THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S296 of 2013

BETWEEN

Wayne Lum Young
Elvis Lum Young

(Appellants/Defendants)

v.

Pooran Sookdeo
Superior Doors Limited

(Respondents/Claimants)

Panel:
N. Bereaux J.A.
C. Pemberton J.A.
A. des Vignes J.A.

DATE DELIVERED: November 19, 2019

Appearances:

Mr. N. Ramnanan on behalf of the appellant.

Mr. S. Saunders instructed by Ms. C. Jankie on behalf of the respondent.

I have read the judgment of des Vignes J.A. and agree with it and have nothing to add.

N. Bereaux J.A.

I have read the judgment of des Vignes JA. I also agree with it and have nothing to add.

C. Pemberton J.A.

JUDGMENT

Delivered by A. des Vignes, J.A.

Introduction

1. This appeal is from the judgment of Rampersad J delivered on 11 November, 2013. It arises out of three moneylending transactions between the First Appellant and the First Respondent on 26 January, 2007, 24 June, 2007 and 2 November, 2007 ("the transactions").
2. There are two issues to be determined in this appeal:
    (i) whether the transactions are enforceable or illegal, null, void and of no effect given the alleged breaches of section 11 of the Moneylenders Act Chapter 84:04 (the Act);

(ii) Even if the transactions are unenforceable, whether the First Appellant is entitled to recover the amounts loaned on the basis of the principle of unjust enrichment.

Summary of decision

3. The appeal is allowed for two reasons:

(i) The transactions failed to comply with Section 11 of the Act and this rendered them unenforceable but not illegal, null, void and of no effect;

(ii) Based on the principle of unjust enrichment, the First Appellant is entitled to recover from the First Respondent the principal amounts of the loans less any payments made by the First Respondent, together with interest thereon at the rate of 3% per annum from 30 September, 2010 to the date of judgment and thereafter on the said principal sums from the date of judgment to the date of payment at the rate of 2% per annum.

The Facts

4. The First Appellant is a licensed moneylender. Between 2004 and 2007, the First Respondent and his wife took several loans from the First Appellant which were all repaid.

5. In 2007, the First Respondent and his wife entered into three loan transactions with the First Appellant. On 26 January, 2007, they borrowed $1,000,000.00, on 24 June, 2007 they borrowed $1,000,000.00 and on 2 November, 2007, they borrowed $200,000.00. The loans were taken to inject capital into the Second Respondent, a limited liability company engaged in the business of manufacturing doors of which the First Respondent was the Manager.

6. In respect of the first loan ("the January loan"), the First Respondent and his wife gave the First Appellant an undated cheque for $1,000,000.00 drawn on the bank account of the Second Respondent. The First Respondent and his wife also signed a promissory note along with two handwritten authorizations permitting the First Appellant to enter onto the First Respondent's premises to seize goods in the event of default in repayment of the loan. However, the First Respondent did not provide them with copies of these documents.

7. In respect of the second loan ("the June loan"), the First Respondent and his wife requested and it was agreed with the First Appellant that the June loan of $1,000,000.00 be consolidated with the January loan, making the entire loan $2,000,000.00 with interest thereon at the rate of 5% per month. However, they did not sign a promissory note or any other documents at the time of the June loan. The First Respondent's passport was retained by the First Appellant as security to ensure that the First Respondent did not leave the country without repaying the loans.

8. In respect of the third loan transaction ("the November loan"), the First Respondent and his wife borrowed a further amount of $200,000.00. On the 15 November 2007, the First Respondent signed a promissory note promising to pay on demand to the order of the First Appellant the total sum of $216,000.00 together with interest thereon at the rate of 48 % per annum. On the same day, the First Respondent and his wife signed a promissory note promising to pay on demand to the order of the First Appellant the total sum of $2,960,000.00 principle (sic) and interest at the rate of 4% per month. The loan repayment date was 15 November 2008.

