IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 171 of 2016

JANINE VEGA	**CLAIMANT**
AND	
LAURA BLANCO	**1st DEFENDANT**
JULIO BLANCO	**2nd DEFENDANT**
d.b.a. PAYDAY ADVANCE &	
EZY LOANS PAWNING	

BEFORE THE Honourable Madam Justice Sonya Young

Written submissions
Claimants – 5.12.2016
Defendants – 28.11.2016
9.12.2016

Decision
6th February, 2017

Mr. Kevin L. Arthurs and Mr. Estevan Perera for the Claimant.
Mrs. Magali Marin-Young, SC for the Defendants.

Keywords: Civil Procedure – Summary Judgment – Striking Out – Contract – Money Lenders – Compliance with Money Lenders Act - Memorandum of Agreement – Rate of Interest – Harsh and Unconscionable Transaction – Unenforceable – Illegal – Unjust Enrichment – Restitution – Constructive Trust- Money Lenders Act Cap 260 (The Act)

DECISION

1. The Applicant/Claimant seeks summary judgment pursuant to Rule 15.2 and to have the Ancillary claim filed herein struck out pursuant to Rule 26.3(1)(a).

2. Ms. Vega alleges that the Defendants (the Blancos) doing business as money lenders under the names Payday Advance and EZY Loans Pawning failed to comply with certain provisions of The Act. She cites section 13 which requires every contract made thereunder to be by memorandum in a specified form. Non-compliance with this section renders the contract made and the security given, unenforceable by the lender. Next, she says that section 14 prohibits the rate of interest which she had been charged by the Defendants and this renders any such contract, illegal.

3. As a consequence, she proposes, the Defendants could have no grounds for defending or any real prospects of successfully defending, the claim. The Defendants however, neither admit nor deny that there was a memorandum in writing as required by The Act. In fact, they never touched on the issue in their submissions, save and except to say that if the Court was to find against them, then it would be unjust for Ms. Vega to be enriched by being allowed to retain the money which she had received from them and which she holds on constructive trust for them.

4. To this Ms. Vega pleads limitation. She says that the claim is statute barred as it was not commenced within twelve months of the accrual of the cause of action as prescribed by section 23 of The Act. She adds that a claim for unjust enrichment or constructive trust is

tantamount to a claim for the enforcement of the money lender's agreement and ought not to be countenanced.

5. Now, it does not seem that there is much dispute over the basic facts of this case. The Claimant received two loans from the Defendants. The first for $2,500 in August and the other for $1,000 in December, 2012. She was issued with tickets No. 27495 and 28530 respectively. Security for those loans was provided through the surrender of original land titles to 30.4 acres of land more specifically, Parcel No. 21 Block 4 Indian Hill East Registration Section (The Land) and the execution of a blank transfer of title (to The Land) document.

6. From the tickets, the duration of the loans appear to be forty days from the date of each loan. There is no rate of interest on the ticket but The Blancos say there was an agreed interest at the rate of four percent and in default an additional penalty interest increase of six percent.

7. Ms. Vega made two payments of $550 each on the 1st November, 2012 and 8th October, 2012 respectively. There were no further payments. But there was communication between Ms. Vega and/or her mother and The Blancos where certain extensions for payment were granted. On the 26th June, 2014 the Defendants enforced their security by transferring The Land into their personal names.

Preliminary Issues:

8. There were two issues raised which this Court feels it ought only to comment on. The first is a ground of the Claimant's application for

striking out and the second is an objection made by the Defendants in their affidavit in response to the application and (without genuine enthusiasm) in their submissions.

a. A ground of the strike out application was the Defendants' failure to comply with a rule or practice direction in not seeking the Court's permission to file the Ancillary Claim.

9. The Court states only that it is accepted by the Claimant that his application was flawed in that, in error, this particular ground appeared therein. Counsel explains that it was an inadvertent remnant from his original application which he had previously withdrawn. I am minded to believe, since the Ancillary Claimant had already been given retrospective permission by Court to file the said claim.

b. The Defendants objected to the Claimant's failure to comply with Rule 15.4(1) where the application for summary judgment had not been served within 14 days of the date fixed for hearing.

