IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
OWUSU (MS), JSC
YEBOAH, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO. J4/7/2010
21ST JULY, 2010

AHENFIE CLOTH SELLERS ASSOCIATION
PER THE PRESIDENT JOANA EWURABENA OCRAN
H/NO. 36 NUNGUA BUADE, ACCRA … PLAINTIFF/RESPONDENT
RESPONDENT

VRS

1. PHILOMENA MENSAH
   LAPAZ, ACCRA
2. TINA MAVIS DODD
   ACCRA
3. DAVID AFRIYIE
   ACCRA
4. BEN MENSAH
   ACCRA

… DEFENDANTS/APPELLANTS
APPELLANTS

J U D G M E N T

BROBBEY JSC:

This is the unanimous decision of the court. In this judgment, the appellants shall be referred to as the defendants while the respondent will be referred to as the plaintiff

or the plaintiff association. The bare facts which gave rise to this litigation were as follows: The plaintiff is an association of which the PW1 is the president. According to the PW1, the association was formed with the aim of sourcing loans for its members because the members found it difficult to source loans for their businesses if they sourced the loan as individuals. The association was registered as a company limited by guarantee. The 1st, 2nd and 3rd defendants denied that they were members of the Association but the plaintiff produced evidence to prove that they were members.

The association obtained a loan of three billion old Cedis from the Ghana Commercial Bank for use by its members. The first defendant applied for and was given three hundred million old Cedis as a loan which was guaranteed by the second, third and fourth defendants. The three billion Cedis was to have been paid to the bank within a period of 52 weeks and it attracted interest of 29 per cent per annum. The plaintiff did not state the exact rate of interest attracted by the loan to the first defendant. The 1st defendant was to have repaid her loan of three hundred million Cedis at the rate of nine million Cedis per week but within the same 52 weeks. At the rate of nine million Cedis per week, the 1st defendant would have paid four hundred and sixty eight million Cedis within the 52 weeks. The 1st defendant paid the weekly nine million Cedis for 21 weeks, after which she stopped or failed to pay any more money to the plaintiff. The plaintiff therefore took action against her and the other defendants in their capacities as guarantors for the recovery of 279 million Cedis which she alleged was the balance owed on the three hundred million Cedis loan. That transaction between the plaintiff and the defendants was evidenced by exhibit A.

The parties do not dispute that by the agreement on the facility given to the first defendant, she was to have paid GH¢46,800.00 from the GH¢30,000.00 loaned to her. The difference was GH¢16,800.00. By **simple** arithmetical calculation, the difference of GH¢16.800.00 on the GH¢30,000.00 amounted to 52 per cent. That included the 29 per cent charged by the bank. In other words, the Association

charged 52 per cent for lending the GH¢30,000.00 to the first defendant. If the 29 per cent were to be deducted from the 52 per cent, the plaintiff would have charged 23 per cent as interest on the amount lent to the first defendant.

At the trial court, the defendants contended that *"the terms, interest and other charges levied on the said loan are harsh, excessive and unconscionable in terms of the Loans Recovery Ordinance, Cap 175(1951 Rev.)."* In further answer to the claim, the defendants averred that the transaction was *"illegal and unenforceable in terms of the Money lenders Ordinance, Cap 176."* They therefore counterclaimed that the loan transaction was illegal and unenforceable in terms of the Moneylenders Ordinance Cap 176 and for an order *"re-opening the transaction on the ground that the interest and charges were excessive, harsh and unconscionable."*

The trial High Court gave judgment in favour of the plaintiff. The defendants appealed against the judgment to the Court of Appeal where they lost to the plaintiff again. It was against the judgment of the Court of Appeal that the defendants have appealed to this court, initially on two grounds, to which were added three more grounds. The five grounds will be read out as and when they are discussed in this judgment.

APPLICABLE LAWS

The law on money lending in Ghana has been discussed in a number of cases, particularly in **Yeboah v Bofour** [1971] 2 GLR 199, **Ayiwah v Badu [1963] 1 GLR 96, SC** and **Dua** v **Afriyie** [1971] 1 GLR 260, all of which were based on the Money lenders Ordinance, Cap 176 and the Recovery of Loans Ordinance, Cap 175. Cap 176 was repealed in 2008 by the Non Bank Financial Institutions Act, 2008 (Act 774), s. 47(1). However, since the 1992 Constitution prohibits retroactive legislation, Act 774 cannot retroactively affect transactions which took place before the coming into force of that Act. The transaction involved in the instant case took place in 2004. It cannot be affected by legislation which came into force in 2008. Cap 175

has not been repealed. It follows that both Cap 175 and Cap 176 are applicable to the transaction involved in the instant dispute.

1ST AND 2ND GROUNDS OF APPEAL

Counsel for the defendants argued together grounds (a) and (b) of the grounds of appeal. Those grounds were:

> *"a The judgment was against the weight of evidence and*
>
> *b. The trial court erred in law when it held that the plaintiff is not a money lender when there is evidence on record that the plaintiff continuously lends money to people and charges interest without being in possession of moneylender's license."*

A number of issues were raised at the trial court. The most fundamental one was whether or not the transaction was money lending one. In arguing the first two grounds of appeal, counsel for the defendants contended that the transaction was money lending one. Counsel for the plaintiff on the other hand argued that the transaction was not money lending one.