9. The First Respondent made payments of interest on these loans but eventually defaulted in the repayment thereof. According to the witness statement of the

First Appellant (at paragraph 25) the First Respondent paid $660,000.00 but upon a computation of the payments itemised therein, the correct amount paid was $640,000.00. Pursuant to the documents signed by the First Respondent and his wife authorising the seizure of goods (referred to in paragraph 6 above), the First Respondent's motor vehicle was taken by the First Appellant's agent on or about March or April 2009, but was never returned to him because it was subject to a mortgage and was repossessed by the mortgagee and sold. In August 2009, the Second Appellant took a motor vehicle belonging to the Second Respondent together with some of the First Respondent's personal items valued at $8,350.00. In July 2010, goods valued at $71,300.00 were seized by the First Appellant from the First Respondent's residence together with a motor vehicle belonging to the Second Respondent valued at $54,000.00.

10. This resulted in the Respondents filing an action against the Appellants in which, inter alia, they alleged that the First Appellant failed to comply with section 11 of the Act which is set out below.

11. Accordingly, the Respondents claimed, inter alia, a declaration that the three moneylending transactions entered into in 2007 were illegal, null, void and of no effect.

12. By their Amended Defence and Counterclaim, the Appellants denied that the loan transactions failed to comply with section 11 of the Act and claimed that the Respondents were indebted to the First Appellant as at 15 October 2010 in the sum of $4,590,000.00. In the alternative, the Appellants contended that the Respondents were indebted in the said amount as monies had and received and that their refusal to pay the said amount amounted to unjust enrichment and was unconscionable, oppressive and illegal.

13. In their Reply and Defence to Counterclaim, the Respondents contended that the First Appellant was not entitled to the payment of the amount of $2,200,000.00

as monies had and received because it was so intimately bound up with the claim on the promissory note and the moneylender's contract that it would be contrary to public policy to enforce it. Further, they contended that the First Appellant had acted unconscionably and had charged an interest rate higher than that allowed by the Act.

14. By court order dated September 28, 2010, all items seized by the Appellants, including the First Respondent's passport, were returned to the Respondents.

FINDINGS OF THE TRIAL JUDGE

15. The trial judge found, inter alia, that the three moneylending transactions were unenforceable, illegal, null, void and of no effect and dismissed the counterclaim with no order as to costs on the claim and counterclaim.

16. The trial judge found that there was no evidence of two separate documents, as prescribed by the Court of Appeal in the case of **La Chapelle v Moses**[1]. The only documents pertaining to the loan transactions were the promissory notes and these were insufficient for the purposes of section 11 of the Act. Further, he found that, by the First Appellant's own admission, there was no written agreement outlining all of the terms and conditions of the agreements with the First Respondent and his wife which was contrary to section 11 (2) of the Act. On this basis, the trial judge found that the loans were unenforceable and he granted a declaration that the loan agreements were illegal, null, void and of no effect.

17. In relation to the First Appellant's reliance upon the doctrine of unjust enrichment, the trial judge court found that any attempt to bypass section 11 of the Act by adopting the reasoning in **South Western Atlantic Investments Co. Ltd v. Millette**

[1] Volume XIII (1952-1953) Trin. L. R., 40

(No. 2)[2], would involve a serious error on the part of the court on the existing authorities. Accordingly, the court found that the First Appellant was not entitled to restitution of the sums loaned to the First Respondent and his wife on the ground that it would be contrary to public policy since to grant such relief would be to avoid and/or negate the intentions of Parliament in enacting section 11 of the Act.

ISSUES ON APPEAL

18. As earlier indicated, the issues which arise for determination of this court may be summarized as follows:

    (i) whether the transactions are enforceable or illegal, null, void and of no effect given the alleged breaches of section 11 of the Moneylenders Act Chapter 84:04 (the Act);

    (ii) Even if the transactions are unenforceable, whether the First Appellant is entitled to recover the amounts loaned on the basis of the principle of unjust enrichment.

Issue No. (i) - Whether the transactions are enforceable or illegal, null, void and of no effect given the alleged breaches of section 11 of the Act.

THE APPELLANTS' SUBMISSIONS

19. The Appellants submitted that a breach of section 11 of the Act is not an illegality. The breach of the section simply renders the contract unenforceable. The effect of the section is that it creates a statutory defence for the borrower and therefore must be pleaded. The Respondents are therefore confined to those matters pleaded in relation to the breach of the section namely, there was no sufficient

[2] (1991) 46 WIR 351

note or memorandum signed by the First Respondent and his wife and no copy was delivered to them within seven days. Alternatively, any note or memorandum signed by the First Respondent and his wife did not contain all the material terms stipulated under section 11(2) of the Act. It was impermissible, therefore, for the trial judge to have considered any breaches of section 11 other than those which were specifically pleaded by the Respondents.

