[2025] JMCC Comm 06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2023IS00007

IN THE MATTER of the Moneylending Act, to include Sections 2,3,6,7,10 and 11

AND

IN THE MATTER of an application for a Declaration to reopen loan agreement and to take an account between the parties

AND

IN THE MATTER of the Insolvency Act, 2014

AND

IN THE MATTER of an application by the trustee of bankruptcy, Jennifer Messado.

BETWEEN	**DALMA JAMES (Trustee for the Bankrupt for the Estate Jennifer Messado in Bankruptcy)**	**CLAIMANT**
AND	**LAURISTON STEWART**	**1st DEFENDANT**
AND	**TANIQUE STEWART**	**2nd DEFENDANT**

IN COURT

Appearances: Mr. Neco Pagon instructed by Aligned Law for the Claimant

Mrs. Symone Mayhew KC instructed by Mayhew Law for the 1st Defendant

Heard: 21st March 2024 and 17th January 2025

Bankruptcy – The Moneylending Act, Ss. 2, 7 & 8 – Illegality – Unjust Enrichment – Contracts for the Protection of the Public

BROWN BECKFORD J

BACKGROUND

[1] This claim has its origin in a series of moneylending transactions which are now being challenged on the basis that the interest rate charged was in breach of **The Moneylending Act**, and said transactions are harsh and unconsconscionable.

[2] Mr. Lauriston Stewart, former commercial banker **("1st Defendant")**, entered into several loan agreements with several companies and an individual, which were brokered by Mrs. Jennifer Messado, then an Attorney-at-Law **("the Bankrupt")**. Mrs. Messado was purportedly acting on behalf of clients, and, in the case of the individual, on behalf of her daughter. Mrs. Messado was associated with at least two of the companies involved. These loans were said to be intended to be used for the completion of conveyances and related real estate ventures.

[3] Ms. Messado was declared bankrupt on May 12th 2021, when a Certificate of Assignment was issued by the Office of the Supervisor of Insolvency. Mr. Dalma James was duly appointed as Trustee for the Bankrupt for the Estate of Jennifer Messado.

[4] The transactions at the centre of this dispute were brought to the attention of Mr. James **("the Trustee")** by Mr. Stewart, by virtue of a claim made pursuant to **The Insolvency Act, 2014**. Mr. James considered the transactions to be in breach of the **The**

Moneylending Act and so he sought, through the Court, to reopen several of the transactions. The impugned transactions evidenced by promissory notes are as follows:

a) Reggae Adventures Limited dated the 23rd day of November, 2016 for the sum of $3,000,000 for a period of 180 days.

b) Brilliant Investments Limited dated the 2nd day of April 2017, for the sum of $4,000,000.00 for the period of 180 days.

c) Brilliant Investments dated 30th day of May 2017, for the sum of $1,500,000.00 for the period of 180 days.

d) Ingrid Distant (daughter of the Bankrupt) dated the 12th day of March 2018, for the sum of $2,500,000.00 for the period of 120 days.

e) Orpheus Stennett and Jennifer Graham dated the 28th day of January 2018, for the sum of $4,000,000.00 for the period of 120 days.

f) Delta Investments Limited dated the 8th day of May 2015, for the sum of $2,200,000.00 for the period of 180 days.

g) Delta Investments Limited dated the 13th day of May 2015, for the sum of $1,800,000.00 for the period of 180 days.

h) Windsor Commercial Land Company Limited for the sum of $2,500,000.00 which was signed in 2016 for the period of 180 days.

An examination of the promissory notes for each transaction in question indicates an interest rate of 10% per month. The promissory notes were silent on an interest rate beyond the stipulated period.

[5] Proceedings were commenced by Mr. James by way of Fixed Date Claim filed July 23rd 2021, as amended on December 7th 2022, against the 1st and 2nd Defendants, Mr. Lauriston Stewart and Ms. Tanique Stewart, respectively. The claim was initially filed in the Commercial Division under claim number SU2021CD00330, but was subsequently

transferred to the Insolvency Division by the Order of this Court on February 21st 2023, and assigned Claim number SU2023IS00007. On July 5th 2023, the Amended Fixed Date Claim, filed December 7th 2022, was Ordered by this Court to be converted and treated as if commenced by way of Claim Form. The 2nd Defendant, who is the daughter of Mr. Stewart, and whose name appears on the promissory notes as a co-lender, has not participated in the proceedings.

[6] The Claimant sought the following Orders:

1. A declaration that the interest charged being the rate of 10% per month on loan contained in promissory note dated 8 May 2015 and promissory note dated 13 May 2015 between Delta Investments Limited and the Defendants, Lauriston Stewart and Tanique Stewart, for moneys lent in the sums of J$1,800,000.00 and J$2,200,000.00 respectively is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

2. A declaration that the interest charged being the rate of 10% per month on loan contained in Promissory Note dated 23 November 2017 between Reggae Adventures Limited and Lauriston Stewart and Tanique Stewart for moneys lent in the sum of J$3,000,000.00 is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

3. A declaration that the interest charged being the rate of 10% per month on loan contained in promissory note dated 2016 between Windsor Commercial Land Company Limited and Lauriston Stewart and Tanique Stewart for moneys lent in the sum of J$2,500,000.00 is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

4. A declaration that the interest charged being the rate of 10% per month on loan contained in promissory note dated 2 April 2017 and promissory note dated 30 May 2017 between Brilliant Investments Limited and Lauriston Stewart and Tanique Stewart for moneys lent in the sum of J$4,000,000.00 and J$1,500,000.00

respectively is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

5. A declaration that the interest charged being the rate of 10% per month on loan contained in promissory note dated 12 March 2018 between Ingrid Distant (formerly married and referred to as Ingrid Emmons, neé Messado) and Lauriston Stewart and Tanique Stewart for moneys lent in the sum of J$2,500,000.00 is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

6. A declaration that the interest charged being the rate of 10% per month on loan contained in promissory note dated 28 January 2018 between Orphious Stennett and Jennifer Joy Graham and Lauriston Stewart and Tanique Stewart for moneys lent in the sum of J$4,000,000.00 is excessive and that in any event the transaction is harsh and or unconscionable and is contrary to the Moneylending Act.