The findings of fact made by the trial court were these: that the appellant was an association which was formed with the object of rendering financial assistance to its members: that it took loans from commercial banks, specifically, from the Ghana Commercial Bank, for the benefit of its members; that it in turn loaned three hundred million Cedis of that amount to the first defendant; that the loans were legally contracted and that the terms were neither harsh nor unconscionable. The Court of Appeal endorsed these findings of the trial court. On bases of those findings, the trial court and the Court of Appeal concluded that the transaction between the first defendant and the association was not money lending one.

WHETHER OR NOT THE PLAINTIFF AS AN ASSOCIATION WAS A MONEY LENDER

The fundamental issue in this appeal is whether or not the Association was a money lending one. Who is a money lender? "Money lending" has been defined in the definition section of Cap 176 as follows:

> *"'Moneylender' means and includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not he also possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the business as a principal or as agent."*

That definition is followed by exemptions which are discussed below in this judgment.

Section 3 of Cap 176, elaborates on this definition further by creating a presumption in the following terms:

> *"Any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed to be a moneylender until the contrary be proved."*

The uncontroverted facts in this case are that the plaintiff gave out GH¢30,000.00 (or 300,000,000 in the old currency) to the first defendant. The first defendant agreed with the plaintiff to re-pay that amount by GH¢900.00 per week within a period of 52 weeks as stated in exhibit A. That meant that the total amount to have been re-paid to the plaintiff was GH¢46,800.00 (or ¢468million in the old currency). The increase was GH ¢16,800.00 (or ¢168 million in the old currency). On the face of section 3 of Cap 176, the initial onus on the borrower was to establish that the lender gave out money in consideration of being repaid a higher amount. In so far that the loan of GH¢30,000.00 (or ¢300 million in the old currency) was to have

been repaid by GH¢46,800.00, the first defendant discharged the initial onus on her. She was able to establish that the transaction fell within the definition of a money lender in section 3 of Cap 176.

After that had been done, what was required of the plaintiff? The case of ***Dua v Afriyie*** [1971] 1 GLR 260 at pages 262-263 explained the implication of section three as follows:

> *"The statute thus creates a rebuttable presumption in favour of a person who alleges that another is a money lender provided that he shows that that person lent money even on one occasion."*

On the facts of the instant case, when the first defendant established that the plaintiff had loaned money in consideration of being repaid a higher amount, the onus shifted to the plaintiff to show that the transaction was not money lending one. How was this to have been done? This was elaborated upon in the same case of ***Dua v Afriyie*** supra as follows at page 263:

> *"To escape the clutches of the Money Lenders Ordinance Cap 176, the appellant (the plaintiff in the instant case) must displace the statutory presumption by evidence. That evidence must be directed to showing that his business is not that of money lending or that he does not carry on or advertise himself or announce himself or hold himself out in any way as carrying on business as a money lender."*

Ground 3

The issue raised by the onus on the plaintiff was the main bases of the third ground of the appeal which reads as follows:

> *"the learned Justices of the Court of appeal just as the trial judge misdirected themselves as to the scope and meaning of section 29(c) of the Money Lenders Ac, 1941(Cap 176) and thereby misapplied the*

law when it held that the plaintiff/respondent is exempted by the said section 29(c).”

The method by which the Association will displace the onus on it is to place its case in one of the exceptions in Section 29 of Cap 176. The exceptions as set out in section 29 are as follows:

> *“Moneylender includes a person whose business is that of money lending or who carries on or advertises or announces or holds himself out in any way as carrying on that business, whether or not that person possesses or owns property or money derived from sources other than the lending of money or whether or not that person carries on the business as a principal or as an agent, but does not include*
>
> *(a) A society registered under the Co-operative Societies Act, 1968; or*
> *(b) A body corporate, incorporated or empowered by special Act to lend money in accordance with that Act; or*
> *(c) A person bona fide carrying on the business of banking or insurance or bona fide carrying on a business not having for its primary object the lending of money, in the course of which and for the purposes of which that person lends money; or*
> *(d) A person or body corporate exempted from the provisions of this Act by the Minister; or*
> *(e) A pawnbroker licensed under the Pawnbrokers Act, 1940, where the loan is made in accordance with the Pawnbrokers Act, 1940, and does not exceed the sum of thirty million cedis.”*

The plaintiff contended that it was exempted under section 29(c). Persons who qualify under section 29(c) include “any person … bona fide carrying on a business not having for its primary object the lending of money, in the course of which and

for the purpose of which that person lends money." Indeed, in the case of ***Yeboah v Bofour*** [1971] 2 GLR 199 at page 201, it was held that Cap 176

> *"is not intended to apply to every person who lends money at an interest to his relations or friends by way of financial assistance. It applies to only a person who really carries on the business of money lending as a business. Whether a person is carrying business as a money lender or not is a question of fact to be decided by the court upon the particular facts of the case."*

To decide whether or not the plaintiff is exempted under section 29(c), it is important to determine what the primary object of the plaintiff Association was. In determining that issue, a distinction should be drawn between the plaintiff as an Association and the members of the Association. The plaintiff is a distinct legal entity with a distinct legal existence. As legal entities, the members of the Association are different from the Association. This case concerns the Association. It was the Association which lent the money to the first defendant. It was the Association as the plaintiff which sued the defendants. The members have not given any money to the defendants. The members have not brought any action against the defendants. For the purpose of this case, the plaintiff is totally different from its members.

