JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 125/2000

BEFORE:	**THE HON. MR. JUSTICE DOWNER, J.A.** **THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MR. JUSTICE WALKER, J.A.**	
BETWEEN:	**CORNERSTONE INVESTMENTS & FINANCE COMPANY LTD.**	**APPELLANT/ DEFENDANT**
AND	**IMORETTE PALMER**	**FIRST RESPONDENT/ PLAINTIFF**
AND	**MARCIA SUSAN GALLIMORE**	**SECOND RESPONDENT/ PLAINTIFF**

Hilary Phillips, Q.C. Denise Kitson and Gordon Brown instructed by Grant Stewart Phillips and Co. for the Appellant.

Donald Scharschmidt, Q.C. and John Graham instructed by John Graham and Co. for the Respondents.

November 29-30, 2001, February 28, 2002, April 1-4, 2003, September 30, 2003, October 1-2, 13-17, 23-24 28-30,2003 and July 29, 2005

DOWNER, J.A. (Dissenting)

INTRODUCTION

Imorette Palmer and Marcia Gallimore the Respondents, in this appeal are the registered owners along with Margaret Salter of a property, in Retreat and Norbrook in the parish of St. Andrew. On the face of the title, the property was

mortgaged for US$250,000 on November 19, 1997 to Cornerstone Investments and Finance Company Ltd, the Appellant. The Respondents were sureties for a loan stated to be US$250,000, to Kenroy Salter from the Appellant. The Respondents guaranteed "the loan" and executed a mortgage on the Norbrook Property as security. It should be stated that the Respondents are the mother-in-law and sister-in-law of the borrower, Kenroy Salter.

Kenroy Salter has stated in his affidavit that he borrowed US$90,000 from the Appellant and it was proved by the Appellant that he guaranteed a loan of US$160,000 from the Appellant to Desmond Rankine. There is evidence from the Appellant suggesting that Salter's guarantee was for the debt owed by companies dominated by Rankine. It ought to have been easy for the Appellant to adduce the documents showing Rankine's default to the Appellant and that Salter was informed of this. Although this was specifically requested by the Court the documents were not produced. They may have an important bearing on the case. There was no evidence to suggest that the Respondents knew of the Rankine obligations. Salter stated on page 4 of the Record :

> "2. That on or about October, 1997, I applied for a loan from the defendant company. The loan was for **US$90,000.00** however, it was agreed between the defendant and I that to the extent that I may require further loan advances in the future the loan documentation would be prepared to reflect a loan of **US$250,000.00** so that if and when those further advances were to be made the disbursement would be expedited as it would not be necessary of (sic) any further documentation to be executed."

Here is the second Respondent's affidavit at page 34 of the Record on the issue:

> "3. I have read the Affidavit of **KENROY SALTER** filed herein and confirm that Kenroy Salter requested that my mother the first Plaintiff, my sister MARGARET SALTER and I provide collateral for a loan which he had sought from the Defendant for US$90,000.00. We agreed and in pursuance of the agreement we agreed to grant to the Defendant a first legal mortgage over the property aforesaid and to execute a guarantee in favour of the Defendant.
>
> 4. That by an instrument of Mortgage executed on the day of 1997, (sic) I along with Imorette Palmer, my mother and Margaret Salter, my sister executed a mortgage and a guarantee over the property aforesaid in favour of the defendant for a loan which was to be granted to Kenroy Salter. Both the mortgage and the guarantee showed that the principal sum loaned was **US$250,000.00.**
>
> 5. The defendant did not in fact loan the sum of **US$250,000.00** to the principal debtor as set out in the agreement but the sum of **JA$3,300,000.00** being the agreed Jamaican dollar equivalent of **US$90,000.00."**

The incident which gave rise to these proceedings was stated by Kenroy Salter. His affidavit evidence was that on 28th August 1998 the Appellant sent out a Statutory Notice to sell the property in issue. Mr. Gordon Brown, the Attorney-at-law, for the Appellant confirms this. He has stated that the Rankine obligations fell into arrears and that the Appellant took steps to realize its security interest in the collateral provided by the Respondents and Mr. Salter as security for the loan. It was in these circumstances that the Respondents instituted proceedings in the Supreme Court by Originating Summons before

Reid, J. The details of the Summons were as follows at page 59 of the Record:

> "**A Declaration that:**
>
> i) The loan agreement dated **19th November, 1997** between the defendant and Kenroy Salter is void and unenforceable as being in breach of section 8 of the Moneylending Act.
>
> ii) That the Guarantee and the Mortgage executed by the plaintiffs as collateral security for the loan are void and unenforceable in that the documents failed to comply with the provisions of the Moneylending Act and in particular section 8 thereof.
>
> iii) Alternatively that the interest charged in respect of the sum "actually" lent is excessive and that the transaction is harsh and unconscionable and for an order that the transaction b/e (sic) re-opened and that an account be taken between the parties.
>
> **An order that:**
>
> a) The said mortgage over premises known as Townhouse # 12 Airdre Mews which premises is and registered at Volume 1207 Folio 678 and guarantee signed by the defendants in favour of the plaintiff be cancelled and delivered up to the plaintiffs.
>
> b) The duplicate Certificate of Title in respect of premises registered at Volume 1207 Folio 678 of the Registered Book of Titles be delivered to the registered proprietors thereof."

The order below reads as follows at page 85 of the Record:

> "1. The loan agreement dated 19th November, 1997 between the Defendant and Kenroy Salter is void and unenforceable as being in breach of section 8 of the Moneylending Act.

2. The Guarantee and the Mortgage executed by the Plaintiffs as collateral security for the loan are void and unenforceable in that the documents failed to comply with the provisions of the Moneylending Act and in particular section 8 thereof.

3. The said mortgage over premises known as Townhouse # 12 Airdrie Mews which premises is registered at Volume 1207 Folio 678 of the Register Book of Titles and guarantee signed by the defendants in favour of the Plaintiff be cancelled and delivered up to the Plaintiffs.

4. The duplicate Certificate of Title in respect of premises registered at Volume 1207 Folio 678 of the Register Book of Titles be delivered to the registered proprietors thereof.

5. Costs to the Plaintiffs to be agreed or taxed."

The Respondents are contending, that the order of Reid J. ought to be affirmed. There was no cross-examination in the court below, but the necessary findings were made on the basis of documentary evidence in the court below and in this court.

Regrettably the learned judge gave no reasons for his decision. It is a surprising omission from an experienced judge. Reasoned decisions are an essential judicial function. Litigants expect it so as to determine if there ought to be a further appeal. This court as a court of review expects it so that appeals can be properly conducted. Also Judges are required to make a contribution to the development of the common law by their analysis of evidence, their

evaluation of authorities, their construction of documents, statutes and the Constitution.

Despite the absence of reasons it is clear that the learned judge below considered these issues before making his Order. Firstly, he must have decided that the transaction between Salter and the Appellant was within the intendment of the Moneylending Act (the "Act") as the rate of interest stated as 22% per annum in substance exceeded that prescribed by the Minister. Secondly, he must have reasoned that the Loan Agreement, the guarantee and the mortgage were in contravention of section 8 of the Act. Thirdly, to order that the guarantee and mortgage be cancelled and that the duplicate certificate of title be returned to the Respondent means that the learned judge must have taken into account the provisions of sections 2 and 3 of the Act as well as the equity jurisdiction to set aside the aforesaid guarantee and mortgage.

(i) Was the transaction between Salter and the Appellant moneylender exempt from the provisions of the Act?

It should be stated at the outset that it is common ground that the learned judge below decided this case without the 1997 amendment to the Act. This issue of exemption from the Act was argued initially on a preliminary point of law and then on the merits of the case. Section 13(1)(i) of the Act reads:

> "13.-(1) This Act shall not apply to-
>
> (i) any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order *prescribe"

The Moneylending (Prescribed Rates of Interest) Order 1997 Jamaica Gazette Supplement dated August 27 sets out the prescribed rates.

It reads:

> "In exercise of the power conferred upon the Minister by sections 3 and 13 of the Moneylending Act, the following Order is hereby made:-
>
> 1. This Order may be cited as the Moneylending (Prescribed Rates of Interest) Order, 1997.
>
> 2. For the purposes of section 3 of the Act, an interest rate of forty per centum per annum is hereby prescribed.
>
> 3. For the purposes of paragraph (i) of section 13 of the Act, an interest rate of twenty-five per centum per annum is hereby prescribed.
>
> Dated this 27th day of August, 1997.
>
> OMAR DAVIES,
> No. 840/01 IV Minister of Finance and Planning"

The "note or memorandum" at page 10 of the Record states the interest and principal as follows:

> "14. This Agreement shall in all respects be governed in accordance with the Laws of Jamaica.
>
> **SCHEDULE**
>
> 1. **THE BORROWER:** **KENROY SALTER**
>
> 2. **THE SUM LOANED:** **TWO HUNDRED AND FIFTY THOUSAND DOLLARS, UNITED STATES CURRENCY (US$250,000.00)**

3. **INTEREST RATE:** **Twenty-two percent (22%) per annum**

4. **DATE OF MATURITY:** **THE 18TH day of November 1998**

5. **ADDRESS OR REGISTERED OFFICE:** **16 North Street, Montego Bay in the Parish of St. James."**

On the face of the memorandum the transaction appears to be exempt as the rate is below the 25% per annum, prescribed. The Act however has its own definition of interest and principal in section 1(2) which reads:

> "(2) In this Act –
>
> "interest" does not include any sum lawfully charged in accordance with the provisions of this Act by a lender of money for or on account of costs, charges or expenses, but save as aforesaid includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a lender in consideration of or otherwise in respect of the loan;
>
> "principal" means in relation to a loan the amount actually lent to the borrower"

So the initial issue to be determined is what was the amount "actually lent" by the Appellant to Salter. Mr. Scharschmidt, Q.C. for the Respondent, contends that US$90,000 was the amount. Ms. Phillips, Q.C., for the Appellant was emphatic that the amount was as stated on the memorandum, which is US$250,000. I think the Respondents are correct. The Appellant in a statement dated November 19, 1999 to Salter at page 30 of the Record stated that US$90,000 or J$3,300,000 was credited to Salter and that US$160,000 was already disbursed. It is clear from the guarantee that the US$160,000 was

disbursed to Desmond Rankine, and not to Salter. To reiterate, the loan transaction between the Appellant and Rankine was never adduced by the Appellant before this Court.

The Instrument of Guarantee is exhibited at page 7 of the Supplementary Record . This document was admitted in this Court on the principle propounded by Lord Scott in paragraphs 14 and 15 of **Universal Leasing & Finance Ltd. v. Montego Vacations Ltd.** Privy Council Appeal No. 33 of 2000. Those paragraphs read:

> "14. The two actions came on for trial before Chester Orr J on 18 February 1992. Various procedural applications were made by counsel on behalf of the defendants in the second action and Universal's case was opened by Mr. Miller. The judge's notes show that Mr. Miller made an express reference in opening to paragraph 8 of the amended Statement of Claim. The note reads ' Para. 8. Defendant fixed completion date 1/10/85.' This is a clear reference to the effect of the letter of 15 September 1984 that had been pleaded in paragraph 8. The existence and effect of this letter had never been denied, save to the extent that Montego's general traverse might constitute such a denial. Their Lordships were told that the rules of discovery applicable in Jamaica are much the same as they are, or were prior to the Civil Procedure Rules, in this country. It is a legitimate inference therefore, that the letter of 15 September 1984, or a copy of it, would have been listed at least in Montego's and in Mr. Watson's respective lists of documents.
>
> 15. The hearing continued until 20 February 1992 when, part heard, it was adjourned to a date to be fixed. On 22 June 1992 the actions were, on the plaintiff's application, taken out of the list and on 27 November 1995 they were by consent adjourned *sine die.* The hearing resumed on 28 October 1996. On

> 4 November 1996 an agreed bundle of documents was produced by junior counsel for the plaintiff. Their Lordships have not been shown a list of the documents comprised in the agreed bundle but it seems almost inconceivable that it would not have included the letter of 15 September 1984."

