SUPREME COURT OF NAURU

[CIVIL JURISDICTION] **Civil Suit No. 6 of 2017**

Between: **Bernard Amwano**

PLAINTIFFS

And: **Manuella Atsime**

DEFENDANTS

Before: Chief Justice Filimone Jitoko

APPEARANCES:
Appearing for the Plaintiff: V. Clodumar (Pleader)

Appearing for the Defendant: K. Tolenoa(Pleader)

Date of Hearing: 6 April, 2018
Date of Judgment: 15 October, 2018

Catchwords: *Loan-Moneylenders Act 1900-interest Prima Facie Excessive-Harsh and unconscionable-Equitable relief.*

JUDGMENT

This action is a moneylender's suit under Order 55 rule 2 of the Civil Procedure Rules, that is, "a suit for the recovery of money lent by a moneylender or for the enforcement of any agreement or security relating to money so lent, being a suit brought by a lender or assignee."

Background

Between the period 13 May 2015 to 30 June 2015, the defendant (the debtor), on fifteen (15) different occasions, asked and was given, sums of money by the plaintiff (the creditor).

The agreed facts filed by counsel on 19 July 2017 state as follows:

"1. That the defendant did borrow moneys from the Plaintiff.

2. The amount borrowed was $2,225.00 between 13 May 2015 and 30 June 2015 as shown on the schedule of loan under Particulars.

3. That the defendant repaid the sum of $2,836.35 on the following dates and amounts:

(a) 17/6/15 : $145.00

(b) 23/6/15 : $100.00

(c) 13/10/15 : $591.35

(e) 30/6/16 : $2,000.00

4. That the amount of $591.35 was part of the money taken by the Plaintiff directly from Nauru Rehabilitation Corporation and recorded as a payment towards the debt.

5. That the Plaintiff did approach the defendant on several occasions for her to pay the debt."

Defendant's Case

While conceding that she had borrowed the sum of $2,225.00 from the plaintiff, the defendant argued that at no time was there agreement between the parties that interests were going to be levied and, in any case, the interest rate of 20% per fortnight charged was exorbitant and unconscionable.

The loan was for the defendant daughter's 21st birthday and was, according to counsel, a "good-will business deal", whatever this means. Further, the defendant said that the plaintiff told her to "pay the loan whenever she is able."

There was a counter claim added by the defendant on a motor cycle she owned but given to the plaintiff's family, which has not been fully paid for. It emerged that the motor cycle was never part of the loan and the issue and claim was subsequently withdrawn by the defendant's counsel on the eve of the hearing.

Plaintiff's Case

Counsel for the plaintiff argued that the plaintiff had given the loan as a money lender and as such, unless specifically stated otherwise, interest rate must be presumed. In any case, counsel pointed out that the issue whether the interest rate was chargeable was not pleaded in the defendant's Statement of Defence.

In counsel's view the only issue to be decided is whether the interest rate of 20% per fortnight was unduly excessive. In this regard, the plaintiff that he has since stopped charging this interest rate since 8 September, 2015. He furthermore has also converted the interest rate from compound to simple interest rate over the succeeding period of 23 months.

The sum of $4, 500 that the plaintiff is demanding, represents the outstanding interest accrued on the original compounding debt. In addition, the plaintiff pleads that a 5% interest per annum be charged on the outstanding amount from 8 September to the judgment date.

Consideration

The business of money lending on Nauru is governed by the United Kingdom Moneylenders Act 1900. There are two (2) important aspects of the legislation that are relevant to this case. First the definition of a money lender. It defines a "money lender" to "include every person whose business is that of money lending, or who advertises or announces himself or holds himself out in any way as carrying on that business...." There was no legal requirement for a license to carry out money lending business. It was only in 1925 that amendment was made to the Act requiring licenses to be taken out by money lenders. Secondly, the law is silent on the interest rate to be charged even though it is the sine qua non the business of money lending. Clearly, the issue of what interest rate is to apply is a matter for the parties to decide.