In deciding the issue of the core or main business of the plaintiff, the source from which the money is obtained to be loaned out should not be allowed to cause any confusion. A person lending money may take his own money to lend out or borrow money from a source like a bank to lend out. Where the money comes from is not relevant. It is the object of giving out the money which matters. That object determines whether it is money given out as a benevolent gesture, friendly assistance or money lent to make more money by way of profit from the interest earned on the money lent. The trial court and the Court of Appeal upheld the view of the plaintiff that the transaction was friendly assistance to members of the association. Friendly assistance can take many forms. What cannot be denied is that *"friendly assistance"* does not attract interest. Where the money given out as

"friendly assistance" attracts interest of 52 or 23 per cent, that transaction will cease to be *"friendly,"* let alone an *"assistance."*

The view that the transaction was a friendly assistance was not conceptually sustainable.

The question to be answered is this: What business does the Association, qua Association, do? Identifying the business will facilitate the decision to be taken on the "primary object" of the business of the Association.

The plaintiff seems to have based its case on what occurred in three English cases which both counsel for the plaintiff and counsel for the defendants referred to in their addresses. They were the cases of **Litchfield v Dreyfus** [1906] 1 KB 584, ***Kohnor Khoon v E. K. Lion Hin Ltd*** [1960] 1 All ER 440 and ***Premore Ltd v Shaw Brothers*** [1962] 2 All ER 583. In all these three cases, the lenders were engaged in their main or core businesses but they resorted to borrowing or lending as a sideline to promote the main business. In the last case of ***Premore Ltd v Shaw Brothers***, the plaintiffs were financiers of hire purchase. That was their core business. Lending and borrowing money was not their main business. In ***Koh Hor Khoon v E. K. Lion Ltd,*** the respondents were rubber merchants and shippers. That was their core business. Borrowing money and lending to members was not the core business as such. In ***Lietchfield v Dreyfus,*** the lenders were dealers in antiques and art works. That was their main or core business. Borrowing money and lending it was not their core or main business.

In the instant case before this court, there is no evidence that the Association was engaged in any other business apart from taking moneys from the bank and giving it out to its members. Counsel for the plaintiff exhibited a judgment of the Court of Appeal entitled ***Royal Beneficiaries Association v Mrs. Vivian Mensah*** and three others, Civil App No H1/239.2010 dated 13 May 2010. On facts quite similar to those in the instant case, that the Court of Appeal took the view (at page 11 of the judgment) that *"the appellant as an Association engages in no business of its*

own but its members do." That finding with respect could not be correct. How could an Association be formed and registered to do no business? What was it registered for? It must have been registered for a purpose? In this country, no association can be registered unless its objects and purposes have been declared on the registration forms. Those objects and purposes will spell out the business of the association. Unfortunately for the plaintiff, that case did not assist the stand it took in this case.

The facts in the instant case do not support the impression given by the plaintiff that the association had been registered to sell cloth as its core business but it resorted to borrowing as a sideline with the view to improving the capital base of their businesses so as to promote the core businesses of cloth selling. That is not what the Association was registered for. It was registered specifically to raise loans from banks and lend them to its members. That was what the president of the association told the trial High Court in her evidence. From the facts, it cannot be denied that the business of the Association, qua Association, was to raise loans and lend them out to its members. The core or main business of the Association was to raise money and lend it to its members. If further confirmation is required of this view, one may look at the position taken by the originators of the loan transaction, namely, the Ghana Commercial Bank.

In exhibit 5, the letter from the Ghana Commercial Bank to the Association granting the loan facility of three billion Cedis, it is stated as follows:

"Dear Madam,

FACILITY LETTER

We refer to your application dated March 22, 2004 and are pleased to advise that the bank has approved the following in favour of your Association.

FACILITY

Short-term loan of three billion Cedis

PURPOSE

For lending to members of the Association as working capital.

Etc, etc……. (Emphasis mine)"

What this exhibit demonstrates is that even the bank described the transaction as money for ***lending*** to the members of the Association. That was how the bank which was the originator of the money understood the use to which the amount would be put.

If taking money from the bank and giving it out with interest is not money lending, we cannot imagine what else will constitute money lending. Since the primary or core object of the business of the Association was to raise money and lend it, the Association was engaged in money lending. As it was rightly held in ***Yeboah v Bofour*** supra, whether or not a person is a money lender is a question of fact to be decided on the circumstances of each case. The logical conclusion one can come to on the peculiar facts of this particular case is that the plaintiff was a money lender.

In so far that the plaintiff's core in the business was that of money lending, it was not exempted under section 29(c) of Cap 176.