20. Further, the Appellants submitted that the trial judge's reliance on the case of **La Chapelle v. Moses** (supra), was misplaced and misconceived for several reasons. They contended that there is a difference between suing on a promissory note and suing on a loan agreement. A promissory note is a bill of exchange as defined under the Bill of Exchange Act, Chapter 82:32. It creates a cause of action in itself and does not require further particulars to be relied upon unlike a loan agreement where the cause of action is breach of contract which requires further particulars of the loan to be pleaded. The Appellants were not relying on the promissory notes in this case as bills of exchange but instead had pleaded that there were loans to the First Respondent and his wife and the particulars of the loans were stated on the promissory notes.

21. Further, the Appellants submitted that although the documents were labelled as promissory notes, they contained all the material terms of the contract between the parties and were capable of constituting a sufficient note or memorandum within the meaning of section 11 of the Act. The case of **Reversionary Property & Advance Society v. Hugget**[3] was relied upon in support of this submission.

22. Further, they submitted that the trial judge failed to distinguish between an unsecured loan and a secured loan. In relation to an unsecured loan, it was permissible for there to be only one document setting out the terms of the loan

[3] [1964] C.L.Y. 2403

since the borrower would be suing for breach of contract on the basis of an unsecured loan and section 11 of the Act contemplates cases where there is an unsecured loan. Insofar as **La Chapelle v. Moses** stated that there was a requirement of two separate documents, this related to a situation where the borrower is seeking to enforce a claim based on a secured loan.

23. The Appellants submitted that in this case, the promissory notes contained all the terms of the loan agreements and they were not relying on them as bills of exchange. Accordingly, they were entitled to rely on the promissory notes as a sufficient note or memorandum of the loan agreements and this was in compliance with section 11 of the Act.

24. The Appellants also submitted that the breaches of section 11 as pleaded by the Respondents could not operate to render the loans unenforceable.

THE RESPONDENTS' SUBMISSIONS

25. The Respondents submitted that the Appellants should not be permitted to raise the argument that the Respondents should not be allowed to rely on breaches of section 11 that were not specifically pleaded since this was not raised or suggested in the court below and they have not applied to amend the grounds of appeal to include this point. The cases of **Nicholas Jones v. MBNA International Bank**,[4]; **Osborne v. Pavlick**[5]; **Malcolm Johnatty v. The AG of Trinidad and Tobago**[6] and **Figeroux v. Obioma Bankole**[7] were cited in support.

26. The Respondents also submitted that in any event they were not constrained to rely on those breaches of section 11 of the Act that were specifically pleaded since they had pleaded non-compliance with section 11 generally.

[4] Official Transcript dated June 30, 2000
[5] 2000 BCCA 11
[6] [2008] UKPC 55
[7] Magisterial Appeal No. Po62 of 2016

27. Further, they submitted that the trial judge correctly applied **La Chapelle v. Moses** which decided that section 11 contemplates two separate documents namely, a note or memorandum and the security, and that the mere delivery to the borrowers of a promissory note is not in compliance with the section. The cases of **Temperance Loan Fund Ltd v. Rose and Anor**[8] and **Colin Campbell Limited v. Christie and Anor.**[9] were relied upon to demonstrate the need for two separate documents and that a document can either be a promissory note or an agreement, not both and that the stamp on the document was decisive.

28. If the Appellants were correct in asserting that unsecured loans could fulfil the requirements of section 11 with only one document, a promissory note is a form of security and in the instant case the promissory note evidences the fact that the First Respondent used his passport as security hence the loan was secured.

LAW & ANALYSIS

29. Section 11(1) of the Act provides as follows:

> "11. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender licensed under this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent in respect of any such contract is enforceable, unless a note or memorandum in writing of the contract is made and signed personally by the borrower, and unless a copy of the note or memorandum is delivered or sent to the borrower within seven days of the making of the contract: and no such contract or security is enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or before the security was given, as the case may be.

[8] [1932] 2 KB 522
[9] (1935) SLT (Sh. Ct.) 37

(2) The note or memorandum 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, either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent per annum, represented by the interest charged as calculated in accordance with the Schedule.

