IN THE SUPREME COURT OF BELIZE A.D. 2018

(CIVIL)

CLAIM NO. 243 of 2018

BETWEEN:-

ELODIA ESCOBAR	**CLAIMANT**

AND

RAPIDITO LOANS CO. LTD.	**1st DEFENDANT**
MARIA ALICIA ESCOBAR	**2nd DEFENDANT**
CARLITOS CAN	**3rd DEFENDANT**

Dates of Hearing:	**4th April, 2019; (29th April, 2019, Written Submissions of Claimant; 3rd May, 2019, Written Submissions of 1st Defendant)**
Before:	**The Hon. Madame Justice Griffith**
Appearances:	**Ms. Payal Ganwani, Estevan Perera & Co. LLP for the Claimant; Mr. William Lindo, Glenn D. Godfrey & Co. LLP for the 1st Defendant; Mr. Kevin Arthurs, Arthurs & Associates for the 2nd & 3rd Defendants.**

IN THE SUPREME COURT OF BELIZE A.D. 2018

(CIVIL)

CLAIM NO. 625 of 2018

BETWEEN:-

ELLOYD GILHARRY	**CLAIMANT**

AND

ADAN CAL d/ba CAPITAL JEWEL QUICK LOANS	**DEFENDANT**

Dates of Hearing:	**11th June, 2019; (15h July, 2019, Written Submissions of Claimant & Defendant)**
Before:	**The Hon. Madame Justice Griffith**
Appearances:	**Mr. Kevin Arthurs, Arthurs & Associates for the Claimant; Mrs. Magali Marin-Young SC with Mr. Allister Jenkins for the Defendant.**

IN THE SUPREME COURT OF BELIZE A.D. 2018

(CIVIL)

CLAIM NO. 171 of 2018

BETWEEN:-

SHANNAE CABALLERO	**CLAIMANT**
AND	
MELBOURNE MARLON RICE d/ba YMANIE'S PAWN SHOP	**1st DEFENDANT**
GILROY USHER SR. d/ba MONICA'S PAWNSHOP	**2nd DEFENDANT**

Dates of Hearing:	**9th July, 2019; (19th July, 2019, Written Submissions of Defendant; 23rd July, 2019, Written Submissions of Claimant)**
Before:	**The Hon. Madame Justice Griffith**
Appearances:	**Mr. Kevin Arthurs, Arthurs & Associates for the Claimant; Mr. Anthony Sylvestre, Musa & Balderamos, for the Defendant.**

DECISION

Introduction

1. The subjects of this Decision are a trio of moneylending cases, which were tried within months of each other and amongst which there is an overlap of legal issues. As a consequence, the Court has as a matter of expediency, elected to deliver these decisions together, albeit at some inconvenience and delay to the two matters which were tried first in time. In disposing of the matters, the Court will firstly treat with the relevant law, which will be largely if not entirely applicable to all three cases. Thereafter, with the applicable law set out, the Court will treat with the factual circumstances and determinations according to law in respect of each claim. Briefly by way of introduction however, the subject claims are identified as follows, in the order in which they were tried:-

   (i) Claim No. 243.2018 – **Elodia Escobar v Rapidito Loans Co. Ltd., Maria Escobar & Carlos Can** ("*Claim No. 1*")

(ii) Claim No. 625.2018 - **Elloyd Gilharry v Adan Cal dba Capital Jewel Quick Loans** (“*Claim No. 2*”).

(iii) Claim No. 171.2018 - **Shannae Caballero v Melbourne Marlon Rice dba Ymani’s Pawn Shop & Gilroy Usher Sr. dba Monica’s Pawnshop** (“*Claim No.3*”)

PART I - The Moneylending Law in Belize

2. The law governing moneylending in Belize is by principal Act contained in the Moneylending Act, Cap. 260. Along with this principal Act, there are two pieces of subsidiary legislation – the Moneylenders (Body Corporate Exemptions) Regulations and the Moneylending Rules (the latter now repealed). These laws are of some vintage, the principal Act having been enacted in 1954 and the subsidiary regulations and rules enacted in 1967 and 1992 respectively. As with the majority of laws in the Commonwealth Caribbean, Cap. 260 replicates counterpart laws in England, namely the Moneylenders Acts 1900 through 1927. These English Acts have themselves been repealed and replaced by the Consumer Credit Act, 1974, as thereafter amended in 2006; then updated in 2015 by the Consumer Rights Act, 2015. The law in Belize however, remained stationary until 2017, when following upon the heels of a Supreme Court decision on moneylending,[1] there was amendment in the form of the Moneylenders (Amendment) Act No. 13 of 2017 and the Moneylenders Regulations, SI No. 83 of 2017. The new moneylending regulations repealed the old moneylending rules, and the amendment to the principal Act amended, repealed and replaced, as well as expanded upon the provisions of the old Act.

3. The underlying transactions of all three of these claims however, occurred prior to these amendments in 2017 and as such, the updates to the law in Belize are inapplicable and will not form the basis of the Court’s decisions. The applicable law remains that of the principal Act Cap. 260 in its original form, and the application of the Act will be aided by decisions and authorities through 1974, based upon the UK 1900-1927 Acts.

[1] Belize Supreme Court Claim No. 171.2016 – Janine Vega v Laura Blanco et al.

It is to be noted that these two UK Acts are read together, as the latter was an amendment and not total repeal of the former[2]. The two sets of subsidiary legislation earlier identified - Corporate Exemptions Regulations and Moneylenders Rules - bear no relevance to the matters which fall to be decided.

4. The provisions of Cap. 260 which arise for discussion in this matter are sections 2, 3, 4, 10, 11, 13, 14, 15, 19, 24 – 27. These sections are hereto annexed as Schedule I, where they are set out in their entirety. As hereinafter follows however, they will be referred to either in brief or extracted in full as may be required. In this section, it is proposed to set out the Court's interpretation of the above sections in turn, as aided or illustrated by authorities which would all have been cited only upon the basis that the Belize Cap. 260 in its original form, is almost entirely the same as the underlying UK 1900 and 1927 legislation.

(A) (i) Section 2 – is the interpretation section in which is found the definition of '**interest**' as well as '**moneylender**'

> "interest" *does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges or expenses, but except as aforesaid, includes any amount, by whatever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan;*
>
> "moneylender" *includes every person whose business is that of money lending, who advertises or announces himself or holds himself out in any way as carrying on that business, but does not include,*
> *(a)…(d)*

(ii) In relation to the definition of 'interest', when deconstructed, a money lender is permitted to impose costs, charges or expenses in addition to interest on a principal loan. However, any amount outside of principal which is not properly a charge, cost or expense, will be considered interest, regardless of by what name the amount is termed. There is no definition of what constitutes a proper charge, cost or expense but the Court construes same to mean that they must arise out of and be referable to

[2] Halsbury's Statutes of England, 2nd Ed. Vol. 16, pgs 370 – 402, repeals specifically @ pgs 401-402.

the moneylender's operational or administrative cost of carrying out the transaction as already agreed. The qualification of 'transaction as already agreed' is made by virtue of section 15, which speaks to the prohibition of certain charges for expenses on loans.

(iii) Section 15 in fact prohibits any *collateral agreement* for expenses, charges or costs incidental or relating to any *negotiations* for or *for the grant* of a loan. This operation of this section is illustrated by **Ladin Finance Ltd v Arikat**[3] applying the equivalent section 12 of the UK Moneylenders Act, 1927 in which a borrower was obliged to agree the lender's solicitor's costs before the loan agreement was concluded, (there being no guarantee of successfully obtaining the loan). The English Court of Appeal found firstly that the lender's solicitors charges arose out of the costs of negotiating the transaction; and secondly, that at the time of the agreement to pay those costs, there had as yet been no agreement concluded for the actual loan. As provided by section 12 of the UK Act of 1927, the borrower was therefore entitled to recoup the monies paid as solicitor's charges in his successful defence to the moneylender's action for enforcement.

(iv) The imposition of costs, charges or expenses, must thus be referable to the cost of carrying out the agreed loan transaction itself (not to the cost of negotiation of the transaction). Further, the costs, charges or expenses must not be excessive. In light of the fact that there are no provisions defining or limiting costs, charges or expenses in the Act, it is considered that such costs, charges or expenses must be reasonable in incurrence as well as quantum. To the extent therefore that there is any charge, cost or expense found to be unreasonably incurred or excessive, the disqualified amounts would according to its definition, be deemed to constitute interest.

[3] [1982] EWCA Civ J1111-1

(B) With respect to 'moneylender', given the use of 'includes' as opposed to 'means', the Court notes that the definition is expansive and not restrictive. The question of who is a moneylender would therefore be one of fact. Some guidance is obtained from Halsbury's Laws of England, wherein it is acknowledged that there are a number of circumstances in which money is loaned, so that what constitutes the business of moneylending is the presence of some degree of system and continuity in the loans made[4]

(C) Sections 3 & 4: Section 3 obliges the moneylender to (a) register with the Magistrate's Court of the judicial district of operation of the business, to be evidenced by a certificate issued by the Court, and (b) obtain a moneylender's excise licence in respect of each place of business registered with the Court. Section 4 requires the certificate issued by the Court to be obtained in relation to each place from which the moneylender will operate business. Correspondingly, the excise licence is required for each place of business, hence, the address of the place of business is part of the certificate's registration particulars.

(D) (i) Sections 10 & 11: Section 10 inter alia prohibits the moneylender from using any other name besides a registered name to do business. Section 11 criminalises contravention of sections 3, 4 and 10, as well as other statutory obligations not germane to this discussion. In particular, sections 11(b)&(c) state:-

11. *Every person who,*

(b) carries on business as a moneylender without having in force a proper moneylenders excise licence authorising him to do so;

(c) being licensed as a moneylender, carries on business as such in any name other than his registered name, or at any other place than his registered address or addresses; or
(d)…

[4] Halsbury's Laws of England, 3rd Ed. Vol. 27, paras. 26-27

commits an offence and shall be liable on summary conviction to a fine of two thousand dollars,

Provided that…

(ii) It can be seen from section 11 that the carrying on of moneylending without a licence is rendered unlawful by reason of the criminal offence created and penalty imposed. The proviso prescribes a penalty of imprisonment in lieu of, or in addition to a fine for a second or further offence. Two cases are cited to illustrate the application of any contraventions of sections 3 and 4, (which are criminalized by sections 11(b) and (c)). **Cornelius v Phillips**[5] concerned the equivalent English provision to section 11(b) (section 2 of the Moneylender's Act, 1900), by which it is an offence for a moneylender to carry on business at any address other than his registered address or addresses. In relation to a moneylender carrying out a transaction at an address other than his registered address, it was held that the moneylending contract was void and could not be enforced by the moneylender against the borrower.

(iii) In particular, Lord Finlay LC in **Phillips**, posed the question as to whether the contravention of the statute rendered the transaction void or merely subjected the moneylender to a penalty. The Court of Appeal by majority had decided the latter. In reversing the Court of Appeal, the House of Lords unanimously found, that given the statutory prohibition against the act of carrying on business at an address other than the registered address, to do so was an unlawful act thus rendering the contract void. Further, the case of **In re Campbell. Ex parte Seal**[6] dealt with an unregistered moneylender. The appellant in this case was an unregistered moneylender who obtained a judgment in default of defence against the borrower.

[5] [1916-17] All ER 685
[6] [1911] 2 K.B. 992

Pursuant to an arrangement made after the default judgment, the borrower agreed to pay the debt by installments. The borrower subsequently was adjudged bankrupt and the appellant sought to prove the amount owed under the agreement, in the bankruptcy.

(iv) The claim in bankruptcy was rejected, and on appeal, it was unanimously held that as the agreement was based upon an illegal moneylending transaction, the judgment in default was bad, the ensuing agreement to pay was bad, therefore the attempt to prove the debt on the agreement in the bankruptcy proceedings was properly rejected. Specifically, Farwell L.J., after affirming the correctness of the trial judge's finding that the transaction in question was a moneylending transaction by an unregistered moneylender, said thus[7]:-

> *"It follows from this that as a matter of law the transaction was illegal and void and constituted a criminal offence, <u>and can therefore form no ground for civil proceedings</u>…It follows also that no judgment could have been obtained for the alleged debt if the Court had been informed of the true facts…<u>The taint of criminal illegality runs through the whole transaction: there is no actual consideration</u>"*

(v) An illustration of the wider effect of a contract by an unregistered moneylender is **In re Robinson's Settlement. Gant v Hobbs**.[8] In this case trustees on the instructions of their beneficiary borrowed monies from a moneylender and secured same by mortgage. Upon default the moneylender brought the suit to enforce the mortgage security. On appeal, the first instance decision that there was no moneylending transaction but an agreement for private investment, was reversed. It was instead held that the moneylender being unregistered, rendered the security taken entirely void and incapable of being enforced.

[7] *Ibid* @ 996

[8] [1912] 11 Ch. 717

It was also held that the moneylender could not succeed on a claim for money had and received. Cozens Hardy MR said as follows:-

> *"If he was a moneylender he was not registered, and the security in question was not given in his registered name…It seems to me impossible to doubt that this was a security in the course of Gant's business as a money-lender, and that being so, having regard to the circumstances, which I need not refer to, the security qua security, qua charge, is invalid and cannot be supported."*

(E) (i) Section 13 is an important section relied upon by all claimants in these matters. It is extracted in full as follows:-

> ***13.*** *(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.*

(ii) Section 13 stipulates the basis upon which a moneylending contract is enforceable. It can be broken down as follows:-

(a) A moneylending contract is for repayment of money lent including repayment of interest on the money lent, as well as enforcement of any security given for the money lent;

(b) The money lent can be received by a borrower or agent of a borrower;

(c) In order for the money lending contract to be enforceable (i.e. repayment of money lent including interest thereon and/or enforcement of security given), it is a precondition that:-

- The contract is **reduced into a note or memorandum signed personally by the borrower** (whilst there is provision for the borrower's agent to receive the money, there is no provision for the agent to sign the note or memorandum); and
- The note or memorandum signed personally by the borrower must be **delivered or sent to the borrower within 7 days of making the contract**; and
- The note or memorandum is to **contain all the terms of the contract**, particularly the date the loan was made, the principal amount and the effective annual interest rate on the loan.

