrying interest at 11%. What they want to do is to enforce the original mortgage at 9%; and whether they can do so or not depends on whether the agreement of variation, itself unenforceable, drags down with it to the same fate the agreement which it was seeking to amend.

At the root of the problem there lies the concept of unenforceability, first introduced into English law by the Statute of Frauds and since made use of in a number of other settings, including the Moneylenders Act 1927. If the statute made the amending contract void and of no effect, there would be no problem at all. An attempt at changing the original contract would have failed altogether and so left it quite untouched. But unenforceability creates only a procedural bar. The substance of the contract is good; yet, although the contract is alive and real, the Court will not give effect to it unless its existence can be proved in the way prescribed by the statute. Thus the difficulty about enforcing the original mortgage in this case is that, although itself untouched by the statute, it is no longer the real contract between the parties. In reality, although the statute prevents reality from being proved, there is no longer a mortgage at 9% but one at 11%. Since however the real contract is not evidenced in the way required by the moneylending law, it cannot be enforced. This is the approach made by Douglas J. in the Supreme Court and by Lewis J. who gave the leading judgment for the majority in the Court of Appeal.

Another way of arriving at the same result is to treat a variation of a contract as something that necessarily requires the rescission of the old contract and the substitution of a new one. On this view the old contract cannot be enforced because it has been rescinded and the new contract cannot be enforced because it is not properly evidenced. This was the conclusion reached by the Divisional court in *Williams v. Moss' Empires* [1915] 3 KB 242 and adopted by the Court of Appeal in *Morris v. Baron*. As Sankey J. put it in the former case at 247: "The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract".

The disadvantage of this view is that a minor variation may destroy the effect of the whole of the transaction between the parties. The alternative view, adopted by the House of Lords in *Morris v. Baron* [1918] A.C.1 and again in *British and Beningtons v. N. W. Cachar Tea Company Ltd.*, [1923] A.C.48 (where Lord Sumner referred to the former view as possibly correct "as a matter of formal logic") is based on the intention of the parties. They cannot have that which presumably they wanted, that is, the old agreement as amended; so the Court has to make up its mind which comes nearer to their intention—to leave them with an unamended agreement or without any agreement at all. The House answered this question by rejecting the strict view propounded by Sankey J. and distinguishing

between rescission and variation. If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old remains in force and unamended.

If the principle in *Morris v. Baron* applies to this case, the mortgage of 22nd April remains in force. The contrary has not been and could not be argued. It would be impossible to contend that a temporary variation in the rate of interest reveals any intention to extinguish the debt and the mortgage. So the question in this appeal is whether the Board should apply to the Moneylending Law the reasoning which *Morris v. Baron* applied to the Statute of Frauds or whether the Board should apply the reasoning which in *Morris v. Baron* the House rejected. There is no direct authority on the point. The point could have arisen in *Eldridge v. Taylor* [1931] 2 KB 416, but there the lender sought to enforce only the variation and not the original agreement; the case was rightly distinguished on this ground by Duffus P. in the Court of Appeal.

In their Lordships' view the problem—that is, how to handle the consequences of unenforceability—takes the same form under the Moneylending Law as it does under the Statute of Frauds and similar statutes considered in *Morris v. Baron*. Both the Statute of Frauds and the Moneylending Law are procedural statutes enacting that a contract shall not be enforced unless certain matters can be proved. The matters are not in the two cases the same in all respects. Both statutes require the production of a note or memorandum containing all the terms of the contract, but the Moneylending Law requires also that the note must be one that was signed by the borrower before the money was lent and one of which a copy was delivered to the borrower within 7 days of the making of the contract. These additional requirements do not in their Lordships' view alter the nature of the problem.

The choice before the Board lies between solving the problem by means of what Lord Sumner called formal logic or solving it by giving effect as far as possible to the intention of the parties as was done in *Morris v. Baron*. The argument for the respondent assumed rightly that their Lordships would accept the guidance offered in *Morris v. Baron* unless it could be shown that, despite the similarity in the operative parts of the statutes, there are underlying differences between them that destroy the value of the guidance. There are of course differences which Mr. Coore has expounded. Some stem from the differing attitude of the Courts which have been more sympathetic to the objects of moneylending legislation than they have to those of the Statute of Frauds. Thus the rule that an estoppel cannot be set up in the face of a statute has not been applied to the Statute of Frauds but has been applied to moneylending legislation on the ground that the latter reflects a general or social policy which the courts will assist: see *Kok Hoong v. Leong Cheong* [1964] AC 993 per Lord Radcliffe at 1014. Other differences stem from the fact that the formal requirements of the two statutes are not precisely the same, so that what may be a good note or memorandum for one statute may not be good for the other.

The missing link in Mr. Coore's argument is the one that should connect such differences with the reasoning in *Morris v. Baron* and *British v. Beningtons*. It is not enough for him to show that there are differences. He must show also that they are such as to make the application of formal logic, which the House rejected as a solution of the problem when it arose out of the Statute of Frauds, appropriate as a solution of the same problem when it arises under the Moneylending Law. None of the differences suggested touch that point. The intention of the parties is just as important in moneylending contracts as in any other. *Cooper v. Zeffert* [1884] 32 WR 402 was usefully cited by Mr. Arnold as a case in which the principle later applied in *Morris v. Baron* was applied by the Court of Appeal in England in an action on a bill of sale given as security for a debt. The Board can see no reason for not following *Morris v. Baron*.

For these reasons, which are substantially the reasons given by Duffus, P. in his dissenting judgment in the Court of Appeal, the Board will humbly advise Her Majesty to allow this appeal and to order that the costs of the proceedings in the courts below should be paid by the respondent. The respondent must also pay the costs of the proceedings before the Board.

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DELIVERED BY

LORD DEVLIN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1968