7. An order that this Honourable Court reopens each of the said moneylending transaction to:

    a) set aside or revise or alter the moneylending transaction in respect of the interest charged being the rate of 10% per month and instead apply an interest rate of 5% per annum pursuant to section 186 of the Insolvency Act or such other rate of interest per annum as this Honourable Court might adjudge to be reasonable;

    b) take an account of all moneys paid by the Bankrupt, Jennifer Messado in respect of the said moneylending transactions in respect of such principal, interest and charges; and

    c) relieve the Bankrupt, Jennifer Messado (and by extension, each person named in the respective promissory notes) from payment of any sum in excess of the sums) adjudged by this Honourable Court to be fairly chargeable and due in respect of such principal, interest and charges; and

d) direct the Defendants to repay the Claimant on behalf of the Estate of the Bankrupt the sum of $19,544,181.04 or any such sum(s) in excess of the sum(s) adjudged by this Honourable Court to be fairly chargeable and due in respect of such principal, interest and charges.

8. Alternatively, a declaration that the Dalma James, a licensed trustee under the Insolvency Act and the appointed trustee for the estate of Jennifer Messado, the Bankrupt, is entitled to utilize the power conferred by section 2(2) of the Moneylending Act, to grant to the Bankrupt the same protections to which she would have been entitled in the context of Court proceedings.

9. Consequent to a declaration made in terms of paragraph 8 above, an order pursuant to section 2 of the Moneylending Act that the Defendants repay to the estate of the Bankrupt the sum of $19,544, 181.04 being the sum determined by the trustee as the excess paid by the Bankrupt.

10. An order that Defendants deliver to the Registrar of the Supreme Court, the duplicate Certificate of Title of property registered in the name Ingrid Emmons: and which is registered at Volume 998 Folio 242 of the Register Book of Titles.

11. Interest on any judgment sum adjudged by this Honouarble Court for the beenift of the estate of the Bankrupt.

12. Costs.

13. Such further order and or relief as this Honourable Court deems fit.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[7] Counsel on behalf of the Claimant, Mr. Neco Pagon, submitted that in accordance with **S.2(2) of the Money Lending Act** and **Ss. 251(1) and 263 of The Insolvency Act, 2014**, the duly appointed Trustee for the bankrupt has the power to apply to the court to reopen moneylending transactions. He further argued that the Court is empowered

pursuant to **S.2(1) of the Money Lending Act** to grant said application if the transaction is found to be harsh or unconscionable. To this end he relied on **Vernalyn Elizabeth Barnaby v The Insolvency Act** [2021] JMSC Civ 5. Counsel also relied on the Canadian authorities of **Ss. 119(1)-(2) of the Bankruptcy and Insolvency Act (R.S.C, 1985, c. B-3) and Rizzo & Rizzo Shoes Ltd.** (Bankruptcy of) 1998 CanLII 2673 (ON CA).

[8] Further, irrespective of the repeal of **The Bankruptcy Act**, which has now been replaced by **The Insolvency Act, 2014**, the powers of the Trustee remain in existence. Firstly, **The Moneylending Act** refers to "Trustee in Bankruptcy" which is not a statutory term. Secondly, the powers of the Trustee in **The Insolvency Act** are extensive and would allow for the reopening of a moneylending transaction. Reliance was placed on **Ss. 85, 86, 122(3) and 126(e) of the Insolvency Act**. In summary, **The Insolvency Act, 2014** does not seek to alienate the powers of the Trustee exercisable outside the scope of the Act such as contained in **The Moneylending Act**.

[9] Counsel Mr. Pagon indicated that in accordance with **S.7 of The Moneylending Act**, where a money lending transaction contravenes the Act, the transaction will be found to be illegal unless it is proved that the contravention occurred without the consent of the lender. He submitted that the evidence of Mr. Stewart on cross-examination proves that Mr. Stewart was in agreement that the interest rate to be charged per transaction is 10% per month. Additionally, the promissory notes were on his instructions and issued at his directions. Consequently, Counsel argued that by virtue of **S.7 of The Moneylending Act** the transactions are illegal and cannot be enforced.

[10] In the alternative, Counsel contended that the transaction ought to be deemed harsh or unconscionable and therefore subject to be reopened pursuant to **Ss.2(1) and (2) of The Moneylending Act**. He further argued that the power of the court to find that a moneylending transaction is harsh or excessive is discretionary and must be determined on an examination of the facts. His argument was bolstered by the case of **North American Holdings Company Limited v Howard Webber et al** [2013] JMSC Civ 156.

[11] It was also Counsel's submission that the test in determining the appropriate interest rate is reasonableness. He relied on **Ivor Davidson v Headley v Dona Davis et al** (unreported) Supreme Court of Judicature of Jamaica, judgment delivered 14 November 1996, **Trade & Investment Development Corporation of The Philippines (Formerly Philippine Export & Foreign Loan Guarantee Corporation v Roblett Industrial Construction Corporation, Roberto G. Abiera and Leticia Abiera, A Paramount Insurance Corporation G.R. No. 139290**. Counsel implored the Court to give consideration to Mr. Stewart's evidence that an interest rate of 120% per annum was indeed high.