(iii) With respect to the matters arising under this section, it is firstly observed that the Act defines neither note nor memorandum. There is also no qualification on 'contract', which therefore can be either oral or written. In the circumstance of an oral contract, the rationale for the requirement of the note or memorandum (some acknowledgment in writing) is patent. However, where there may already be a written contract, the question must arise as to whether that written contract suffices as the note or memorandum, or whether what is required is an entirely separate document that serves as a short reference to the written contract. Given the absence of definition or qualification in the Act, recourse must be had to other available sources of law, particularly with reference to the law of England as existing during the subsistence of the Moneylenders Acts 1900 and 1927[9].

(iv) On the question of the form of note or memorandum, Halsbury's Laws of England[10] makes no distinction between whether a contract is oral or written, it merely by specific case law examples, identifies circumstances in which memoranda were found to fall short of compliance with the statutory requirement to contain all terms of the contract.

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[9] The English equivalent to section 13 of Cap. 260 was section 6 of the 1927 Act.
[10] Halsbury's Laws of England, 3rd Ed. Vol. 27, para 50

Having regard to the examples given, the Court considers that the requirement for the note or memorandum firstly precludes there ever being a purely oral moneylending contract. Moreover however, even where there may be a written contract or other written documentation containing additional terms and conditions of the contract (such as documents creating security) all important terms governing the loan, interest and security must together be contained in a single document signed by the borrower.

(v) For example, in **Central Advance and Discount Corpn. Ltd v Marshall**[11], an action by a moneylender against a borrower to recover arrears on the debt failed, where the borrower successfully pleaded that the contract was unenforceable because the memorandum omitted a clause defining liability against the guarantors of the bill of sale given as security for the loan. The term omitted from the memorandum but contained in the bill of sale was found by the Court to have been an onerous term, thereby necessitating its inclusion in the memorandum.

(vi) By way of further example, reference is made to **Temperance Loan Fund, Ltd. v Rose et anor**.[12] The English Court of Appeal in this case held that a contract for renewal of a loan was subject to the requirement that a memorandum setting out terms be signed by the borrower prior to the renewed loan being made. In this case the borrower agreed to a loan of funds intended to pay off his existing loan which he had failed to pay within the agreed time of six months. A new memorandum was in fact signed but failed to specify the date of the new loan, which is a specific requirement of the statute. The memorandum was found to be insufficient and the contract unenforceable.

[11] [1939] 3 All ER 695
[12] [1932] 2 K.B. 522

This decision considered **Lyle v Chappell**[13], in which the principle is perhaps more clearly illustrated albeit in circumstances where the memorandum upon a renewal of loan was upheld.

(vii) In arriving at this decision, Scrutton L.J. said thus[14]:-

> *"When the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period."*

Scrutton LJ thereafter continued by expressing his view that it could not be said, that Parliament intended to disallow renewals of loans, but that in effect, the renewal was a new loan and as such was subject to the requirement regarding provision of a note or memorandum of the now new contract.

(iv) The second issue to be discussed in relation to section 13, is the fact that there is again, no definition or qualification in relation to the giving of security. Recourse is therefore once again had to other sources of law in order to construe the provision. As a matter of general principle, a money lending contract is merely one of the several circumstances in which money is loaned, except that it is subject to the controls of moneylending laws and regulations. Halsbury's Laws of England speak generally to contracts for loans of money.[15] With reference to such contracts, it is stated therein that the repayment for a loan may be secured by the giving of security in various forms – namely, a bill of sale over goods intended to remain in the borrower's possession; a mortgage of land or property other than personal chattels; the pawn or pledge of goods. A further form of security for money loaned is identified as the deposit of bills of exchange, stocks and shares, life assurance policies or documents of title to *goods*.

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[13] [1932] 1 K.B. 691

[14] Ibid pg. 700

[15] Halsbury's Laws of England, 3rd Ed. Vol. 27, paras 15-16

There is no suggestion of deposit of title to land; and it can be seen that goods may be pawned or pledged (placed into the possession of the moneylender), or be made the subject of a bill of sale where the goods remain in a borrower's possession.

(v) Given the absence of any provisions in the Act making special provision for the giving of security on money loaned under a moneylending contract, the Court finds that such security must be governed by whatever legal principles generally exist in relation to such forms of security. By way of example, the following cases illustrate the incorporation of security under moneylending contracts generally:-

- **Coast Brick & Tile Works et al v Premchand Raichand et anor**;[16] **In re Robinson's Settlement. Gant v Hobbs**[17] – moneylending transactions secured by mortgages (by way of legal charge) over land;
- **Cohen v J Lester Ltd**.[18] – security by way of pledge of goods (jewelry);
- **Bonnard v Dott**[19] - security by way of promissory note & bills of exchange (shares);
- **Whiteman v Sadler**[20] – security provided by way of registered bill of sale on goods.

(F) Section 14 – prohibits the charging of compound interest, whether directly or indirectly and charging of compound interest would render the contract illegal (not merely unenforceable as in section 13). The proviso to section 14 however permits simple interest to be charged upon a balance owing upon default of repayment. That simple interest is permitted at a rate not exceeding the rate on the original principal and is excluded from categorization of interest for purposes of the Act.

[16] [1966] 1 All ER 819
[17] [1912] 1 Ch. 717
[18] [1938] 4 All ER 188
[19] [1906] 1 Ch. 740
[20] [1910] A.C. 514

(G) <u>Section 19</u> - places an obligation upon the moneylender to prominently display their effective interest rate within the premises. It is observed that there is no sanction imposed for a moneylender's failure to do so. By contrast, breach of this provision is rendered a criminal offence with stated penalty, in the Act's 2017 amendment. There is also no omnibus provision in the Act or old Rules, which creates a criminal offence for breach of any provision of the Act, nor stipulates any consequence for so doing. In the circumstances, it is concluded that in its original form, a breach of section 19 of the Act would attract no consequence.

(H) (i) <u>Sections 24 – 27</u> – these provisions fall under the Part, partially entitled 'Relief from Harsh and Unconscionable Transactions'. The moneylender's cause of action is subject to a one year limitation (section 23), however there is no corresponding limit on the rights of a borrower. The usual limitation of six years, as applicable to causes of actions based on contract would therefore apply to borrowers.

(ii) Section 24, speaks to proceedings brought by a moneylender, which is not the situation in this case, but by virtue of section 25, the provisions therein are equally applicable in relation to relief sought by a borrower. These two sections are extracted in full as follows:-

Section 24's marginal note reads **'Power to relieve borrower from harsh transaction'**

24. *(1) Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement 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, 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, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of*

account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable.

(2) If any such excess has been paid, or allowed in account, by the debtor, the court may order the creditor to repay it, and may set aside, either wholly or in part or may revise or alter any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued.

Section 25's marginal note reads **'Power to grant relief at instance of borrower or surety**.'

25. *Any court in which proceedings might be taken for the recovery of money lent by a moneylender 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, whether or not 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 repayment of the loan or any instalment thereof, may not have arrived, or that the moneylender's right of action for the recovery of the money lent is barred.*

(iii) Section 24 is set out in relation to proceedings taken by a moneylender and not at the instance of a borrower. This section operates in the following manner:-

(a) In respect of proceedings taken in any court for recovery of money lent or enforcement of any agreement or security in respect of money lent;

(b) The court is satisfied (on evidence) that

- interest charged on the principal is excessive;
- the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or other charges are excessive; and

- in either of the above two cases the transaction is harsh and unconscionable**[21]**: **OR**
- the transaction is otherwise deserving of relief in a court of equity[22];

(c) The court's power is to
- reopen the transaction or any account already taken between the moneylender and person sued
- take an account between the moneylender and person sued (which may be the borrower or some other 3rd party under contractual obligation regarding the moneylending debt)
- relieve the person sued from payment of any excess deemed to exist having regard to the account taken by the court

(d) The account by the court may be taken regardless of any dealings or agreement arising to settle transaction;

(e) The account taken by the court aims to arrive at a sum reasonably found to be 'fairly due' in respect of the principal, interest and charges, having regard to the risk of the transaction and all its circumstances.

(iv) Section 25 speaks to proceedings at the instance of the borrower or other person sued for recovery under a moneylending contract. The section incorporates what is most logically the powers of the court as provided under section 24, however the reference therein is to '*like powers as may be exercised under this section*', which on first glance is incomprehensible. As stated before, Cap. 260 is derived from the English 1900 and 1927 Acts, which are to be read together. The equivalent to section 25 is section 1(2) of the English 1900 Act, which follows section 1(1), of which section 24 is the equivalent (both in exact terms[23]). It is therefore the case that somewhere in the reproduction of the Act into Belize law, the sections were split and the appropriate adjustment within section 25 to change '*like powers as may be exercised under* **this section**' to '*like powers as may be*

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[21] **In Re A Debtor. Ex parte the Debtor [1903] a K.B. 705** per Collins MR @709 – "*Relief may be given if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges*"

[22] **Ibid** per Romer LJ @710 – "*In my judgment the phrase 'harsh and unconscionable' stands by itself as an isolated phrase , and is not bound up wih the words which follow it, so as to limit 'harsh and unconscionable' to those cases in which before the Act a Court of Equity would have given relief to a borrower*"

[23] Sections 1(1) and (2) of the Moneylenders Act, 1900 of England are annexed as Schedule II.

exercised under the **preceding section**', was unfortunately neither apprehended nor made.

(v) With the clarification that the powers of the court referred to in section 25 are those contained in section 24 which are extracted in (iii) above, the considerations applicable to the exercise of the court's powers under section 25 are set out as follows:-

- the section is available to a borrower, surety or other person liable under a moneylending contract;
- proceedings (for the exercise of the court's powers expressed in (iii) above), may be taken by the borrower, surety or other person liable, whether or not action has been taken by the moneylender to recover money lent;
- the proceedings are available whether or not there is any agreement or provision to the contrary (meaning that there can be no contracting or stipulation extinguishing the entitlement to proceed
- proceedings by the borrower, surety or other person liable may be taken before the expiration of time for repayment, or after such expiration – even where the moneylenders right to proceed is statute barred (i.e. after one year from accrual of cause of action to moneylender).

(vi) Section 26 follows upon the power of the court (in sections 24 and 25) to reopen a transaction on the basis that it is harsh and unconscionable. This section creates a presumption that interest on a transaction above forty-eight percent (48%) per annum is excessive and that the transaction is harsh and unconscionable. The presumption would be rebuttable (i.e. that the interest rate above 48% is not excessive and the transaction not harsh and unconscionable) at the instance of the moneylender. It is also herein provided that charging of interest below 48% per annum does not preclude a court from finding interest on any particular transaction to be excessive or the transaction harsh and unconscionable. The question of whether interest (or charges) is excessive and a transaction harsh and unconscionable by reason of such interest or charges, or other reason relative to relief available in equity - is therefore very much one of fact.

(vii) Section 27 - this section inter alia preserves the rights of a bona fide assignee or holder for value without notice, relative to any powers exercised pursuant to sections 24, 25 & 26. The wider jurisdiction or any other powers of the court are also not affected by the exercise of powers under these sections.

(viii) Finally in relation to the law, reference is made to section 32 of the Act which empowers the court, notwithstanding its powers under sections 24 and 25, to determine the moneylending contract and order payment to be made by the borrower of any outstanding sum to the moneylender. This power arises only upon proceedings taken by a moneylender and obviously contemplates a circumstance where any amount outstanding under a contract can be isolated from any part of a contract in respect of which sections 24 or 25 is applied.

In the final analysis, when one considers all of the provisions which have been examined above, it can be observed that there is a distinct legal regime established under the Act with respect to the legal consequences flowing from and the causes of action arising out of moneylending transactions. In particular, the regime can be set out as follows:-

(a) A money lending contract may be illegal (based upon breach of section 11 or 14 in part) and as such void. In this circumstance, neither the borrower or lender can seek to enforce its terms; but the borrower may have limited rights to recover security;

(b) A money lending contract may be unenforceable, for breach of section 13 and the lender cannot enforce the contract in any court of law and the borrower may be able to sue for the return of security;

(c) On an enforceable contract, the borrower can seek relief from the bargain on the basis that the contract is harsh and unconscionable.

This is to be done either in answer to a moneylender's claim for recovery or enforcement of security (section 24); or by suit of the borrower seeking such relief (section 25);

(d) A moneylender has no rights in law or equity upon an illegal or unenforceable contract, to either repayment of outstanding loan or enforcement of security.

PART II – Determination of Claims

A. Claim No. 1 - 243 of 2018, Elodia Escobar v Rapidito Loans Ltd., Maria Escobar & Carlitos Can

Relief Claimed

5. The following relief has been claimed against the Defendants in this Claim. There is no counterclaim:-

(i) A Declaration that the **FIRST DEFENDANT** failed to comply with section 13 (1) of the Money Lenders Act by failing to state the total yearly interest in the loan agreement for 1,000.00 BZE Dollars thereby making the loan agreement unenforceable.

(ii) A Declaration that the **FIRST DEFENDANT** failed to comply with the section of the Money Lenders Act by failing to display prominently in the store the annual interest rate and all other charges and fees the **FIRST DEFENDANT** levies on its loans.

(iii) A Declaration that the interest rate of 180% per year in respect of the sum borrowed being $1,000.00 BZE Dollars is excessive and that the transaction is harsh and unconscionable and that it is not in accordance with section 26 (1) of the Money Lenders Act of Belize thereby making the contract for repayment of the money lent or any interest thereon and any purported security given by the Claimant unenforceable.