The Act has its special provisions for discovery and it is necessary to refer to them as there was no full compliance with the request by the Respondents pursuant to a letter dated May 4, 1999. It reads at page 65 of the Record:

> "Cornerstone Investment &
> Finance Company Limited
> Content
> P.O. Box 23
> Reading
> St. James
>
> Dear Sir:
>
> Re: Loan to Kenroy Salter et al
>
> We act on behalf of Imorette Palmer and Marcia Susan Gallimore, guarantors of the above loan.
>
> Pursuant to section 10 of the Moneylending Act, we hereby make a formal request that you furnish us with copies of all loan documentation which has been executed by Kenroy Salter, Marcia Susan Gallimore, Margaret Salter and Imorette Palmer in relation to the subject loan.
>
> In keeping with the provisions of the Moneylending Act, we hereby enclose the sum of $200.00 in cash to defray the expense relating to the photocopying and transmission of the documents.
>
> Yours faithfully
> PATTERSON, PHILLIPSON & GRAHAM

Per JOHN G. GRAHAM

c.c. Imorette Palmer
c.c. Marcia Susan Gallimore
c.c. Mr. Gordon Brown
Attorney-at-Law"

The letter is not precisely worded. Since Salter was named in the caption and the demand was made on behalf of the guarantors the implication was that there was compliance with section 10(2) of the Act.

Section 8(2), and 10(2) of the Act and the letter of 4th May, 1999, when properly construed required the Appellant to produce the details of the loan to Rankine which Salter guaranteed.

It is appropriate to set out section 10 in full. It reads:

> "10.-(1) In respect of every contract for the repayment of money lent whether before or after the commencement of this Act, the lender shall, on any reasonable demand in writing being made by the borrower at any time during the continuance of the contract and on tender by the borrower of the sum of fifty dollars for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement signed by the lender or his agent showing –
>
> (a) the date on which the loan was made, the amount of the principal of the loan and the rate ***per centum*** per annum of interest charged; and
>
> (b) the amount of any payment already received by the lender in respect of the loan and the date on which it was made; and
>
> (c) the amount of every sum due to the lender, but unpaid, and the date upon which it became

> due, and the amount of interest accrued due and unpaid in respect of every such sum; and
>
> (d) the amount of every sum not yet due which remains outstanding, and the date upon which it will become due.
>
> (2) A lender of money shall, on any reasonable demand in writing by the borrower, and on tender of a reasonable sum for expenses, supply a copy of any document relating to a loan made by him or any security therefor to the borrower, or if the borrower so requires, to any person specified in that behalf in the demand.
>
> (3) If a lender to whom a demand has been made under this section fails without reasonable excuse to comply therewith within one month after the demand has been made, he shall not, so long as the default continues, be entitled to sue for or recover any sum due under the contract on account either of principal or interest, and interest shall not be chargeable in respect of the period of the default."

These provisions will be relevant to the equitable and statutory discretion in section 8(3) and section 2(2) of the Act, which will be addressed later. In any event it must be emphasized that Salter's guarantee of the Rankine obligations should have been stated in the Memorandum pursuant to section 8(3) of the Act.

The opening paragraph of the Instrument of Guarantee reads:

> "TO: MESSRS. CORNERSTONE INVESTMENTS AND FINANCE COMPANY LIMITED of Montego Bay, in the parish of St. James (hereinafter called 'the Lender'); IN CONSIDERATION of loan and credit facilities to the extent of **One Hundred and Sixty Thousand Dollars United States Currency (US$160,000.00),** equivalent for the purposes of stamp duty to **Five Million Seven Hundred**

> **Thousand Dollars Jamaican Currency (J$5,700,000.00)** together with interest thereon being granted by the Lender at the request of **DESMOND RANKINE** of Montego Bay in the Parish of Saint James, Businessman ('hereinafter called the Borrower'), on the terms and conditions established by a Loan Scheme Arrangement made and entered into on or about the 27th day of February 1996 between the Borrower and the Lender, (hereinafter called 'the Principal Transaction') **I, KENROY SALTER** of Montego Bay in the Parish of St. James (hereinafter called 'the Guarantor') DO HEREBY GUARANTEE to the Lender the repayment of and DO HEREBY UNDERTAKE to pay to the Lender all Principal, interest and other moneys at any time owing or payable by the Borrower to the Lender in the event of default by the Borrower..."

There are features to note in this paragraph. The loan of US$160,000 was made to Desmond Rankine on 27th February, 1996 and Salter would be liable in the event that Rankine defaults. This as the authorities state, is the principal attribute of a Guarantee in law.

If the Instrument of Guarantee signed by Salter which guaranteed Rankine's debt was worded so that it was both a guarantee and a separate and independent obligation then Ms. Phillips' submission that Salter had assumed Rankine's debt on 19th November would have been sound and the loan agreement for US$250,000 would be exempt from the Act. **M. S. Fashions Ltd. et al v. Bank of Credit and Commerce International S.A. (In Liquidation) et al** [1993] Ch. D. 425 had an independent principal debtors clause. This is how Dillon L.J. put it in the Court of Appeal at 445:

> "In a further section of the 'cash deposit security terms' Mr. Ahmed agreed to guarantee to pay and/or

> discharge to B.C.C.I. upon written demand all liabilities of the company to B.C.C.I. Mr. Ahmed further declared 'as a separate independent obligation hereunder' that the company's liabilities 'shall be recoverable by you from me as principal debtor and/or by way of indemnity and shall be repaid by me on demand made in writing by you or on your behalf whether or not demand has been made on the [company]'."

There is no such clause in the Instrument of Guarantee. In fact the principal debtor clause there, is subordinate to the primary clause which makes Salter's liability contingent. Salter became liable on the default of Rankine in the Instrument of Guarantee.

Of equal importance is the fact that the Loan Scheme Arrangement between the Appellant and Rankine was never exhibited. It was requested of the Appellant by this Court. Its absence was accounted for on the basis that Bruce Spencer a director and majority shareholder of the Appellant now resides in Canada. But there ought to be a Secretary of the Appellant company who would have custody of its documents.

The Loan Scheme Arrangement is of vital importance especially in light of the following paragraphs in the Affidavit of Gordon Brown which reads thus:

> "6. That the basis for the Respondent granting loan facilities to Mr. Salter was his agreement to guarantee existing facilities in the sum of US$160,000.00 owed by one Desmond Rankine to the Respondent("the Rankine Obligations").
>
> 7. That Mr. Salter agreed to guarantee the Rankine obligation, and to this end, executed the annexed Instrument of Guarantee now shown to me and marked **"GPB 1"** for identity.

8. That it was always understood and agreed that in the event of default by Mr. Rankine or his affiliated companies in payment of the Rankine Obligations, that the collateral given by Mr. Salter would be applied to cover same.

9. That the Rankine Obligations fell into arrear, by reason of which the Respondent took steps to realize its security interest in the collateral provided by the applicants and Mr. Salter."

Be it reiterated that Gordon Brown is the Attorney-at-Law for the Appellant. He stated that he had conduct of its matters for several years including the preparation of "the loan agreement and security documentation the subject hereof".

The Respondents as sureties for Salter are entitled to these documents pursuant to section 10 of the Act. This Court is entitled to inspect this agreement generally and specifically since Salter's guarantee was to the Appellant for Desmond Rankine's obligations. It is essential to know whether it was Rankine, or his companies, or Rankine and his companies, who borrowed US$160,000. What is relevant is that the US$250,000 was made up with US$160,000 lent to Rankine or his companies and the US$90,000 lent to Salter. This had three painful results. First, the rate of 22% should have been on US$90,000 for a year. It was 22% on US$250,000 for a year. Second, having regard to the definition of interest and principal in the Act, US$160,000 for one year was also interest. This was the essence of the Respondents' case for contending that the transaction was not exempt from

the Act because the effective rates exceeded 25%. **Askinex, Ltd. v. Green and others** [1967] 1 All E.R. 65 at 68 supports the above analysis of interest and principal. Third, section 3 of the Act becomes relevant. It reads:

> "3.-(1) Where, in any proceedings in respect of any money lent after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the prescribed rate per annum, the court shall, unless the contrary is proved, presume for the purposes of section 2 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 prescribed rate per annum, is excessive.
>
> (2) In this section "prescribed rate" means such rate as the Minister may from time to time, by order, *prescribe."

The prescribed rate in this instance is $40% per annum.

(ii) What was the effect of section 8 of the Act as regards the Loan Agreement?

Section 8 of the Act reads:

> "8.-(1) Subject to subsection (3), no contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of 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 as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within

> seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.
>
> (2) The note or 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 the interest charged on the loan expressed in terms of a rate *per centum* per annum.
>
> (3) Notwithstanding anything in subsection (1) or (2) any court or competent jurisdiction may, upon application being made and if it considers it equitable to do so, declare the contract to be enforceable in the same manner and to the same extent as if the requirements of subsections (1) and (2) had been complied with."

The lender and borrower have freedom to contract but section 8(1) deals with the first set of essentials which must be stated in the note or memorandum in order that the loan agreement and the security be enforced. It is instructive to list them. The note or memorandum must be in writing, it must be signed by the borrower and sent to him within seven days of making the contract. Further, it must be signed by the borrower before the money is lent.

Applying the sub-section 8(2) of the Act to the transaction in this case, there is no reference to the money actually lent which was US$90,000. This amount should also have been stated in the mortgage and the guarantee instead of US$250,000. The security and guarantee in this instance, like the

loan, was for US$250,000. The registered title and mortgage entered as security read as follows at page 12 of the Record:

> "Transfer No. 627017 registered on the 2nd of July 1998 as to one undivided one half share and interest to IMORETTE REBECCA PALMER Minister of Religion as to one undivided one quarter share and interest to MARCIA SUSAN GALLIMORE Businesswoman and as to one undivided one quarter share and interest to MARGARET ALISON SALTER Airline Attendant, all of 4 Paradise Crescent, Montego Bay, Saint James as Tenants-in-Common. Consideration in pursuance of the devise contained in the will of ALFRED TENNYSON PALMER Deceased."

Then the mortgage was entered thus:

> "Mortgage No. 1002209 registered on the 11th of February 1998 to CORNERSTONE INVESTMENTS AND FINANCE COMPANY LIMITED at Content Post Office Box 23, Reading, Montego Bay, Saint James to secure the monies mentioned in the mortgage stamped to cover Two Hundred and Fifty Thousand Dollars United States Currency with interest."

The following cases establish that if the principal is not correctly stated in the loan agreement, the guarantee and the mortgage are all unenforceable; **Dunn Trust Ltd. v. Feetham** [1936] 1 K.B. 22, and **B.S. Lyle Ltd. v. Chappell** [1931] All E.R. Rep. 446. Both the loan agreement and the guarantee, as well as the mortgage as security are unenforceable pursuant to section 8(1) of the Act.

Then section 8(2), which states the details to be included in the memorandum, reads:

> " The note or 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 the interest charged on the loan expressed in terms of a rate *per centum* per annum."

The draftsman was careful to maintain a distinction in 8(1) and (2) between agreed terms of the contract and the terms which were obligatory by statute. As for the statutory obligations neither the principal of US$90,000 nor the effective interest was stated. So on this basis the loan agreement was unenforceable.

A case in which the loan was declared to be unenforceable because of the omission to include a statutory term is **Kasumu and others v. Baba-Egbe** [1956] 3 All E.R. 266. See also **United Dominions Corporation (Jamaica) Ltd. v. Michael Mitri Shoucair** (1968) 12 W.I.R. 510 at 512 and **Gaskell Ltd. v. Askwith** (1928) 45 T. L.R 566.