JUSTIFICATION FOR THE 52 PER CENT OR THE 23 PER CENT INTEREST

It has already been explained that the whole transaction raised 52 per cent interest. The bank interest was 29 per cent. Taking 29 from 52 would leave 23 per cent. If the 29 per cent was the bank interest, it meant that the plaintiff took 23 per cent from the transaction. The question that remains to be answered is what happened to that 52 per cent or the 23 per cent? The 52 per cent or the 23 per cent could not have covered administrative and legal expenses. The evidence showed that the first defendant paid nine hundred Ghana Cedis and three hundred Ghana Cedis for administrative and legal expenses respectively. These were paid for separately from the weekly installments of 9 million Cedis. There was no evidence that the president accounted for the 23 per cent to the members on any occasion. The only conclusion deducible from the facts as presented by the plaintiff and its president, the PW1, is that the 23 per cent went to the PW1 as profit on the transaction. It went to her

because the evidence showed that she was the one who run the affairs of the plaintiff association.

The PW1 in her evidence stated that there were other expenses like servicing the registration of the documents used as collateral for the loan from the Ghana Commercial Bank. She did not however place any money value on those expenses. Counsel for the plaintiff in his address also referred to the fact that the plaintiff had to incur other expenses. He too did not point out the monetary value of those expenses. To establish the justification for the interest, the onus was on the plaintiff to have led evidence to show what constituted the expenses incurred in administering the loan for the members for which the interest was required to be used to offset those expenses and how much they cost in terms of money. The PW1 was evasive in her answers on this issue.

If she had explained what those expenses were and how much they cost in terms of money, it would have been possible for the court to evaluate those expenses in relation to the interest she charged on the amount loaned. That would have allowed the appropriate decision to be taken as to whether the expenses were reasonable, fair and justifiable or excessive and harsh. Not having led any evidence on those expenses, it can only be presumed that the amount in the 52 per cent or the 23 per cent went to the plaintiff and its president.

The Association was a registered one. Exhibit D which is the certificate of incorporation showed on its face that the Association was registered as one *"limited by guarantee."* Under normal circumstances, an Association limited by guarantee does not make profit. Counsel for the plaintiff cited parts of the Companies Code at pages 263 and 264, paragraph 3, to show that a company limited by guarantee is sometimes allowed to make profit. But the proviso to the passage he cited showed that the profits are to be used *"for the payment in good faith of reasonable and proper remuneration to any officer of the society."* There is no evidence that part of

the 52 per cent or the 23 per cent was used to pay the officials of the association. In any case, that passage he relied on begins by emphasizing that:

> *"The income and property of a society whensoever derived shall be applied solely towards the promotion of the objects of the society as set forth in the immediately preceding regulation and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or profit to any person who is a member of the society or council."*

It has been found in this judgment that the 52 per cent or the 23 per cent went to the plaintiff and its president. The plaintiff did not say that the moneys in the 23 per cent were used to pay the officers of the association. The reference to the Companies Code did not assist the plaintiff's case.

Application of Cap 176 and Cap 175

The position with regard to the charging of such interest on money lending transactions was originally regulated by Cap 176, s 13(1) (c), which stated that:

> *"13. (1) Where, in any proceedings in respect of any money lent by a money lender or by any person other than a money lender after the commencement of this Ordinance, or in respect of any agreement or security made or taken after the commencement of this Ordinance in respect of money lent either before or after the commencement of this Ordinance, it is found that -*
>
> *…(c) on an unsecured loan the interest exceeds the rate of 30 per cent per annum or the corresponding rate in respect of other period, the court, notwithstanding any native law or custom to the contrary, shall, unless the contrary is proved, presume for the purposes of the Loan Recovery Ordinance, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be*

without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding the rates mentioned in this section, is excessive."

These provisions have been repeated in the new Moneylenders Act, 1941 (Cap 176), s 11.

The loan of GH¢30,000.00 (or ¢300million in the old currency) given to the first defendant was unsecured in that there was no collateral or security for it. On the basis that the plaintiff charged 52 per cent which exceeded the 30 per cent referred to in section 13(1) (c) just quoted, the interest levied by the plaintiff was excessive, "harsh and unconscionable." As the last clause of section 13(1) indicates, even if the 23 per cent does not exceed the rate of thirty per cent, it was still excessive when one considers that the Ghana Commercial Bank which gave out the initial loan bank charged 29 per cent.

The plaintiff did not provide the justification for the 52 per cent or the 23 per cent interest. Since either of them was excessive, it was harsh and unconscionable.

LEGALITY OR ILLEGALITY OF THE TRANSACTION

Cap 176, s 4 requires that any person who carries on the business of money lending should possess a money lender's license. There is no doubt that the plaintiff had no money lender's license. Counsel for the defendants contended that since the plaintiff had no money lender's license, the transaction was illegal. In his view, the courts are not set up to enforce illegal contracts and therefore the transaction should not be enforced. The legality or otherwise of the transaction raises serious issues which need to be addressed.

In the law of contract, agreements or contracts are described as illegal, void, null, enforceable, unenforceable, voidable, etc, and by the use of various appellations. Each word carries its own meaning and connotation. It appears that counsel for the

defendants has not used the descriptions of the "contract" or the "transaction" in the instant case with much precision.