(iv) A Declaration that the fine and/or penalty charged by the **FIRST DEFENDANT** being the confiscation of the **CLAIMANT'S** property valued at $277,800.00 BZE Dollars is excessive and that the transaction is harsh and unconscionable.

(v) A Declaration that the **FIRST DEFENDANT'S** practice of having the **CLAIMANT** execute blank transfer forms for the transfer of the land into its own personal name is harsh and unconscionable. Further, that this action is not under law a security of any sort.

(vi) A Declaration that the purported loan is void, unenforceable and illegal under the Money Lenders Act due to the many breaches of the Act by the **FIRST DEFENDANT.**

(vii) A Declaration that the transfer instrument dated the 6th day of August 2009 in respect of Parcel 94, Block 23 of the San Ignacio South Registration Section ("the property") signed between the CLAIMANT and the directors of the FIRST DEFENDANT is unlawful, null and void and that no legal interest thereby passed to the FIRST DEFENDANT on the basis that it was fraudulently transferred under an unenforceable contract.

(viii) A Declaration that the FIRST DEFENDANT had no right or legal justification to transfer the Claimant's property into its name on the 17th of December, 2012.

(ix) A Declaration that as of the 17th day of December 2012, the FIRST DEFENDANT held the property on trust for the CLAIMANT.

(x) A Declaration that the transfer instrument dated 13th day of November, 2014 signed between the directors of the **FIRST DEFENDANT** (Felipe Blanco & Menda Blanco) as transferor and the **SECOND DEFENDANT** as transferee is null and void, and that no legal interest thereby passed to the **SECOND DEFENDANT**, on the basis that the parties stated an incorrect and grossly undervalued consideration or purchase price for the sale of the said parcel and the parties failed to pay the appropriate sum for stamp duty and defrauded the government revenue in violation of Section 36 of the Stamp Duties Act.

(xi) A Declaration that the Land Certificate for the property issued in the name of the SECOND DEFENDANT on the 20th day of November 2014 be set aside on the basis of fraud;

(xii) A Declaration that the transfer instrument dated 8th day of September, 2015 signed between the **SECOND DEFENDANT** as transferor and the **THIRD DEFENDANT** as transferee, on the basis the transfer instrument dated 13th day of November, 2014 signed between the directors of the **FIRST DEFENDANT** (Felipe Blanco & Menda Blanco) as transferor and the **SECOND DEFENDANT** as transferee is null and void and in violation of Section 36 of the Stamp Duties Act.

(xiii) A Declaration that the Land Certificate of the property issued in the name of the THIRD DEFENDANT on the 8th day of September, 2015 be set aside on the basis of fraud;

(xiv) A Declaration that the SECOND and THIRD Defendant are not innocent purchasers for value as they at all times knew of the Claimant's rights and interest in the property and knew that the Claimant held and still has possession of the property and is currently collecting rent from the tenants of the lower flat.

(xv) An Order that the **THIRD DEFENDANT** return the property to the **CLAIMANT.**

(xvi) An Order directing the Registrar of Lands in accordance with the Registered Lands Act to rectify the register for Parcel No. 94, Block 23, San Ignacio South Registration Section in terms that the Certificate of Title issued in the name of the **THIRD DEFENDANT** for the said parcel be cancelled and that a new Certificate of Title be issued in the name of the **CLAIMANT** on the basis that the **DEFENDANTS** obtained ownership by fraud.

(xvii) An injunction restraining the **THIRD DEFENDANT** from in any way dealing with Parcel No. 94, Block 23, San Ignacio Registration South Section, including from selling, leasing, transferring, mortgaging, charging or otherwise disposing of their legal interest in the said parcel.

(xviii) An Order that the **SECOND DEFENDANT** accept the payment of $15,000.00 BZE as repayment of the loan borrowed under the oral agreement.

(xix) An Order that the **DEFENDANTS** pay to the **CLAIMANT** any and all legal cost associated with the transfer of the Property to the **CLAIMANT** including any required Stamp Duty Tax payable to the Government of Belize for the return of the property.

<u>In the Alternative</u>

(i) The sum of $262,800.00 BZE being the value of the property that the Defendants took from the **CLAIMANT** less the sum of $15,000 BZE, as was loaned to the Claimant by the **SECOND DEFENDANT**.

(ii) General Damages

(iii) Interest pursuant to Section 166 of the Supreme Court of Judicature Act

(iv) Costs

(v) Such further or other relief as the Court sees fit.

<u>Uncontested Facts:-</u>

6. The Claimant, Elodia Escobar of Benque Viejo, Cayo ('the Claimant/Ms. Escobar') was the owner of registered land (Parcel 94 Block 23, San Ignacio South Registration Section) situate in San Ignacio, Cayo.

In August, 2009, Ms. Escobar borrowed $4,000 from the 1st Defendant, Rapidito Loans ('Rapidito'), a moneylender. Pursuant to what Rapidito termed their usual practice, Ms. Escobar as security for the loan, lodged her original certificate of title for the property with the business, as well as a blank transfer form, which she'd executed (signed) before a justice of the peace and employees of Rapidito. The Claimant repaid this loan of $4,000 and received back in return, her original land certificate. The blank transfer form bearing her signature was not returned to her; that remained in the possession of Rapidito. On 14th December, 2011 Ms. Escobar once again borrowed money in the sum of $1,000 from Rapidito, whereupon she redeposited her original land certificate. As evidence of this loan Ms. Escobar received a loan ticket containing certain particulars of the loan transaction.

7. The loan ticket stipulated that the loan, interest and all charges, was repayable within 40 days, failing which the item left as security would become the sole property of Rapidito and would be sold after 40 days without further notice. According to Ms. Escobar she was not aware of the interest rate but understood her repayment on the $1000 to be $250 per month. There is a second loan ticket issued by Rapidito to Ms. Escobar showing the altered amount of $1500, the additional $500 therein stated to have been added on the 16th December, 2011. Ms. Escobar made 2 payments but thereafter defaulted on the loan. In January, 2013 Mr. Felipe Blanco, owner of Rapidito, says he caused the property to be transferred to Rapidito, 'to perfect' their security on account of Ms. Escobar's default (and to avoid the limitation period under the Act). The property was in November, 2014, transferred by Rapidito to the 2nd Defendant Ms. Alicia Escobar, the niece of Ms. Elodia Escobar for the sum of $10,000. In September, 2015, the property was again transferred, on this occasion by Ms. Alicia Escobar, to the 3rd Defendant Carlitos Can ('Mr. Can'), for the sum (as stated on the transfer) of $8,000. Mr. Can is Ms. Alicia's brother-in-law, i.e. her sister's husband, that sister also the niece of Ms. Elodia Escobar. These as stated, are the uncontested facts.

Contested Facts, Discussion and Analysis

8. Outside of the relatively simple matrix set out above, there was an entirely separate body of both major and minor facts alleged, in respect of which there was substantive degree of variance amongst the three sets of parties. In relation to the more minor facts in issue, Ms. Escobar disputed that she requested the $500 added to the original $1000 as well as having received the amended loan ticket which shows the altered sum received as $1500. There is also of minor import, a dispute as to whether or not as required by section 19 of the Act, the annual interest rate, and all fees and charges imposed by Rapidito was conspicuously displayed in the business. In relation to more major issues, however, Ms. Escobar disputes knowledge of the actual terms of the loan, save the obligation to repay $250 in installments. Rapidito says the terms of the loan were explained to and accepted by Ms. Escobar before she received the loan, (and in any event she was quite aware of the terms given that she'd had several loans with them throughout the years). According to Mr. Blanco, the terms as explained to Ms. Escobar and of which she was well aware, given her prior dealings with Rapidito were (i) interest rate of 4% plus 6% service charge, totaling 10% on the loan to be repaid every 40 days; (ii) upon default of repayment within 40 days the Claimant had the option to pay the interest plus service charges to obtain an extension of 40 days on the loan; and (iii) default of the loan rendered the security the property of Rapidito after 40 days and the security could be sold without further notice.

9. In terms of the default on the loan, the Claimant does not deny that she defaulted having made only two payments. However, she says she was unaware that the property had been transferred into Rapidito's name since January, 2013, and that she only found that out after learning from her niece Ms. Maria Escobar sometime in 2014, that the property was being sold. In particular, Ms. Elodia's position was that her niece Ms. Maria sometime in 2014, approached her on the basis of having received information that Rapidito was selling the house for $10,000. After finding out about the property being for sale, Ms. Elodia says that she and Ms. Maria entered into an oral agreement whereby Ms. Maria would repay Rapidito the $10,000 and thereafter she would repay Ms. Maria the sum of $15,000 in installments of $500 per month.

In respect of Rapidito's transfer of the property into its name (via the blank transfers executed in 2009) Mr. Blanco says he spoke to the Claimant in early 2013 and advised her of the transfer to Rapidito's name, that they would hold the parcel for her until she could repay the loan and that they would not sell or transfer the property to anyone else unless she authorized them to do so. The Claimant denied having ever been told in early 2013 of Rapidito's completion of the transfer to themselves or being advised in the manner alleged by Mr. Blanco.

10. According to Mr. Blanco, in October, 2014, he was authorized by the Claimant (by telephone) to proceed with transferring the property to the Claimant's niece, in furtherance of an agreement they had between themselves. The transfer was effected as authorized he says and upon receipt of the $10,000, the Claimant's loan was repaid in full. In October 2015, Mr. Blanco says he was contacted by the Claimant who sought information on her loan, whereupon he reminded her of the transfer to her niece which had been carried out with her authorization. Ms. Maria's position was that her aunt Ms. Elodia came to her, told her of her desire to sell the house and implored her to make a request of Maria's sister Anna Can (the wife of the 3rd Defendant) to purchase the house. Ms. Anna resided in the United States, thus Ms. Maria arranged a telephone call between Ms. Elodia and her sister Anna which took place a few days after Ms. Elodia made the request. It was only after that conversation took place between Ms. Elodia and sister Anna, that Ms. Maria says she became aware of her aunt's debt to Rapidito. At the request of her sister Anna, Ms. Maria says she agreed to accompany Ms. Elodia to Rapidito, where they learned that the house had been up for sale since 2009 and that the house could be regained by Ms. Elodia upon purchase for $10,000.

11. According to Ms. Maria, she thereafter at the Claimant's behest and insistence, facilitated communication between Ms. Anna and the Claimant and they agreed (sister Anna and her husband Carlito and the Claimant), for Ms. Anna and husband Carlito to purchase the house for $10,000. Ms. Anna sent the money to Ms. Maria in July, 2014.

12. The purchase was effected in Ms. Maria's name with the monies sent by Ms. Anna, in November, 2014.

Ms. Maria received a certificate of title in her name, however in January, 2016 she made the transfer to the 3rd Defendant, her brother-in-law, Carlitos Can. In addition to denying the existence of any oral agreement between her and the Claimant, Ms. Maria denies that at any point in time she held the property other than on behalf of her sister Anna and brother-in-law Carlitos. In relation to said Carlitos the 3rd Defendant, his case was that the Claimant had implored him and his wife to purchase the property, saying that she would prefer to lose it to a family member instead of to the pawn shop. That he could not afford the price she was asking of $175,000 but after learning that the property was available for $10,000 from the pawn shop, he was happy to make that investment whilst at the same time making their aunt happy that the property would be remaining in the family. Later on that year in December, 2014, whilst on vacation in Belize the Claimant asked him to repurchase the house from him for $15,000.

13. Neither he nor his wife were pleased with the Claimant's attempt to repurchase the house nor the price offered and they refused. He said the Claimant by that time had continued in occupation of the house and was still collecting rents from the tenant, which she failed to hand over to them as the new owners, or to account for. There was discord between the Claimant and Carlitos and his wife over the Claimant remaining in occupation and continuing to collect rent. In cross examination it was revealed that although issuing a lawyer's letter to the tenant for rent to be paid over to them, they ultimately decided to avoid the trouble and confrontation the situation was causing. The Claimant, Ms. Elodia, refuted Carlitos' account of the circumstances giving rise to his purchase and ownership. She maintained that the only agreement she had relating to the property was for Ms. Maria to pay off her debt for 10,000 and for her to repay Ms. Maria $15,000 in installments. She learned from Mr. Blanco that the house had been transferred to Ms. Maria, who then told her that the 3rd Defendant was in charge of the matter.

14. These respective factual accounts represent the contentions between the Claimant on the one hand, and the 2nd and 3rd Defendants, whose cases were complimentary to each other; and the Claimant and the 1st Defendant. Considering the factual issues only, the Court would have been tasked to decide them as follows:-

(i) Was the Claimant aware of Rapidito's transfer of the property into their name, as alleged to have been told to her in early 2013;

(ii) Was there an oral agreement between the Claimant and 2nd Defendant for the latter to pay her debt to Rapidito in the sum of $10,000 and for the Claimant to then repay the 2nd Defendant the sum of $15,000 in installments of $500 per month;

(iii) Alternatively, had the Claimant invited the 3rd Defendant's purchase of the property via her niece the 2nd Defendant and authorized Rapidito to make the transfer to the 2nd Defendant?

15. Having already set out the law, complete with authorities however, the Court considers that before attempting to make any factual determinations on the issues stated above, the legalities surrounding the loan transaction must firstly be addressed. In law, the Claim alleges breaches of the Act and other violations of law extracted in brief in the following terms:-

(i) Section 13 – failure to comply with requirements for a valid memorandum;

(ii) Section 19 – failure to prominently display effective rate of annual interest and other fees and charges payable on loans;

(iii) Section 26 – imposition of an effective rate of 180% per annum thereby rendering the transaction harsh and unconscionable;

(iv) The transaction was harsh and unconscionable by further reason of

(a) the penalty of selling the Claimant's property valued at $277,800 arising from default of loan of $1000;

(b) the requirement for the Claimant to execute blank transfer forms to the business;

(v) That the loan was void, unenforceable and illegal due to the many breaches of the Moneylender's Act;

(vi) As a result of the loan being void, unenforceable or illegal the respective transfers to and Rapidito and the 2nd and 3rd Defendants were void, fraudulent and should be set aside.