[12] Lastly, Counsel Mr. Pagon argued that in keeping with **S. 186(2) of the Insolvency Act**, owing to the absence of any interest specified in the undertakings signed by Jennifer Messado, or in the promissory notes, and no interest specified for the period beyond the duration of the promissory notes, the Court should find that the applicable interest is deemed to be 5% per annum.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[13] Counsel on behalf of the Defendant, Mrs. Symone Mayhew K.C, has rejected that **S.2(1) of The Moneylending Act** is applicable in the case at bar, as no action was brought against Mrs. Messado. She however accepts the jurisdiction of the Court to hear the matter pursuant to **S.2(2) and S.2(3) of of The Moneylending Act**, on the basis that the claim was made in the Bankruptcy Estate by Mr. Dalma James, the Trustee for Mrs. Messado's Estate.

[14] Counsel also accepted that, pursuant to **S.3 of The Moneylending Act**, the interest rate of 10% per month which equates to 120% per annum exceeds the prescribed rate of 40% per annum, and there is therefore a presumption that the rate is excessive, and the transaction harsh and unconscionable. She however indicated that this presumption is rebuttable, and the Court has a discretion to determine whether to reopen the transaction. To this end, Counsel asserted that the Court determining that the

transaction is harsh and unconscionable is only the first condition to be met in a claim to reopen a transaction. She relied on **Ivor Davidson and Dora Davis v Jamaica National Building Society**, unreported Supreme Court Suit No E60/96 (delivered November 1996).

[15] In furtherance of the foregoing, Counsel argued that in accordance with **Reading Trust Limited v Spero** [1930] 1 KB 492, the following factors indicate that the transactions were not unconscionable even if the interest is presumably excessive.

a) Mrs. Messado and Mr. Stewart knew each other for over thirty **(30)** years, during which she acted as his attorney-at-law.

b) Mrs. Messado encouraged Mr. Stewart to start lending money. She suggested he lend to her clients needing bridge financing, assuring him that the investment would be safe as she would have carriage of sale and provided professional undertakings to repay him. Also, the promissory notes referenced charges over properties as security. However, these charges were not registered on the titles, rendering them invalid as legal charges. Consequently, in cases of default, Mr. Stewart had to pursue court action to enforce them.

c) Mrs. Messado was aware of the 10% per month interest rate, having introduced Mr. Stewart's brother to one of her clients for a moneylending transaction with an interest of 10% per month, and Mr. Stewart to his first borrower under the same terms.

d) She prepared all the loan documents for the transactions, making her fully aware of the interest rate.

e) Mrs. Messado often negotiated loan terms on behalf of borrowers, introducing them to Mr. Stewart without him meeting them directly.

f) The loans were short-term, with promissory notes specifying 120 to 180 days, and therefore meant the interest rate was not for long-term application.

g) As an experienced former attorney with a once thriving conveyancing practice, Mrs. Messado was familiar with loan financing and borrowing.

h) There was no undue pressure or misrepresentation by Mr. Stewart. In fact, Mrs. Messado sought out the loans for her clients. However, she misrepresented facts, as borrowers later denied seeking the loans or signing the documents when contacted by Mr. Stewart.

i) Mrs. Messado raised no issue with the interest rate until she was charged.

j) Mrs. Messado is bound by the contracts she drafted, negotiated, and gave professional undertakings to honour.

[16] In light of this, it was submitted that Mrs. Messado's failure to repay the principal sums upon loan maturity, and her requests for loan extensions led to her substantial liability for interest payments.

[17] Counsel Mrs. Mayhew strongly denied the Claimant's assertion that there was no agreed rate of interest beyond the expiry date of the promissory notes. She argued that there is ample evidence of such agreement between Mrs. Messado and Mr. Stewart. In response to an email requesting confirmation of the outstanding loans as of January 31, 2018, Mrs. Messado acknowledged that the details provided were true and correct. By that date, the loans had already expired, but according to Mr. Stewart, discussions with Mrs. Messado resulted in the promissory notes being extended or renewed on the same terms. Mrs. Messado continued making monthly interest payments at a rate of 10% per month until around the time of her arrest. The only variation was a new promissory note dated August 8, 2018, which suggested an interest rate of 6% per month; however, no agreement on the new rate was reached.

[18] Further, **S.186(2) of the Insolvency Act** does not apply in the current case. The case of **Vernalyn Elizabeth Barnaby v The Insolvency Act** *(supra)* claries that **S. 186 of the Insolvency Act** is only applicable where there was no agreement between the bankrupt and the creditor as to the rate of interest.

[19] In light of this, Counsel urged the Court to find that the presumption of an excessive interest rate has been rebutted, and that the transactions were neither harsh nor unconscionable. Consequently, the Court should decline to reopen or revise the moneylending agreements. Alternatively, if the Court decides to reopen the transactions, she argued that the interest rate should be capped at the maximum prescribed rate of interest under **The Moneylending Act**, 40%. Finally, she requested that the Court order an accounting at this rate and mandate the payment of any amounts found due to the Defendants in satisfaction of their claims against the Bankruptcy Estate.

UNDISPUTED FACTS

[20] The underlying facts are largely undisputed. Mr Stewart was a client and friend of Mrs Messado. The acquaintance is not disputed and seems to account for the less than arm's length nature of the arrangements between them. The promissory notes and other documents including lodging caveats on the Titles to properties used to secure the loans, related to these transactions, were prepared by Mrs. Messado. Mr. Stewart ‘s evidence is that Mrs. Messado acted as his Attorney-at-Law in the preparation of the loan documents. Mrs. Messad agreed to this. The loans were issued at her instructions and funds provided through these loans were deposited into Mrs. Messado’s client trust accounts. Repayments were made by her, through her firm, by way of post-dated cheques. The interest rate was set by Mr. Stewart and agreed to by Mrs. Messado. The evidence of Mr. Stewart is that the interest rate was set based on the short term repayment period of the loans.