In this context Mr. Brown told the Court at page 5 of the Supplementary Record:

> "6. That the basis for the Respondent granting loan facilities to Mr. Salter was his agreement to guarantee existing facilities in the sum of US$160,000.00 owed by one Desmond Rankine to the Respondent ('the Rankine Obligations')."

On the basis of section 8(2) this agreement should have been stated in the memorandum. It was not. Cases which support the proposition that the terms agreed must be recorded in the memorandum are **Central Advance and**

Discount Corporation Ltd. v Marshall [1939] 3 All E.R. 695 and **Orakpo v. Manson Investments Ltd.** [1978] A.C. 96.

It is important to note the agreed terms, which were not incorporated in the memorandum to understand the limited nature of the relief, equity may accord the lender of moneys pursuant to section 8(3) of the Act. The relief is available where there has been a failure to incorporate the agreed terms of a contract in the note or memorandum. Here is how Lord Salmon, who agreed with every word of Lord Keith of Kinkel, put it at page 111 of **Orakpo** (supra).

> "It plainly appears from the correspondence passing between the lender's solicitors and the borrower's solicitors that in the case of each transaction the money was lent upon the terms that it should be used to pay off the amount owed by the borrower to the unpaid vendor or to redeem the charges with which the property acquired by the borrower was encumbered. Accordingly section 6 requires that these terms should have been incorporated in the respective memoranda of loan and no trace of them is to be found in any of these memoranda. Even if, contrary to my opinion, these terms would have subrogated to the lender the rights of the vendors and the chargees and thereby given an additional security to the lender, these rights and this security would have been unenforceable by the lender because in breach of section 6 no mention of the terms from which they would have sprung appears in the memoranda of loan."

It is clear from this passage that the equitable principles governing subrogation could have been applied to the circumstances of this case despite the absence of section 8(3) in the United Kingdom Act. Then at page 119 Lord Keith said:

"Subrogation may result from agreement, or it may arise by operation of law in a number of different situations. In some circumstances the debtor may know nothing whatever about the transactions which have caused a third party to become subrogated to the rights of his original creditor, as in **Brocklesby v. Temperance Permanent Building Society** [1895] A.C. 173, where a forged mortgage had been used, unknown to the debtor, to obtain money to pay off the holder of an existing charge. But in the present case the ground for the appellants' claim to subrogation is that, in so far as the money borrowed from them was used to pay the unpaid vendors and the holders of the existing charges, this was done in pursuance of the common intention of the parties, and indeed matters were so arranged that the respondent never obtained unrestricted control of the money. If there had been no such common intention, and the respondent had simply borrowed the money without any strings attached and then voluntarily used it to complete contracts for the purchase of land or to pay off the holders of existing charges, no question of subrogation would have arisen. If it had been a term of the contract of loan that the money was to be used for such purposes, and there had been no agreement for fresh security to be given to the lenders, then upon the money being so applied the lenders would by operation of law have been subrogated to the security rights of the vendors and of the existing chargeholders. It is not inconceivable that a moneylender should be prepared to proceed on that basis, intending and expecting that he would be so subrogated by operation of law. He might indeed expressly stipulate for such subrogation, but that would not be necessary. Subrogation would be the legal result of carrying out the contract entered into. The legal results of contractual terms do not require to be set out in the note or memorandum signed for purposes of section 6. It is enough if the actual terms are accurately set out therein: **Holiday Credit Ltd. v. Erol** [1977] 1 W.L.R. 704. If the term in question were duly set out in the note or memorandum, and the money were duly applied by the borrower as intended, so that the lender took by

> way of subrogation the security rights which he intended to acquire, it is difficult to reach the conclusion that such rights would not constitute a "security given by the borrower" in respect of the contract for the repayment of the loan, within the meaning of section 6. The security would have been obtained in direct consequence of the contract entered into by the borrower, and his acts done in implement of the contract. If in such a case there were some material defect in the note or memorandum, I am of opinion that section 6 would apply, to the effect that the security rights to which the lender had been subrogated would be unenforceable."

Lord Edmund-Davies put the matter tersely at page 115:

> "I am thus led to the conclusion that at no relevant time did the appellants possess the subrogated rights claimed and that Walton J. and the Court of Appeal were wrong in thinking that they did."

The importance of the memorandum was stressed in **Holiday Credit Ltd. v. Erol** [1977] 2 All E.R. 696. Lord Wilberforce at page 699 said:

> "It is an obvious feature of moneylending transactions, particularly where some security is given for repayment, that more than one document may be required in order to complete the transaction. There may be a promissory note, or a bill of sale, or a mortgage, in addition to the contractual agreement to repay. To meet these situations and to enable the requirements of s 6 of the 1927 Act, to be satisfied, a number of techniques have been developed and approved by the courts. Thus the repayment contract may have attached to it, and make reference to, a copy or draft of the security to be given (**Tooke v T W Bennett & Co Ltd.** [1939] 4 All ER 200, [1940] 1 KB 150), or the repayment contract may refer to another identifiable document which is also given to the borrower (**Reading Trust Ltd v Spero** [1930] 1 KB 492, [1929] All ER Rep 405) where Scrutton LJ said ([1930] 1 KB 492 at 505, [1929] All ER Rep 405

> 409) that the security might not be part of the memorandum. In the present case, and no doubt with the remarks of Scrutton LJ in mind, the legal charge, which is clearly identified, is by an express term incorporated in the contract of repayment and is deemed to form part of it. Both documents, or one should say, the single composite document, were handed to the borrower. If, therefore, s 6 is to be regarded purely as a requirement as to documentation, it could be said that this requirement has been met: all the relevant legal instruments have been given to the borrower; there is no contractual term relating to the loan outside or apart from these legal instruments."

Lord Diplock put the matter thus at page 109 of **Orakpo** (supra):

> "I do not myself think that subrogated rights arising by operation of law in consequence of it being a term of the contract that the money lent shall be applied in a particular way can properly be regarded as given by the borrower or taken from him or made at the time. If, however, they were so given, then to comply with section 6 the conclusion appears inevitable that to comply with that section, the note or memorandum must state what were the rights given; for the giving of such rights would be a term of the contract. But the note or memorandum does not have to state the legal effect or consequences of the contract made, only its terms (see **Holiday Credit Ltd. v. Erol** [1977] 1 W.L.R. 704) and it follows that if the legal consequence of a term of the contract correctly stated in the memorandum is that the moneylender gets a subrogated right, section 6 would not in my opinion render that right unenforceable."

Then Lord Diplock said at page 102:

> "Through inadvertence, however, the written memorandum of the contract left out one of its terms, of which, however, the borrower was well aware and had expressly consented to. Nevertheless, under section 6 of the Moneylending Act 1927 this omission as is now conceded by the lenders made the

> contracts for the repayment of the loans and the legal charges in respect of the loans unenforceable. The borrower who had fallen behind in his interest payments brought an action for a declaration that each of the contracts was unenforceable, and for an injunction restraining the lenders from taking steps to sell or otherwise dispose of the properties subject to the legal charges. The lenders counterclaimed as alternative remedies either (1) repayment of the loans and interest or (2) a declaration that they were entitled to a lien upon the properties for such part of the money lent as was applied to defray the purchase price or to redeem prior charges affecting the properties in question."

This is how Lord Diplock states the principle of subrogation and its connection with unjust enrichment as it obtains in the common law:

> "My Lords, there is no general doctrine of unjust enrichment recognized in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law. There are some circumstances in which the remedy takes the form of "subrogation," but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed ultra vires to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment."

That he was of like mind with the other Law Lords that if the matter were incorporated in the contract and the memorandum, subrogation could have been applied, is to be found in the following passage at page 105:

> "Much as I should like to be able to do so, there seems to be insuperable obstacles to relying upon this particular kind of subrogation to mitigate the harshness to the moneylender and the undeserved enrichment of the borrower which would otherwise follow from a technical failure to observe the provision of section 6 of the Moneylenders Act 1927.
>
> In the first place the origin of the right of subrogation is the contract between the borrower and the moneylender for the loan of money by the moneylender to the borrower. The contract either will or will not incorporate a term that the moneys lent shall be applied in discharging a security on the property of the borrower in favour of a third party. If it does, the term that the moneys shall be so applied must be included in the note or memorandum under section 6. If it does not and there is no contractual obligation upon the borrower to apply the moneys in this way (as was held to be the case in **Hanyet Securities Ltd. v Mallett** [1968] 1 W.L.R. 1265), the expectation of the parties that the money will in fact be used by the borrower for this purpose does not give rise to any right of subrogation in the moneylender even if the money is so applied."

Lord Diplock returned to the issue on page 106 thus:

> "The lenders in the instant case are in the dilemma that either it was a term of their contract of loan with the borrower that the money lent should be applied to discharge existing equitable charges on the properties, or it was not. If it was not, no equitable charge-by-subrogation in favour of the lenders would result from the money being in fact applied to discharge existing equitable charges. If it was a term, the resulting equitable charge-by-subrogation would in my opinion be a charge taken in respect of a

> loan made by a moneylender and subject to the period of limitation prescribed by section 13 for proceedings for the enforcement of a security. So, reluctant though I am to have to do so, I would dismiss the appeal."

How did Ms. Hilary Phillips, Q.C. meet the formidable case mounted by the Respondents? She contended that on the true construction of the Instrument of Guarantee it was in substance an Indemnity. Further, she submitted that after the clause previously cited which limited Kenroy Salter's liability "to the default of the borrower"- Rankine, there follows the important clause which in effect made Salter a principal borrower. The relevant clause reads at page 7 of the Supplemental Record:

> ". . . in the event of default by the Borrower upon the terms hereof AND IT IS HEREBY AGREED AND DECLARED that:-
>
> 1. This Guarantee is a continuing guarantee of the liabilities of the Borrower under the said Loan Agreement and the liabilities of the Borrower under the said Loan Agreement and the liability of the Guarantor is that of the principal debtor as between the Guarantor and the Lender."

It will be found that clause 2 listed below and every other clause in the Instrument of Guarantee, save Clauses 1,3 and 12, is to be found in contracts of guarantee. Clauses 1, 3 and 12 are exceptions as they make the guarantor a principal debtor in limited circumstances. They are of common form and do not transform the Instrument of Guarantee into an Indemnity. Here is one of the typical clauses to be found in Instruments of Guarantee:

Clause 2 reads:

> "2. The Lender shall not be bound to exhaust its rights against the Borrower before making demand upon the Guarantor for the repayment of the aggregate indebtedness of the Borrower under the Principal instrument and the liability of the Guarantor hereunder shall first arise when notice in writing is given by the Lender to the Guarantor of any default and demand for payment is made under this Guarantee."

The first point to note is that if the guarantee by Salter to pay Rankine's debt if he defaulted was to be treated as a loan to Salter, then this ought to have been stated in the loan agreement pursuant to section 8(2) of the Act. This Instrument of Guarantee however it is to be construed, was not mentioned in the Loan Agreement. Here is how Clauson LJ put the matter in **Central Advance and Discount Corporation Ltd v. Marshall** [1939] 3 All E.R. at 696:

> "The only matter to which it is necessary for us to refer is the contention that the contract for repayment and the bill of sale and the guarantee are unenforceable on the ground that the note or memorandum in writing of the contract did not contain all the terms of the contract, in that while the note or memorandum mentioned the bill of sale and the guarantee, it did not disclose the clause mentioned above, imposing on the guarantors immediate liability for repayment of the whole debt in the event of the bill of sale being or becoming in-operative in whole or in part. The existence of this clause obviously resulted in the possibility of the guarantors becoming liable to pay the whole debt immediately in the event mentioned of the bill of sale being or becoming inoperative in whole or in part, and in the event of the lenders enforcing the relevant clause against the guarantors."