16. The first legal issue addressed is the asserted breach of section 19 by the failure to prominently display the effective annual rate of interest and charges, on the premises. The 1st Defendant submitted photographs to establish its compliance. The weaknesses endemic in proving this issue manifested on both sides. It is regarded as unlikely that the average person seeking a loan would be aware of this legal requirement so as to have an awareness after the event of whether or not there was such a sign posted in the business. Further, it is also regarded as unlikely that this Claimant, as a person of advanced years, now five years after the fact of entering the business place to obtain the loan, is able to positively recall whether or not there was such a sign. On the other hand, the fact that the 1st Defendant is able to produce a photograph of such a sign in his business now, does not assist in establishing that the sign was in place years earlier. If it were only a matter of evidence, the Court would be minded to find that this Claimant's assertion on this issue would not be accepted, given the overall poor recall exhibited in her evidence. In any event however, as a matter of law, the Court's view as expressed above[24] is that section 19 in its original state legislated no legal consequence for breach of that provision. It was not made an offence, there was no sanction for breach, nor was there a general section in the Act which rendered breach of any provision of the Act an offence. This is to be contrasted with the amended section 19, which by the 2017 amendment to the Act is now made an offence punishable on summary conviction[25]. In relation to this issue therefore the Claimant fails in her quest for any relief based on the alleged breach of section 19 of the Act.

17. Now on to the issue of the absence of a memorandum evidencing the contracted loan of $1,000. The Court has examined several authorities above and indeed the number of authorities on this point is substantial. There is no need to repeat the Court's findings on the law on this issue, as stated under paragraph 4E above. The sole document produced to the Court in evidence of the loan transaction of $1000 was the loan ticket.

[24] Supra, para. 4E(v-vi) herein

[25] Act No. 13 of 2017, section 11

It was accepted by Mr. Blanco for Rapidito loans that the ticket did not contain the rate of interest. On the law, this fact alone establishes that there was no proper memorandum evidencing the transaction. Mr. Blanco's evidence was to the effect that because the Claimant had taken several loans over the years, she was well aware of the terms and conditions offered. The familiarity attributable to the Claimant with the terms and conditions of the loan does not assist Mr. Blanco. The Court revisits the authorities cited on this point. In **Central Advance and Discount Corpn. Ltd v Marshall**[26] the memorandum of the loan therein was held insufficient and the contract unenforceable by reason of the omission of an onerous term of liability against the third party guarantor. This omission was not in relation to one of the specific requirements of date, principal or rate of interest which are mentioned in section 13(3). The omission was a term contained in the instrument of security and not the loan document itself. *A fortiori* therefore, given the absence from the loan ticket of the interest rate, this omission being in contravention of the express requirements of section 13(3), this loan agreement for $1000 was unenforceable.

18. The Claimant's case also pleads that the loan transaction was harsh and unconscionable, given the interest rate and charges vis-à-vis that amount. Although by reason of the omission of the interest rate on the loan ticket there is already breach of section 13(1), the Court does speak to some other complaints seeking to impugn this transaction, specifically as they relate to the memorandum. The interest rate was stated to be 4% per month and the period for repayment 40 days. At the end of this 40 days, if not repaid, the loan is defaulted. The agreement is that the loan may be renewed by paying the interest. This manner of renewal offends against section 13(1) also. As illustrated by **Temperance Loan Fund, Ltd. v Rose et anor**[27] which applied **Lyle v Chappell, (**these cases were directly on the point of renewal), upon the expiration of a loan agreement without repayment, that contract is at an end and the renewed terms are in fact a new contract. The new contract contains at least, the altered amounts owed as well as a new date for repayment.

[26] Supra

[27] Supra

As a result, that new contract must be evidenced by its own memorandum which complies with the statutory requirements. In the instant case therefore, where it was intended for the contract to be ‘extended’ (renewed) upon default but upon payment of the interest and charges, there was continuous breach of section 13(1) for failure to issue new memoranda evidencing the new particulars of each renewed loan. In **Temperance Loan Fund Ltd**., there was a new memorandum issued for a renewed contract, however the effective date of the renewal was omitted in the new memorandum. This omission was found fatal and the contract was ruled unenforceable. In the circumstances before the Court there was never any new memorandum upon the renewal of each period of forty days. The second loan ticket for $1,500 would also run afoul of these omissions, much less the change in principal was not initialed by the Claimant who was disputing having received the additional $500. In this regard, it is considered unnecessary to make a finding of fact as to whether the addition of $500 was requested by the Claimant. The additional contract is in any event unenforceable for the same reason as the initial sum of $1000.

19. There is also the question of the charges of 6% which comprised the amounts charged on repayment of the loan. As stated above, fees, costs or charges imposed in relation to a loan can be found to be excessive. Given that they are supposed to be administrative charges, what this 6% charges accounted for was not explained, particularly as it amounted to more than the actual rate of interest which was 4% per month. It is considered that this additional and recurrent 6% charge without explanation, is excessive and as such would have to be classified as interest. If this issue (amount of interest and charges) were the only complaint, meaning that there was a valid memorandum and the relief sought by the Claimant was in fact pursuant to section 25 of the Act, the Court would proceed to determine what was fair and reasonable and hold the moneylender to account in the manner provided in the section. However, the contract is already deemed to have been unenforceable by reason of failure to comply with section 13, thus no question of affording relief to the Claimant under section 25 arises. This position notwithstanding, there are yet further issues to be confronted arising from this transaction.

The Claimant pleaded that the security taken by the moneylender was harsh and unconscionable given the value of the land relative to the minor amount of the loan. The 1st Defendant pointed out that there was no valuation of the land properly in evidence. It is however the case that through the case of the 2nd and 3rd Defendants it was admitted that the Claimant had been seeking to sell the land for $175,000. Whether or not that is the actual appraised value of the land (which comprised a building that was being rented as a restaurant), its value is accepted by the Court to be significantly in excess of the initial loan of $1,000.

20. Before considering any issue relating to the fairness or not of the value of the security taken vis-à-vis the amount of the loan, the Court addresses the issue of the manner in which the security was provided. As expressed in setting out the law, the Moneylender's Act contains no provision as to the manner in which security is to be taken under the law. The Court has concluded therefore that all legal principles and formalities prescribed in relation to the giving of security for money are applicable to loans granted by a moneylender. The fact that the transaction is meant to subsist as an alternative to offerings by mainstream financial institutions does not remove the requirements for providing security where regulated by law. To deposit goods in exchange for money is actually a pledge. This position is now defined in such terms in law by virtue of the 2017 amendment and the business related to pledging is identified as 'pawnbroking'. There were no such definitions or regulating provisions in the original Act which is under consideration in this case. In the circumstances, the deposit of 'goods' under a pledge, never included land, so the deposit of the Claimant's certificate of title, was not the giving of good security. The security provided by land is effected in the law of Belize, by way of legal charge. Further, as the land in question is registered land, any security given in relation to this land would have had to have been given in compliance with the applicable provisions of the Registered Lands Act, Cap. 194. It is clear that there was therefore no valid security given in this case and as the memorandum was insufficient, the issue of the value of the land relative to the security given need not be considered, at least at this stage.

21. There is the further question of the blank transfers. It is perhaps best to say as little in relation to that incredulous practice as possible. It suffices to say that security of land provided for a loan by a moneylender must comply with legal requirements for the creation and enforcement of that particular kind of security. As illustrations of the fact that security of land was given in the usual manner of mortgage of land, the Court repeats its earlier examples of **Coast Brick & Tile Works et al v Premchand Raichand et anor**;[28] and **In re Robinson's Settlement. Gant v Hobbs.**[29] The transfers executed by the Claimant as purported security for the loan of $1000, thereafter eventually effected in favour of Rapidito upon the Claimant's default of her loan, were void. The only lawful way for security to have been created in relation to the Claimant's land was by charge in accordance with the Registered Land's Act. Further, the only lawful way for that charge to have been enforced upon default of the loan would have been in accordance with the provisions for sale under the Registered Lands Act. The 1st Defendant was in any event unable to enforce the loan given that there was no memorandum issued in compliance with section 13 of the Act, in neither case for the original loan of $1000 nor the further sum of $1500. The question that now arises is of the remedy to be afforded the Claimant vis-à-vis the payments under the contract and the disposition of the land.

22. The Claimant defaulted on the loan and never made more than 2 payments of the repayment amount of $250 and Rapidito did not sue for recovery of the debt. Rapidito did however take action to enforce the security (invalid as it was). With respect to the security, aside from not having been validly created, the contract was not and as such neither was the security enforceable. Referring once more to **Temperance Loan Fund Ltd. v Rose et anor**, it was stated therein, that:-

> "*If the transaction between a money-lender and a borrower is unenforceable against the borrower by reason of non-compliance by the moneylender…by the omission from the memorandum of the date on which the loan was made – <u>it is equally unenforceable against a person who has guaranteed the payment of the debt.</u>*"[30]

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[28] [1966] 1 All ER 819
[29] supra
[30] Supra @ 522

According to law therefore, this was a moneylender's loan that ought never to have been enforced but it was so done when the Claimant's land was acquired by the 1st Defendant and thereafter sold. The Claimant says she is entitled to the return of her land which is now in the hands of the 3rd Defendant, who says that he is a bona fide purchaser for value without notice. Were it simply a matter that the contract were enforceable and the Claimant was suing for the return of her security, there would be a substantive issue as to whether the 3rd Defendant qualified as a bona fide purchaser of the land for value without notice. However, this case is complicated by the fact that there was never any security validly given and the fact that the land in question is registered land.

23. On these facts, the first consequence imposed by the Court is that the transfer executed by the Claimant to Rapidito Loans was void as it did not amount to valid security on the loan. There should be an additional consequence that when the title was transferred into Rapidito's name, any further transfer by Rapidito should have attracted the principle of *nemo dat quod non habet* - meaning that Rapidito could give no greater title than they themselves acquired. However, as stated, this case deals with registered land and once registered as proprietor thereof, Rapidito possessed absolute title, free from all other interests or claims whatever.[31] As a result, until divested of same, Rapidito had the power to transfer the entire estate in the property. Furthermore, a bona fide purchaser for value without notice would acquire good title to the property, and such title could only be set aside pursuant to the narrow provisions of section 143 of the RLA. In this regard, the question arises as to the effect of the statutory scheme of indefeasibility of title on the application of the principle *nemo dat quod non habet*. The case of **Barclays Bank Plc v Guy**[32] answers this question and illustrates the respective rights of parties in circumstances akin to the present. In this case a registered proprietor transferred land to a company, which then granted a legal charge to a third party. The third party sought to enforce the power of sale under the charge and the original registered proprietor sought to impugn the original transfer as having been obtained by fraud.

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[31] As provided in section 26 of Registered Lands Act, Cap. 194, but subject as therein provided to the duties of trustees, as well as unregistrable interests as identified in section 31.
[32] [2008] EWHC 893

Correspondingly, the original proprietor contended that the legal charge was also void as a result of the fraud upon initial transfer.

24. Upon an application for summary judgment by the 3rd party, the trial judge held that even if it were accepted that the initial transfer from the registered proprietor could be set aside on the basis of fraud, once registered, that transfer nonetheless gave good title until set aside. Having obtained good title upon registration, the company validly executed the charge to the 3rd party, which also obtained good title to the charge. The legal chargee (third party) successfully obtained an order for summary judgment to exercise its power of sale. The registered proprietor was twice unsuccessful in obtaining leave to appeal, on both applications, the Court of Appeal stating that the trial judge's application of the law on registered title was correct.[33] By way of further illustration, reference is made to **Brelsford and others v Providence Estate Ltd and another,[34]** arising out of the Eastern Caribbean Court of Appeal (Montserrat). In this case, property was transferred to multiple persons by a development company, except by the hand of a sole director who was subsequently convicted of conspiracy to defraud in respect of his dealings with the company. The registered proprietors then sought declarations against the company and a former director that they were absolute owners of the registered parcels. The company resisted on the basis that the registered proprietors were not bona fide purchasers for value without notice, as they had failed to enquire as to the fraudulent director's authority to represent the company.

25. This defence was accepted at first instance, but on appeal, it was found that albeit the transfers were void by reason of the director's lack of authority, the registered proprietors obtained indefeasible title which was liable only to be set aside on the bases provided within the Act – i.e. – by fraud or mistake, with inter alia, notice of such fraud or mistake by the persons obtaining title. The Eastern Caribbean Court of Appeal found:-

> *"The mere fact that the transfers in the instant case were void did not render the title acquired by the appellants defeasible. The effect of the void transfers was that PEL was nonetheless divested of its title to the parcels of land and the titles were vested in the*

[33] Barclays Bank Plc v Guy (no.2) 2010 EWCA Civ. 1396
[34] [2018] 3 LRC 513

purchasers who acquired indefeasible title to the parcels. The Act permitted rectification by the court only upon the occurrence of two conditions, both of which had to be present: (i) where registration had been obtained, made or omitted by fraud or mistake and (ii) the registered proprietor (in the instant case the purchasers) had knowledge of the omission, fraud or mistake in consequence of which the rectification was sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

The Court now turns its attention to the case at bar. It would seem from these two authorities (**Barclays Bank Plc v Guy**; **Brelsford et al v Providence Estate Ltd et anor;**), that Rapidito nonetheless acquired indefeasible title, once registered as proprietor to the Claimant's land. Further, that Rapidito would have been able to pass similarly indefeasible title to the 2nd Defendant Maria Escobar, and she, subsequently to the 3rd Defendant.