[21] The substance of the details of the promissory notes has not been challenged. Mrs. Messado agreed that she entered into the transactions upon the terms contained in the promissory notes. She has accepted responsibility for the repayment of the loans based on her professional undertaking given to Mr. and Ms. Stewart to repay the loans.

[22] There are some disputed facts. These would be relevant to the determination of the appropriate interest rate if the Court were to find that the transactions should be reopened.

LAW AND ANALYSIS

*Whether pursuant to **S.2 of the MLA** Mr. Dalma James has standing to initiate the claim?*

[23] **S.2(1) of the MLA** empowers the Court to reopen and revise a moneylending transaction if the rate of interest charged on a sum lent is excessive, or the transaction is harsh or unconscionable. The section reads as follows:

> *2. - (1) Where proceedings are taken in any court by any person for the recovery of any money lent either before or after the commencement of this Act, or the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, enquiries, fines, bonuses, premiums, renewals or any other charges, are excessive, or that, in any case, the transaction is harsh or unconscionable, the court may reopen the transaction, and take an account between the parties, and shall, notwithstanding any statement or settlement of account, or any note, security or agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly chargeable and due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and shall set aside, either wholly or in part, or revise, or alter any security given, or agreement made in respect of money lent, and if the lender has parted with the security, may order him to indemnify the borrower or other person who gave such security.*

[24] This section is however only applicable where the creditor has commenced proceedings. This was expressed by the court in the Privy Council decision of **Estate of Palmer (deceased) Cornerstone Investments & Finance Company Limited (Jamaica)** [2007] UKPC 49, where the tribunal went further to state that **S.2(2) of MLA**

empowered the court to, in proceedings as referred to in **S.2(1)**, to exercise similar powers at the request of a borrower, surety.[1] **S.2(2)**reads:

> *(2) Any court in which proceedings might be taken for the recovery of money lent, shall have, and may at the instance of the borrower, or suety, or other person liable, exercise the like powers as may be exercised under this section where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower, or surety, or other person liable, notwithstanding that the time for the repayment of the loan, or any instalments thereof, may not have arrived*
>
> *Provided that in the event of the bankruptcy of the borrower the powers of a court under this subsection may be exercised at the instance of the Trustee in Bankruptcy notwithstanding that he may not be a person liable in respect of the transaction.*

This section clearly empowers the Trustee in Bankruptcy, through application to the court, to reopen a moneylending transaction where the interest rate is considered to be excessive, and the transaction harsh or unconscionable. Mr. Dalma James, Trustee for the Estate of the Bankrupt, therefore rightfully has standing to commence the claim pursuant to **S.2(2) of MLA**.

*Whether the interest rate of 10% per month as stated in the promissory notes contravene **S.7(1) of the MLA**, thereby rendering the moneylending agreements unlawful and unenforceable?*

[25] S.7(1) of the MLA reads:

> *7. - (1) Where any document issued or published by or on behalf of a lender of money purports to indicate the terms of interest upon which he is willing to make loans or any particular loan, the document shall express the interest proposed to be charged in terms of a rate per centum per annum.*
>
> *(2) Any person who contravenes the provisions of this section commits an offence and shall be liable, on summary conviction before a Resident Magistrate, to a fine not exceeding one hundred thousand dollars*

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[1] [2007] UKPC 49, para 18

> *or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.*
>
> *(3) Where it is shown that a moneylending transaction was brought about by a contravention of the provisions of this section, the transaction shall be illegal, unless the lender proves that the contravention occurred without his consent or connivance.*

[26] In the case at bar, Counsel for Mr. James contended that **S.7(1) of the MLA** was contravened by virtue of the interest rate in the promissory notes being stated as *"10% per month"* as opposed to being expressed as *"per annum"*, as stipulated by **S.7**, thereby rendering the promissory notes unenforceable. This issue was not addressed in the submissions by Counsel on behalf of the 1st Defendant.

[27] There is no dispute that the interest rate of each loan was expressed to be at a rate of 10% per month which was for the duration of the loan. Though Counsel for the Claimant and 1st Defendant both argued that the 10% per month equated to 120% per annum, there was no mathematical formula suggested by either Counsel by which this determination was made. I am not by any means a mathematician, but the difficulty is that there was no provision for the interest rate to be applied after the period stipulated. I am not persuaded that it would be as simple a matter as multiplying the rate by 12 months. Though not stated in the submissions by the 1st Defendant's Counsel, an argument could be made that as there was an agreed extension for a further six months, the effective interest rate was 120% per annum. This argument may not hold weight in light of the dicta of Scrutton LJ in **B. S. Lyle Limited v Chappell [1932] 1 K.B. 691**, that the renewal was considered to be a new loan, and as such was therefore subject to the requirement for a note or memorandum for what would be a new contract. **(See S. 8 and 9 of the MLA)**. The answer however is that there was no basis in the promissory notes, which are relied on as the notes or memoranda in writing of the loan contracts, to determine the per centum interest rate per annum.

[28] In light of the foregoing authorities, I conclude that the interest rates in the promissory notes, expressed as 10% per month, contravene **S.7(1) of the MLA**, and are therefore illegal and the contracts are consequently rendered void. I must point out that

the professional undertaking given in respect of each loan is equally unenforceable, being founded upon an illegality.