Osborn's Concise Law Dictionary, 8th edition, at page 169 defines illegal contract as:

> *"A contract that is prohibited by statute (e.g. one between traders for minimum resale prices) or at common law as being contrary to public policy (such as agreements in restraint of marriage). It is void and neither party can recover money paid under it."*

Black's Law Dictionary, 7th edition, at page 322 also defines illegal contract as

> *"A promise that is prohibited because the performance, formation, or object of the agreement is against the law. Technically speaking, an illegal contract is not a contract at all, so the phrase is a misnomer."*

An illegal contract is one which is null and void; it is of no effect whatsoever and is clearly unenforceable. It affects both parties to the contract and none of them can enforce it. A typical instance of an illegal contract is agreement by drug dealers to trade in drugs. Another instance of such transaction was in ***Addy v Irani Brothers***[1991] 2 GLR 30 where the plaintiff sued for money illegally acquired by selling goods above the legally controlled price and for foreign money acquired through changing money at "black market." The subject matters in that case, like drugs, were illegal and were therefore irrecoverable through the courts. None of the parties can sue on any such agreement or contract because the law does not protect even parties found to be innocent but who can at the same time be described as being *in pari delicto*. It is a contract which literally does not exist and it is in that sense it is said to be a misnomer to describe such a transaction as a contract or agreement.

A contract or agreement which is against the provisions of a statute is not necessarily illegal. In ***Olatiboye* v *Captan*** [1968] GLR 146 where the argument was canvassed that a transaction was illegal because it violated the provisions of the Diamond Mining Industry Protection Ordinance, Cap 152 (1951 Rev.), s 3(1) in that

the plaintiff had no license as required by that statute, Amissah JA drew the distinction between the two types of contracts as follows:

> *"(1) it is not every infringement of a statutory provision that makes a contract illegal and therefore unenforceable. Where the act contemplated by the contract was prohibited by statute but was subject to a penalty which was merely for the benefit of the revenue, the contract could be enforced. Where the provisions of a statute indicated the intention of the legislature to prohibit the contract itself, then even though the penalty imposed for a breach incidentally benefitted the revenue, the contract would nevertheless be illegal and unenforceable."*

Lending money is a social phenomenon. No legislature can legislate to prohibit it. If it does, it will be an exercise in futility because people cannot be stopped from borrowing money and lending it when needs arise. Even the Bible endorsed borrowing and lending in the Old Testament as will be found in Exodus 22: 25 which reads:

> *"If you lend money to any of my people who are poor, do not act like a money lender and require him to pay interest."*

Similar endorsement of borrowing and lending will also be found in the New Testament in Luke 6: 34-35 which reads:

> *"Love your enemies and do good to them. Lend and expect nothing back. You will then have a great reward and will be the children of the Most High God."*

It was not the intendment of the legislature when it passed Caps 176 and 175 to prohibit lending and borrowing. Money lending and borrowing were not proscribed or prohibited by Cap 176 or Cap 175. All that the legislature did by the two statutes was to regulate the methods of lending and borrowing by getting lenders to acquire licenses which place some obligations on them for the protection of borrowers. That was what section 5 of Cap 176 which regulated lending money without license was intended for.

A contract may be in violation of a statute and yet it may be enforceable. Such a contract can be described as voidable. It is not void but may be enforced on the satisfaction of certain conditions. Analogy may be drawn from the Limitations Act, 1972 (NRCD 54). Sections 2, 3, 4, 5, and 6 of the Act begin by stating categorically that *"a person shall not bring an action after the expiration of ….certain periods…etc."* Yet, if an action is brought in violation of that statute, that action does not become unenforceable. If the action is outside the statutory time limits and therefore in violation of the statute but the defendant does not plead limitation, the contract will be enforced: see ***Bassil v Kabbara*** [1966] GLR 102, SC. In fact, the rule is that the court has to enforce the contract even if it is in violation of the statute but limitation is not pleaded and this is so where the court is fully aware that the action is statute barred. The court is not allowed suo motu to apply limitation to dismiss the plaintiff's action. A direct authority on this is ***Dolphyne (No 3) v Speedline Stevedoring Co Ltd***.[1996-97] SCGLR 514, SC.

In effect, contracts on money lending may be illegal which will imply that they are null, void and unenforceable ab initio in their formation, performance or enforcement. They may, on the other hand, be voidable and enforceable on the satisfaction of certain conditions and payment of certain penalties.

Where a contract is in violation of a statute, that statute invariably sets out the exact status of such a contract. If the statute prohibits or proscribes the contract in its formation, performance or enforcement, it so provides in no uncertain terms. If the statute does not prohibit it but allows it to be enforced on the satisfaction of certain conditions or the payment of certain penalties, it provides that in the statute itself. The money lending transaction which is the subject matter of the instant appeal is regulated by Cap 175 and Cap 176. Section 5(c) and (2) of the old Cap 176 in the 1951 Revised Laws of the Gold Coast has been replaced with section 3 of the Money Lenders Act, Cap 176, to be found in the green coloured revised Statutory Laws of Ghana, 2006. Both the old section 5(c) and (2) and the new section 3 make it an

offence to lend money without license. They go further to prescribe sanctions for such dealings which constitute the offence.