The important point to note is that the guarantor Salter became liable as a principal debtor in specified circumstances stated in clauses 3 and 12. The principal debtor clause is thus of a limited effect. This is at the heart of the Respondents' case.

The second point is the gloss Ms. Phillips put on two authorities. The first is **B.S. Lyle v Chappel** (supra). The ratio, as expressed by Scrutton LJ . at 450 reads:

> "On the memorandum itself, I think that an agreement to borrow is justified by an agreement to re-lend on fresh terms, using the sum to settle the original debt. This transaction is disclosed on the face of the memorandum, in pursuance of the decision of CHARLES, J., which it is safer to follow, though the bills of sale cases suggest it is unnecessary."

Greer, L.J. said at page 452 :

> "In my judgment, the document of Oct. 22 signed by the defendant is a sufficient memorandum of a contract for the repayment by the defendant as the borrower of £200 lent to him on Oct. 22, 1930, within the meaning of s. 6."

Slesser, L.J. stated his reasons thus at page 453:

> "The defendant has pleaded as one of his defences s.6 of the Moneylenders Act, 1927, which requires, inter alia, that a note or memorandum in writing shall be signed by the borrower before the money is lent or the security given, which note or memorandum shall contain all the terms of the contract as set out in sub. s.2 of that section. If this be not done, the contract for the repayment by the borrower is declared to be unenforceable. In my view, in this case the plaintiffs exactly complied with the requirements of the section. The note or memorandum which was made and

> signed personally by the borrower before the money was lent or the security given exactly sets out all the terms of the contract. In particular, it states that the defendant authorised and requested the plaintiffs to allocate the whole of the above advance of £200 in settlement of his promissory note in their favour dated April 25, 1930. I am unable to see in these circumstances how there was a scheme to deceive the court."

There was an issue in **Lyle** as in the present case regarding the principal actually lent. US$90,000 was lent in the instant case and a guarantee of US$160,000 executed. However, it is important to note that US$250,000 was not lent to Salter as reflected in the Loan Agreement.

It was further contended on behalf of the Appellant that **General Produce Co. v. United Bank Ltd.** [1979] 2 Lloyds Law Reports 255 supports its contention that the Instrument of Guarantee is an Indemnity and not a guarantee with a limited Indemnity clause. However, the following passage at page 259 supports the Respondents' submission that the principal debtors' clause is of limited effect. It reads:

> "There was a provision in the guarantee that the defendant's liability should be as primary obligor and not merely a surety. Mr. Justice Fisher held that the debenture was illegal and void under s. 54 of the Companies Act, 1948. It was argued for the plaintiff that the guarantee was nevertheless enforceable. Mr. Justice Fisher said at p. 503:
>
> . . . In the present case, the instrument was given pursuant to clause 7 of the agreement which calls for a personal guarantee. The word "guarantee" is used in it time and again. The obligation is to pay the principal moneys to become due under the debenture if and whenever the company makes default. The

> statement of claim refers to it as a guarantee and pleads the company's default and the consequent liability of the guarantor. The only straw for the plaintiff to clutch is the phrase "as a primary obligor and not merely as a surety". But that, in my judgment, is merely part of the common form of provision to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity.
>
> I agree with Mr. Justice Fisher that it is common to find a provision such as is found here in par. 5 in guarantees, and I certainly do not hold that it automatically converts every guarantee into an indemnity. But equally its operation is not confined to the consequences of giving time or other indulgence to the principal debtor, and I very much doubt if Mr. Justice Fisher intended so to confine it. In the present case it is combined with a provision for the continuance of the bank's rights despite the release of the principal debtor's liability by operation of law. The release of the principal debtor normally discharges the guarantor as does a binding agreement to give time. The words in par. 5 seem to me equally apt to enable the guarantor's liability to continue as if he were the principal debtor in either case. That does not necessarily mean that he is to be regarded as the principal debtor for all purposes from the inception of the guarantee but only that the creditor is entitled to treat him as the principal debtor in certain events."

The reasoning by Fisher J and Lloyd J contain the correct approach to construing the principal debtor clause in the Instrument of Guarantee. Every clause save 1, 3 and 12 is a classic guarantee clause. All that clause 2 provides is that the lender need not await the judgment of the Court against the borrower before giving a notice to the guarantor and demanding payment from him.

On a true construction, the Instrument of Guarantee is a guarantee and not an indemnity, and the clause which refers to the guarantor as a principal debtor is subordinate to the main clause where Salter undertakes to pay the lender in the event of default of Desmond Rankine. The circumstance in which the guarantor becomes a principal debtor is stated in paragraph 12 at page 10 of the Supplementary bundle thus:

> "12. The liability of the Guarantor hereunder shall not be affected by any failure by the Lender to take any security or by any invalidity of any security taken or by any existing future agreement by the Lender as to the application of any advances made or to be made to the Borrower."

The other clause which confirms the ratio expounded by Fisher J and Lloyd J runs as follows at paragraph 3 at page 8 of the Supplementary Bundle:

> "3. The Lender, without exonerating in whole or in part the Guarantor may grant time or other indulgence to the Borrower or any person, persons or corporations liable to the Lender for or in respect of the moneys or any part thereof owing under the said Loan Agreement and may accept compositions from and may otherwise deal with any such other person, persons or corporations as the Lender may think expedient and may give up, modify and abstain from perfecting or taking advantage of any securities in such manner as the Lender may think expedient all without obtaining the consent of the Guarantor and without giving notice to the Guarantor."

The guiding principle in interpreting guarantees is stated in paragraph 6 of **Re Hugh Maxwell Taylor Ex parte Century 21 Real Estate Corporation** (1995) 130 A.L.R. 723 and runs thus:

"6. The emphasis placed in **Re Brown and Bradford Old Bank** ([1918] 2 K.B. 833) on the construction of the particular document is fully supported by high modern authority. In **Moschi v. Lep Air Services Ltd.** (also called **Lep Air Services v. Rolloswin Ltd.)** (1973) AC 331 at 344, Lord Reid said:

> '. . . I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means'."

Lord Diplock said at (349):

> 'Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends upon the words in which the parties have expressed the promise. Even the use of the word "guarantee" is not in itself conclusive. It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to misdescribe what is in law a contract of indemnity and not of guarantee. Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from its being classifiable as a guarantee. Every case must depend upon the true construction of the actual words in which the promise is expressed'."

On the basis of the preceding analysis the Instrument of Guarantee signed by Salter to pay Rankine's debt, if Rankine defaulted, is a true guarantee.

It is now appropriate to examine the amendment in [section 8(3)] to the Act which reads:

> "(3) Notwithstanding anything in subsection (1) or (2) any court of competent jurisdiction may, upon application being made and if it considers it equitable to do so, declare the contract to be enforceable in the same manner and to the same extent as if the requirements of subsections (1) and (2) had been complied with."

It has already been demonstrated that without the amendment in 8(3) the English courts would have applied the appropriate equitable principles as developed by the Courts of Chancery in the case of **Orakpo** (supra). In that case it was demonstrated that subrogation would have been applied if the terms agreed by the parties had been incorporated in the note of memorandum as required by the statute. This route by virtue of section 48(a) and 49(2) of the Judicature (Supreme Court) Act would be followed in this jurisdiction.

Since the term equity has more than one meaning it must be ascertained what meaning ought to be attributed to it in the circumstances of the amendment. Since section 8(1) and (2) of the Act deals with agreed and statutory terms, then section 8(3) must refer to circumstances where the Court will enforce the contract notwithstanding there has been an omission of the agreed terms in section 8(1) and (2). Section 8(3) is in the nature of a proviso. The first requirement is that an application must be made by the moneylender to verify that there was an omission of agreed terms in the note

or memorandum. Secondly, he must state the basis for asserting that the contract to be enforced requires the Court to go beyond the equitable principles developed by the Court of Chancery.

As regards the extended meaning to be accorded to the word equitable in section 8(3) of the Act there are two options which spring to mind. Firstly, there may be reliance on the primary meaning of equity which means fairness. It would however be extra-ordinary and require clear words for Parliament to confer a general power to be fair with respect to the statutory obligations which are imposed on the moneylender in section 8(1) and (2). The judiciary would be arrogating to themselves the power to second guess the mandatory provisions of an Act of Parliament which was designed to protect borrowers and guarantors.

Secondly, the word "equitable" may be construed to mean the courts may rely on an equitable construction to enforce a contract where there has been non-compliance with statutory provisions in section 8(1) and (2) of the Act. One of the outstanding examples of equitable construction to mitigate the strict construction of a statute was the development of the doctrine of part performance in relation to contracts for the sale of land by the Court of Chancery in relation to the Statute of Frauds. This development suggests if the agreed terms were inadvertently omitted from the note or memorandum and the loan was made then the contract would be enforced pursuant to section 8(3) of the Act by inserting the omission.

In the first place to assume that equitable principles, could circumvent obligatory statutory provisions would be a constitutional absurdity. Such an absurd construction would enable the judiciary to dispense with statutory provisions without Parliament so stating in clear terms. The equitable principles are to be confined to the contractual provisions contemplated in sections 8(1) and (2) of the Act. In this context, the words of **Stradling v Morgan,** referred to in **Statutory Interpretation** by Sir Rupert Cross, quoted at page 8 are appropriate:

> ". ..from which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things and those which generally prohibit all from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded on the intent of the legislature which they have collected sometimes by considering the calls and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

The other approach is to resort to the maxim of equity which states that equity deems as done that which ought to be done. Be it noted however that the Court of Chancery confined this doctrine in **Walsh v Lonsdale** (1882) 21 CH.D 9 to leasehold agreements in writing which ought to have been embodied in a

deed. Specific performance was granted on the basis of a written agreement although not embodied in a deed.

In the instant case the non-compliance concerned serious matters of substance which involved omissions of statutory provisions and there was no prayer to include agreed terms which were inadvertently omitted. Further, despite the provisions of section 10 of the Act which provide for a cheaper method of discovery of documents, then resort to the Civil Procedure Code Law and an express request by this Court, the amount due from Desmond Rankine to the Appellant has not been supplied. How are the sureties to know the state of the Rankine accounts, assuming that there was a loan agreement with Rankine which Salter had guaranteed. Yet the Appellant moneylender states that it was Rankine's default that triggered the statutory notice to exercise the power of sale contained in the mortgage with respect to the Respondents' property. There was no omission of agreed terms of the contract which was unintentionally omitted from the loan agreement as in **Orakpo** (supra).

So I would not grant the appellant any relief pursuant to section 8(3) of the Act as it is clear there was no injustice which arose as in the case of **Orakpo** (supra) who was a borrower. The Respondents as sureties are the ones who seek justice by relying on the provisions of the Statute in the circumstances of this case. This Court ought not to deny them the justice accorded them in the Court below.

(ii) Was the interest rate excessive within the intendment of section 3 of the Act thus making section 2 of the Act relevant in determining the outcome of this case?

That the interest rate was excessive in this case has already been demonstrated. To reiterate, the interest can be approached from two angles. Firstly, the loan agreement states the principal as US$250,000 with a rate of interest at 22% per annum. Since the amount actually lent was US$90,000 then the interest was $160,000 for the year together with 22% of $250,000. The actual percentage was not computed by counsel but it seems that there must be recourse to the statutory presumptions in section 3 of the Act. The interest rate was therefore "excessive" and the transaction "harsh and unconscionable."

It is now appropriate to set out section 3 and section 2(1) of the Act. Section 3 reads:

> "3..-(1) Where, in any proceedings in respect of any money lent after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act, it is found that the interest charged exceeds the prescribed rate per annum, the court shall unless the contrary is proved, presume for the purposes of section 2 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 prescribed rate per annum, is excessive.
>
> (2) In this section "prescribed rate" means such rate as the Minister may from time to time, by order, *prescribe."