10. On the date of hearing counsel for the defence was given time to file her affidavit in response to the application. No objection was made then that she had been short served. In any event, the hearing was done on paper and counsel was given two opportunities to address the Court. She took full advantage of both. It must also be reminded that the matter had originally been listed for case management when the original application for summary judgment was made. When that was withdrawn, the Case Management Conference was adjourned. The Order dated 20th September, 2016 clearly shows this. Rule 15.4(3) allows the Court, at any Case Management Conference, to exercise its

powers even without such notice of application having been served. Moreover, there is no sanction for short service. Most likely all that would have been considered, had the short notice been raised at the hearing, was an adjournment after objection and perhaps condemnation in costs at most. The events as they have transpired has caused no prejudice to the Defendants. The hearing was adjourned to give the parties additional time as they both desired.

11. In the circumstances of this case and standing firmly on the overriding objective, the Court will proceed to consider the application. The Defendants' objection is therefore overruled.

The Issues:

12. Both parties have impressed, in their different ways, that jurisprudence on this area of the law is of great importance to the Belizean society. They both recognize that a determination of this matter may have far reaching repercussions. For this reason, although I am certain that a finding on the issue relating to the enforceability of the contract and security would negate the need to discuss the legality of the rate of the interest, I shall nonetheless oblige. So for convenience sake, the judgment will deal with the interest issue first. The issues as the Court determines are as follows:

A. Summary Judgment:

1. Whether the rate of interest charged renders the contract illegal.
2. Whether the tickets issued to Ms. Vega were in compliance with section 13 of the Act.

B. Strike Out

1. Whether a claim for unjust enrichment or constructive trust is tantamount to the enforcement of the money lender agreement.
2. Whether the counterclaim is statute barred.

Whether the rate of interest charged renders the contract illegal:

13. Section 14 of the Act directs that:

> *"Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money by a moneylender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract:*
>
> *Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the money-lender under the contract, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on that sum from that date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default and any interest so charge shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan.*

14. The amended Ancillary Claim filed by the Defendants states as follows:

> *"By virtue of an agreement ("**loan agreement**") as evidenced in money lenders tickets dated 24th August, 2012 and 17th December, 2012 ("**the money lenders' tickets)** between the Ancillary Claimants and the Ancillary Defendant, the Ancillary Claimants agreed to lend and the Ancillary Defendant agreed to borrow the total sum of BZ$3,500.00 plus interest at a monthly rate of 4%, to be repaid within such a time, failure of which, the Ancillary Defendant agreed to pay the Ancillary Claimants the principal plus default interest at a monthly rate of 10%. It was always intended that these loans were to be short term;*

Consideration:

15. It is obvious from The Blancos' own pleadings that they increased the rate of interest on default of payment. This particular practice is

prohibited by section 14. There is no need to even discuss the proviso of that section since The Blancos can find no shelter there.

16. A clear interpretation of the extent of the illegality rests on the use of the phrase *"in so far as"* in section 14. It indicates that the illegality goes no further than the prohibited type, rate or amount of interest being charged. It does not (as the Claimant urges) render the entire contract illegal. Counsel for the defence presented ***Malcolm Murir Ltd v Jamieson [1947] S.C. 314*** which discussed a similar term in the Money Lenders Act (UK), 1927. Lord Jamieson opined:

> *"It is only in so far as a contract provides for compound or a higher rate of interest on default in payment that it is declared illegal. The section does not say that the contract is illegal if it so provides. We were told there is no authority on the matter, but the wording of the section seems to make it clear that the illegality extends only to a provision entitling the moneylender to obtain more interest than he would have received if no default in payment had been made."*

17. Closer to home counsel helpfully cited ***Rasheed Ali of Ali's Poultry and Meat supplies v Neil Rabindranath Seepersad and Investments Limited Claim No. Civ 2013-01618*** and quoted from paragraph 28:

> *"Fourthly, while there can be no doubt that the interest charged is above 24% per annum limit and therefore in breach of section 12 (1) of the Moneylenders Act, that of itself does not render the loan agreement unenforceable."*

This Court relies on both these cases in making its finding.