The old Cap 176, s 5 read as follows:

> "5. If any person –
>
> (a) Takes out a moneylender's license in any name other than his true name; or
> (b) Carries on business as a moneylender without being in possession of a valid moneylender's license authorizing him so to do; or
> (c) being licensed as a money lender, carries on business as such in any name other than his authorized name, or at any other place than his authorized address o addresses; or
> (d) Enters into any agreement in the course of his business as a moneylender with respect to the advance or repayment of money or takes any security for money in the course of his business as a moneylender, otherwise than his authorized name;
>
> He shall be for each offence be liable on summary conviction –
>
> (1) If other than a body corporate, to a fine not exceeding one hundred pounds and in the event of a second or subsequent conviction to imprisonment for three months or a fine of one hundred pounds or both; and
> (2) In the case of a body corporate, to a fine of one hundred pounds and in the event of a second or subsequent conviction to a fine of five hundred pounds:
>
> Provided that no prosecution shall be instituted under paragraph (b) without the consent of a Law Officer."

In the new Moneylenders Act, 1941 (Cap 176), s 2 makes it mandatory for every moneylender to obtain a moneylender's license before operating. Section 3 which replaced section 5 of the old Cap 176 states that:

> "3. **Penalty for breaches of section** 2

(1) A person commits an offence if that person

(a) takes out a moneylender's license in a name other than the true name of that person, or

(b) carries on business as a moneylender without being in possession of a valid moneylender's license authorizing that person to do so, or

(c) being licensed as a moneylender, carries on business as a moneylender in name other than the authorized name, or at any other place than the authorized address, or

(d) enters into an agreement in the course of business as a moneylender with respect to the advance or repayment of money or takes a security for money in the course of business as a moneylender, otherwise than in the authorized name.

(2) A person convicted of an offence under subsection (I) is liable on summary conviction,

(a) In the case of a person, other than a body corporate, to a fine not exceeding two hundred penalty units, and in the event of a second or subsequent conviction to a term of imprisonment for six months or to a fine of two hundred penalty units or to both the fine and the imprisonment;

(b) In the case of a body corporate, to a fine of two hundred penalty units and in the event of a second or subsequent conviction to a fine of one thousand penalty units.

A prosecution shall not be instituted under paragraph (b) without the consent of the Attorney-General."

No where in section 5 of the old Cap 176 or section 3 of the new Cap 176 are the words "illegal," "void" or "unenforceable" used to describe any money lending transaction which is carried out without the lender being in possession of a valid money lender's license. Other sections dealing with criminal offences and criminal

sanctions are sections 25 and 26. Section 26 of the old Cap 176 renders void and unenforceable the taking of a security or promissory note in respect of money lending transaction which leaves the amount blank or does not truly state the amount. Such a transaction is fraudulent. Fraud vitiates everything. The transaction should therefore be void and unenforceable. It was for these principles that ***Dapaa v Wae*** [1966] GLR 1, SC held that a transaction which breached section 26 of the old Cap 176 was void and unenforceable. On the basis of those principles and in the face of the express provisions of section 26, that decision cannot be faulted.

The instant case does not concern security or promissory note. The loan transaction with the first defendant was unsecured. No security issue was therefore raised. The instant appeal which concerns lending money without license is regulated by section 5 quoted above which does not render the transaction void or unenforceable.

The same Cap 176, s 13 refers to Cap 175 for remedies. By section 13 of Cap 176 and section 3 of Cap 175, the remedies are that the transaction should be re-opened. Re-opening has been considered below in this judgment. The fact that the sections provide remedies clearly shows that the intendment of the Legislature in Caps 175 and 176 was not to render the money lending transaction illegal or void. If it were illegal, as explained already, the transaction would cease to exist. A non-existing contract cannot be re-opened. Therefore, if it were illegal, there would have been no basis for the provision that the transaction should be re-opened.

The contention of counsel for the defendants that the transaction was illegal because it infringed the provisions of Cap 176 is untenable and is dismissed.

LENDING TO MEMBERS ONLY

One of the points canvassed in favour of the plaintiff was that the Association lent the moneys to only members and to the extent that non members were disqualified, the plaintiff could not properly be described as a money lender. This argument was based on decisions in the British case of ***Litchfield v Dreyfus,*** supra, that to qualify as the business of money lending, the lender should be in a position to lend to all

and sundry and not to limited members. The principles to be applied to a situation like that which arose in the instant case were enunciated by Azu Crabbe JSC (as he then was) in ***Yeboah v Bofour*** supra. After referring to the English Money Lenders Act of 1900 and provisions equivalent to the provisions of Cap 176, he concluded at page 208 that:

> "There must be a business of money lending, and the word "business" imports the notion of system, repetition and continuity….If it appears that the transactions are sufficiently numerous to require the inference that a system and business of money-lending is carried on, then the requirement of s 6 of the 1900 Act are fulfilled and the question arises whether the case falls within the exceptions indicated in that section.."

In the instant case, the defendants were able to establish that the president of the plaintiff was engaged in different money lending transactions with different company names. The Registrar of the Circuit Court who was called as the witness of the defendants told the trial court that the plaintiff had as many as 97 cases in one court in which the president, Joan Ewuraba Ocran, had sued debtors in the names of three companies, namely, Ahenfie Cloth Sellers Association, Royal Beneficiaries Association and Maye Kom Association. It is true that the instant case concerns only Ahenfie Cloth Sellers Association: Yet the facts of being engaged in different companies involving several debtors could not just be ignored by the court. The evidence showed a pattern or system. The system was that the associations had been set up to source for loans: When the loans were obtained, they were lent to members. It was not just one isolated transaction. They were many, as the court cases in exhibits 6, 7 and 8 indicated. The plaintiff had set up those companies to make money from the loans granted to borrowers by the interest charged. That system is further evidence that the plaintiff was engaged in money lending transactions but in different names. For as long as she borrowed money to lend to people with interest, she was engaged in money lending transactions with the aid of the companies she set up, of which the instant case before this court is one.