26. As a result of good title being in the hands of the 3rd Defendant, the remedy of rectification of the register by the Court, can only be obtained pursuant to section 143 of the Act. In **Barclays Bank Plc**, it was expressly stated that unlike in unregistered conveyancing, the maxim *nemo dat quod non habet* had no application to registered conveyancing (RLA 2002 of the UK, being the same Torrens system embodied by Belize's Cap. 194). It was therein stated:-

"This result is different from what would have been happened with unregistered conveyances, where the title of R2 and M1 would have depended on the rule nemo dat quod non habet*. It also differs from what might have been the result under the rectification provisions of the former Land Registration Act 1925…*

…It is submitted, however, that this approach is not justifiable under the 2002 Act. First, it was the explicit policy of HM Land Registry and the Law Commission in the consultation paper that preceded 2002 Act that, in the absence of some error on the register, the principles of unregistered land should not determine whether the register should be rectified. Any other result would undermine the general aim of the Act that the register should indicate accurately and comprehensively the state of the registered proprietor's title. A registered proprietor cannot be deemed to lack powers of disposition which the fact of registration indicates that he actually has. Secondly, the 2002 Act has narrowed the grounds of rectification provided in the 1925 Act so that it no longer allows rectification where the proprietor of a legal estate would not have been the estate owner if the land had been unregistered. The applicant for rectification must prove some error in registration."

27. In the instant case, the Claimant has sought rectification of the register by the Court on the basis of fraud, albeit not specifically pleaded pursuant to section 143 of Cap. 194. However, as a matter of law, that would be the only basis upon which rectification of registered title could be sought to be ordered by the Court.

The particulars of fraud pleaded however are pleaded as against the 1st Defendant only, who no longer holds the registered title. The statement of claim does assert fraud on the part of all the Defendants in the claim, but the particulars of fraud are alleged only in relation to the 1st Defendant. It is in this context therefore the 1st Defendant's action must be found to have been fraudulent and the 3rd Defendant's acquisition of title must fall within the bounds of section 143(2) as set out below.

> "(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."[35]

The Court is not of the view that the 1st Defendant's actions were fraudulent. The transfer was committed under a grave misapprehension of law, however that does not amount to fraud. The only other alternative would have been mistake and the mistake occurring in the case would have been mistake of law. The issue of mistake was neither pleaded nor ventilated at the trial thus the Court cannot properly determine the matter on such a basis. The Court is therefore not of the view that the Claimant can be awarded rectification of the register pursuant to section 143 of Cap. 194.

28. This position with respect to the remedy of rectification notwithstanding, the Court is of the view that as between the Claimant and 1st Defendant, the transfer was void and as such will so declare. Whilst the Court finds that section 143 is not applicable, regard is had to the remedy afforded the defrauded registered proprietor in **Brelsford et anor v Providence Estate Lands**[36]. It was held in this case that the persons who obtained the indefeasible titles, were not bona fide purchasers for value without notice as they were

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[35] **Brelsford et anor v Providence Estate Lands,** supra. @ 515

[36] supra

deemed (in accordance with principles of company law) to have constructive notice of the convicted director's lack of authority to represent the company. As a consequence, the company was found to have an equitable right to sue for the return of the parcels which had been fraudulently transferred and an order for the re-conveyance to that effect was made. The question now arises as to how the transfer from Rapidito to the 2nd Defendant and the subsequent sale from the latter to the 3rd Defendant are to be regarded. The Court firstly regards the transfer by Rapidito to the 2nd Defendant and from the latter to the 3rd Defendant as having arisen under the same transaction. The Court accepts the evidence of both the 2nd and 3rd Defendants that the money to purchase was provided by the 3rd Defendant so that the 2nd Defendant was no more than a purchaser on his behalf. Further, the 3rd Defendant also admitted under cross examination that no monies passed between him and the 2nd Defendant in consideration of her transfer to him – given that he had already provided the monies for the purchase. As a matter of law therefore, the 2nd Defendant was in fact a resulting trustee for the 3rd Defendant and the transfer between the two of them was merely a vesting of title by a trustee to a beneficiary.

29. As a consequence, the 3rd Defendant is in no better standing than the 2nd Defendant vis-à-vis his legal position in relation to the title received from Rapidito. At this point, the Court recalls its finding that Rapidito had no valid security and as between the Claimant and Rapidito the title obtained is declared void. It has also been held however that given the scheme of the legislation (the RLA Cap. 194), good title to the property nevertheless passed to the 2nd and thereafter 3rd Defendant. The 1st Defendant is in the first instance, therefore liable to be ordered to repay the Claimant for the value of the land he wrongfully transferred. In determining whether the 1st Defendant should be so ordered, the Court must first determine whether the 3rd Defendant should be regarded as a bona fide purchaser for value without notice whose title to the property should be allowed to stand. Section 27 of the Act exempts any action taken by the court in furtherance of sections 24, 25 or 26 from affecting title of a bona fide purchaser (or holder) of property without notice.

Sections 24 – 26 concern the Court's reopening of a transaction and giving relief to a borrower. However, there is no such exemption to the title acquired by a bona fide purchaser (or holder) for value, in relation to contracts or security rendered unenforceable for breach of section 13.

30. The Court considers that in determining the remedy available to the Claimant, the case is as such that the circumstances under which the 3rd Defendant acquired title to the property, should be examined. This is particularly the case as the security was unenforceable and the Claimant is in effect, (based on the authorities), entitled to seek return of her property in equity. In this regard, the Court finds that the 2nd and 3rd Defendants were both aware of the Claimant's circumstance of indebtedness to the moneylender; the 3rd Defendant was aware of the Claimant's initial asking price of $175,000; and both these Defendants were familiar with the property, including the fact that there was a paying tenant. In those circumstances, whilst the court acknowledges that there was no finding of fraud by the 2nd or 3rd Defendants and the 2nd Defendant was merely the resulting trustee for the 3rd Defendant, the Court must consider the allegation that 3rd Defendant's purchase of the property was at a gross undervalue. Reference is made to the case of **Midland Bank Trust Co. Ltd. and another v. Green and Another**[37] where the UK Court of Appeal found itself justified in going behind consideration paid, to ascertain whether the consideration was adequate. The circumstances in that case are different to those at hand, in that there was a finding of dishonesty in relation to the undervalued transfer in question. However, the circumstances of the instant case (particularly the invalid security to begin with), are of such that the Court finds it appropriate to look behind the consideration paid.

31. In the same vein as the remedy to sue in equity for a return of the property which was afforded the defrauded registered proprietor in ***Brelsford***, the Court's inquiry into the circumstances of the purchase price paid by the 3rd Defendant is similarly made in furtherance of an equitable claim by the Claimant for the return of her property.

[37] [1980] Ch. 590

In the circumstances identified in paragraph 29 above, the Court finds the consideration of $10,000 paid by the 3rd Defendant to have been to his knowledge grossly inadequate, given his knowledge of the Claimant's initial asking price of $175,000, which he acknowledged that he could not afford. Further, as the 3rd Defendant was aware that the property was being sold to pay off a moneylending debt of $10,000 the Court finds the 3rd Defendant to have been party to an unconscionable bargain and he does not have clean hands in which to retain the Claimant's property. In the circumstances, the Claimant succeeds against the Defendants on the basis of the unenforceability of the moneylending contract; the invalid security taken; and the unconscionable bargain obtained by the 3rd Defendant upon purchase of the Claimant's property at a gross undervalue of $10,000.

Disposition of Claim 1 – No. 243 of 2018

32. The Court makes the following declarations and orders arising from its determination in Claim No. 243 of 2018:-

A. IT IS HEREBY DECLARED THAT

(i) The moneylending contract between the Claimant Elodia Escobar and 1st Defendant Rapidito Loans, for the sum of $1000, dated the 14th December, 2011 was unenforceable for failure to comply with the provisions of section 13(1) of the Moneylending Act, Cap. 260 of Belize;

(ii) The security issued by the Claimant Elodia Escobar for the said moneylending contract by way of deposit of certificate of title to her land registered as Parcel 94 Block 23 San Ignacio South Registration Section, was invalid by reason of failure to comply with legal formalities of a legal charge on land;

(iii) The transfer forms for the said property executed by the Claimant in favour of the 1st Defendant Rapidito Loans on the 6th August, 2009, were void by reason that no valid security was created by the Claimant in favour of Rapidito Loans;

(iv) Notwithstanding the invalid security and void transfers executed by the Claimant, the 2nd Defendant acquired lawful title to the Claimant's property upon registration as proprietor of the said property and transferred good title to the 3rd Defendant;

(v) The 2nd Defendant acquired the Claimant's property as trustee, under a resulting trust in favour of the 3rd Defendant;

(vi) The Claimant has not established fraud on the part of the 2nd and 3rd Defendants in their acquisition of the property, thus the Court makes no order for rectification of the register pursuant to section 143 of the Registered Lands Act, Cap. 194;

(vii) The Claimant is nonetheless in equity entitled to relief against the 1st Defendant for the value of her land or alternatively against the 3rd Defendant, for the re-transfer of her property to her;

(viii) The 3rd Defendant's purchase of the Claimant's property is found to constitute an unconscionable bargain thus the Claimant is entitled to the return of her property as described in paragraph A(ii) above, as against the 3rd Defendant.

B. As a consequence of the Declarations made in paragraph A, **the COURT HEREBY ORDERS** as follows:-

(i) The 1st Defendant shall forthwith return the sum of 10,000 to the 3rd Defendant;

(ii) The 3rd Defendant shall forthwith execute a transfer of the property in favour of the Claimant;

(iii) The Claimant is entitled to her costs against the 1st and 3rd Defendants apportioned at 90% and 10% respectively. Costs have been agreed in the sum of $10,000, thereby $9000 payable by the 1st Defendant and $1000 payable by the 3rd Defendant;

(iv) There is no order as to costs in favour of or against the 2nd Defendant.

Claim No. 2 – 625 of 2018, Elloyd Gilharry v Adan Cal dba Capital Jewel Quick Loans

Relief Claimed

33. The following relief is claimed in this Claim and there is no counterclaim:-

(i) A Declaration that the Defendant failed to comply with Section 13 (1) of the Money Lenders Act by failing to state the total yearly interest of 240% in the loan agreement.

(ii) A Declaration that the Defendant failed to comply with section of the Money Lenders Act by failing to display prominently in the store the annual interest rate and all other charges and fees the Defendant levies on his loans.

(iii) A Declaration that the interest rate of 240% per year in respect of the sums borrowed being $15,000.00 BZE Dollars is excessive and that the transaction is harsh and unconscionable and that it is not in accordance with Section 26 (1) of the Money Lenders Act of Belize.

(iv) A Declaration that the fine and/or penalty charged by the Defendant being the confiscation of the Claimant's property valued at over $75,000.00 BZE Dollars is excessive and that the transaction is harsh and unconscionable.

(v) A Declaration that the notation on the Defendant's money lenders ticket which states that thirty (30) days after the inscribed date, the item is forfeited to the CAPITAL JEWEL QUICK LOANS is excessive and harsh.

(vi) A Declaration that the Defendant's practice of having the Claimant execute blank transfer forms for the transfer of the vehicles into his own personal name is harsh and unconscionable.

(vii) Damages in detinue

(viii) The return of all monies paid in excess of the regulated statutory rate of 4% per month.

(ix) An Order that the Defendant return the property to the Claimant.

(x) An Order that the Defendant pays to the Claimant the difference between the lawful interest earned according to statute and the monies paid in to the Defendant which are in excess of such rate.

(xi) An Order that the Defendant pay to the Claimant any and all legal cost associated with the transfer of the Property to the Claimant including any required Tax or transfer fees payable to the Government of Belize for the return of the property.

<u>In the Alternative</u>

(i) The sum of **SEVENTY FIVE THOUSAND DOLLARS** in Belize Currency ($75,000.00 BZE) being the value of the said trucks be paid to the Claimant.

(ii) General Damages

(iii) Interest pursuant to section 166 of the Supreme Court of Judicature Act.
(iv) Costs
(v) Such further or other relief as the Court sees fit.

Uncontested Facts

34. On 2nd September, 2015 and 30th December, 2015 respectively, the Claimant Mr. Gilharry received two loans from the defendant Capital Jewel Quick Loans ('Capital Jewel'/'the Defendant'). One of $5000 ('the first loan') and the other of $10,000 ('the second loan'). As security for the first loan the Claimant signed a blank transfer form for a 2006 GMC truck. As security for the 2nd loan, the Claimant signed a blank transfer form for his 1994 international goods truck, which he used in his frozen treats business. In respect of both loans, the Claimant received loan tickets and in respect of both loans, the Claimant accepted that he signed a vehicle loan agreement for each loan. The monthly interest charged on both loans was 4% per month, along with 16% of the loan, charged as other charges and fees, so that the monthly repayment for the loan of $5000 was $1000. For the loan of $10,000, the monthly repayment was $2000 based upon the same configuration of interest and charges. The Claimant defaulted on both loans, with a payment last being made in October, 2016 in respect of the 1st loan; and May, 2016 in respect of the second loan. Capital Loans completed the transfer of the Claimant's vehicles into its name and instructed the Claimant to bring in his vehicles, which they then parked at their premises. In August, 2017 the Claimant's default was assessed to be $31,000 inclusive of principal, interest and other charges on the first loan of $5000; and the sum of $66,000 in principal, interest and charges on the second loan of $10,000.

On August 8th and 9th, 2017, the trucks were purchased for $15,000 by a Mr. Wendell Humes, who is a friend of the Claimant's. By this purchase the Claimant's debt to the Defendant was discharged.

Contested Facts and Determinations of Facts

35. There were many contested facts but most of them are not relevant to the Court's consideration. Once more, because of the determinations of law made by the Court from the outset, the substance of the dispute can be streamlined without having to navigate

every aspect of the variant factual contentions. The issues that fall to be decided in this case having regard to the prior determinations of law, are as follows:-

(i) Was there a sufficient memorandum given to the Claimant in compliance with section 13 of the Act, for each loan?

(ii) Was there an agreement between the parties which settled the debt, as alleged by the Defendant; and if so, does this agreement preclude the Claimant from seeking relief under the Act?