Finding:

18. The increased rate of interest charged in default is in breach of section 14 of The Act and is therefore illegal. This does not, however, render the entire contract illegal.

Consequences:

19. At the rate of 10 percent per month the borrower is charged 120 percent per annum. Section 26 of The Act allows the court to make a presumption that any interest charged which exceeds 48 percent per annum is excessive and the transaction is harsh and unconscionable. In the instant case the Defendants have not convinced me that the rate of interest is anything but excessive. On such a finding the transaction is deemed to be harsh and unconscionable.

20. Section 24 and 25 of The Act empowers the Court to reopen such a transaction. The Court is then allowed to grant relief, by making substitutions as it deems reasonable. It may even set aside securities given or order indemnities where said security has already been enforced against, but parted with. The Court can exercise these wide, discretionary powers whether it is the money lender who has applied for enforcement or the borrower or any other person liable who has applied for relief.

21. Now, it is only in circumstances where there is an enforceable contract that the Court could be stirred to exercise its statutory discretionary powers to grant aid to the borrower. For this reason, we must move to what is perceived to be the more important aspect of the Claimant's attack as it will determine whether or not the agreements are enforceable.

Whether the tickets issued to Ms. Vega were in compliance with the Act:

22. Section 13 of The Act reads:

> *"(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender 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 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.*
> *(2) 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.*
> *(3) 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 effective annual rate of interest charged on the loan."*

23. The tickets, to which both parties refer, gives the date, states the name and address of Ms. Vega, the amount of the loan and the following:

> *"The above items are held for collateral only. Forty (40) days after the above date Item(s) become the sole property of EZY LOANS PAWNING. No item(s) redeemed without this receipt. Please notify EZY LOANS PAWNING immediately if receipt is lost or stolen.*
> *$2.00 EXTRA COST FOR LOST TICKET*
> *All items(s) left over (40) days will be sold without notice Expiry date:"*

24. The first ticket dated August 24, 2012 appears to have three expiry dates stamped on its face October 3, 2012, November 12, 2012 and December 22, 2012. A date is stamped at the top of the ticket but there is no evidence, thus far, regarding what it represents. There are lines marked through each expiry date. The second ticket has one expiry date January 26, 2013. The specifics of The Land are written on both and same is accepted, by both parties, as having been the security used for the loans.

Consideration:

25. It is clear that these tickets do not meet with the statutory requirements of a moneylender's contract. Ms. Vega pleads that she did not sign either ticket and there is no allegation from the defence that she did. But, beyond this, the effective annual rate of interest charged and any terms relating to penalty interest or extensions of time in which to make repayment are also absent. The annual rate of interest and the borrower's signature are essential.

Findings:

26. This Court therefore finds that what has been presented as the written record of the money lender's contract falls far short of what is statutorily required by section 13 of The Act. It is therefore non-compliant.

Consequences:

27. The Act is unambiguous, if the memorandum or note does not comply, the borrower cannot enforce the contract for repayment of money lent or the payment of interest nor the security given. As draconian as this may seem, it is obvious that it is intended to protect the borrower. This contract being unenforceable means that even though the contract itself may be valid, neither the borrower nor the Court can compel the borrower to perform and neither can compel enforcement of the security. The security must therefore be surrendered forthwith.

28. The Defendants seem to have assumed that the only way to restore the security to the Claimant is through a reopening of the transaction

under sections 24 and 25 of The Act. This is not so. The bringing of a court action is not the only form of enforcing the security. The very transferring of The land into the Defendants' names is an enforcement of that security. Such an enforcement is equally prohibited by section 13. The Defendants therefore exercised their right to a remedy that they simply did not lawfully have. They will not be allowed to retain The Land.