On the facts, to loan money and charge interest as much as 52 per cent was clearly excessive and harsh. The trial judge and the Court of Appeal erred in holding that the interest was not excessive or harsh. If the two courts below had analyzed the facts on the record more carefully, they would have come to the conclusion that it was harsh and excessive to loan money at an interest of 52 per cent or even at 23 per cent.

What this conclusion amounts to is that the plaintiff did not succeed in establishing that her case fell within the provisions of the exceptions in that section 29 of Cap 176.

The conclusion of the Court of Appeal on the issue of the reasonableness of the interest was wrong and cannot be accepted.

Grounds one, two and three of the grounds of appeal succeed and are upheld.

Concurrent findings of fact

This court is not unmindful of the principle that where lower courts have made two concurrent findings of fact, the subsequent court on appeal has to tread cautiously in disturbing those findings. At the same time, the well established rule is that an appeal is a re-hearing and where the findings of the lower courts are not supported by the evidence, the appellate court should be in a position to make the appropriate conclusions from the facts and evidence on the record. In the instant case, however, the core or main business of the Association being one of taking loans and lending them out, the two lower courts should have considered the purpose for which the Association was set up in relation to its core business before concluding that it was not engaged in money lending and so was exempted by section 29(c) of Cap 176. ***Hodgson v the Republic*** [2009] SCGLR 642 (holding 6) provides an instance where this court has recently departed from the findings of lower courts.

Ground four of the grounds of appeal read as follows:

"The learned justices of the Court of Appeal erred in law when they concluded that the business of the individuals is the business of the plaintiff though the plaintiff is a company incorporated under the Companies Act, 1963 (Act 179)."

This is not a ground over which much time should be spent because counsel for the plaintiff admitted that the business of the Association was different from the business of the members. No such assumption or finding was made by the Court of Appeal. The facts show that the plaintiff was an Association registered to source for loans and lend them out to its members. Borrowing moneys and lending them out to members were its business. The members were cloth sellers. In other words, cloth selling was the business of the members. The two businesses were not the same. The business of the individual members could not be the same as the business of the Association.

There is no merit in that ground of appeal and same is dismissed.

CONSENT BY THE BORROWER TO ENTER INTO THE TRANSACTION

Again, even if it were argued that the defendants knew of the harsh and excessive terms and yet they consented to them by entering into agreement with the plaintiff, Cap 176, s 13 (3) and Cap 175, 3(1) allow the agreement to be enforced, *"whichever form it may be"* so long as it is a money lending transaction. In ***Mills Investments Ltd* v *Leslie*** [1931] All ER Rep 442 which was based on the British Money Lenders Act, 1927, (c. 21), s 10, the terms of which were similar to those in Cap 176, s 13(1), it was held that even where a party consented to judgment, that consent did not relieve the duty of the courts to enforce the presumption arising out of the loan transaction.

RE-OPENING OF THE TRANSACTION

Where the transaction is found to be excessive, harsh and unconscionable, it is regulated by the Loans Recovery Ordinance, Cap 175, s 3 which provides that:

"3(1) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Ordinance, or the enforcement of any agreement or security made or taken after the commencement of this Ordinance, in respect of money lent either before or after the commencement of this Ordinance, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amount charged for expenses, enquiries, fines, bonus, premium, renewals, or any other charges, are excessive and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the lender and person sued, and may, notwithstanding any statement or settlement of the account or any agreement purporting to close previous dealings and create a new obligation, re-open 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 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 on account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of the money lent by the lender, and if the lender parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a lender shall have and may, at the instance of the borrower or surety 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 the power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Ordinance by the borrower or surety, or other person liable, notwithstanding that the time for

repayment of the loan, or any installments thereof, may not have arrived.

(3) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money lending."

In simple straight forward language, all that these provisions state, in so far that they apply to the instant case, is that in any action involving money lending, if the court finds that the interest charged on the amount lent is harsh and excessive and therefore unconscionable, the court may order the transaction to be re-opened. The provision has been re-stated in the new Loans Recovery Act, 1918 (Cap 175) which will be found in the revised Laws of Ghana, 2006. That Act begins by the provision that:

"1. (1) the court may re-open a transaction where the transaction is harsh and unconscionable or is otherwise in respect of which a court of equity would give relief."

In re-opening the transaction, the court is empowered under the old Cap 175, s 3(1) to consider all the charges levied by the lender as well as other expenses incidental to the loan given to the borrower. The new Cap 175, s 1(2) (a) and (b) provide that in re-opening the transaction, the court may take into account a statement or settlement of the account or agreement purporting to close previous dealings and opening a new obligation. Other factors which the court should take into account are the necessities of the borrower, her pecuniary position, the presence or absence of security, the relationship in which the lender stood to the borrower and the total remuneration derived by the lender from the whole transaction.