Then section 2 in part reads:

> "2.-(1) Where proceedings are taken in any court by any person for the recovery of any money lent either before or after the commencement of this Act, or the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, enquiries, fines, bonuses, premiums, renewals or any other charges, are excessive, or that, in any case, the transaction is harsh or unconscionable, the court may reopen the transaction, and take an account between the parties, and shall, notwithstanding any statement or settlement of account, or any note, security or agreement purporting to close previous dealings and create a new obligation, reopen 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 chargeable and 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 in account, by the debtor, may order the creditor to pay it; and shall set aside, either wholly or in part, or revise, or alter any security given, or agreement made in respect of money lent, and if the lender has parted with the security, may order him to indemnify the borrower or other person who gave such security."

This statutory provision is generous to the moneylender. **Samuel v Newbold** [1906] A.C. 461 and **Sockalingam Chittar and Another v. Ramanayke and Another** [1937] 1 All E.R. 196 are examples where the borrower resorted to section 2(1) of the Act. It must be stressed however that

the instant proceedings were instituted by the Respondents as sureties and the relevant section is section 2(2) of the Act which reads:

> "2(2) Any court in which proceedings might be taken for the recovery of money lent, 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 power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower, or surety, or other person liable, notwithstanding that the time for the repayment of the loan, or any installments thereof, may not have arrived."

The three persons mentioned in this section are the borrower, the surety, or other person liable. The Respondents are sureties. When section 2 is analysed the following are the sub-sections prayed in aid by the Respondents both in this Court and in the Court below. The relevant parts of section 2 reads:

> "2.-(1) Where proceedings are taken in any court by any person for the recovery of any money lent either before or after the commencement of this Act, or the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, . . . or that, in any case, the transaction is harsh or unconscionable, the court may reopen the transaction . . .having regard to the risk and all the circumstances, may adjudge to be reasonable;. . . and shall set aside, either wholly or in part, or revise, or alter any security given, or agreement made in respect of money lent, and if the lender has parted with the security, may order him to indemnify the borrower or other person who gave such security."

The Respondent sureties are asking this Court to set aside the guarantee and mortgage as a security on the basis of the provisions in section 2 of the Act.

The Privy Council has recently emphasized the distinction between a surety and a borrower in different circumstances from this case. Paragraph 39 of **National Commercial Bank (Jamaica) Ltd. v Raymond Hew and Clifton Hew as executors of the estate of Stephen Hew** Privy Council Appeal No. 65 of 2002 delivered 30th June 2003 states:

> "39. The suggestion that the Bank took excessive security is a surprising basis on which to make a claim of exploitation. Their Lordships think that the Court of Appeal may have confused the position of third party sureties with that of the actual borrower. The cases cited by the Court of Appeal all involved sureties. In such cases the lender obtains additional security at the expense of the surety, who incurs a liability and obtains nothing in return."

Equally important is the statement by Greer LJ. in the case of **Temperance Loan Fund Ltd. v. Rose and Another** [1932]All E.R. Rep. 692 at 694 which reads:

> "If the second contention urged by counsel for the moneylenders, namely, that the Act makes the contract unenforceable only as against the borrower – were sound, the effect would be that the statute would give a defence to the borrower who has no merits and who has had the money, but refuses a similar defence to a person who signs merely as guarantor and who has not had the money. I decline to construe the section in that way. The section is not confined in its operation to a contract for the repayment of money lent. It provides that any

> security given shall be unenforceable unless certain conditions are complied with. Section 6, it is clear, applies to a promissory note, bill of exchange, or any other security given by a third party and received by the moneylenders as security for the payment of the money lent."

That the liability of the surety goes if the borrower is no longer liable and this is illustrated by **Eldrige & Morris v Taylor** [1931] 2 KB 416. At 423 Slesser L.J. said:

> "As to the female defendant I think that, to the knowledge of the plaintiffs, she was added as a surety and for no other purpose. We are entitled to look at the substance of the transaction, and doing so, I think it is clear that the wife was only to be liable as a surety, and if the principal debtor is not liable the surety cannot be liable either. The husband is protected from liability owing to the omission by the plaintiffs to comply with the requirements of s. 6; so too the wife is protected."

Scrutton L.J. at pages 419 and 420 and Greer L.J. at page 422 expressed similar sentiments. Scrutton LJ at page 420 stated that:

> "As I have said, the contract of repayment is joint and several, and if the one party cannot be sued neither can the other. Further, the wife was merely surety for the husband, and if the debt of the principal is gone, the surety is also discharged; consequently the action cannot be maintained against the wife. I am inclined to think that she comes within the word "borrower," although I do not wish to be taken as deciding this. But on the point about the wife being a surety I am quite clear. Rowlatt J. therefore came to a right conclusion, and the appeal must be dismissed."

Greer L.J. at page 422 said:

> "With regard to the female defendant I think the money lenders knew perfectly well that the money had been borrowed by the husband, and that to enable them to get the money from him they insisted upon the wife being added as a surety. Inasmuch as if time had been given to the principal debtor the surety would have been released, so by omitting to give the principal debtor the proper document under s. 6 of the Act of 1927 the plaintiffs having failed against the principal debtor they fail likewise against the wife. For these reasons I agree, although with some regret, that the appeal must be dismissed."

The basis on which Scrutton L.J. described the wife as a "borrower" is explained in the headnote at page 416 thus:

> "The male defendant borrowed, by promissory note, money from the plaintiffs a firm of money-lenders, and agreed to repay the same by monthly installments. In this transaction the requirements of s.6 of the Moneylenders Act, 1927, were duly complied with. The borrower made default in paying the installments, whereupon the plaintiffs issued a writ to recover the amount. Negotiations then took place, and in the result an arrangement was made by which the male defendant and the second defendant (his wife) gave the plaintiffs a joint and several promissory note in respect of the amount unpaid on the first promissory note, an amount for interest, and certain agreed costs. A memorandum of this contract was signed by both defendants, but no copy was sent to them within seven days, as required by s.6 of the Act of 1927. The amount of the promissory note not having been repaid on the due date, the plaintiffs sued the defendants to recover the same."

In the instant case the security is a registered mortgage. The proceedings have been instituted by the sureties but the principle stated by Scrutton L.J. at page 693 of **Temperance Loan Fund** (supra) is applicable:

> "I am relieved from considering these authorities, because this action is brought upon a promissory note; that note is a security given by a borrower to moneylenders; that security includes a promise by a third party that he will pay, and this Act provides that security shall be unenforceable unless a memorandum complying with the statute has been signed. That is a sufficient answer to this point taken by the moneylenders. As a result the defendant is discharged of the debt, and the appeal must be allowed."

Salter the borrower was not candid with the Court or it seems to the sureties. He gave a false explanation as to why he signed the loan agreement of US$250,000. He said it was for future advances. The evidence on behalf of the moneylender discloses that it was a condition precedent for granting the actual loan, that he guaranteed the debt of US$160,000 for Desmond Rankine. To reiterate, this should have been stated in the loan agreement. Had it been stated the sureties would have been aware of the true position.

By failing to indicate that the Loan Agreement of US$250,000 was comprised of a guarantee of US$160,000 by Salter with respect to a debt owed by Rankine together with a loan of US$90,000 to Salter, the Appellant improperly concealed the true state of affairs from the Respondents. This amounted to a misrepresentation and equity will intervene to set aside the mortgage and guarantee given by the Respondents to the Appellant. See **Snell's Principles of Equity** 26th edition Chapter 11. Also relevant is **T.S.B. Bank plc v. Camfield and another** [1995] 1 All E.R. 951 and **Blest v Brown** 45 ER 1225.

Be it noted however that the Appellant moneylender may take whatever action is available to it against Salter, the borrower, who was not a party in these proceedings.

Should the order of the Court below be affirmed?

Since the interest was excessive that would be one of the bases for re-opening the agreement and setting aside the security and guarantee given by the Respondents pursuant to section 2(1) of the Act. This is what the learned judge below did and his order should be affirmed.

The learned judge below grasped the essentials that to set aside the security was an appropriate remedy for the sureties. To vary the principal to US$90,000 would have been the appropriate relief if the borrower had instituted these proceedings.

There are two other sub-sections to be noted. Section 2(4):

> "2(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of moneylending."

Even more important is section 2(5) which reads:

> "2(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court."

This section emphasizes the powers of the Court inherited from the Court of Chancery which in this case refers to the power to cancel the Respondents' guarantee and mortgage. It also refers to the Court's powers

pursuant to section 158(2)(b) of the Registration of Titles Act to cancel the mortgage. That section reads:

> "158.-(1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar-
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
>
> (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,
>
> and the Registrar shall give effect to that direction.

Section 158(2) is applicable. It reads:

> "(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar -
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
>
> (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

I asked Ms. Phillips for the Appellant what impediment there was to prevent the Appellant as Mortgagee from exercising its power of sale pursuant to sections 105 and 106 of the Registration of Titles Act? I think the

impediment has been demonstrated in this case. The Mortgagee issued a statutory notice for sale and the Respondent sureties countered by way of Originating Summons and prayed in aid section 2(2)of the Act. See **British American Cattle Co. v Caribe Farm Industries Ltd and Another** (1988) 53 W.I.R. 101 where a later Act, the Aliens Landholding Act, modified the provisions of the Law of Property Act in Belize. In the circumstances of this case the Act has modified the provisions of the powers of sale by a mortgagee in the Registration of Titles Act.

The Appellant has failed because the Loan Agreement misrepresented vital terms agreed as well as statutory obligations pursuant to section 8(1) and (2) of the Act and no relief against the sureties is permissible in the circumstances by praying in aid section 8(3). There were no agreed terms which were inadvertently omitted in the Loan Agreement. Equally, the Appellant cannot resort to section 8(3) with respect to US$90,000 actually lent because of its failure to produce vital documents relating to the Rankine's obligations to enable this Court to exercise its discretion to vary the mortgage from US$250,000 to US$160,000 which Salter is reputed to have guaranteed as indicated in the Instrument of Guarantee. Such a variation could be made at the instance of Salter if he were a party to these proceedings. Any such variation will have no bearing on the Respondent sureties who are entitled to have the mortgage cancelled either by virtue of the provisions of the Act or because of the intervention of equity.

It is because Desmond Rankine failed in his repayment of US$160,000 that the Appellant has attempted to exercise its powers of sale under the mortgage. The Respondents are entitled to ask for the extent of the Rankine obligations if any. The failure to produce those documents could lead to the inference that there was no loan to Desmond Rankine. Consequently, section 10 of the Act would entitle Salter to refuse to pay. In any event even if the loan agreement were varied to read US$90,000, then immediately if there was such a variation, the mortgage would be set aside at the instance of the Respondents as sureties.

Conclusion

The gist of this case is that the Appellant moneylender failed to incorporate in the loan agreement the amount actually lent to Salter, the effective interest charged, which are statutory obligations as well as the information that Salter was granted the loan provided he guaranteed a loan of US$160,000 previously made to Desmond Rankine. The Respondents as innocent sureties of Salter were never aware of the two-fold nature of Salter's obligation to the Appellant as borrower of US$90,000 and as a surety for Desmond Rankine for US$160,000.

No equitable relief pursuant to section 8(3) of the Act is available in these circumstances. He who comes to equity must come with clean hands. Additionally the generous provisions of section 2 of the Act to revise the security are not available to the Appellant with respect to the Respondent

guarantors. The Respondent can seek and have sought to set aside or cancel the security. It is arguable that Desmond Rankine has no obligations to the Appellant. Yet it is on this basis of the alleged failure of Rankine to meet his payment to the Appellant, that the Appellant wishes to exercise its powers of sale so as to deprive the Respondents of their Norbrook property. The Respondent sureties are entitled to say there was no loan to Salter of US$250,000 and once that was established their liabilities as sureties never existed. This Court will not assist the Appellant moneylender in this regard. So the Order of Reid J. must be affirmed.