29. On the other hand, the Claimant seems to have assumed that an unenforceable contract is invalid or void. Again, this is not so. In ***McGuffick v Royal Bank of Scotland Plc (2009) EWHC 2386 (Comm)*** Mr. Justice Flaux sought to clarify the effect of the unenforceability of a contract. He concluded that unenforceability did not mean that the rights of the parties under the agreement were never acquired or are somehow extinguished. They continue but simply cannot be enforced. He discussed in detail the House of Lords decision in ***Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816***. Here the Court considered inter alia section 127(3) of the Consumer Credit Act 1974 which rendered a credit agreement unenforceable by the creditor where the debtor did not sign a document containing the statutorily prescribed terms of the agreement. The old UK Money Lenders Act 1927 is the predecessor to this Act. Now, the House of Lords had determined that the section deprived the pawn broker of its right to repayment and removed the borrower's obligation or liability to repay.

30. However, Mr. Justice Flaux resolved:

"60. As I have already indicated, I am fortified in that conclusion by the fact that the House of Lords did not have cited to it or deal with earlier authorities as to the effect of an agreement being unenforceable in a contractual as opposed to a human rights context. Mr. Handyside referred to a number of cases decided under earlier statutes of limitation. For present purposes however, one can confine the analysis to cases concerned with what might be described as "consumer protection" statutes. In a number of such cases, the courts have recognized that, although the statute may render the agreement unenforceable, the agreement remains a valid and subsisting contract and rights and obligations under it continue to exist, even if unenforceable by the creditor."

"61. Taylor v Great Eastern Railway Company [1901] 1 KB 774 was concerned with section 4(1) of the Sale of Goods Act 1893, which provided: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." Bigham J found at 778-9: The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer."

"62. Eastern Distributors Limited v Goldring [1957] 2 Q.B. 600 was concerned with the meaning of "shall not be entitled to enforce" in section 2(2) of the Hire-Purchase Act 1938. The Court of Appeal said this at page 614:

How is the present case affected by the fact that the hire-purchase agreement is unenforceable? If the Act said that it was void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be unenforceable. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced.

"63. Orakpo v Manson Investments Limited [1978] AC 95 was concerned with section 6(1) of the Moneylenders Act 1927 which was a direct predecessor of sections 61 and 65 of the Consumer Credit Act 1974. The subsection provided: "No contract for the repayment by a borrower of money lent to him … by a moneylender … shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower … "Lord Diplock at 106B-C stated the principle in relation to such provisions as follows:

Agreements or securities that are unenforceable are not devoid of all legal effect. Payments made voluntarily pursuant to their terms are not recoverable and I regard it as open to question whether the

unenforceability of a higher ranking security which is not void ab initio excludes the doctrine of the merger in it of a lower ranking security in respect of the same charge, at any rate when the higher ranking security remains potentially enforceable in the hands of an assignee."

"64. Although Orakpo was referred to by their Lordships in Wilson, that was in the context of the decision in that case that an alternative restitutionary remedy was not available to a creditor where the agreement was unenforceable: see per Lord Nicholls at paragraph 50 paragraph 122 and Lord Scott at paragraph 172. Nothing in those passages impinges on the principle stated by Lord Diplock which I have quoted."

"67. Taking the authorities as a whole, I consider that the better view is that the effect of unenforceability under section 65 is that the rights of the creditor and corresponding liability or obligations of the debtor do exist but are unenforceable … If the Court declines to make an order or section 127(3) precludes the Court from making an order then the creditor cannot enforce the agreement. Its rights continue but cannot be enforced."

31. ***Grace and another v Black Horse Ltd [2014] EWCA Civ 1413*** considered Justice Flaux's analysis and agreed that it was correct. So, whereas under a void contract no rights or obligations arise because none were created, unenforceability under section 13 merely removes the lenders' remedies, not their rights and obligations. The contract remains effective in every respect, other than enforcement. Therefore, payments made under the agreement and securities given, are lawful. The pledge of the land in this case was the security given, but it cannot be lawfully enforced; neither through coercive action by the lender nor the Court. In light of what was just expressed, we must now discuss the second issue.