At the same time, it should consider the fact that the first defendant benefitted from the transaction. As a court of equity, she should not be allowed to take the money, make use of it and shirk her responsibility to pay what is due from her, considering,

as she knows too well, that the initial loan was taken from the Ghana Commercial Bank to which refund should be made with interest of 29 per cent.

Considering all the circumstances of the case, we think that interest of eleven per cent over and above the 29 per cent would be fair, i.e. the total interest on the GH¢300,000.00 should be forty per cent which the first defendant should pay, effective from the day the loan was granted to her. That should cover the 29 per cent from the bank and possible expenses that would be incurred in order to administer the loan. This conclusion implies that the parties open their accounts and work out how much had been paid by the time the first defendant stopped the payment, and credit her with those payments.

For the avoidance of doubt, the interest should continue to run till the day of final of payment by the first defendant.

RE-OPENING AT THE INSTANCE OF THE BORROWER

The fact that it was the defendants who in their counterclaim applied for the transaction to be re-opened did not make any difference. In ***Ayiwah v Badu*** [1963] 1 GLR 86, SC, it was held (in holding 3) that:

> *" A borrower's right to sue and maintain a claim for the re-opening of a loan transaction on the ground that it is harsh and unconscionable and for accounts is set out in the Loans Recovery Ordinance, s 3(1) in unambiguous terms?"*

For the avoidance of doubt, Cap 175, s 3(3) provides that:

> *"3(1) the foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially on one money-lending."*

Cap 176, s 13(3) also emphasizes the efficacy of this provision by stating that:

> *"13(3) the powers of a court under the said subsection 3 of section one of the Loans Recovery Ordinance may be exercised notwithstanding that the money lender's right of action for the recovery of the money lent is barred."*

These two provisions underline the fact that even if the transactions were to be considered as violations of Cap 176, they were still enforceable to the extent that the courts are empowered to re-open them. ***Yeboa v Bofour*** supra held (in holding 5) that money lending transaction by a lender without a valid license is void under Cap 176, s 5(a) and (d). Section 5 has already been quoted in full above. With respect, the provisions in section 5 do not state or even imply that any transaction for lending money without a valid license is void. They merely create offences and prescribe the consequences for those who commit those offences. The consequences are the payment of fines or imprisonment. Holding 5 of that decision cannot be correct.

Ground 5 of the grounds of appeal stated that:

> *"The court erred in making order in favour of the plaintiff/respondent in the face of clear evidence that the plaintiff/respondent was carrying on business for profit in breach of the provisions of the Companies Code, 1963 (Act 179)."*

The orders made herein justify this last ground of appeal. That ground succeeds and is upheld.

From the foregoing, the appeal fails in part on ground four and succeeds in part on grounds one, two, three and five.

In the result, judgment is entered in favour of, or against, the plaintiff and the defendants in the terms set out in this judgment.

It has to be re-iterated that the instant appeal has been decided on its own facts and that is why the interest was set at that rate. It should not be taken as setting

interest rates for other money lending transactions involving the plaintiff and any other person or body. Each case has to be decided on its own facts and circumstances.

In the proceedings of this case, attention has been drawn to the fact that there are numerous cases pending in the courts involving similar money lending transactions. Although each case still remains to be decided on its own facts, it is considered desirable to set out the general guides which may assist in the determination of similar cases. The rules established over the years and deducible from decided cases are these:

1. In money lending transactions, the borrower assumes the initial onus to establish that the lender has lent money at an interest.
2. When it is established that a person has lent money at an interest even on one occasion, the transaction is presumed to be money lending one under the Money Lenders Ordinance, Cap 176.

3. Once that presumption has been raised, the onus shifts to the lender to prove that the transaction is not money lending one.

4. Cap 176 applies to a person whose business it is to lend money. It does not apply to a person who helps friends or relations with money lent to them.
5. Whether or not any transaction will mount to money lending one will depend on the facts and circumstances of the case. Each case has to be considered on its own facts and circumstances.

6. For the lender to prove that she is not a money lender, she has to lead evidence which places her transaction under one of the exceptions raised in the Money lender's Ordinance, Cap 176, s 29.

7. The established rule is that the onus on the lender is one of the rare occasions where a party will be required to prove the negative, ie to prove that she is not a money lender.

8. If the lender is able to prove that she is not a money lender, her case will be upheld and the defendant ordered to pay whatever she owes to the plaintiff.

9. If she is not able to prove that, the transaction may have to be considered to the extent that it is reasonable or harsh and excessive and conscionable or unconscionable, based on its terms and conditions.

10. If it is found to be unconscionable, the court is empowered to re-open the transaction under Cap 176, s 13 and the Loans Recovery Ordinance, Cap 175, s 3.

11. In re-opening the transaction, the governing principle is that the fact that a person lends money without being in possession of a money lending license amounts to a breach of the statutes on money lending, ie Cap 176 and Cap 175. The transaction is enforceable within the terms of the statute which had been breached. That fact does not render the money lending transaction illegal.

12. After the transaction has been re-opened, the terms and conditions imposed by the court will depend on the terms and conditions of each particular case. Each case has to be decided on its own facts and circumstances.

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