30. Under cross-examination, the First Appellant admitted that he did not have a written agreement outlining all the terms and conditions of the agreement between the parties[10]. The effect of this admission is that even if this Court were to accept the Appellants' argument that these were unsecured loans and consequently only one document was necessary, the fact is that the promissory notes executed by the First Respondent and his wife did not contain all the terms of the contract. Accordingly, the promissory notes were not in compliance with section 11(2) of the Act and the contracts for the repayment of the money lent and for the payment of interest thereon are unenforceable.

31. The Act makes it clear that any breaches of section 11 renders the contract merely unenforceable as between the parties. Therefore, the Appellants cannot enforce the repayment of the loan or interest on the loan pursuant to the loan contracts. Accordingly, I am of the view that the trial judge was right to find that the transactions were unenforceable under the Act but fell into error insofar as he found that the transactions were illegal, null, void and of no effect.

Issue No. (ii) – Even If the transactions are unenforceable, whether the First Appellant is entitled to recover the amounts loaned on the principle of unjust enrichment.

[10] Pg. 122 of Record of Appeal

THE APPELLANTS' SUBMISSIONS

38. The Appellants submitted that restitution under the principle of unjust enrichment is available where a contract is rendered unenforceable by section 11 of the Act and relied on the case of **Janine Vega v. Blanco Julio Blanco**[11]. The Appellants disagreed with the trial judge's analysis of the authorities in relation to the issue of unjust enrichment and sought to distinguish them from the present case.

39. Firstly, the Appellants sought to distinguish the Privy Council case of **Kasumu v Baba – Egbe**[12] on which the trial judge relied. In that case, a money lending transaction was found to have been executed in breach of Section 19 of the Money Lenders Ordinance of Nigeria which provided for certain material requirements. It was held that the moneylender was not entitled to enforce any claim whatsoever in respect of such a transaction. Section 19 of the Money Lenders Ordinance of Nigeria provided that: "(4) Any money-lender who fails to comply with any of the requirements of this section shall not be entitled to enforce <u>any claim</u> in respect of any transaction in relation to which the default shall have been made." The Appellants argued that whereas section 19 of the Nigerian Ordinance prevents a moneylender who breaches the requirements of the section from enforcing "any claim", a breach of section 11 of the Act merely has the effect of making the contract unenforceable.

40. The Appellants also sought to distinguish the case of **Lodge v National Union Investment Co. Ltd.**[13]. In that case, it was held that the borrower should be put on terms as to the repayment of the loan as a condition of the lender delivering up the securities. The Appellants submitted that this was distinguished in the case of **Kasumu** (supra) on the basis that the effect of such an order would be to enforce

[11] Claim No. 171 of 2016, Supreme Court of Belize
[12] [1956] 3 AER 266
[13] [1907] 1 Ch 300

the security since the borrower's security would not be released if the loan was not paid.

41. The Appellants contended that the principle in the case of **Haugesund Kommune v. Depfa ACS Bank**[14], is that restitution would not be available where a claim is inconsistent with the express provision of a statute or its intention. However, section 11 of the Act renders the contract unenforceable and does not bar other remedies.

42. The Appellants submitted that the case of **Equuscorp Pty Ltd v. Haxton**[15], as relied upon by the trial judge is irrelevant since it deals with unenforceability of agreements made in furtherance of an illegal purpose. The Appellants emphasised that non-compliance with section 11 of the Act was not an illegality.

43. On the hearing of the appeal, the Appellants also relied on **Patel v Mirza**[16], a decision of the United Kingdom Supreme Court delivered after the decision of the trial judge in this matter in support of the submission that the Appellants are entitled to recover the monies lent on the grounds of unjust enrichment.

THE RESPONDENTS' SUBMISSIONS

44. The Respondents agreed with the trial judge's analysis of the authorities in relation to the issue of unjust enrichment and considered the cases of **Orakpo v. Manson Investments Ltd**[17] and **Wilson First County Trust Ltd (No. 2)**[18] to be of further assistance. According to the Respondents, Lord Diplock in the case of **Orakpo** confirmed that the Moneylenders Act 1927 was designed to protect

[14] [2010] EWCA Civ 579
[15] [2012] 3 LRC 716
[16] [2016] UKSC 42
[17] [1977] 3 WLR 229
[18] [2003] UKHL 40

unsophisticated borrowers from being overreached by unscrupulous moneylenders and that according to Viscount Dilhorne, the Act had to be construed strictly. They also submitted that in **Wilson First County Trust Ltd** the court, in commenting on section 65 of the Consumer Credit Act 1974 (which is the successor to section 6 of the Moneylenders Act 1927 and which is identical to section 11 of the Act), concluded that it would be inconsistent with parliamentary intention to render an agreement unenforceable where there is a failure to comply with the statutory provisions for the court to find that this consequence is unjust and should be reversed at common law.