(iii) If the Court finds breaches of the Act which impugn the moneylending contract (by section 13 or otherwise), what if any relief, should be afforded to the Claimant?

36. The Claimant acknowledged receiving loan tickets and when put to him in cross examination, accepted having signed vehicle loan agreements in relation to both loans. However, it was never asserted by the Defendant in any pleading or evidence in chief of any of its witnesses that the Claimant received a copy of these vehicle loan agreements at the time loan was made. It was asserted in cross examination but not accepted, that the agreements were provided to the Claimant upon his request for a statement of account in February, 2017. A copy of only the first vehicle loan agreement is before the Court. As it relates to the issue of the sufficiency of the memorandum provided, the position according to the evidence is that the Claimant received only the loan ticket but had sight of the vehicle loan agreement, having signed them. The loan tickets and vehicle loan agreements were signed prior to receipt of the loan as well as the loan ticket was provided prior to receipt of the loan. Counsel for the Claimant asserts that the loan ticket does not comply with the requirements of section 13 of the Act. Senior Counsel for the Defendant contends that the loan agreement contained all relevant terms of the transaction, of which the Claimant had full notice. Pertinent to the issue of sufficiency of the memorandum, the loan ticket contained the following information:-

(i) the date of issue and date of expiration;

(ii) the amount (but not rates) representing interest (no mention is made of charges on the loan note);

(iii) the total amount of the loan (the principal is not expressly stated but would be implied from the difference between the amount of interest and total);

(iv) the registration particulars (registration number and year of manufacture) of the truck taken as security;

(v) the statement 'Thirty days after the above date items become the sole property of Capital Jewel Quick Loans'.

37. Information not contained in the loan ticket that also governed the loan was contained in the vehicle loan agreement, as follows:-

(i) A breakdown of the $1,000 monthly payment as comprised of 4% interest plus 16% other charges;

(ii) Estimated market value of the vehicle at $15,000 and additional vehicle particulars;

(iii) Additional and expanded terms of the agreement, as follows:-

(a) the vehicle becomes the sole property of Capital Jewel if not redeemed within 30 days or the 20% interest is not paid within the 30 day loan period;

(b) The agreement could be renewed or extended (at the borrower's option), for monthly periods once interest and other charges are paid;

(c) The borrower is obliged to –

- transfer the certificate of title to Capital Jewels
- Provide a copy vehicle key
- Pay all legal fees associated with the transfer of the Certificate of Title
- Keep the vehicle insured against theft or other damage
- Upon failure to redeem or pay interest and other charges upon expiration of the 30 day loan period, to allow Capital Jewel to take possession of the vehicle
- In the event that vehicle is damaged or condition unacceptable to Capital Jewel, to pay the market value of the vehicle should the vehicle have to be taken into possession by Capital Jewel.

38. When compared together, it can be seen that the information on the vehicle loan agreement is significantly more than that on the loan ticket. The question is whether what was on the loan ticket was sufficient to satisfy section 13. Counsel for the Claimant contended in relation to the first loan, that the loan ticket was deficient in setting out required information for a memorandum in that it failed to specifically identify the actual interest rate especially given that there was the additional 16% per month payable in respect of other charges, which was stated in the loan agreement.

Further, the issue of the duration of the loan was not properly reflected on the loan note insofar as the vehicle loan agreement provided for 'renewal'. The point was also made that the loan note did not provide for the right of the Defendant to sell the vehicle. To the extent that the Defendant contended that the Claimant was aware of all of the terms contained in the vehicle loan agreement (having had the agreement explained to him by the Defendant's personnel), Counsel for the Claimant reverted to the plain terms of section 13 which required all of the terms of the memorandum to be stated. Counsel referred to the case of **Poran Sookdeo et al v Wayne Lum Young et anor**[38], on the issue of the sufficiency of the memorandum.

39. In reliance of this authority, Counsel for the Claimant contended that even where there is a written agreement, the memorandum was required to be a separate document evidencing the required information. In the circumstances, the fact that there was a loan agreement was not sufficient to cure the defect in the memorandum. In relation to the second loan, Counsel for the Claimant submitted that there was in fact no memorandum before the Court at all, as the loan note itself was deficient in the ways already described. It was the Claimant's position that both loans were unenforceable for failure to comply with section 13 of the Act. On the Defendant's part, it was submitted that the vehicle loan agreement, which was signed by the Claimant before the loan was received, was clearly a memorandum within the scope of section 13, as it contained all of the terms relevant to the transaction. Even though a copy of the loan agreement for the second loan was not put into evidence, Senior Counsel for the Defendant points out that the Claimant admitted to signing the agreement.

40. The Court has already stated that the vehicle loan agreement was not provided to the Claimant as evidence of either of the loan transactions. The Claimant consistently denied having received either of the two, but admitted signing them before he received his loans.

[38] Trinidad & Tobago High Court CV2010-03195

Neither the Defendant's representative nor two employees who testified asserted in their evidence in chief that the vehicle loan agreements were given to the Claimant at the time of the transaction (or within 7 days thereafter)[39]. The evidence of employee Mr. Zelaya was that the loan agreement was read to the Claimant, its terms and he was issued with a loan ticket. Given that it was only the loan tickets provided, the Court agrees with Counsel for the Claimant that these tickets failed to satisfy the requirement of section 13 of the Act, as they did not contain all of the terms of the loan agreement. The requirement of the section is that the note or memorandum must be signed by the borrower before the monies are received, and that a copy of the note or memorandum containing all of the terms must be provided within 7 days of the transaction. Reference is made to the Court's findings on the law set out at paragraph 4E(ii) above, particularly with respect to the determination that whilst there is no identifiable form that a memorandum should take, the requirement that ***all*** the terms of the contract be contained therein means that where there is more than one document comprising the transaction, the material terms should all be accounted for in one single document.

41. This determination is once again illustrated by the case of **Central Advance and Discount Corpn. Ltd v Marshall**[40] in which the moneylending transaction was secured by a bill of sale and a guarantee. There was a separate memorandum in which the existence of both documents of security was stated. There was not however, mention of the specific term in the guarantee, which defined the basis upon which the guarantor's liability would arise. It was held that the term was an onerous one and its absence of that term rendered the memorandum insufficient and the loan unenforceable. Clauson LJ stated as follows[41] (emphasis mine):-

> *"The Act does not require the terms of a security to be set out in the memorandum, <u>but, if the effect of the security is that a liability different in any respect to that described in the memorandum is, or may be, directly or indirectly imposed on the borrower, this further liability must appear in the memorandum</u>."*

[39] Witness statement of Adan Cal paras 5 and 8; Witness statement of Leslie Zelaya para. 3
[40] [1939] 3 All ER 695
[41] Ibid @ 696-697

When one examines the loan agreement versus the loan ticket, the Court agrees that the loan ticket does not contain all relevant terms of the loan transaction. It is plain that the contracted interest rate of 4% per month is not reflected on the loan ticket but is so stated on the loan agreement; there is also no mention of the option to renew on the loan ticket, which is stated to be available upon payment of the interest and other charges; the right of the moneylender to sell the vehicle upon default (failure to pay within the 30 day loan period); the right of the moneylender to take possession upon default, is also not stated. The only statement on the loan ticket regarding enforcement is that the vehicle shall become the sole property of the moneylender after 30 days.

42. Having regard to the authority of **Central Advance and Discount Corporation v Marshall** above, it is found that both loan tickets were deficient by omission of significant and material terms which were comprised in the loan agreements. The Court is unable to accept that the vehicle loan agreements could themselves be regarded as the memoranda required to be provided in respect of both loans, as these agreements were not provided to the Claimant within 7 days of the issuance of the loan as required by section 13. In the circumstances, in relation to issue (i) as set out in paragraph 32 above, the Court is in full agreement with Counsel for the Claimant regarding the insufficiency of the memoranda provided the Claimant, thereby rendering both loan contracts unenforceable. The issue to be discussed concerns the existence, validity or effect of the agreement alleged by the Defendant to have been made in disposal of the Claimant's debts under the loans.

However the Court will first examine additional allegations of breaches of the Act, raised in relation to the validity of the Claimant's loans. The alleged breach of section 19 of the Act by means of failing to prominently display the effective rate of interest in the business premises is treated in the same manner as Claim No. 1 above. The Court considers it highly unlikely that the Claimant registered the presence or not of any signs speaking to the effective interest rate, so as to be able to definitively say four years thereafter that there were no such signs. Similarly, the Court views the Defendant's photographs of indeed very visible signs (presumably taken in 2019) as being unhelpful as proof of what was actually present at the material time in September and December, 2019.

In any event, the Court repeats its position in law, that the absence of sanction to breach of section 19 gave rise to neither civil nor criminal proceedings. This lack of sanction has been corrected in the amended legislation.

43. With respect to other breaches, Counsel for the Claimant has attacked the validity of security given, by means of a requirement for the vehicle loan agreement – given its effect authorizing the power of distress (seizure and sale) of the vehicles - to have been registered under the Bills of Sale Act, Cap. This point was only taken by Counsel for the Claimant in closing submissions, but Senior Counsel for the Claimant appears to have conceded that there was a requirement for registration of the vehicle loan agreement as a bill of sale, and in the absence of such registration, there was no security given for the loans. Albeit the issue was raised late in the day, as it is a matter of law which plainly arises on the circumstances, the Court accepts the applicability of the issue, as well as the legal conclusion advanced and apparently accepted. In this regard, the Court reverts to its earlier determination that given the absence of any provisions prescribing the form of security to be given under the Act, the reference to 'security given', means security given in accordance with general requirements of law. The above case of **Central Advance and Discount Corporation v Marshall** illustrates the use of a bill of sale on goods as security for a moneylending loan. Also cited above for this purpose is **Whiteman v Sadler.**[42] Counsel for the Claimant is therefore once again correct in his submission that there was no valid security given for the two loans. The effect of this finding will be shortly discussed.

44. At this juncture, the Claimant's two moneylending loans have already been impugned by the Court on two bases and the Court is in a position to examine the remedies available to the Claimant. However, there are two other important issues which arise which ought to be dealt with as they will reoccur in the business of moneylending in Belize. The first is the question of the interest rate, which Counsel for the Claimant submitted was in effect 20% per month, thereby being 240% per annum and as such prima facie excessive by virtue of section 26 of the Act. Senior Counsel for the Defendant submits that the interest rate itself conforms to the maximum 48% per annum (at 4% per month) and the other

[42] supra

16% of the repayment amount comprised charges. The Defendant's witness Mr. Adan Cal alluded to the composition of the charges, as including the requirement to conduct monthly searches on the vehicle registration to ensure the title remained with the borrower. The Defendant's second witness Mr. Zelaya, in response to Counsel for the Claimant in cross examination, gave a more detailed breakdown of the composition of the 16% charges. The other charges detailed were 5% for the pawn and drive facility; 5 % for inspection of the vehicle and another 5% administrative fee. The interest was 4%. The remaining 1 percent is presumably an error in one of the stated percentages or allotted to some other undefined charge. Counsel for the Claimant termed these charges interest and referred to the curious description of the 20% as interest in one instance in the agreement. The Defendant's witness accepted that there was such a reference but clarified that the 20% at all times comprised 4% interest and 16% charges.

45. The Act makes provision for costs, charges and expenses related to the loan to be paid, so there is no issue to be taken with the fact of such charges being imposed. As stated before however, the Act defines interest as any amount in excess of principal, not being costs, charges or expenses. The Act contemplates that the costs, charges or expenses can be deemed excessive (section 24) and where such excess is determined, it would mean that the actual amount deemed excessive, will then be attributable to interest. The result of such additional interest being attributed or by virtue of the excessive costs, charges or fees themselves, would be a factor for consideration in whether the transaction has been rendered harsh and unconscionable. Because the loan transaction has already been found unenforceable, the transaction cannot at the same time be reopened pursuant to section 25. The borrower's remedy is not to try to reopen the unenforceable transaction in order to seek relief therefrom, but to sue for the return of his security or the cancellation of such security. The borrower's remedies upon an unenforceable contract was discussed in **Cohen v J. Lester Ltd**. [43]

[43] [1938] 4 All ER 188

The issue in this case arose out of an action based upon breach of section 6 of the UK Moneylender's Act, 1927 (to which section 13 is equivalent), and pertained to the remedy of the successful borrower in the face of the unenforceable contract therein. Tucker J made the following statements[44]:-

> *"…What I have to decide is whether there is a distinction between contracts which are stated to be illegal and those which are stated to be unenforceable with regard to the principles applicable to obtaining relief and getting repayment of money paid by way of security…amongst the relief he can get is an order for delivery up of promissory notes that have been given in respect of transactions, and also for the delivery up and/or cancellation of bills of sale that have been given by way of security…"*

46. It is therefore concluded that in respect of the operation of section 13, the finding that a loan agreement is unenforceable precludes the application of the remedies provided in sections 24 and 25. In section 25 the borrower's right to re-open the transaction is saved even where the moneylender's right of action to repayment has not yet accrued or has expired. That is not the same as preserving the right to the remedies available under section 25 even where the contract is found to be enforceable. For the instant case, it means that the Court is not obliged to make a finding in relation to the excessiveness or not, of interest charged or the costs, charges or expenses. The Court however feels compelled to observe that were it engaging in the application of section 25 on behalf of the borrower, the 16% charges specified by the Defendant would be heavily interrogated with a view to ascertaining the necessity and reasonableness of the nature and amount of charges which result in a charge 4 times that of the maximum allowable interest. On first glance, the charges appear to be excessive and invite a finding that the transaction is harsh and unconscionable. The Court however declines to exercise its powers under section 25, as the transaction has already been found unenforceable.

47. Another issue arising out of this transaction that the Court considers it important to speak to, is the question of renewal of the loan. This issue was similarly addressed in Claim No. 1 above, as it relates to the sufficiency of the memorandum.

