S.C.

COLE v. JOHN

Supreme Court (Butler-Lloyd, Ag. C.J.): August 15th, 1928

[1] **Money — interest — rate of interest — excessive interest justifies court's intervention unless lender shows transaction not harsh and unconscionable in circumstances:** A borrower of money is entitled to statutory relief under s.3 of the Money-lenders Ordinance (*cap.* 129) if the court finds that the money lending transaction is "harsh and unconscionable;" an excessively high interest rate, if unexplained is sufficient to justify the court's intervention, and if such a rate is established the onus shifts to the lender to show that in the circumstances the charge is not harsh and unconscionable (page 149, lines 5—21).

[2] **Money — moneylenders — harsh and unconscionable transaction — excessive interest justifies court's intervention unless lender shows transaction not harsh and unconscionable in circumstances:** See [1] above.

The plaintiff borrower brought an action against the defendant moneylender for relief under s.3(2) of the Money-lenders Ordinance (*cap.* 129).

The plaintiff borrowed first £50 and subsequently another £10 from the defendant with interest at 60% per annum payable in specified monthly instalments. Security was provided in the form of a mortgage of the plaintiff's land in which the true rate of interest was disguised, the advance being described as £71 at 10% interest. The deed gave the mortgagee the right to foreclose if the mortgagor fell into arrears of payment for two months.

After the plaintiff had defaulted in the monthly payments, he brought the present proceedings contending that the rate of interest was excessive and rendered the transaction harsh and unconscionable to an extent sufficient to justify the court's intervention under the Money-lenders Ordinance (*cap.* 129), s.3(2).

The defendant denied that he charged an excessive rate of interest; he agreed that in view of the security given a rate of 10% was reasonable but argued that he had not exceeded this amount since the mortgage deed stated the true position.

The court rejected the defendant's evidence and gave judgment for the plaintiff.

Case referred to:

(1) *Samuel v. Newbold*, [1906] A.C. 461; (1906), 95 L.T. 209, applied.

BUTLER-LLOYD, Ag. C.J.:

This is an action by a borrower against a money-lender asking for relief under s.3(2) of the Money-lenders Ordinance (*cap.* 129) which is a reproduction of s.1(2) of the English Money-Lenders Act, 1900.

The facts are as follows: By an indenture dated March 1st, 1925 the borrower mortgaged some land in Walpole Street to the lender for £71 with interest at 10% per annum to be repaid by monthly instalments of £6.10s.0d., the mortgagee having the right to foreclose should the mortgagor be in arrears of payment for two months. The mortgagor paid three instalments of £6 on April 1st, May 1st and July 1st, 1925. On January 11th, 1927 the borrower signed a form of receipt for £88 including interest repayable not later than June 30th, 1927 the form bearing the following note: "The above amount has reference to the mortgage deed dated March 1st, 1925." Further payments were made of £4 on January 31st, £6 on February 28th, £5 on April 29th and £5 on June 1st, 1927.

The first point to be decided in this matter is what sum was actually advanced in the first instance. As to this there is a direct conflict of evidence, the defendant stating that the sum advanced was £70 plus £1 for the cost of the mortgage deed, whereas the plaintiff states that he only received £50, but in chosing between these two versions I think that the evidence of Nicol is decisive. Nicol states that he approached the defendant on behalf of the plaintiff for a loan of £50 only, and that the defendant stated that the interest would be one shilling per pound per month and subsequently refused to reduce the interest to 10d. per pound and that he afterwards told him that the transaction had gone through, without any reference to an increase on the amount lent or a reduction of the rate of interest.

In view of this evidence it appears quite incredible that the defendant should have decreased his rate of interest from 60% to 10% and this apparently without any pressure on the part of the plaintiff, who though perhaps reluctant was apparently in the last resort prepared to pay the higher rate. I have therefore no difficulty in concluding that the sum advanced was £50 and not £70 and that the higher figure was introduced into the mortgage for the purpose of concealing the true rate of interest.

As to the document signed in January 1927 I am inclined to accept the defendant's statement that a further £10 was advanced

S.C.

as I do not see how the sum of £88 was arrived at otherwise. It is true that the document itself contains no reference to a further advance, but its terms are not inconsistent with such an advance having been made, and it appears that the security was ample to cover it.

These facts having been ascertained, it only remains to consider whether the interest charged was excessive and the bargain harsh and unconscionable. The leading decision on this section is *Samuel* v. *Newbold* (1) which established two vital principles which have been followed ever since: (i) that excessive interest by itself is sufficient if unexplained to render a bargain harsh and unconscionable; and (ii) that when excessive interest is established, the onus shifts to the lender to show that in the circumstances the excess is not harsh and unconscionable.

First, then, as to the rate of interest. Here we are fortunate in having the lender's own admission that in view of the security given 10% would be a reasonable rate, whereas I have found as a fact that the rate charged was 60% capable of being converted by the operation of the default clause into a rate of over 300%. I have no hesitation whatever therefore in holding that these rates are excessive, and no attempt having been made to justify them, that the whole transaction is harsh and unconscionable.

I therefore order that an account be taken between the parties on the basis that £50 was advanced on March 7th, 1925, which I accept as the true date on which the money was actually handed over notwithstanding the receipt as on March 1st contained in the mortgage itself, and a further £10 on January 11th, 1927, credit being given for the payments on account detailed above, and interest to be allowed at 10% throughout.

The plaintiff is to have the costs of the case.

Judgment for the plaintiff.