[29] The Amended Fixed Date Claim Form pleaded that the rate of 10% per month was excessive and the transactions were harsh and unconscionable and contrary to **The Moneylending Act**. Counsel for the Claimant expressly pleaded **S.7 of The Moneylending Act** in the Amended Fixed Date Claim Form, which reads:[2]

> *F. Each moneylending transaction is illegal in that the respective promissory notes are in breach of section 7 of the Moneylending Act which requires the Defendants to "express the interest proposed to be charged in terms of a rate per centum per annum.*

[30] The issue of how the Court should treat with an illegal contract was recently addressed by the Court of Appeal in **Caribbean Real Estate Investment Fund v King (Valrine)** [2023] JMCA Civ 18 **("Caribbean Real Estate Investment")**, where it considered the failure to have obtained a licence to carry on real estate business as required by the **Real Estate (Dealers and Developers) Act**.

[31] Brooks P said:[3]

> *[16] The principle guiding the assessment of these issues is that a court will not enforce an illegal contract. Parke B made this point in **Cope v Rowlands** 2 M & W 149; (1836) 150 ER 707 at page 710 of the latter as follows:*
>
> > *"**It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect**. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition." (Emphasis supplied)"*
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> *[17] Additionally, in **In re An Arbitration Between Mahmoud and Ispahani** [1921] 2 KB 716, a government Order stipulated that both the buyer and seller of linseed oil needed licences to conduct that transaction.*

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[2] dated December 7th 2022, pg 5 ground F
[3] [2023] JMCA Civ 18, paras 16-22

The plaintiff had the licence to sell linseed oil but the defendant did not have a licence to purchase it. The plaintiff sold linseed oil to the defendant. The Court of Appeal had to consider whether the contract was lawful where the defendant did not have a licence when the contract was made. Bankes LJ, at page 726, opined that such a contract could not be enforced. Scrutton LJ relied on the dictum in ***Cope v Rowland*** *and ruled that if a statute forbids a conduct, the court cannot enforce an illegal contract. He said this at page 729 as follows:*

> *"…If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract. …In my view the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract. The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That in my view does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition…"*

[18] Satrohan Singh JA, in delivering his judgment in ***Weekes v Gibbons****, cited, with approval, at page 145 of the report, a portion of that quote from* ***In re An Arbitration Between Mahmoud and Ispahani****.*

[19] The learned editors of Cheshire Fifoot & Furmston's Law of Contract, 17th edition, page 454, made the point that a contract is illegal if the existence of the contract is prohibited and that contract is void from the moment it was created. They said:

> *"A contract is illegal as formed if its very creation is prohibited, as for example where one of the parties has neglected to take out a licence as required by statute. In such a case it is void ab initio. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not." (Italics as in original)*

[20] … In ***Cope v Rowlands****, Parke B considered the question of whether a particular statute meant to prohibit a contract by a broker. He stated that the court must determine whether the statute only imposed the penalty to obtain revenue, and therefore only requires the person acting as a broker to pay a penalty, if he or she does not comply with the revenue requirement.*

He further stated that the court must consider whether the purpose of the legislation is to protect the public and prevent persons from acting as brokers without the necessary licence. Parke B went on to show that the requirements in that statute for particular standards and ethical behaviour demonstrated that the licence requirement was intended for the benefit of the public.

[21] Buckley J at page 630 of ***Victorian Daylesford Syndicate Ltd v Dott*** *[1905] 2 Ch 624, determined that once the objective of the statute is to prohibit an act, so as to protect the public, that act is illegal. In the context of assessing a complaint against a moneylending contract, he said, on page 629 of the report:*

> *"There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced."*

He also highlighted, relying on authorities such as Cope v Rowlands, that statutes may impose a penalty for the protection of the revenue or it may impose a penalty for the additional purpose of protecting the public. He later said at page 630 that:

> *"If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal."*

[22] Satrohan Singh JA, at pages 146 to 147 of Weekes v Gibbons, considered the relevant portions of the Registration of Building and Civil Engineering Contracting Undertakings Ordinance 1968 which required the registration of building and civil engineering contracts. He determined, at page 147, that since contracts should only be registered if they exceeded $10,000.00, as well as the fact that it did not apply to the Crown and the provision of additional penalties for continuing offences, the contract was not "absolutely prohibited". He found that the contract could be performed without registration provided that the contractor is willing to pay the initial and continuing penalties or if the contractor, upon discovery of the breach, registers. He also added that the only remedy for the breach was the enforcement of the penalty. He concluded that the registration requirement was not for the protection of the public and it did not absolutely prohibit the performance if there was no registration.

[32] The applicability of the above dicta to the **MLA** can be specifically seen from paragraph 21. **S.7 of the MLA** provides not only for a fine, but also alternatively for imprisonment. **S.7(1)** is a mandatory provision. **S.7(3)** stipulates that a moneylending transaction made in contravention of the section was illegal. It is of some consequence that **S.7(2)**, the penalty section, was added in 1997. It seems pellucid that this was done

for the protection of the public and not as a revenue raising measure. The substance of **S.7(1)** is reiterated in **S.8(2)**. There is however no prescribed penalty for any breach. **S.8(3)** provides that a court may declare the contract enforceable if it considers it equitable to do so.