[44] Ibid @ 192

The statute does not preclude renewal but renewal must be effected with reference to the illustration provided by **Temperance Loan Fund, Ltd. v Rose et anor.**[45] The authority of this case is to the effect that a renewal of a loan is subject to the requirements for a separate memorandum as upon default, the original loan has in fact expired and a new loan is created, even if on generally the same terms. As a result, this renewed loan and each such renewed loan is subject to the requirement of providing a memorandum to the borrower, setting out the material terms of the agreement. There was no such new memorandum for each month the Claimant continued to pay the interest and charges, thereby extending the life of the loan. At the expiration of each 30 day period, the Claimant ought to have received a new loan ticket or other form of memorandum containing the material terms as identified by Court. In the circumstances, this failure amounts to a third basis upon which there is a breach of section 13 of the Act. The Court still has to consider the validity or otherwise of the agreement alleged to have been reached between the parties in disposal of the Claimant's debt.

The Agreement to Settle the Claimant's Debt

48. The Court now examines the alleged settlement agreement as the issue is one which can foreseeably arise in relation to future moneylending contracts. For all intents and purposes it is useful to consider the agreement on the basis of acceptance of the Defendant's case. It is assumed for argument therefore that the Claimant did initiate the agreement that for the total sum of $15,000, the Claimant could repurchase his vehicles and his two loans, then totaling almost $100,000 would stand discharged. On the Defendant's case, the Claimant dishonestly procured the purchase of his vehicles for the benefit of Mr. Humes, on the guise of purchasing them himself. For the record, the Court considers the entire dispute on this issue of for whose benefit the vehicles were actually purchased, to be irrelevant to the real issue of the effect in law of the agreement. Having found the loan agreements unenforceable, this settlement would itself be found unenforceable given that it is based upon the unenforceable transaction to begin with.

[45] Supra

The case of **Re Campbell. Ex parte Seal**[46] is found illustrative of this point. The moneylender in this case obtained a default judgment against the borrower and thereafter entered into an agreement to pay the judgment. The moneylender sought to prove the debt arising from that agreement in bankruptcy notice filed against the borrower. The court of appeal upheld the first instance refusal of the moneylender's attempt to prove the debt in bankruptcy proceedings. The Court of Appeal's decision that the moneylender could not enforce the agreement entered into by the borrower, in furtherance of a default judgment of the court, was unanimous.

49. It is admittedly the case that the moneylending contract in that case was found to be illegal, as opposed to merely unenforceable. However the Court is of the view, that if the moneylender is unable to assert the contract in court to enforce it, any attempt to enforce it otherwise is similarly enforceable. The agreement for payment of $15,000 so as to settle the Claimant's account was in fact an enforcement of the loans. Even if **Re Campbell** is found inapplicable on the basis of the fact of the underlying illegality, the Court refers once more to the case of **Cohen v J. Lester Ltd**[47], which was a case of an unenforceable as opposed to illegal contract. The moneylender in this case accepted that the contract was unenforceable but attempted to withhold the security (deposit of jewelry) until the borrower made good on the monies received under the contract. Tucker J expressed and resolved the argument of the moneylender in the following terms, after highlighting that the moneylender had accepted that the both the contract and security thereon were unenforceable:-

> "'...but he says, I am not seeking to enforce the security. I am only saying that before an order can be made against me for delivery up, the plaintiff must put himself right with equity.' *I think on the whole, Mr. Salmon is seeking to enforce the contract by saying*: 'I am entitled to keep the jewelry'. *It is clear that his only title to keep the jewelry is derived from these enforceable contracts…It is quite true that he is not claiming to realise his security by sale, but I think that when he says* 'I am entitled to keep this jewelry, and I refuse to hand it over to you except on terms of paying money to you due under the contracts,' *he is doing the very thing*

[46] [1903] 1 KB 705
[47] Supra

which s. 6 says cannot be done – that is, he is seeking to enforce a contract which the statute has said shall be unenforceable."

50. The point extracted from this case is that regardless of the method of enforcement sought, if the intent or effect of the moneylender's action is to make good the security or otherwise obtain repayment of the debt, the means of so doing in nonetheless precluded as the contract to repay was unenforceable. This point is illustrated in **Kasumu et al v Baba-Egbe**[48] where in delivering the judgment of the Board, Lord Radcliffe stated with respect to the means of enforcement of security in an unenforceable contract:-

"So far as legal rights of action go he loses his money. Secondly, their Lordships are satisfied that the words of deprivation 'not be entitled to enforce any claim in respect of any transaction' are very widely drawn and that they should not be confined to the assertion of rights by means of or in the course of legal proceedings."

In the instant case, the agreement for acceptance of $15,000 in settlement of the amounts outstanding under the Claimant's loans, was regardless of who paid or who initiated the agreement, (and whether there was agreement or not) – the collection of that $15,000 in settlement of the Claimant's debt arose from the unenforceable contract in the first place. The Court refers to yet another authority on this issue of subsequent compromise based on moneylending transaction – the case of **Binder v Alachouzos.**[49] In this case the plaintiff brought an action for recovery of sums loaned to the defendant. The defendant set up a defence that the transaction was a moneylending transaction and as the plaintiff was not registered as a moneylender under the UK 1927 Act, the transaction was illegal. Shortly before trial the parties reached agreement on a sum payable by the defendant, to be paid in installments by a certain time, as well as the defendant agreed that the transaction was not a moneylending transaction. The defendant defaulted on that agreement and the plaintiffs sued for recovery on the terms of that compromise. The defendant again set up the defence that the plaintiffs were unregistered moneylenders. The Court of Appeal granted summary judgment in favour of the plaintiff, thereby upholding the compromise.

[48] [1956] 3 All ER 266 @ 268
[49] [1972] 2 Q.B. 151

51. The difference in that case however was that the question of whether or not the plaintiff was a moneylender and the transaction a moneylending transaction was a disputed fact in issue which was to be tried. Further, on this fact in issue, the defendant had with the benefit of counsel, entered into the compromise and stipulated that the transaction was not a moneylending transaction. This authority is cited by the Court in the instant case however, in further support of its regard of the agreement asserted in the instant case by reason of the following dictum from Lord Denning M.R.[50]:-

> *"There are here two competing considerations. On the one hand the Moneylenders Acts are for the protection of borrowers. The judges will, therefore not allow a moneylender to use a compromise as a means of getting around the Act. They will inquire into the circumstances giving rise to the compromise. They will not allow the moneylender to take unfair advantage of the borrower. Even if the borrower consents to judgment being entered against him, the courts will go behind that consent if the justice of the case so requires. For instance, where the interest charged was so high that it was presumed to be harsh and unconscionable."*

Of that particular case Lord Denning Mr. said further:-

> *"In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened."*

52. In the Court's view, even though the compromise in the above case was upheld, the critical distinguishing factor was the fact that the transaction was not at the time of the compromise a moneylending transaction. That was a disputed fact in issue in the proceedings first instituted, required to be proven. Further, as extracted from the dictum of Lord Denning M.R., the courts are entitled to go behind a compromise arising from a moneylending transaction, even where a borrower has consented. Even further, Lord Denning MR. alluded to the stringent scrutiny a compromise based on a moneylending transaction would attract in order to be upheld.

[50] Supra @ pg 157

Such scrutiny would include the relative strengths of the parties, whether there was representation by counsel as well as the overall fairness of the bargain struck. With all three of the decisions cited on this issue, the Court is of the firm view that even accepting the Defendant's case as to how it originated, the agreement as asserted is itself unenforceable. As regards the question of the sale of Claimant's vehicles, this issue is already determined by reason of the Court's finding that no valid security had been given as the vehicle loan agreements ought to have been registered under the Bills of Sale Act and forfeited accordingly. This position notwithstanding, the Court also rules that had the vehicle loan agreement been valid, the settlement for $15,000 would still have been invalid by reason of the unenforceability of the underlying transaction. The Court also finds it necessary to express its view that the practice of requiring blank transfers which are then somehow completed to register title in the name of the moneylenders is simply unlawful. The legal principles applicable to executing and registering the various forms of security which may be given for a loan of money apply to the security taken under the Moneylenders Act. Failure to comply with those general legal principles applicable to such various forms of security result in invalid securities which cannot be enforced.

The Claimant's remedies

53. The question now arises as to what remedies are the Claimant entitled to. Given that the contract is unenforceable, the Claimant would have been entitled to a return of his security (which in any event was invalidly given). In the instant case however the Claimant's vehicles have already been transferred to a third party, who was not made a party to the claim. There is therefore no question of the Court ordering a return of the vehicles to the Claimant. Considering however that this is a remedy that the Claimant would have been entitled to, had the Defendant still been in possession of the vehicles, the Court considers it appropriate that the Defendants should be ordered to pay to the Claimant the value of the said vehicles. The value of the security ordered to be paid is the very amount the Defendant's received for the vehicles, which is the sum of $15,000. The Claim herein sought the return of $75,000 being the value of the two vehicles.

That value was always the Claimant's to prove but he has not adduced any evidence of the actual value of the vehicles (other than his assertion of a combined value of $75,000) whether by means of a comparable or the last value known. The Court does note that there was a value assigned in the loan agreement of the GMC truck in the sum of $15,000, however that was not the value at the time the Defendant's took possession of the vehicles. With respect to any sums paid in excess of principal, that is a remedy afforded under section 25 of the Act, which the Court has declined to apply in light of the fact that the contract has been found unenforceable.

Disposition

54. The following declarations and orders are made upon disposal of **Claim No. 2 – 625.2018 Elloyd Gilharry v Adan Cal d/ba Capital Jewel Quick Loans**

A. IT IS HEREBY DECLARED THAT:-

(i) The moneylending contract between the Claimant Elloyd Gilharry and Adan Cal d/ba Capital Jewel Quick Loans, for the sum of $5000, dated the 2th September, 2015 was unenforceable for failure to comply with the provisions of section 13(1) of the Moneylending Act, Cap. 260 of Belize;

(ii) The security issued by the Claimant Elloyd Gilharry for the said moneylending contract for $5000 by way of vehicle loan agreement in respect of vehicle registered as GMC 5500, was invalid by reason of failure to comply with legal formalities of a bill of sale under 6 of the Bills of Sale Act, Cap. 246 of Belize;

(iii) The moneylending contract between the Claimant Elloyd Gilharry and Adan Cal d/ba Capital Jewel Quick Loans, for the sum of $10,000, dated the 30th December, 2015 was unenforceable for failure to comply with the provisions of section 13(1) of the Moneylending Act, Cap. 260 of Belize;

(iv) The security issued by the Claimant Elloyd Gilharry for the said moneylending contract for $10,000 by way of vehicle loan agreement in respect of vehicle known as the 1994 International truck, was invalid by reason of failure to comply with legal formalities of a bill of sale under 6 of the Bills of Sale Act, Cap. 246 of Belize;

(v) The sale by the Defendant of the Claimants vehicles for the total sum of $15,000 in full satisfaction of the Claimant's loans amounted to an unlawful enforcement of the security, in contravention of section 13(1) of the Moneylending Act, Cap. 260.

B. As a consequence of the Declarations made in paragraph A, **the COURT HEREBY ORDERS** as follows:-

(i) The Defendant shall pay to the Claimant the sum of $15,000, being the amount obtained by the Defendant for the wrongful enforcement of the security under both moneylending contracts

(ii) The Claimant is entitled to his costs against the Defendant, agreed in the sum of $7,000.

Claim No. 3 – 171.2018, Shannae Caballero v Melbourne Marlon Rice d/ba Ymanie's Pawn Shop & Gilroy Usher Sr. db/a Monica's Pawn Shop

Relief Claimed

(i) A Declaration that the 1st Defendant failed to comply with Section 13 (1) of the Money Lenders Act by failing to state the total yearly interest of 300% in the loan agreement.

(ii) A Declaration that the 1st Defendant failed to comply with section of the Money Lenders Act by failing to display prominently in the store the annual interest rate and all other charges and fees the Defendant levies on his loans.

(iii) A Declaration that the interest rate of 300% per year in respect of the sum borrowed being $1,000.00 BZE Dollars is excessive and that the transaction is harsh and unconscionable and that it is not in accordance with section 26 (1) of the Money Lenders Act of Belize.

(iv) A Declaration that the two hundred and fifty dollars per month in the one thousand dollars for the "renewal" of the loan is illegal as being incidental to the granting of the loan and proposed loan and is by operation of Section 15 of the Money Lender's Act recoverable as a debt to the borrower/Claimant in this case.

(v) A Declaration that there is no note or memorandum in writing as is required under Section 13 of the Money Lenders Act and therefore the purported loan by the Defendants is void, unenforceable and illegal.

(vi) A Declaration that the 1st Defendant had no license under the Money Lenders Act to have issued a loan and in contravention of Section 3 of the Money Lender's Act the contract for loan and is unenforceable and the monies issued by the Defendants and installment payments made are recoverable to the Claimants as a debt due to her.

(vii) A Declaration that the purported loan is void, unenforceable and illegal under the Money Lender's Act due to the many breaches of the Act by the 1st Defendant.

In the Alternative

(i) The sum of **ONE THOUSAND TWO HUNDRED AND FIFTY DOLLARS** in Belize Currency ($1,250.00 BZE) being the value loan paid by the Claimant together with the installment payment made by the Claimant in furtherance of the money and is by operation of Section 15 of the Money Lenders Act recoverable as a debt due to the borrower/Claimant in this case

(ii) General Damages

(iii) Interest pursuant to section 166 of the Supreme Court of Judicature Act.

(iv) Costs

(v) Such further or other relief as the Court sees fit.

