

EQUITY AND THE MONEY LENDERS ACT BY MR. M. MUNTAZ ALI
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In **Shakespeare's Hamlet, Polonius** advised his son "**neither a borrower nor a lender be, for loan oft loses both itself and friend**". It seems that the framers of the **Money Lenders Act** of Guyana Cap. 91:05 have so drafted the law that indeed the possibility of loan and friend being lost becomes very real.

Our present **Money Lenders Act** was passed in the year 1957 and is based substantially on the English Money Lenders Act 1900 and 1927. These Acts were intended to protect borrowers from unscrupulous lenders. Prior to these Acts there were the Usury Acts. According to medieval ideas, the taking of usury involved the sin of avarice. When medieval conceptions began gradually to give way before the impulse of commercial activity, it was said that the sin of avarice turned into the offence of usury. Many legal systems frowned upon money lending and in Islamic jurisprudence, interest is absolutely prohibited.

Under the Guyana Act there are several requirements for the lender to comply with, such as taking out a licence, using his authorised name, procuring a note or memorandum of the contract signed personally by the borrower, keeping a book in which is entered a contemporaneous record of the transaction, limiting the rate of interest, prohibiting compound interest, supplying of information as to the state of the loan and copies of documents relating thereto, etc. Non

compliance with these requirements often involves penalties including imprisonment, fines, forfeitures, costs and expenses incurred under the Act. But the story does not end here. In addition to the above, there is a specific provision whereby no action shall be brought by the lender for the recovery of any sum of money lent where a higher rate of interest is charged in contravention of the provisions of the Act. In another section the contract shall be void unless the note or memorandum is made or signed personally by the borrower.

Thus can be seen that failure by a moneylender to comply with the Act, even innocently, may result in the lender losing his whole capital. To comply with all the requirements of the Act requires an extremely high degree of care and expertise. It is not surprising that many organizations which engage in money lending are exempted from the Act such as Barclays Overseas Development Corporation Limited, the Commonwealth Development Finance Company Limited, Commercial Banks, and some others. One ventures to think that were they subject to the **Money Lenders Act, Polonius'** advice of losing both loan and friend would certainly be true even in this age.

The penalties prescribed in the Act are very severe. If a lender loans \$10,000.00 at a rate of even 1% above the rate of interest permitted by the Act, it means the lender would not only lose the interest charged but his whole capital of \$10,000.00. Could this be justified in this period of modern commercial activities? It is well known that equitable principles have a

distinctive ethical quality. Equity will ordinarily come to the assistance of a party where it is reasonable and just to do so.

In **Lodge v National Union Investment Ltd.**, (1906) the plaintiff borrowed money from the defendant in transactions which were in breach of the Moneylenders Act 1900 and were consequently void for illegality. The plaintiff sought, *inter alia*, an equitable order for the delivery up of certain documents comprising assignments and bills of exchange which were received by the defendant as security for the advance of the loans. In these circumstances the question arose whether the principles should be applied as often referred to in the maxim "**he who seeks equity must do equity**". It is clear that the plaintiff did not satisfy the requisites for obtaining equitable relief. **Justice Parker**, an eminent equity Judge, held that the plaintiff was entitled to the relief sought only if he had made an appropriate repayment of the sum advanced to him.

After withstanding the test of time for 50 years it fell to the lot of the Privy Council in the case of **Kasumu v Baba-Egbe** (1956) 3 AER 266 to decide a similar question. Here a money lending transaction had been entered in breach of the legislative provision which provided that failure to comply with the material requirements, a money lender shall not be entitled to enforce any claim in respect of the transaction. The plaintiff sought an equitable order for the cancellation of a mortgage, together with the delivery of certain deeds received as security for the repayment of the loan. **Lord Radcliffe** delivering the

decision of the Board, did not follow **Lodge's** case and granted the equitable reliefs sought. In the course of his judgment he said if the courts impose upon themselves the obligation of protecting the lender while the Act protects the borrower they may find themselves in the difficulty that they are in effect reversing the Act of Parliament in their endeavour to achieve a truly equitable solution.

In the year 1966, in the **United Dominions Corporation (Jamaica) Ltd. v Shoucair**, 12 WIR 510, the Court of Appeal of Jamaica was invited to decide a similar question. Here the equitable reliefs sought were almost identical to those in the **Kasumu** case. The Court of Appeal (**President Duffus** dissenting) followed the **Kasumu's** decision and held that the contract was unenforceable for want of compliance with the Moneylenders Act and the borrower was entitled to the equitable relief sought. This matter was taken to the Privy Council. Fortunately for the lender (the loan was £55,000.00) the Privy Council held that the transaction did not contravene the Moneylenders Act and was enforceable. The dissenting judgment of **President Duffus** was upheld and the decision of the Court of Appeal of Jamaica was set aside.

It is very significant that the **Kamusu** decision was delivered just one year before the local **Money Lenders Act** was passed. One wonders whether the legislature was aware of this decision. It appears that this decision is not in accordance with the well established principles of equity. Should a borrower be

permitted to gain such a great advantage at the expense of the lender who fails to comply with the provisions of the Act?

Could this decision be reconciled with the equitable maxims "**he who seeks equity must do equity**" and "**he who seeks equity must come with clean hands**"? Would equity assist in enriching a recalcitrant and unscrupulous borrower? With all due respect to **Lord Radcliffe**, it seems that he placed too great a reliance upon the Act of Parliament to the sacrifice of equitable principles.

I am not aware of any similar case which was decided by the Guyana Court of Appeal. Should this Court be confronted with such a case it is hoped that it will remember the dictum of **Chancellor Crane** in **Glen v Sampson** (1972) 19 WIR 237

"It seems to me there is no alternative in our present situation but for us to overrule former judgments of the British Caribbean Court of Appeal, and refuse to follow even those of the Privy Council, if they conflict with later decision of our Court of Appeal. There being no higher authority to look up to, we cannot permit matters to remain at large and conflicting and competing precedents to militate against certainty and development in the law".

In **Seepersaud v Port Maurant Ltd** (1972) 19 WIR 393, **Chancellor Luckhoo** similarly opined

'I am conscious that there was an error in Abhiraj's case. It is my view that this Court must not allow itself to perpetuate an error of which it has become aware and convinced, and is in a position to rectify subsequently.'

CONCLUSION

Should the Guyana Court of Appeal be persuaded by the reasons of the Privy Council in the **Kasumu** case? It is respectfully submitted that the law should be amended to avoid so oppressive a penalty being inflicted on the lender. Perhaps it may even be better to have the whole Act repealed, which must now be considered archaic, and replaced with some legislation like the English Consumer Credit Act, which reflects the modern trends in economic activities.

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