I would like to emphasise that this finding in favour of the Respondent sureties is without prejudice to any action that the Appellant may wish to institute against Salter in his capacity as a borrower or a guarantor for Desmond Rankine.

There ought to be an additional Order that the Registrar of the Supreme Court must direct the Registrar of Titles to cancel the mortgage on the Respondents' Norbrook property forthwith. The Respondents ought to have the costs of this appeal.

The Order ought to read as follows:

(1) Appeal dismissed.

(2) Order of the Court below affirmed.

(3) Order that the Registrar of the Supreme Court direct the Registrar of Titles to cancel the mortgage referred to at paragraph 3 in the Order of the Supreme Court.

Costs to the Respondents to be taxed if not agreed.

(4) The Appellant must pay the costs of the Appeal.

PAUL HARRISON, J.A:

This is an appeal from a decision of Reid, J on September 28, 2000 in which he entered judgment in favour of the respondents. His decision reads:

> "1. The loan agreement dated 19th November, 1977 between the Defendant and Kenroy Salter is void and unenforceable as being in breach of section 8 of the Moneylending Act.
>
> 2. The Guarantee and the Mortgage executed by the Plaintiffs as collateral security for the loan are void and unenforceable in that the documents failed to comply with the provisions of the Moneylending Act and in particular section 8 thereof.
>
> 3. The said mortgage over premises known as Townhouse #12 Airdrie Mews which premises is registered at Volume 1207 Folio 678 of the Register book of titles and guarantee signed by the defendants in favour of the plaintiff be cancelled and delivered up to the Plaintiffs.
>
> 4. The duplicate Certificate of Title in respect of premises registered at Volume 1207 Folio 678 of the Register Book of Titles be delivered to the registered proprietors thereof.
>
> 5. Costs to the Plaintiffs to be agreed or taxed."

Unfortunately, contrary to what he is required to do, Reid, J gave no reasons for his decision. This Court is unable to say definitively the nature of the process by which the learned judge arrived at his conclusion.

The relevant facts are as follows:

Kenroy Salter ("Salter") is the husband of Margaret Salter who is the daughter of Imorette Palmer and the sister of Marcia Gallimore, ("the respondents.") The respondents and Margaret Salter are the registered owners of premises, namely Townhouse #12 Airdrie Mews registered at Volume 1207 Folio 678 of the Register Book of Titles. In order to secure a loan from the appellant, Cornerstone Investments and Finance Co., Ltd., ("Cornerstone") to Salter, the respondents and Margaret Salter executed a mortgage over the said premises and signed a guarantee. Salter himself executed a loan agreement and a guarantee on the said occasion. All four documents were executed on the 19th day of November 1997.

The loan agreement, signed by the appellant company and Salter, recited a loan of US$250,000.00 at an interest rate of 22% per annum.

The instrument of guarantee signed by Salter guaranteed the repayment of a loan of US$160,000.00 made by the appellant to one Desmond Rankine under a "loan scheme arrangement" entered into on February 27, 1996. This document of guarantee was not exhibited to Reid, J.

The loan of US$250,000.00 to Salter fell into arrears. As a consequence, on August 28, 1998, the appellant company sent out a statutory notice to realize its security by the sale of the said mortgaged

premises. In response, the respondents filed an originating summons, seeking:

> "A Declaration that:
>
> i) The loan agreement dated 19th November, 1997 between the defendant and Kenroy Salter is void and unenforceable as being in breach of section 8 of the Moneylending Act.
>
> ii) That the Guarantee and the Mortgage executed by the plaintiffs as collateral security for the loan are void and unenforceable in that the documents failed to comply with the provisions of the Moneylending Act and in particular section 8 thereof.
>
> iii) Alternatively that the interest charged in respect of the sum "actually" lent is excessive and that the transaction is harsh and unconscionable and for an order that the transaction b/e (sic) reopened and that an account be taken between the parties."

In the summons the respondents also sought an order that the mortgage over the said registered premises and the guarantee signed by them be cancelled and the duplicate certificate of title thereto be delivered to them, the registered proprietors.

Reid, J found for the respondents and made the order now appealed.

Before this Court, Miss Phillips, Q.C., argued that the loan of US$250,000.00 at an interest rate of 22%, per annum evidenced by the loan agreement was exempt from the provisions of the Moneylending Act. ("the Act"). She referred to section 13(1)(i) of the Act and the

Ministerial Order published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated August 27, 1997, in which the Minister prescribed a rate of 25% per annum, demonstrating that the loan at a rate of 22%, being within the ceiling of 25%, was not governed by the Act. She argued further that, by the terms of the guarantee signed by Salter, he assumed the primary responsibility as debtor for the sum of US$160,000.00 loaned to Rankine. The latter sum, already disbursed prior to November 19, 1997, added to the sum of US$90,000.00 disbursed to him Salter, created a single loan of US$250,000.00 the repayment of which was the responsibility of Salter, as the principal debtor.

Mr Scharschmidt, Q.C., for the respondents submitted that the guarantee signed by Salter, made him a guarantor for the repayment of US$160,000.00 in the event that Rankine did not pay. Salter was not the principal debtor. Therefore the only amount "actually lent" to Salter was US$90,000.00. In view of the definition of "interest" in section 2 of the Act, the balance of the sum of US$160,000.00 was interest. Accordingly, the rate of interest strictly chargeable was in excess of 25% and consequently, the loan transaction was void as being in breach of section 8 of the Act. Therefore the mortgage and guarantee given by the respondents were unenforceable.

Moneylending transactions, unlike the "sin" of usury of early times, although now viewed as acceptable and legitimate, are regulated by

strict statutory provisions. The Moneylending Act, 1938 (" the Act") (Jamaica) as amended, modelled on the U.K. Moneylenders Acts 1900-1927, provides the regulatory framework that governs as a general rule, all moneylending transactions. Section 8 of the Act requires that, (1) a note, list or memorandum in writing of the contract be in existence containing all the particulars, signed by the borrower; (2) a copy thereof be sent to the borrower within 7 days; and (3) the note or memorandum be signed before the money is lent or before the security for such loan be given (section 8(1)). The note or memorandum must contain all the terms of the loan, in particular, the date on which the loan was made, the principal and the interest charged (section 8(2)). No contract for such loan, nor any security given shall be enforceable, if any of these provisions is breached. However, sub section (3) provides:

> "Notwithstanding anything in subsection (1) or (2) any court of competent jurisdiction may, upon application being made if it considers it equitable to do so, declare the contract to be enforceable in the same manner and to the same extent as if the requirements of subsections (1) and (2) had been complied with."

This provision is a statutory recital of the equitable jurisdiction of the court to exercise its discretion favourably, despite the fact that the procedures required by the section had been breached.

Despite these strict provisions, some moneylending transactions are exempt from the provisions of the Act. Section 13 provides that the Act

shall not apply, inter alia, to, building societies, friendly societies, registered provident societies, companies licensed under the Financial Institutions Act, Banking Act and The Insurance Act, and any person lending money incidental to its main business. Additionally, the Act shall not apply to:

> "13 – (1)...
>
> (i) any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order *prescribe."

The Minister prescribed " ... an interest rate of twenty-five per centum per annum ..." (See the Moneylending (Prescribed Rate of Interest)) Order, October 1997 published in the Jamaica Gazette Supplement dated August 27, 1997).

Consequently, if the loan transaction is subject to an interest rate of 25% or less, it is not governed by the provisions of the Act:

"Interest" is defined in section 1(2) of the Act. It reads:

> "(2) In this Act -
>
> 'interest' does not include any sum lawfully charged in accordance with the provisions of this Act by a lender of money for or on account of costs, charges or expenses, but save as aforesaid includes <u>any amount, by whatsoever name called, in excess of the principal, paid or payable to a lender in consideration of or otherwise in respect of the loan</u>." (Emphasis added)

"Principal" is also defined in the said section:

" 'principal' means in relation to a loan the amount actually lent to the borrower."
(Emphasis added)

Consequently, each fact must be genuinely so stated and so avoid any deception or apparent concealment. This distinction was demonstrated in the case of ***Dunn Trust Limited v Feetham*** [1936] 1K.B. 22. The defendant, an undischarged bankrupt, seeking a loan of £100 from the plaintiffs, moneylenders, agreed that he would pay the latter £50 therefrom as compensation for their loss in past moneylending transactions with him. The plaintiffs had proved in his bankruptcy but received no dividend. The memorandum signed under the Moneylenders Act, 1927 and a promissory note, each recited a loan of £100 at an interest rate of £64 per centum per annum, repayable by 14 consecutive monthly installments of £10 each. The default clause stated the principal sum as £140 described by the plaintiffs at trial as a mistake. Two cheques of £50 each were prepared in the defendant's name. He retained one and endorsed and handed back the other to the plaintiffs. The defendant having defaulted after one monthly payment, the plaintiffs sued on the promissory note. It was held, confirming the court below, that the money "actually lent" was £50. The sum of £50 retained was in excess of the principal and was therefore "interest", in accordance with the statutory definition. The true interest was therefore in excess of that stated in the

memorandum. The contract was therefore in breach of the Act and unenforceable.

In contrast, where a moneylender, in payment of a former loan, pays to a borrower the difference between the fresh loan and a former loan, it was held that the transaction was valid under the Moneylenders Act. The moneylender had in effect cancelled the former loan and advanced the total sum of the second loan. It was unnecessary that the borrower physically hand back from the proceeds, the amount of the former loan (***B.S. Lyle Ltd v Chappell*** [1932] 1 KB 691).

The documentation usually employed to effect a moneylending transaction involves several documents, varying between the note or memorandum, a guarantee, a mortgage, a promissory note or a combination of some of these. Lord Wilberforce, in ***Holiday Credit Ltd v Erol*** [1977] 2 All ER 696, at page 699, said:

> "It is an obvious feature of moneylending transactions, particularly where some security is given for repayment, that more than one document may be required in order to complete the transaction. There may be a promissory note, or a bill of sale or a mortgage, in addition to the contractual agreement to repay. ... Both documents, or one should say, the single composite document, were handed to the borrower. If, therefore, s 6 is to be regarded purely as a requirement as to documentation, it could be said that this requirement has been met: all the relevant legal instruments have been given to the borrower; there is no contractual term relating to the loan outside or apart from these legal instruments."

The guarantee is frequently employed when security is given for a loan under the Moneylending Act. The authors of the ***Modern Contract of Guarantee by O' Donovan and Phillips***, 3rd edition at page 25, defined a guarantee, simpliciter:

> "... in a contract of guarantee the surety assumes a secondary liability to the creditor for the default of another who remains primarily liable to the creditor."

This is in contrast with a contract of indemnity where the surety assumes a primary liability. However, by the use of a clause labelled "a principal debtor's clause" a document which is called a guarantee may be interpreted as an indemnity. The said authors, at page 27, said:

> "In the doubtful cases, the courts will decide whether a contract is one of indemnity rather than a contract of guarantee by a careful perusal of all the provisions of the agreement to ascertain if the rights of the creditor against the party entering into the contract are different in extent from those available against the debtor."

and at page 29:

> "... a guarantee which contains clauses preserving the liability of the guarantor in certain circumstances when the principal is no longer liable ... will invariably also contain a principal debtor clause, whereby the creditor is 'given liberty to act as though the guarantor were a principal debtor'."

Each case has to be determined on its own facts after an examination of the terms of the contract. The intention of the parties and what they in fact agreed, is the determinant of the nature of the transaction.