Whether a claim for unjust enrichment or constructive trust is tantamount to enforcement of the money lender agreement:

32. The Ancillary Claimants plead three causes of action namely: (1) a claim pursuant to the agreement and the money lenders' tickets between the Defendants and the Claimant. This has already been

found to be unenforceable and has therefore failed. (2) Alternatively, an action in unjust enrichment where the Defendants say that it would be unjust for the Claimant to retain the monies borrowed; and (3) further, an action in trust; where the Defendants urge that the Claimant holds the money advanced to her, by way of the loans on constructive trust. The Claimant submits that the alternate claims are nothing more than an indirect attempt at the enforcement of the agreement which is prohibited by section 13.

Consideration:

33. Counsel for the Defendants sought to distinguish the Privy Council case of ***Kasumu v Baba – Egbe [1956] 3 AER 266*** on which the Claimant heavily relied. Here a money lending transacting was found to have been entered in breach of the legislative provision which provided for certain material requirements. It was held that the money lender was not entitled to enforce any claim whatsoever in respect of such a transaction. Section 19 of that particular Money Lenders Ordinance reads:

> *"(4) Any money-lender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable on conviction to a fine of ten pounds or in the case of a continuing offence to a fine of five pounds for each day or part of a day during which such offence continues."*

34. Counsel for the Defendants pressed and I agree, that *"any claim"* therein, was any claim including any equitable claim. Further, the equivalent section in The Act is not as widely worded and ought not to be as widely interpreted. Our section 13 speaks specifically to

enforcement of the contract, payment of interest on money lent and the security. It does not speak to any alternative cause of action for the recovery of the money lent. This particular interpretation is supported by the very specific and very different wording of other sections of The Act which will be considered shortly.

35. The Claimant also referred to Snells Equity at paragraph 5-010 where reference was made to the decision in ***Lodge v National Union Investment Co. Ltd. [1907] 1 Ch 300*** under the broad heading: "*He who seeks equity must do equity":*

> *"Further, it has been held that if the contract with the moneylender is not illegal but merely unenforceable, the borrower can recover a security without repayment for otherwise the moneylender would be indirectly enforcing the contract, against a claimant not disabled by any illegality from proceeding at law."*

36. But even the author had difficulty reconciling the "better treatment" afforded to illegal rather than unenforceable contracts:

> *"It seems odd that a moneylender who commits an offence and makes an illegal contract should receive better treatment than one who has merely made an unenforceable contract, but that is how the decisions stand at present."*

37. Since **Lodge,** the claim of unjust enrichment has taken a strong footing in English Common Law jurisdictions and is recognized far beyond simply doing equity as proffered by the Claimant. The very change of the title of the first major practitioner's text from the **Law of Restitution by Robert Goff and Gareth Jones** to more recently **Goff & Jones**: **The Law of Unjust Enrichment** speaks volumes for its recognition. In fact, **Davenport and Harris – Unjust Enrichment (1997)** begins thus at page 1: *"Two decades ago, unjust*

enrichment was described as "The Cinderella of law, barely 10 years old but growing up rapidly. Until recently recognized and overshadowed by the ugly sisters, Contract and Tort, Cinderella's day has arrived."

38. In an unjust enrichment claim the wrong is not the action. The unjust enrichment is the cause of action and restitution the remedy. There are settled principles and guidelines which must be applied for the reversal of the Defendant's gain.

39. Counsel for the Defendants also urge that the existence or operation of a constructive trust is not affected by The Act. Equity will enforce it because it would be unconscionable for the other party to disregard the Defendant's rights.

40. Could these claims perhaps be better described as claims for the recovery of money loaned rather than an indirect enforcement of the agreement. I say this because I do not believe that section 13 prescribes or intended that the recovery of the money loaned is impossible in all circumstances. A consideration of other sections such as 23, 24, 25 and 26 which speak to the recovery of any money lent as well as the enforcement of the agreement or the security buttresses this interpretation. Why make this distinction if The Act did not contemplate and appreciate that proceedings other than that for the enforcement of the agreement, could possibly be taken for the recovery of the money lent.

