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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1214/81

714

BETWEEN: ALERT FINANCE LIMITED
 a duly incorporated
 company having its
 registered office at
 Auckland and carrying
 on business as
 Financiers

Plaintiff

A N D: BRYAN JACKSON of
 Queensland, Australia
 Company Director

Defendant

A N D: GORDON MARTIN BAILEY
 of Auckland, Chartered
 Accountant,
BRUCE McCALLUM of
 Queensland, Builder
 a n d
ALAN GADSON of Auckland
 Company Director

Third Parties

Hearing: 8th June 1984
Judgment: 19th June 1984
Counsel: M E Casey and B J McHardy for
 plaintiff
 G Bogiatto for defendant
 D F Dugdale for third parties
 McCallum and Gadson
 I F Williams for third party Bailey

JUDGMENT OF HENRY, J.

Plaintiff is a financier and in the course
 of its business as such advanced certain monies to Unit

Developments Limited, now in liquidation. Defendant was, at all material times, Managing-Director of and a shareholder in Unit Developments Limited. On 14 July 1977, Unit Developments Limited made two such advances each of \$5000.00 and a further one on 27 November 1978 for \$10,000.00. In each case the advances were secured by registered mortgage executed by Unit Developments Limited and also executed by the Defendant as a covenanting party and as a guarantor. A fourth advance was made on 22 December 1977 in the sum of \$12,120.00, secured by a sub-mortgage, again executed by Unit Developments Limited and by the Defendant as covenantor and guarantor.

Default was made in all four transactions, that default resulting in the four series of claims now being made against the Defendant. The transactions as outlined above were proved in evidence, as was the quantum in each case and to which no challenge was made by the Defendant or by any of the Third Parties. In summary, the amounts outstanding, including interest, at the date of trial were :

First cause of action (known as no.4 Florence)	\$10,529.49
Second cause of action (known as no.8 Florence)	\$10,597.44
Third cause of action (known as Beach Road)	\$8,755.90
Fourth cause of action (sub-mortgage)	\$23,162.07
<u>TOTAL:</u>	<u>\$53,044.90</u>

It was further established that pursuant to the mortgage documents, Defendant became liable for costs incurred consequent on default, and these were proved at a total of \$7,738.60, including the costs of trial

Defendant's liability was not contested in respect of the first three causes of action, and is properly proved by the evidence. An issue does, however, arise in respect of the fourth cause of action which, it was submitted, is based on a contract rendered unenforceable by reason of non-compliance with the provisions of s.8 (2) of the Moneylenders Amendment Act 1938, which states:

"8.(2) The note of 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 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 provisions of the Schedule to this Act:"

The Memorandum produced as being in compliance with the section includes the following notation:

<u>"Date of Advance:</u>	22nd December 1977
<u>Amount of Advance:</u> (Including Administration	
Fee of Lender of \$120.00)...	\$12,120.00

Interest 13% p.a. on amount advanced calculated a flat basis for 24 months (effective rate 26% p.a.)...	<u>3,151.20</u>
Total amount repayable...	\$15,271.20
<u>REPAYMENT</u> by 24 consecutive monthly instalments of \$636.00...	<u>\$15,271.20"</u>

The sub-mortgage covering this advance is a table mortgage. Evidence was given by Mr Bailey, one of the Third Parties and a former director and shareholder of Unit Developments Limited, that the true rate of interest payable on the advance was approximately 24%. In cross-examination by Mr Dugdale on this topic he was asked :

"Q. You would accept, would you not, that that is not the true rate, calculated under the Moneylenders Act, or indeed on the basis you indicated to us earlier?

A. I would accept that."

Just what was meant by that question and answer I am unsure, but I do not think it is determinative of the issue. The Memorandum on its face shows an interest charged on the loan expressed in terms of a rate per cent per annum - namely 13% on a flat basis, and an effective rate of 26%. It therefore complies with the subsection unless it can be said that the true interest calculation given by Mr Bailey in evidence as being 24% can be said to show that the memorandum therefore does not contain "the interest charged". What Mr Bailey did was to multiply the flat rate of 13% by a factor of 1.85, which, he said,

"is, to the best of my knowledge, the conversion factor that one uses". I am not prepared to infer from that that 26% is in fact incorrect, certainly not to the extent to show a contravention of s.8(2). There was no other evidence called on this question and, from the document itself, even taking into account the evidence referred to I am satisfied that on the balance of probabilities, even assuming the burden of proof was on the Defendant, the interest charged on the loan, expressed in terms of a rate per centum per annum, is in fact contained in the memorandum. The provisions of s.8 are designed to protect a borrower, and in my view a slight error in the figures, which cannot possibly be material to his interests and which, if anything, shows a marginally higher rate of interest than that factually payable, is not in breach of the section. No authority was quoted, which would suggest otherwise. The sole defence to this cause of action therefore fails, and it must follow that the plaintiff is entitled to judgment for the full amount claimed which, including interest and costs, amounts to \$60,783.50.

It is therefore not necessary to go on and consider the interesting question of whether the repeal of the Moneylenders Act 1908 by the Credit Contracts Act 1981 therefore deprived the Court of its former jurisdiction, under s.55 of the Statutes Amendment Act 1936, to validate or enforce an infringing contract.