The true construction of a document to determine whether it is a guarantee attracting collateral liability or an indemnity, obliging the guarantor to be seen as a primary and immediate debtor was considered in ***Moschi v Lep Air Services et al*** [1973] A.C. 331. Lord Reid, at page 344, said:

> "... I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means."

and Lord Diplock at page 349 said:

> "Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends upon the words in which the parties have expressed the promise. Even the use of the word "guarantee" is not in itself conclusive. It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to misdescribe what is in law a contract of indemnity and not of guarantee. Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from its being classifiable as a guarantee. Every case must depend upon the true construction of the actual words in which the promise is expressed."

In ***M.S. Fashions Ltd. et al v Bank of Credit and Commerce International S.A. (In Liquidation) et al*** [1993] Ch. D. 425 a bank lent money to some companies, whose directors signed guarantees as "principal debtors" and deposited monies with the bank. The directors were guarantors of the companies' indebtedness to the bank and the monies were charged in favour of the bank to secure the repayment of the debts by the companies. The bank became insolvent and was put into liquidation. The bank sought to require the companies to repay the debts in full without recourse to the deposit of the directors. The companies and directors argued that the directors having signed the guarantees as principal debtors, the bank was obliged to apply the monies directly in reduction of the companies' debts to the bank and in reduction of the directors' liabilities. Hoffmann, J (later Lord Hoffmann), found in favour of the directors and the companies. The appeal of the bank was dismissed. The head note, inter alia, reads:

> "... where a liability had been entered into by a "principal debtor" it was a primary liability not contingent upon the making of a demand in writing and could constitute a valid cross claim for the purposes of the rule; (that where there were existing cross claims arising from mutual dealings before the commencement of the winding up of a company, rule 4.90 of the Insolvency Rules 1986 took effect to bring about a set-off) ... accordingly the indebtedness of the companies as at the date of the winding-up of the bank had been extinguished or reduced by

> the amounts which on that date were standing to the credit of the directors."

Dillion, L.J., on page 447 said:

> "In the present case in the letters of charge signed by Mr Amir in respect of Impexbond Ltd. and Tucan Investments Plc. he has expressly agreed that his liabilities thereunder – namely the companies' liabilities charged on his deposits – shall be as that of a principal debtor.
>
> Similarly in the forms setting out the cash deposit security terms which Mr Ahmed signed in respect of High Street Services Ltd. and its associated companies he accepted that the liabilities of those companies should be recoverable from him as principal debtor. ...
>
> The effect of that must be to dispense with any need for a demand in the case of Mr Amir since he has made the companies' debts to B.C.C.I. his own debts and thus immediately payable out of the deposit without demand. In the case of Mr Ahmed there must be immediate liability even though the word "demand" was used, because he accepted liability as a principal debtor and his deposit can be appropriated without further notice."

and at page 448:

> "A creditor cannot sue the principal debtor for an amount of the debt which the creditor has already received from a guarantor."

A document which, at first sight, is read as a guarantee, attracting a collateral or secondary obligation may, on an examination of all the documentation, cumulatively, and the circumstances of the particular case, effectively be construed as an indemnity, giving effect to the

intenfion of the parties and conferring a primary obligation on the guarantor.

In ***Re: Hugh Maxwell Taylor et al Ex parte, Century 21 Real Estate Corporation*** (1995) 130 ALR 723, in the Federal Court of Australia, (in bankruptcy) – Burchett, J had to determine the effect of clauses of a loan transaction. The applicant Century 21 had made a loan to a company, South Pacific, at the request of the Guarantors. Clause 1, inter alia, read:

> "We ... ("the Guarantors")
>
> 1. Hereby jointly and severally, unconditionally guarantee to Century 21 the payment, when demanded from us ... of any sum of money whatsoever that may become payable by South Pacific ..." (Emphasis added)

This clause was construed as a guarantee, unattended by another clause or document. Clause 2, inter alia read:

> "2. As a separate and severable covenant, hereby jointly, and severally agree that, in the event of South Pacific in any respect in any respect of failing to discharge its obligations under the promissory note, the Guarantee shall jointly and severally indemnity ... Century 21 from and against all costs, damages, expenses and losses of any nature whatsoever arising out of ... any such failure." (Emphasis added)

Clause 2, he reasoned, containing the words:

> "... in the event of South Pacific ... failing to discharge its obligations ..."

standing alone, seemed to place on South Pacific the primary obligation. Clause 3(d), however, which read, inter alia:

> "The guarantees and indemnities contained in Clauses 1 and 2 of this Guarantee and Indemnity shall be principal obligations and shall not be treated as ancillary or collateral to any other obligation ... to the intent that these guarantees and indemnities shall be fully enforceable without Century 21 taking any step whatsoever against South Pacific. ..." (Emphasis added)

had the effect of leaving uncontradicted the express terms of Clause 1, by which "... the liability imposed on the guarantors is to attach only when a demand is made upon them." Clause 1, therefore, remained a guarantee of "... the payment when demanded. ..." On the other hand, clause 3(d) confirmed that clause 2 despite the clause, "in the event of South Pacific ... failing to discharge its obligation ..." created an indemnity "... against all costs, damages etc. ..." This was because clause 2 did not contain the requirement for a prior demand, described itself as a "separate and severable covenant," and there was nothing therein "to forbid the application of the words of clause 3(d) in their natural meaning." ..." By the tenor of clause 3(d) no prior step needed to be taken to fully enforce the indemnity in respect of the guarantors. Clause 2 was an indemnity clause.

In the instant case, Salter and Cornerstone executed a document titled "Instrument of Guarantee" on November 19, 1997. It reads:

> "In consideration of loan and credit facilities to the extent of **One Hundred and Sixty Thousand Dollars United States Currency (US$160,000.00),** equivalent for the purposes of stamp duty to **Five Million Seven Hundred Thousand Dollars Jamaican Currency (J$5,700,000.00)** together with interest thereon being granted by the Lender at the request of **DESMOND RANKINE** of Montego Bay in the Parish of Saint James, Businessman (hereinafter called 'the Borrower'), on the terms and conditions established by a Loan Scheme Arrangement made and entered into on or about the 27th day of February 1996 between the mortgager (Desmond Rankine) and the lender (Cornerstone) (hereinafter called 'the Principal Transaction')."

and continuing, it reads:

> "I **KENROY SALTER** of Montego Bay in the Parish of Saint James (hereinafter called the Guarantor') DO HEREBY GUARANTEE to the Lender the repayment of and DO HEREBY UNDERTAKE to pay to the Lender all Principal, interest and other moneys at any time owing or payable by the Borrower to the Lender in the event of default by the Borrower upon the terms hereof AND IT IS HEREBY AGREED AND DECLARED that:
>
> 1. This Guarantee is a continuing guarantee of the liabilities of the Borrower under the said Loan Agreement and the liabilities of the Borrower under the said Loan Agreement and the liability of the Guarantor is that of the principal debtor as between the Guarantor and the Lender;
>
> 2. The Lender shall not be bound to exhaust its rights against the Borrower before making demand upon the Guarantor for the repayment of the aggregate indebtedness of the Borrower under the Principal instrument and the liability of the Guarantor hereunder shall first arise when notice in writing is given by the Lender to the

> Guarantor of any default and demand for payment is made under this Guarantee;"
> (Emphasis added)

This document although headed "guarantee", because it states in clause 1 that "the liability of the Guarantor is that of the principal debtor as between the Guarantor and the Lender" is in fact an indemnity by Kenroy Salter to be liable for the debt of Desmond Rankine, namely US$160,000.00 (i.e. $J5,700,000.00) as a principal debtor. Clause 2 permitted the lender Cornerstone to proceed against the guarantor Salter directly, as a principal debtor of Cornerstone. Salter thereby assumed the US$160,000.00 loan debt of Rankine – a primary liability. Unfortunately, this document was not presented to Reid, J.

In order to confirm that that was the true intention of the parties, namely Cornerstone, Salter and Rankine, a loan agreement was entered into on the said November 19, 1997 between Cornerstone and Salter in the sum of US$250,000.00. This latter sum was an amalgamation of the Rankine loan (US$160,000.00) and a fresh loan to Salter himself of US$90,000.00. Salter assumed the Rankine loan by the principle of novation.

> "Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made ..."

(***Law of Contract***, 11th edition by Cheshire Fifoot and Firmston).

If there was any doubt that Salter assumed the primary liability for the Rankine obligation, the loan agreement between Cornerstone and Salter for US$250,000.00 unmistakably reveals the true intention of the parties. It was unnecessary that Cornerstone hand to Salter the sum of $250,000.00 and request that Salter hand back to Cornerstone a cheque for US$160,000.00 representing the payment of the Rankine loan. The payment of the difference to Salter of US$90,000.00 was sufficient (***B.S. Lyle Ltd v Chappell*** supra) to effect the transaction intended.

In further confirmation of the nature of the transaction and the true intention of the parties, was the issuance of the Statement of Account dated November 19, 1997 from Messrs Grant, Stewart, Phillips and Co., the Attorneys-at-Law of Cornerstone to "Kenroy Salter, 16 North Street, Montego Bay. ..." This document was exhibited to the affidavit of Kenroy Salter dated May 7, 1999 and tendered in the proceedings in the court below. That statement, inter alia, reads:

> "Re: Loan Facility – Cornerstone Investments and Finance Company Limited to you secured by first legal mortgage over Vol. 1207 Fol. 678 ...
>
> Loan proceeds $3,300,000.00
> (NB $5.7M already disbursed)."

and after reciting various consequential fees and charges continues:

> "Balance due to you $2,986,000.00."

Salter at no time challenged the accuracy of this statement of account. On the contrary he relied on it. "$5.7M already disbursed" is a reference to

the Rankine loan. "$3,300,000.00" is the equivalent of US$90,000.00. at the exchange rate prevailing then. In the said affidavit Salter said, in paragraph 4:

> "4. That I provided the following collateral ..."

listing thereafter the mortgage document and the guarantee signed by the respondents and Margaret Salter.

Salter, untruthfully, in paragraph 2, said:

> "2. That in or about October, 1997, I applied for a loan from the defendant company. The loan was for US$90,000.00, however, it was agreed between the defendant and I that to the extent that I may require further loan advances in the future the loan documentation would be prepared to reflect a loan of US$250,000.00 so that if and when those further advances were to be made the disbursement would be expedited as it would not be necessary for any further documentation to be executed."
>
> (Emphasis added)

This was a deliberate, albeit inept, attempt by Salter to deceive the Court, of the true nature of the transaction and the total sums already in fact disbursed.

Also tendered by the respondents and relied on in the Court below was the affidavit of Marcia Susan Gallimore (one of the respondents) dated May 7, 1999. She said, in paragraph 3:

> "3. I have read the Affidavit of **KENROY SALTER** filed herein and confirm that Kenroy Salter requested my mother the first Plaintiff, my sister **MARGARET SALTER** and I provide collateral for a loan which he had sought from the Defendant

> for US$90,000.00. We agreed and in pursuance of the agreement we agreed to grant to the defendant a first legal mortgage over the property aforesaid and to execute a guarantee in favour of the Defendant."

and in paragraph 5:

> "The defendant did not in fact loan the sum of **US$250,000.00** to the principal debtor as set out in the agreement but the sum of **JA$3,300,000.00** being the agreed Jamaican dollar equivalent of **US$90,000.00."**

Both statements are inadmissible as evidence and should not have been relied on by the Court below, for the reasons that:

(1) Each statement is hearsay evidence - she must have been told so by Salter. These proceedings are final, not interlocutory and therefore hearsay evidence is not admissible – Rule 30.3(1) and

(2) Parol evidence, as a general rule, cannot be admitted to alter or vary or contradict a written document.

The respondents signed the instrument of mortgage document and the guarantee document to secure a loan of US$250,000.00. The admissible, uncontradicted documentary evidence confirms this. They did so knowing, then, that the loan was for the latter amount and not for any lesser sum. The guarantee document signed by the respondents itself contained a "principal debtor's" clause in the same terms as clauses 1 and 2 of the instrument of guarantee signed by Salter in respect of the Rankine loan; this also created a primary liability on the respondents.