41. Counsel for the Defendants presented the Trinidadian case of ***South Western Atlantic Investment Trust Co. Ltd. v Millett(No. 2) [1997]***

46 WIR 351 which deals with the recovery of the full principal in restitution where a money lender's agreement (promissory note) was perhaps found to be unenforceable. I use perhaps because that finding is not quite clear. Nonetheless, the court seems to accept that a claim in quasi contract was unaffected by the unenforceability of the contract. What is interesting is that none of the old English cases relating to unenforceability and subsequent recovery were considered. The discussion seemed to focus on the Defendant's own dishonesty rather than whether recovery was an indirect form of enforcement In fact, the court referred in closing to a statement in **Iraqi Ministry of Defence v Arcepey Shipping Co SA [1980] 1 All ER 480**:

> *"There is one final observation that I wish to make, or perhaps (more appropriately) to adopt. It was a statement made by Goff J in Iraqi Ministry of defence v Arcepey shipping Co SA [1980] 1 All ER 480, in which among other things, the plaintiff objected to a Mareva injunction being varied at the request of the interveners, to permit the defendants to pay to the interveners certain sums of money on the ground that the moneys represented a loan which was illegal and void as being contrary to the Moneylenders' Act. Goff J said (at page 487):*
> *'No doubt the court will not enforce, directly or indirectly, an illegal contract; but by lifting the Mareva injunction in the present case to enable the defendants to repay to the interveners the loan they have received would not be to enforce the transaction, even indirectly. A reputable businessman who has received a loan from another person is likely to regard it as dishonourable, if not dishonest, not to repay that loan even if the enforcement of the loan is technically illegal by virtue of the Moneylenders Act.' [emphasis supplied]"*

42. A progressive approach indeed and one which merits consideration. On the other hand, the Claimant has produced no recent cases where this particular issue was decided. Why should a recalcitrant borrower not be called upon to disgorge any benefit by which she may have been unjustly enriched. This is an issue which, to this court, needs

full ventilation at trial. At which time policy and other considerations could properly be discussed and determined.

Finding:

43. To my mind, because section 13 speaks only to the enforceability of the contract and security, if the lender has another right at law whereby he may get his money back, (such as those which the Defendants herein have sought to avail themselves) why should that right not be recognized. This is an issue properly to be determined through trial.

Whether the counterclaim is statute barred:

44. The Ancillary Defendant submits that in any event the claims, whatever form they may take, are all statute barred. She raises the limitation defence in accordance with section 23(1) of The Act which reads:

> *"Notwithstanding anything contained in the Limitation Act, Cap. 170, no proceedings shall lie for the recovery by a moneylender of any money lent by him after the commencement of this Act or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by him, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued."*

Consideration:

45. The issue for the Court to determine here is whether section 23(1) bars an action in quasi contract for unjust enrichment or in equity for constructive trust. The determination of which rests on the Courts' answers to the following: Do these claims (a) fall within the confines of proceedings for *"the recovery by a money lender of any money lent by him."* and (b) when did the cause of action accrue.

A. Proceedings for the recovery of money lent by the money lender:

46. The Ancillary Claimants urge that section 27 of the Act expressly preserves the concurrent and equitable jurisdiction of the Court and thereby distinguishes The Act from the old UK 1927 Act which has no comparable section. Section 27 informs:

> *"Sections 24, 25 and 26 of this Act,*
>
> *(a) shall apply to any transaction which, whatever its form may be, is substantially one of money lending by a moneylender.*
>
> *(b) shall not affect the rights of any bona fide assignee or holder for value without notice.*
>
> *(c) shall not be construed as derogating from the existing powers or jurisdiction of any court."*

47. Section 13(1) of the old UK Moneylenders Act reads:

> *"No proceedings shall lie for the recovery by a moneylender of any money lent by him … or for the enforcement of any agreement made or security taken … in respect of any loan made by him, unless the proceedings are commenced before the expiration of 12 months from the date on which the cause of action accrued: …"*

48. Counsel for the Defendants was swift to proffer such a distinction because the British Courts in interpreting *"no proceedings"… for the recovery by a money lender of any money lent by him"* have consistently found that it meant all proceedings whether directly or indirectly through which the recovery of the loan was sought. The case of ***Orakpo v Manson Investments Ltd (ibid)*** which counsel herself presented demonstrates this.