I turn now to the issues raised by the Third Party Notice. The Defendant claims indemnity against the three Third Parties on the basis of a Deed of Indemnity entered into, dated 8 February 1977. It is desirable to set out the relevant terms of that Deed:

"THIS DEED OF INDEMNITY is made the 8th day of February 1977

BETWEEN GORDON MARTIN ROSS BAILEY
BRUCE McCALLUM
ALAN GADSON and BRYAN JACKSON
 all of Auckland Company Directors
 (hereinafter called "the Principals")
 of the one part

A N D the said BRYAN JACKSON of Auckland Company Director (hereinafter called "the Guarantor") of the other part

WHEREAS the Principals are Directors of and shareholders in UNIT DEVELOPMENTS LIMITED a duly incorporated Company having its registered office at Auckland

AND WHEREAS the Guarantor is also the Managing Director of the said Company

AND WHEREAS the said Guarantor has by virtue of his office as Managing Director of the said Company entered into certain personal guarantees of loans and advances arranged for and on behalf of the said Company and made to the said Company from time to time

AND WHEREAS it is intended that the Guarantor will hereafter continue to enter into and execute such personal guarantees of loans and advances yet to be arranged by the said Company

AND WHEREAS the Principals in consideration of the Guarantor having entered into such guarantees (and having agreed to continue so to do) have agreed to enter into the covenant hereinafter contained

NOW THIS DEED WITNESSETH as follows:

1. IN pursuance of the said Agreement and in consideration of the Guarantor having entered into such guarantees as aforesaid the Principals do and each of them doth hereby covenant with the Guarantor that they the Principals and each of them or their respective personal representatives will at all times hereafter keep the Guarantor and his personal representatives and his and their estate and effects indemnified against all actions proceedings liability claims damages costs and expenses in relation to or arising out of the guarantees given or to be given by the Guarantor as aforesaid

2. THE liability of the Principals pursuant to this Deed of Indemnity will at all times be borne amongst the Principals in direct proportion to their respective shareholdings in the said UNIT DEVELOPMENTS LIMITED at the time of execution of any such guarantee as aforesaid by the Guarantor."

It was submitted that there was no sufficient evidence that in any of the four transactions in issue was it shown that the Defendant entered into the guarantees by virtue of his office as Managing-Director. I can see no substance in this submission. The only possible inference from the evidence is that the Defendant was acting in his capacity as Managing-Director, if indeed that qualification is even necessary to bring the future loans and advances under the umbrella of the indemnity.

Second, it was submitted that there was no proof of the respective shareholdings of the Third Parties, and that therefore a non-suit should follow. Although the evidence does not establish the shareholding

pleaded, if the indemnity applies, as I consider it does, I do not think a non-suit is appropriate. It is in my view far preferable to resolve the matter now, to the extent that it can be resolved, and to make a declaration to the effect that the Defendant is entitled to an indemnity in the terms of clause 2 of the Deed.

One final issue needs to be considered. The Third Parties each claimed a set-off in respect of payments or alleged liability to Credit and Investments Limited in the sum of \$3000.00 each. The only evidence as to this came from Mr Bailey, who testified that a claim instituted by Credit and Investments Limited had been compromised, under which he had paid \$1000.00 and was liable for a further \$2000.00, and that the other two Third Parties had entered into a liability to pay \$3000.00 each on a "little by little basis". Reliance was placed on a further Deed of Guarantee as a foundation for the set-off of these amounts of \$3000.00. Under this Deed, the Defendant and the Third Parties also became co-sureties in respect of advances to Credit and Investments Limited.

The proof of entitlement by any of the Third Parties to contribution from the Defendant is quite inadequate. The terms of the compromise have not been

made available to the Court, the obligations, if any, of the Defendant under it are not known, nor is the relevance of it to the co-sureties' right of contribution known. There is the additional problem of entitlement to relief before actual payment (Halsbury's Laws of England 4th edn. Vol.20 paras.224,225). I am simply not satisfied that there is a liquidated debt or money demand proved as against the Defendant, such as would bring a set-off into operation.

It follows therefore that there will be judgment for the Plaintiff against the Defendant in the sum of \$60,783.50. Leave is granted to amend the Third Party Notice in accordance with the application made at the trial, and on that there will be a declaratory order that the Defendant is entitled to be indemnified by the Third Parties GORDON MARTIN ROSS BAILEY, BRUCE McCALLUM, and ALAN GADSON in respect of the claims the subject matter of this action, provided however that such indemnity shall be borne amongst the Third Parties in direct proportion to their respective shareholdings in Unit Developments Limited at the time of execution by the Defendant of each respective mortgage or guarantee constituting that claim.

The Plaintiff requires no order as to costs. Costs on the Third Party Notice is reserved, with liberty to apply.

Solicitors:

Wallace McLean Bawden & Partners, Auckland, for plaintiff

Anthony Grove & Darlow, Auckland, for defendant

Kensington Haynes & White, Auckland, for Third Parties,
McCallum & Gadson

Shieff Angland Dew & Co., Auckland, for Third Party Bailey.