[33] What is the interplay between these two seemingly inconsistent provisions? Well, in the Court's view **S.7(2)** takes precedence as a specific provision over **S.8(2)** which deals not only with the interest rate but also with other requirements of the note or memorandum.[4]

[34] In **Florence Crooks v Anthony Elliott (unreported), Supreme Court, Jamaica,** Suit No. E 112/1986, judgment delivered 25th April 1988 **("Crooks")**, which considered **S.8** before the proviso was added, it was argued inter alia, that the failure to state the true interest rate in the document rendered it unenforceable. Vanderpump (Master) considered that the failure to comply with the formalities rendered the contract unenforceable. I am aware that in the case of **Brown, Neale v Global Leasing and Finance Company Limited** [2018] JMCC Comm 35, Batts J declined to follow the decision in **Crooks** on the basis that the Learned Master did not have the benefit of applying **S.8(3)** which was a subsequent amendment. I do not disagree with the reasoning of my Brother Batts J. The point of difference is that he did not have the requirements of **S.7** under consideration.

[35] The claims made in the case of **Victorian Daylesford Syndicate, Limited v Dott** [1905] 2 Ch 624, as referred to by Brooks P in **Caribbean Real Estate Investment**, are remarkably similar to the case at bar. In that case, the plaintiffs brought an action alleging that the moneylending transactions were harsh and unconscionable and sought to have them reopened. They also sought that the defendant be ordered to repay the excess. The defendant, who admitted that he was a money lender within the meaning of **The**

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[4] Rachael Graham v Erica Graham and Anor [2021] JMCA Civ 51

Moneylending Act, denied that the charges were excessive, and alleged that the plaintiffs were shrewd men of business and had in fact proposed the terms of the contract themselves. Buckley J answered the question whether the Act was so expressed that the contract was prohibited and was to be rendered illegal. He found that there was no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal, and cannot be enforced. He considered that such statutes could be grouped under the two heads. One group was those in which a penalty was imposed against doing an act for which the only purpose was the protection of the revenue; and secondly, those in which penalties are imposed, not only for revenue purposes, but also for the protection of the public. He indicated that if one came to the conclusion that one of the objectives is for the protection of the public, then the act is impliedly prohibited by statute and is illegal. He considered that the point upon which that case was being made was abundantly plain, and that there was no question of protection of the revenue. He determined that the whole purpose of the provision for the licensing of moneylenders was for the protection of the public. This, he said, was,[5]

> *obviously and notoriously for the protection of those who deal with him (money lenders). The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal.*

He came to the conclusion that the contract upon which the defendant was to receive certain sums was an illegal contract on which he could not sue, and that as a result the defendant's counterclaim failed.

[36] Buckley J went on further to consider that the plaintiffs, who were not relying on the non-registration of the defendant, had asked him to find what was fairly due. He had this to say:[6]

> *I cannot put myself in that position. I have held that the contract is void. I cannot then set myself to see whether under the Act of Parliament, I ought*

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[5] [1905] 2 Ch. 624, pg 630
[6] Ibid., pg 631

> *to set it aside, because there is nothing to set aside, and I cannot say how its terms ought to be reduced, because there are no terms to reduce.*

[37] Having found that the moneylending transactions are illegal, the Court is precluded from considering whether any relief may be given to the borrower by reopening the transactions.

What remedy is available to the borrower on a contract void for illegality?

[38] In answering this question, some guidance was given by the Court of Appeal in the case of **Alexander House Ltd v Reliance Group of Companies Ltd** [2018] JMCA Civ 18. It is noted that the case concerned an interlocutory application and the question of illegality had not yet been settled. However, McDonald-Bishop JA (as she then was opined:[7]

> *[61] In Patel v Mirza, the issue related to a claim for the return of money paid by the claimant to the defendant, pursuant to a contract to carry out an illegal activity, which was not carried out due to circumstances beyond the parties' control. The Supreme Court of England reaffirmed the position that a civil court will not enforce an illegal contract, but the majority of the court adopted a more modern approach and held that the claimant was not precluded from recovering the moneys that he paid to the defendant. The majority ordered restitution despite the tainted contract.*
>
> *[62] Lord Toulson, speaking for the majority, noted:*
>
> *"The question whether a statute has the implied effect of nullifying any contract which infringes it requires a purposive construction of the statute, as illustrated by the decision of the Court of Appeal in Hughes v Asset Managers plc ... which the Commission commended."*
>
> *...*
>
> *[64] Hughes v Asset Managers plc and Patel v Mirza have made it abundantly clear that the question whether a statute has the effect of nullifying any contract which infringes it requires a purposive construction of the statute. Mr Foster, with the aid of Mr Cowan in their written submissions, also submitted that the challenge to the validity of a mortgage*

[7] [2018] JMCA Civ 18, paras 61-65

> *based on a silent statutory prohibition does not make the underlying contract between the parties void and unenforceable.*
>
> *[65] Patel v Mirza also demonstrates that a mere finding of illegality does not necessarily lay the matter of recoverability under the contract finally and conclusively to rest. This decision stands as strong persuasive authority which could influence a trial judge to make an order for restitution for unjust enrichment or to adopt the reasoning of the minority and make no such award…*

[39] The Court of Appeal having accepted the persuasive authority of **Patel (Respondent) v Mirza (Appellant)** [2016] UKSC 42 **("Patel")**, I will take a closer look at the dicta to determine how this case should be disposed. All the judges in that case were of the view that the state of the law on this issue was in a state of uncertainty with conflicting decisions. In the circumstances, the court felt that the comprehensive overview of the law, including examining the law in several common law jurisdictions, and the resulting overhaul, some may say, of the law was necessary. In relation to breaches of **The Moneylending Act**, this uncertainty and conflict can be seen in the Privy Council decision from Nigeria in the case of **Patience Kasumu and others v Gbadamosi Baba-Egbe (West Africa)** Privy Council Appeal No. 9 of 1955 which sought to reconcile differing approaches taken by the courts.