49. I do not know that I can agree that section 27 has the effect she submits. As far as this court is concerned and as the Claimant explained, section 27 speaks specifically to sections 24 – 26 which

deal with special relief for the borrower from harsh and unconscionable transactions. Section 27 restricts the application of the statutory reliefs in relation to a bona fide assignee or holder for value. Such a restriction is understandable as it could equally be perceived as harsh and unconscionable if it were allowed. The section also informs that the statutory reliefs are not the only reliefs available to a borrower where (substantially) a money lending transaction, with a money lender, has been found by the Court to be harsh or unconscionable. That is all. Further, the time limitation placed on a cause of action is not a derogation of the courts existing power or jurisdiction. The powers and jurisdiction of the Court remain, it is the borrowers right to invoke the court's jurisdiction and to seek the exercise of its power which is barred.

50. It is my measured view that the drafters meant to cover every possible proceeding as they first refer to *"recovery of any money lent"* next they speak *"of any interest"* and finally they speak to "*the enforcement of the agreement or security taken."* If the recovery of any money lent was confined only to proceedings on the agreement pursuant to The Act, then many of the phrases used would be superfluous and that could not have been the intention of the draftsman. Even counsel for the Defendants, when making her submission under restitution and constructive trust, stated: *"… the Defendants, may seek redress in equity and in restitution to <u>recover the monies owed to them</u>, as stated in their ancillary claim."* She thereby acknowledged that her claims in the alternative were to recover the monies owed and for all intents and purpose, it was owed, because it had been lent. That fact, no matter how it is

dressed, remains thus. It may not be an action for the enforcement of the agreement but it certainly is one to recover the monies lent.

51. In the Ontario Court of Appeal case of ***McConnell v Huxtable, 2014 ONCA 86***, the Court clarified two issues – (1) The limitation period applicable to a claim for a constructive trust based on unjust enrichment and (2) a seeming overlap between the Limitation Act and the Real Property Limitation Act (The RPLA). The dispute related to proprietary interest in family property. The section of interest for us (section 4 of the RPLA) reads: *"No person shall bring an action to recover any land, but within ten years after the time at which the right to bring such action first accrued to the person bringing it."*

52. The Court, at paragraph 15, felt the following three questions ought to be asked: *"The critical question raised by the appeal is whether a claim for unjust enrichment in which the Claimant asks the Court to impose a constructive trust upon the respondents real property is an action to recover any land … (1) is the respondent's claim an "action" (2) is the action to "recover," and (3) is the action to recover "land"?*

53. The Court answered each question in the affirmative and found that the claim did fall within the confines of the RPLA and not the Limitation Act. This Court having questioned itself in a similar vein can only, likewise, answer in the affirmative.

Finding:

54. Any and all proceedings whether directly or indirectly to recover the money lent, whether by enforcement or otherwise are accordingly barred twelve months after the cause of action accrued.

When did the cause of action accrue:

55. The Ancillary Defendant has not addressed me on this particular matter in relation to the unjust enrichment and constructive trust claims. It is left open for further submissions from both parties.

Conclusion:

56. The Court finds that the Defendants have no real prospect of defending the claim herein. Although the Claimant has sought a number of declarations, the Court is prepared to make the following orders and declarations:

    1. Summary judgment is granted to the Claimant herein.
    2. The loan agreements and the security given are all unenforceable.
    3. The enforcement of the security by transfer of Parcel No. 21, Block 4 Indian Hill East registration section to the Defendants was unlawful.
    4. The Defendants are directed to transfer the property back to the Claimant forthwith. Any costs associated therewith are to be borne by the Defendants herein.
    5. The ancillary claim for the enforcement of the loan agreements herein is struck out.
    6. The Court will accept written submissions on when the Ancillary Claimant's other causes of action accrued. Those submissions are to be filed no later than 27th February, 2017 at close of day.

7. Costs to the Claimant on the summary judgment to be assessed if not agreed.
8. Costs on the striking out application will be on its full determination.

SONYA YOUNG
JUDGE OF THE SUPREME COURT