In this instance, the defendant is adamant that there was no mention of any interest rate to be applied when the loan was taken. Be that as it may, the law recognizes the right of the lender of the money to charge interest on the loan. The court in this regard, takes due note of the fact that the defendant had already paid back not only the total principal loan, but in addition had also paid the plaintiff the sum of $611.35 which can only represent the interest to the loan. This would tend to suggest that the defendant was aware of the element of interest that she was being charged and was repaying.

The only outstanding issue that remains is whether the interest charged was excessive to the extent that a court may deem it necessary or appropriate to intervene. The court may only do so, as it clearly said in *Kyoma Menke v Conak Maaki*[1], if the interest rate is excessive to the extent that it is harsh and unconscionable in all the circumstances of the case.

English case law has since the House of Lords decision in *Samuel v Newbolt*[2] firmly established the proposition that excessive interest of itself is sufficient to render a transaction harsh and unconscionable and entitles the debtor to relief. What amounts to excessive interest is a matter to be determined by the court, having regards to the risk, and to all the circumstances of the case. Where in the opinion of the court, the interest is prima facie excessive, the burden of proof shifts to the money lender to prove that the transaction was not harsh and unconscionable.

A further elaboration of the *Newbolt* principle was made in *Blair v Buckworth*[3], under the following propositions:

(i) That excessive interest alone may be sufficient to condemn a transaction as harsh and unconscionable

(ii) That where in the opinion of the judge the interest is prima facie excessive, having regard to the risk, and to all the circumstances of the case, the burden of proof shifts on to the money lender to prove that the transaction was not harsh and unconscionable

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[1] CA36/2015
[2] [1906] AC 461
[3] 24 TLR 474

(iii) That while the borrower's competence and his understanding and appreciation of the risk, must always be of great importance in considering whether the transaction is harsh and unconscionable yet, where the interest charged is grossly excessive, the money lender will not discharge the burden of proof which is shifted upon him under proposition 2 above, by merely proving the borrower was a competent borrower and that he fully understood and appreciated the transaction.

In this case, the plaintiff was charging an interest rate of 20% per fortnight or 480% per annum. It may not necessarily be excessive in certain circumstances, for example, if the loan was a short term one to a businessman who needed the money for an urgent business deal and was expecting payments from elsewhere overnight. In this instance, the defendant/borrower needed the loan to celebrate her daughter's 21st birthday. At the time of the loan, she was earning a salary from work of approximately $250.00 a fortnight. It is very clear that if the interest on the total loan of $2225.00 was fixed at 20% per fortnight, the interest on the principal alone for a fortnight would come to $445.00; an amount way above the defendant's fortnightly salary. Even if the defendant was to pay all of her fortnightly salary towards the loan, the debt will not be reduced, but continue to climb. There is no possibility ever of the defendant repaying the loan in full. She will remain in perpetual debt to the plaintiff.

Conclusion

In the court's considered view, the circumstances of this case and which I have described above, clearly show that the interest on the loan is not only grossly excessive, it is also harsh and unconscionable. The defendant was in dire need of money to celebrate the important event in her family and a milestone in the life of her daughter, her 21st birthday. In such straits in need of money to mark the occasion, she may have had no alternative but to take out the loan on the only terms she could get it. The plaintiff was well aware of the defendant's needs as well as her financial inadequacies.

This is an appropriate occasion, in my view, where the court should and will intervene to right a situation that has tilted so heavily in favour of the money lender in terms of the benefits accruing from a loan agreement that is harsh and

oppressive as to be unconscionable. The 20% interest per fortnight charged on the principal realized the $4500.00 that now remains outstanding and claimed by the plaintiff.

In the end, the court finds that the 20% interest charged by the plaintiff for the loan is grossly excessive and is hereby set aside and 10% interest substituted in its place. The outstanding balance owed by the defendant on the loan is revised proportionately downwards to $2,250.00, and a 5% interest per annum is levied on the balance of the debt from 8 September, 2015 to the judgment date.

Costs against the defendant, is summarily assessed at $700.00.

Dated this 15th day of October 2018

Hon. Filimone Iitoko

Chief Justice

SUPREME COURT OF NAURU