LAW & ANALYSIS

45. In an unjust enrichment claim the unjust enrichment is the cause of action and restitution is the remedy. In **Haugesund** (supra), the English Court of Appeal held that a lender under a borrowing contract which was rendered void because it was ultra vires could still recover the sum lent in a restitutionary claim in law. It was held, however, that any such claim was subject, where appropriate, to any available restitutionary defences which may include any that could legitimately be founded on the grounds of public policy. In arriving at the decision that the restitutionary claim was not barred, it was held that an account should be taken of the expressed or implied intention of the foreign statute in deciding to what extent a restitutionary remedy should be available despite the ultra vires contract. This therefore demonstrates that it is important to look at the intention of the governing statute in deciding whether the claim of restitution is maintainable.

46. In **Patel v. Mirza** (supra) the issue was whether the maxim "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act" precluded a party to a contract tainted by illegality from recovering money paid under the contract from the other party under the law of unjust enrichment. Lord Toulson, in

delivering the majority judgment endorsed the approach of Gloster LJ in the Court of Appeal. He said:

> *"**115** In the present case I would endorse the approach and conclusion of Gloster LJ. She correctly asked herself whether the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would be stultified if Mr Patel's claim in unjust enrichment were allowed. After examining the policy underlying the statutory provisions about insider dealing, she concluded that there was no logical basis why considerations of public policy should require Mr Patel to forfeit the moneys which he paid into Mr Mirza's account, and which were never used for the purpose for which they were paid. She said that such a result would not be a just and proportionate response to the illegality. I agree."*

47. These cases demonstrate that even where a contract is void or illegal, the Courts have been willing to allow a claim in unjust enrichment provided, that the policy underlying the rule which made the contract void or illegal would not be stultified.

48. The underlying policy of the Act, and specifically section 11 thereof, is to protect the borrower by rendering the contract between the parties unenforceable where there is non-compliance with section 11. However, a careful consideration of the Act and section 11 does not reveal any policy either express or implied which will be stultified if the Appellants were to succeed in their claim in unjust enrichment.

49. Since section 11 of the Act only addresses the enforceability of the contract for the repayment of the money lent and interest thereon and the enforcement of the security given by the borrower in respect of such contract, if the lender has another right at law by which he may get his money back, such as an action in unjust enrichment, then that right should be recognized. The facts reveal that the parties

have had a long-standing relationship. The First Respondent depended on the First Appellant to finance the business of the Second Respondent. Section 11 of the Act does not reveal any intention to prevent a lender from enforcing his legal or equitable rights arising out of the contracts which are outwith the provisions of the Act or to permit a borrower to profit from a loan transaction that has been rendered unenforceable by section 11.

50. The First Respondent undoubtedly benefited from the principal sum of $2,200,000.00 lent by the First Appellant which he utilised in his business. He has made payments of interest thereon amounting to $640,000.00. Nevertheless, he has refused to repay any further monies. The question to be answered here is whether the policy of the Act would be stultified if the First Appellant's claim in unjust enrichment were allowed. In my opinion, there is no logical basis why considerations of public policy should require the First Appellant to forfeit the monies lent to the First Respondent and such a result would not be a just and proportionate response to the fact that the contract for the repayment of the monies lent together with interest is unenforceable. In fact, I am of the view that it would be unjust for the First Respondent to retain the monies borrowed.

DISPOSITION

38. It follows that this appeal must be allowed and the orders of the trial judge, are set aside. The order will be:

    (i) The First Respondent is ordered to pay to the First Appellant the sum of $1,560,000.00, (which represents the principal amount of the loans ($2,200,000.00) less the payments of $640,000.00 made by the First Respondent), together with interest thereon at the rate of 3% per annum from 30 September 2010 to the date of judgment and thereafter at the rate of 2% per annum from the date of judgment until payment;

(ii) We would hear the parties on costs.

Andre des Vignes
Justice of Appeal.