I do not therefore agree with learned counsel for the respondents, that the "money lent" was not US$250,000.00 and that therefore "the interest" was "US$160,000.00" (see ***Dunn Trust v Feetham,*** supra) thereby making the loan subject to and in breach of Section 3 of the Act.

In the above circumstances, the loan evidenced by the agreement between Cornerstone and Salter dated November 19, 1997 for the sum of US$250,000.00 at an interest rate of 22% was a valid and enforceable loan. The loan was not in breach of, and was exempt from, the provisions of the Moneylending Act in accordance with section 13(1)(1) and Ministerial Order published in Jamaica Gazette Supplement dated August 27, 1997.

The transaction was perfectly legal and straightforward. If it was necessary in this case, and I do not so find, it would be appropriate to exercise the equitable jurisdiction of the court to declare the loan contract enforceable, pursuant to section 8(3) of the Act.

I would allow the appeal with costs both here and below, to the appellant to be agreed or taxed.

WALKER, J.A.:

The judgment of Reid, J. has come to this court in cryptic form. The Formal Order reads:

> "(1) The loan agreement dated 19th November, 1997 between the Defendant and Kenroy Salter is void and unenforceable as being in breach of section 8 of the Moneylending Act.
>
> (2) The Guarantee and the Mortgage executed by the Plaintiffs as collateral security for the loan are void and unenforceable in that the documents failed to comply with the provisions of the Moneylending Act and in particular section 8 thereof.
>
> (3) The said mortgage over premises known as Townhouse # 12 Airdrie Mews which premises is registered at Volume 1207 Folio 678 of the Register Book of Titles and guarantee signed by the defendants in favour of the plaintiff be cancelled and delivered up the plaintiffs.
>
> (4) The duplicate Certificate of Title in respect of premises registered at volume 1207 Folio 678 of the Register Book of Titles be delivered to the registered proprietors thereof.
>
> (5) Costs to the plaintiffs to be agreed or taxed."

That was all. The trial judge gave no reasons, either written or oral, for his decision. That is to be deplored. With regard to this aspect of the matter I am content to repeat what I said in ***Winston Campbell v Cable & Wireless Jamaica Limited*** SCCA No. 105/1998 (unreported) delivered on December 4, 2000:

> " I... emphasize the absolute necessity for trial judges to give reasons for judgment. Where an

> oral judgment is delivered, counsel in the case should be invited by the court then and there to take a careful note of the judicial pronouncement so that, in the event of an appeal, that note may be agreed between themselves and afterwards submitted for the judge's approval. It is becoming increasingly difficult for this court to resolve cases on appeal in circumstances where a trial judge gives a bald judgment while maintaining inscrutable silence as to the reasons for the court's decision. At all times, reasoned judgments best serve the interests of justice."

On this appeal the first question to be considered is whether or not the transaction under review is exempt from the provisions of the Moneylending Act ("The Act"). The appellant company contends that it is, the respondents contend that it is not. If it is, the sum of US$250,000.00; lent by the appellant company to the borrower, Kenroy Salter (who is not a party to these proceedings) is repayable and, if not repaid, the security for the loan given by the respondents and one Margaret Alison Salter, by way of a legal mortgage of property owned jointly by them, is enforceable. A second question arises, namely whether or not the transaction complies with the provisions of the Act, only if the first question is answered in favour of the respondents.

The First Question

It is not an uncommon feature of moneylending transactions, particularly where, as here, some form of security is given for repayment, that more than one document may be required in order to complete the

transaction. If authority be required for such a proposition it is to be found in the case of **Holiday Credit Ltd. v Erol** [1977] 2 All E.R. 696. In the present case the documentation of the transaction comprised four separate documents all of which were executed on November 19, 1997.

These documents were:

(1) a document headed "Loan Agreement" executed by the appellant company and Kenroy Salter showing a loan of US$250,000.00 from the appellant company to Kenroy Salter at a rate of interest of 22% per annum;

(2) a mortgage contract executed by the respondents and Margaret Alison Salter pledging real property owned jointly by them as security for the said loan to Kenroy Salter;

(3) a document headed "Instrument of Guarantee" executed by the respondents and Margaret Alison Salter guaranteeing repayment of the loan of US$250,000.00 to Kenroy Salter.

(4) a document headed "Instrument of Guarantee" executed by Kenroy Salter guaranteeing repayment of a loan of US$160,000.00 given by the appellant company to one Desmond Rankine under what was described therein as "a Loan Scheme Arrangement made and entered into on or about the 27th day of February, 1996."

The arguments on this appeal swirled around the amount of the loan to Kenroy Salter and the true construction of document (4). That document (which was not before Reid, J.) contained a principal debtor clause, which reads as follows:

> "This Guarantee is a continuing guarantee of the liabilities of the Borrower under the said Loan Agreement and the liabilities of the Borrower under the said Loan Agreement and the liability of the Guarantor is that of the principal debtor as between the Guarantor and the Lender."

Miss Phillips Q.C. for the appellant company submitted that document (4), however intituled, was, in essence, a novation of the loan of US$160,000.00 to Desmond Rankine. She argued further that, whether at common-law or following the dictates of common sense, under the terms of document (4) Kenroy Salter assumed primary liability for repayment of that loan which when taken together with a loan disbursement of US$90,000.00 to Salter (which was not disputed) created a total loan of US$250,000.00 to Salter as reflected in documents (1), (2) and (3). Accordingly, Miss Phillips said, the loan of US$250,000.00 to Salter which bore an interest rate of 22% per annum was exempt from the provisions of the Act. The exemption came about by reason of the fact that s.13 (1) of the Act ordains that the Act shall not apply to "any loan or contract or security for the repayment of money lent at such rate of interest not exceeding such rate per annum as the Minister may by order *prescribe" and the relevant Minister had by Order made and published

in the Jamaica Gazette Supplement Proclamations, Rules and Regulations on August 27, 1997 (of which Reid, J. was apparently unaware) prescribed a rate of interest of 25% per annum.

Mr. Scharschmidt Q.C. for the respondents contended that document (4) was a guarantee, nothing more and nothing less. Mr. Scharschmidt said that document (4) placed upon Salter, as guarantor, a secondary liability to the appellant company which would arise only in the event of a default by the borrower, Desmond Rankine. The sum of US$160,000.00 for which the guarantee was given by Salter was not money actually lent to Salter and, in the circumstances, the loan to Salter was inaccurately stated as US$250,000.00 in the loan documents. That being so, the loan transaction contravened section 8 of the Act, in the process rendering unenforceable the transaction as also the security and guarantee given by the respondents in respect thereof. There can be no doubt that Mr. Scharschmidt was right in his submission that if the loan transaction, itself, was unenforceable, the security and guarantee given by the respondents were likewise unenforceable: see ***Temperance Loan Fund Ltd. v Rose and Another*** [1932] All E.R. Rep. 690. Now section 8 of the Act provides as follows:

> "8. – (1) Subject to subsection (3), no contract for the repayment by a borrower of money lent to him or to an agent on his behalf after the commencement of 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 as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contact (sic); and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.
>
> (2) The note or 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 the interest charged on the loan expressed in terms of a rate *per centum* per annum.
>
> (3) Notwithstanding anything in subsection (1) or (2) any court of competent jurisdiction may, upon application being made if it considers it equitable to do so, declare the contract to be enforceable in the same manner and to the same extent as if the requirements of subsections (1) and (2) had been complied with."

The Australian case of **Re: Hugh Maxwell Taylor and Albert Brian Taylor exparte Century 21 Real Estate Corporation** (1995) 130 ALR 723 was a case in which a contract of guarantee containing a principal debtor clause was construed by the court. In undertaking that exercise and after consideration of several authorities on that subject matter Burchett, J. said:

> "No generalization is possible; the question must always be one of construction of the particular guarantee."

I agree with those observations of Justice Burchett. In the present case document (4) must be construed and understood in the context of the circumstances in which it was made. What are those circumstances? Document (4) was one of four documents, all of which were executed on the same day. These four documents were conjoined and were related to the same single transaction i.e. a loan of US$250,000.00 to Kenroy Salter. A Statement of Account rendered to Salter by the attorneys-at-law for the appellant company and bearing the same date i.e. November 19, 1997 described the loan proceeds to Salter as a sum of J$3,300,000.00 being the equivalent of US$90,000.00, and noted a sum of J$5,700,000.00 being the equivalent of US$160,000.00 as having already been disbursed. In these circumstances Salter must be taken to have appreciated that document (4) was intended to be part and parcel of a loan transaction whereunder he assumed principal liability for a loan of US$250,000.00. Where the respondents are concerned, they too must be taken to have understood that by executing documents (2) and (3) they were mortgaging their property to secure and guarantee a loan of US$250,000.00 to Salter. That was what was stated in the documents which they signed. What is clear on all the evidence is that Kenroy Salter and the respondents signed the relevant documents with their eyes wide open and with full knowledge of the content and import of the documents they executed. There was no hint of corruption – no

deception or coercion to be found anywhere. The heading "Instrument of Guarantee" was not, by itself, decisive of the nature of document (4). In my opinion, when considered in proper context, the inclusion of the principal debtor clause in document (4) automatically converted that apparent guarantee into an indemnity as it has been recognized such a clause may do; see **Heald and Another v O'Connor [1971] 1 W.L.R. 497; General Produce Co. v. United Bank Ltd.** [1979] 2 Lloyd's Law Reports 255. Again, a money lending transaction may properly be effected in circumstances where the money lent is applied by the lender to the purposes of the borrower in any manner of which the borrower has knowledge and authorizes: see **B.S. Lyle Lt. v Chappell** [1931] All E.R. Rep. 446. In the present case the total sum of US$250,000.00 was lent to Kenroy Salter, of which the sum of US$160,000.00 was applied by the lender, the appellant company, in settlement of the prevailing indebtedness of Desmond Rankine, and this with the full knowledge and approval of the borrower, Salter. At the date of execution of document (4) the Rankine obligations had fallen into arrears. The evidence of that was uncontroverted. The remaining balance of US$90,000.00 was disbursed to Salter, himself, as the uncontradicted evidence showed.

In my opinion this was an instance of a money lender carrying on business in a "perfectly legal, above board and honourable manner" as Walton, J. found was the case in **Orakpo v Manson Investments Ltd.**

[H.L.(E)] (1978) A.C. 95. The present appellant company, the moneylender, acted in an honest, straight-forward manner and did nothing which was not agreed before-hand and perfectly understood by the borrower, Salter, and his sureties, the respondents. Taken together the four documents evidencing the loan transaction between the parties contained all the terms of the loan agreement. The effect of document (4) was to make the obligations of Rankine the obligations of Salter, as Salter well knew and accepted. Under the terms of documents (2) and (3) the respondents' liability was to the extent of US$250,000.00, as they well knew and accepted.

In the result, I conclude that the money lending transaction between the appellant company and Kenroy Salter being a loan of US$250,000.00 at a rate of interest of 22% per annum is exempt from the provisions of the Act. As such it is valid and enforceable, as is the security given by the respondents under the mortgage agreement executed by them.

I would order accordingly in allowing this appeal with costs here and below to the appellant company.

Lastly, I would add only this. If my answer to what I have termed the first question be wrong, and the loan transaction between the parties be subject to, but not compliant with, the provisions of the Act, I should have no hesitation in applying the provisions of section 8(3) of the Act in aid of

the appellant company which would otherwise unjustly suffer a considerable loss.

DOWNER, J.A.

ORDER:

By a majority [P. Harrison, Walker, JJA; Downer, JA (Dissenting)]

1. Appeal allowed.
2. Costs both here and below to the appellant to be agreed or taxed.