[40] The following passages from **Patel** have relevance to this matter:[8]

Lord Toulson, writing for the majority stated:

> *[120] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is*

[8] [2016] UKSC 42, paras 120, 124, 146, 162, 182, 202-203, 210 and 241-243

> *a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.*

Lord Kerr (in agreement with Lord Toulson):

> *124. Central to Lord Toulson's analysis is the "trio of considerations" which he identified in para 101 of his judgment. The first of these involves an examination of the underlying purpose of the "prohibition which has been transgressed". By this, I understand Lord Toulson to mean the reasons that a claimant's conduct should operate to bar him or her from a remedy which would otherwise be available. That such reasons should be subject to scrutiny is surely unexceptionable. Whether in order to preserve "the integrity of the legal system" (per McLachlin J in Hall v Hebert [1993] 2 SCR 159 at 169) or to allow a proper understanding of the true nature of the public policy imperative for recognising a defence of illegality, the purpose of the denial of a remedy to which the claimant would otherwise be entitled should be clearly understood.*

Lord Neuberger (also in agreement with Lord Toulson):

> *146. In such a case, the general rule should in my view be that the claimant is entitled to the return of the money which he has paid. In the first place, such a rule ("the Rule") is consistent with the law as laid down in the 18th century by two eminent judges, one of whom is regarded as the founder of many aspects of the common law, including illegality; in addition it has support from some more modern cases. Secondly, the Rule appears to me to accord with policy, which is particularly important when illegality arises in the context of a civil claim. Thirdly, the Rule renders the outcome in cases in one area of a very difficult topic, that of contracts involving illegality, and the maxim ex turpi causa non oritur actio (ie that no claim can be based on an illegal or immoral arrangement), relatively clear and certain.*
>
> *…*
>
> *162. By way of example, I would mention two possible exceptions. First, where one of the parties, especially the defendant, is in a class which is intended to be protected by the criminal legislation involved, it may well be inappropriate to invoke the Rule…*
>
> *…*
>
> *182. It is also worth referring back to the two examples set out in para 162 above. If the purpose of rendering an activity illegal is to protect a class of persons which includes only one of the parties to the contract, then, absent*

> *any other argument based on policy or proportionality, it would seem appropriate that that party should not be disadvantaged by the illegality, and/or should be entitled to rely on the fact that the activity is illegal, as against the other party. And, if a claimant seeks recovery of money paid to a defendant under a contract which can only be performed illegally, and has not been performed, proportionality and policy may well justify the court refusing repayment if the defendant has spent the money and was unaware of the facts giving rise to the illegality at the time he spent it.*

Lord Mance (in the minority):

> *202. It follows from what I have so far said that I cannot accept Lord Toulson's view (para 116) that it is unnecessary to consider the scope of locus poenitentiae. The underlying concept behind locus poenitentiae is restitutionary. It recognises that neither an admission of nor reliance on illegality is a bar to relief involving the reversal of an illegal transaction. In the full restitutionary sense I have discussed, the concept must be seen as an integral part of the overall principle governing illegality, and as the corollary of McLachlin J's limited rationalisation of that principle. Understood in that sense, free of early 20th century moralising, it restores the position to what it would and should have been, without any illegality. It avoids windfall benefits and disproportionate losses, without involving the positive enforcement of or the recovery of profits based on illegal bargains. No doubt, however, it would be desirable to avoid the moral undertones of the Latin brocard, and to encapsulate the full width of the modern principle, by referring in future simply to parties' normal entitlement to reverse the effects of an illegal transaction, where possible, even though the transaction may have been wholly or in part executed or carried into effect.*
>
> *203. It also follows that in the present case I consider that no problem exists about recognising that Mr Patel is entitled to require Mr Mirza to return the stake which Mr Patel put up for the illegal purpose of use by Mr Mirza to make profits for their joint benefit by misuse of inside information. The claim does not seek to enforce or profit by the illegality. It seeks merely to put the position back to where it should have been, and would have been had no such illegal transaction ever been undertaken. I add that, having written the above and read Lord Neuberger's judgment in draft, it seems to me that, thus far, my analysis is essentially the same as that which Lord Neuberger describes in his judgment as "the Rule".*

Lord Clarke (in the minority):

> *210. As I see it, there is no disagreement between members of the court as to the correct disposal of this appeal. It is that the appeal must be dismissed because Mr Patel is entitled to restitution of the £620,000 that he paid to Mr Mirza on the basis that otherwise Mr Mirza would be unjustly enriched. As it seems to me, the application of orthodox principles of unjust enrichment, rescission and restitutio in integrum leads to this conclusion…*

Lord Sumption (in the minority):

> *241. To the principle that a person may not rely on his own illegal act in support of his claim, there are significant exceptions, which are as old as the principle itself and generally inherent in it. These are broadly summed up in the proposition that the illegality principle is available only where the parties were in pari delicto in relation to the illegal act. This principle must not be misunderstood. It does not authorise a general enquiry into their relative blameworthiness. The question is whether they were legally on the same footing. The case law discloses two main categories of case where the law regards the parties as not being in pari delicto, but both are based on the same principle.*
>
> *242. One comprises cases in which the claimant's participation in the illegal act is treated as involuntary: for example, it may have been brought about by fraud, undue influence or duress on the part of the defendant who seeks to invoke the defence. The best-known example is Burrows v Rhodes [1899] 1 QB 816, where the illegality consisted in the plaintiff having enlisted in the defendant's private army for the Jameson raid, contrary to the Foreign Enlistment Act 1870. The illegality principle was held not to arise because he had been induced to do so by the defendant's fraudulent misrepresentation that the raid had the sanction of the Crown, which if Page 80 true would have made it legal. Cases in which the illegality consisted in the act of another for which the claimant is responsible only by virtue of a statute imposing strict liability, fall into the same category: see Osman v J Ralph Moss Ltd [1970] 1 Lloyd's Rep 313; Les Laboratoires Servier v Apotex [2015] AC 430, para 29. In such cases, however, the construction and purpose of the statute in question will call for careful attention.*
>
> *243. The other category comprises cases in which the application of the illegality principle would be inconsistent with the rule of law which makes the act illegal. The paradigm case is a rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant. Such a rule will commonly require the plaintiff to have a remedy notwithstanding that he participated in its breach. The exception generally arises in the context of acts made illegal by statute. In Browning v Morris (1778) 2 Cowp 790, 792, Lord Mansfield expressed the point in this way:*
>
> > *"Where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one, from their situation and condition being liable to be oppressed or imposed upon by the other, there the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."*
>
> *The classic modern illustration is Kiriri Cotton Co Ltd v Dewani [1960] AC 192, in which a tenant was held entitled to recover an illegal premium paid*

> *to the landlord, notwithstanding that his payment of it involved participating in a breach of an ordinance regulating tenancies. Lord Denning, delivering the advice of the Privy Council, observed at p 205 that: "The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant."…*

[41] It is noteworthy that despite the differing approaches, they were all agreed that the appeal should be dismissed.

[42] It has been said that **The Moneylending Act** is intended to benefit a class of persons. In the Court's view, to give efficacy to the spirit and intendment of the law, the moneylender cannot be allowed the benefit of his illegality by recovering the profit from his actions. By this token, he must repay all sums paid to him above the amounts lent.

[43] The issue is whether he should retain, from the payments made to him; the principal sums loaned. Regardless of the perspective adopted, whether grounded on the view of the range of factors test or on the view of unjust enrichment, without considering any blameworthiness of the borrower, to unjustly enrich the borrower to such an extent of about JM$17,500,000.00 would be disproportionate. The Court is of the view that the principal should be repaid to the lender. Any security being held by the Defendants as guarantee for the loans must be returned.

[44] This requires that an account be taken of the amounts loaned and the amount repaid in each transaction. Thereafter the difference is to be repaid by the 1st Defendant to the Claimant. In any instance where the principal was not repaid, the amount owing should be deducted from the amounts found to be owing to the estate of Mrs. Jennifer Messado. To do otherwise would set an undesirable precedent where a moneylender in an illegal contract who had the benefit of the contract being performed, or partly performed, would be in a better position than one where no performance had taken place. In this event, the Order of the Court will be for the Defendant to repay all sums paid to him in excess of the principal sums loaned.

[45] In light of the forgoing, the claim is disposed with the following Declaration and Orders:

DECLARATION

It is hereby declared:

1. That the following loans were issued in contravention of **S.7(1) of The Moneylending Act**, and are in accordance with **S.7(3)** illegal and accordingly void.

a) Reggae Adventures Limited, dated the 23rd day of November 2016 for the sum of $3,000,000 for a period of 180 Days.

b) Brilliant Investments Limited dated the 2nd day of April 2017, for the sum of $4,000,000.00 for the period of 180 days.

c) Brilliant Investments dated 30th day of May 2017, for the sum of $1,500,000.00 for the period of 180 days.

d) Ingrid Distant (daughter of the Bankrupt) dated the 12th day of March 2018, for the sum of $2,500,000.00 for the period of 120 days.

e) Orpheus Stennett and Jennifer Graham dated the 28th day of January 2018, for the sum of $4,000,000.00 for the period of 120 days.

f) Delta Investments Limited dated the 8th day of May 2015, for the sum of $2,200,000.00 for the period of 180 days.

g) Delta Investments Limited dated the 13th day of May 2015, for the sum of $1,800,000.00 for the period of 180 days.

h) Windsor Commercial Land Company Limited for the sum of $2,500,000.00 which was signed in 2016 for the period of 180 days.

ORDERS

[46] And it is hereby Ordered:

1. That the 1st Defendant is to repay to the Claimant the sum of Twelve Million Five Hundred and Fifty Thousand Jamaican Dollars **(JM$12,550,000.00)** paid to him in excess of the principal sum. (See Appendix)

2. The 1st Defendant is hereby granted a stay of execution of 42 days to repay the said sum to the Claimant.

3. Any security being held by the Defendants is to be returned to Mrs. Messado.

4. Cost of the claim to be the Claimant's.

5. The Claimant's Attorney-at-Law to prepare, file and serve this Order.

_____

Judge

APPENDIX

STEWART / JENNIFER MESSADO

LOANS REWORKED WITHOUT INTEREST CHARGES

	SUMMARY:	Loan	Repayment	Balance
1	DELTA	$2,200,000.00	$7,260,000.00	($5,060,000.00)
2	DELTA 2	$1,800,000.00	$5,940,000.00	($4,140,000.00)
3	ORPHIUS	$4,000,000.00	$1,200,000.00	$2,800,000.00
4	BRILL 2	$1,500,000.00	$1,500,000.00	$0.00
5	BRILL 1	$4,000,000.00	$4,400,000.00	($400,000.00)
6	INGRID	$2,500,000.00	$2,150,000.00	$350,000.00
7	REGGAE	$3,000,000.00	$5,100,000.00	($2,100,000.00)
8	WINDSOR	$2,500,000.00	$6,500,000.00	($4,000,000.00)
		$21,500,000.00	**$34,050,000.00**	**($12,550,000.00)**

Net amount owed to the estate of Jennifer Messado **$12,550,000.00**