Procedural and Factual Background

55. This claim was initially filed by the Claimant in March, 2018 solely against the 1st Defendant Mr. Rice, arising out of loans of money alleged to have been made to her by said Mr. Rice. It was pleaded that in or around April 2013, the Claimant obtained a loan of $1000, which was renewable upon payment of $250 interest per month. The actual life of the loan was not pleaded. The Claimant used her vehicle, a 2003 Ford Escape as security for the loan, but was allowed to retain use and possession of the vehicle. This loan was said to be repaid but the Claimant on a subsequent occasion, through her sister (on a date not pleaded), obtained a second loan in the amount of $1000 on the same terms of repayment of the sum of $250 interest per month.

The Claimant defaulted on the second loan and pleaded that the (then only) Defendant who would have been Mr. Rice, took possession of her vehicle, refused her the opportunity to redeem it and sold it instead. Mr. Rice as the defendant in the Claim as initially instituted, filed a defence whereby he pleaded inter alia, that he opened his business only in April 2014, and as such he was neither a party nor able to speak to the loan transactions alleged by the Claimant. Subsequent to this defence the Claimant filed an amended claim in which she added the 2nd Defendant Mr. Usher Sr. By this amended claim, the Claimant pleaded that the first loan which was repaid, had been issued by the 1st Defendant as agent for the 2nd Defendant. Also, that the 1st Defendant was an unregistered moneylender.

56. The amended claim maintained the allegation that the 1st Defendant Mr. Rice issued her the second loan of $1000, on the same terms of repayment of interest in the sum of $250 per month in order for the loan to be renewed. The life of the loan was not pleaded. This amended claim also maintained the allegations in relation to the default of the second loan of $1000 and the seizure and sale of her vehicle.

The then 1st Defendant Mr. Rice repeated his defence disavowing responsibility for the first loan (repaid), as that his business was registered after that time. In relation to the second loan, Mr. Rice pleaded a lack of knowledge of that transaction given the lack of particulars in relation to the date of that second loan. The 2nd Defendant failed to acknowledge or defend the Claim and the Claimant applied for judgment in default. In the midst of an application seeking permission to defend the claim, the 2nd Defendant consented to the default judgment against him in the following terms:-

> **"IT IS HEREBY ORDERED THAT**:-
> (i) The 2nd Defendant shall take all necessary steps to execute and transfer legal title to one 2003 Grey Ford Escape to the Claimant forthwith (vehicle having been examined by the Claimant and her mechanic on March 12th 2019);
> (ii) The 2nd Defendant shall pay to the Claimant the sum of $500 for mechanical repairs;
> (iii) The 2nd Defendant shall pay the Claimant's costs in the sum of $5000."

This Judgment was entered on the 18th March, 2019. The Claimant continued with the Claim against the 1st Defendant and was directed by the Court to amend the Claim in order for the case as it remained against the 1st Defendant to be identified.

57. The Claimant filed a second amended Claim on the 26th April, 2019. This second amended claim pleaded that the second loan was issued by the 1st Defendant Mr. Rice in September, 2014. The Claimant made a single payment of $250 but defaulted thereafter. There was no mention of the Claimant's vehicle at all in this second amended Claim. Various breaches of the Moneylender's Act were pleaded, inter alia – (i) the 1st Defendant was an unregistered moneylender; (ii) no memorandum was provided in accordance with section 13(1) as there was no writing provided to the Claimant at all; (iii) the interest charged of $250 per month was excessive thus the loan harsh and unconscionable; (iv) the $250 payment amounted to a charge to obtain the loan, in breach of section 15. The Claimant sought declarations to give effect to the several breaches of the Act. In the same breath the Claimant sought a declaration that the loan was void, unenforceable and illegal. In the alternative, the Claimant sought payment of the sum of $1250 being the value of the loan, together with the $250 paid in breach of section 15 of the Act. This second amended claim was ordered to proceed by way of summary trial whereby the Claimant's case consisted of two witnesses – the Claimant and her sister, the latter of whom it was claimed received the second loan on the Claimant's behalf. The Defendant's case was supported by the Defendant as the sole witness on his own behalf.

Evidence and the Court's Findings

58. This matter can be disposed of in short thrift given the law as settled by the Court above. The Claimant's witness statement, save for a few additions, repeats verbatim the allegations pleaded in the second amended claim. She alleges (through her sister), having received the second loan of $1000 sometime in September, 2014. This loan was provided by the 1st Defendant whom she said called her to receive it. The Court processes this allegation to mean that the Claimant once more borrowed $1000 directly from the first defendant, as opposed to the suggestion that the Claimant was somehow enticed to accept money that she did not want.

The 1st Defendant refuted having issued any monies to the Claimant besides the first loan, which as pleaded by the Claimant, he did as agent for the 2nd Defendant. The evidence is as such that aside from the Claimant and her sister's oral evidence that she received the second loan of $1000, there was no other evidence confirming this allegation. There was no receipt, loan ticket or other writing issued which acknowledged the making of this transaction. It is however accepted by the Court that there was such a second loan contrary to the 1st Defendant's case was never that there was no such second loan. The 1st Defendant's case was that he had nothing to do with any such loan. The determination of this claim therefore proceeds on the basis that the Claimant received the second loan of $1000.

59. With respect to the competing allegations in the claim, i.e., that the 1st Defendant issued no second loan to the Claimant, and the Claimant's position that she received that second $1000 from the 1st Defendant - the Court will take the Claimant's case at its highest. To take the Claim at its highest, is for the Court to accept that the Claimant received this second loan of $1000 from the 1st Defendant in his own capacity, independently of the 2nd Defendant. The Claimant pleaded that the 1st Defendant had no moneylending licence and this has in fact been proven. In cross examination, the 1st Defendant without any prevarication, accepted that he does not now and never did have a moneylending licence. In fact, the 1st Defendant stated that he was in the business of pawnbroking. Clearly the 1st Defendant had no appreciation that pawnbroking is in fact the lending of money by taking a pledge of goods, but he was unhesitating and forthright in accepting that he had no moneylending licence. In the circumstances, having regard to the earlier authorities stated - **Cornelius v Phillips,[51]** and **In re Campbell. Ex parte Seal,**[52] besides the criminal sanction prescribed by section 11 of the Act, the consequence of a person carrying on business as an unlicenced moneylender is that the transaction is illegal. It is void and no action can be taken to enforce or give effect to the terms of its terms.

[51] [1916-17] All ER 685
[52] [1911] 2 K.B. 992

60. The situation before the Court however, is not of a moneylender seeking to enforce the terms of an illegal transaction. Rather, the situation is one of a borrower, who having collected $1000 under a void contract and made a single payment of $250, now seeks recovery of $1250, a sum in excess of what she herself paid under the said illegal contract. The recovery of this sum is advanced on the basis of a breach of section 15 of the Act. This claim is misconceived.

61. As stated above[53] section 15 applies to collateral contracts for costs connected to the negotiation or grant of a loan, in the manner illustrated by **Ladin Finance Co. Ltd. v Arikat**[54]. In any event, it is not necessary to speak to the terms of the Act. The transaction is illegal and the consequences are more particularly stated as follows, arising from the case of **Bonnard v Dott**[55]. With respect to the respective positions in law of the borrower and moneylender upon a loan of money by an unregistered moneylender, Collins MR said as follows:-

> *"…That the defendant is a person who is declared by the Court to be a money-lender, and who by his omission to register himself finds himself under a statutory incapacity to enforce the bargain which he has made. The consequence of that is that whether it is the borrower or the lender who brings the matter before the Court, the transaction is absolutely void: The lender cannot compel the borrower to return the money lent, while the borrower, being one of the class which the Act was presumably designed to protect - … - can compel the lender to return the securities for the loan, at any rate on the terms of repaying the amount lent."*

Bonnard was decided shortly after **Victorian Daylesford Syndicate, Ltd. v Dott,**[56] in which it was held at first instance that albeit the moneylending contract itself was not expressed to be illegal, the nature of the prohibition was for the protection of the public and as such the contract itself was by implication illegal.[57] The moneylender in **Victorian Daylesford** appealed but the appeal was dismissed without argument after the decision was in effect affirmed by **Bonnard v Dott**.

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[53] Supra, paras 4A(ii)-(iv)
[54] Supra fn 3
[55] [1906] 1 Ch. 740
[56] [1905] Ch. 624 (This was a first instance decision in which the moneylender appealed, but the appeal was dismissed without argument after the Court of Appeal's decision in ***Bonnard v Dott***.
[57] Ibid @ pgs 629-630

62. The question remains however as to what remedy is to be afforded the borrower in the event of a contract rendered illegal by the actions of an unauthorized moneylender. As stated in **Bonnard v Dott,**[58] being a member of the class of persons the statutory prohibition in designed to protect, the borrower in 'entitled to a return of the securities for the loan…at any rate on the terms of repaying the amount let.'

With respect to that last statement (repayment of the amount let) there was within the English decisions, some uncertainty with respect to the correct legal position. The uncertainty arose primarily from the decision of **Lodge v National Union Investment Co. Ltd**[59] which held that the borrower in a moneylending contract adjudged to be illegal, was entitled to the return of his securities but only upon repayment of the sums outstanding under the contract. This decision was considered at odds with that of **Cohen v J. Lester J. Ltd**, in which the trial judge refused to order that the borrower under an *unenforceable* moneylending contract, pay the price of the loan in order to recover his security. These two decisions were examined in the Privy Council decision of **Kasumu et al v Baba-Egbe**[60] which was cited by Counsel for the Claimant in Claim No. 2. The Privy Council determined that the difference between the two cases was that ***Lodge*** involved an illegal contract whereas ***Cohen*** concerned one which was merely unenforceable. Such a distinction however was viewed as unsatisfactory as an explanation for the different remedies afforded the borrowers therein, as it meant that the moneylender who had committed a criminal offence under the illegal contract stood in a better position than the moneylender whose contract was merely unenforceable[61].

63. The Privy Council examined both cases, particularly ***Lodge***, in the context of its reliance on contracts rendered illegal by virtue of prohibitions against usury. It is not necessary here to delve into the Court's reasoning, but it suffices to say that the parallel of usury cases was rejected, on the basis that those cases were based on a prohibition of the inherent nature of the contract regardless of the role of the borrower.

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[58] Ibid
[59] [1907] 1 Ch. 300
[60] [1956] 3 All ER 266
[61] Kasumu supra @ 269

This is as opposed to contracts rendered illegal by the act of the moneylender, often times independent of any fault of the borrower. The conflict in authorities was also rationalized on the basis that the borrower in ***Lodge***, had sought his relief in equity. When examined against subsequent authorities, ***Lodge's*** case was found to have consistently been distinguished[62] on the basis that having sought the relief in equity, the claim attracted the *in personam* nature of equitable principles, whereby the borrower was also required to 'do equity'. The point was made however that in applying equitable principles which in effect sought to protect the lender against the borrower reaping the benefits of the illegal contract, the Courts could be considered to be acting contrary to Parliament's intention to protect the borrower. **Kasumu** ultimately declined to follow ***Lodge*** and ruled that the borrower should not be put to any terms of repayment, where as in that case, the contract was one which was unenforceable. It was clearly countenanced however that the borrower's remedies subsisted both in common law and equity but there was no definitive conclusion with respect to the application of equitable principles upon a borrower's claim in equity under an illegal contract.

64. In the instant case the Claimant has sought declarations in law arising from the breach of Act, which in the circumstances need not go beyond the finding of illegality of the transaction on account of the 1st Defendant not being a registered moneylender under the Act. The Claimant's claim against the 1st Defendant is therefore successful insofar as the Court declares that the transaction was illegal as a result of the second loan being issued by an unregistered moneylender. Albeit in the alternative, the Court also addresses the claim for a return of the sum of $1250 and finds that it was misconceived and as such dismissed. With respect to the issue of costs, the Court regards the history of the matter as disentitling the Claimant to any costs. As outlined at the onset of this decision, the Claimant obtained a judgment by consent against the 2nd Defendant based upon a pleaded case that asserted her default on the said second loan. The case as remained against the 1st Defendant, given what was pleaded in the first and second cases, arose out of the second loan in respect of which there had been a settlement the terms of which

[62] Eg *Chapman v Michaelson* [1908] 2 Ch. 612

had been reduced into an order of court. The bases of the claims against the Defendants, together with the terms of settlement with the 2nd Defendant were before the Court. The claim as finally amended offered no basis for its continuation against the 1st Defendant – such as the settlement having been insufficient to cover the security lost or monies paid in excess of the transaction.

65. Instead, the claim finally put before the Court and the Claimant's evidence on that final claim respectively implied and asserted that the 2nd Defendant had settled his liabilities in relation to the first loan,[63] when one assertion that remained consistent throughout the Claimant's case as amended twice over, was that she had repaid the first loan in full. On the Claimant's case therefore, the 2nd Defendant had no liabilities to settle from that first loan. The Court finds that the continuation of the claim against the 1st Defendant in the circumstances outlined was tantamount to an abuse of process. Counsel for the 1st Defendant, in his closing submissions himself outlined for the Court the shifts in the Claimant's case and the Court considers that had an application been made by the 1st Defendant to strike out the case as continued against him, such an application would have been favourably regarded. In the circumstances of what the Court considers to have been an unfounded continuation of the original claim against the 1st Defendant having obtained judgment against the 2nd Defendant, the Claimant is ordered to bear the 1st Defendant's costs. In all the circumstances however, the Court awards the 1st Defendant only 75% of his costs, to be assessed if not agreed by the parties.

Disposition

66. Claim No. 3 - 171 of 2018, Shannae Caballero v Melbourne Marlon Rice et anor is disposed with the following declarations and orders:-

IT IS HEREBY DECLARED:

(i) That the loan of $1000 issued by the 1st Defendant to the Claimant in or around September, 2014 was issued in contravention of section 11(b) of the Moneylender's Act, Cap. 260 of the Laws of Belize;

[63] 2nd Amended Statement of Claim paras 10-11; Claimant's Witness Statement, para 22.

(ii) As a result of the breach by the 1st Defendant of section 11(b) of the Act, the loan transaction was illegal and accordingly void.

AND IT IS HEREBY ORDERED:

(i) The Claim for recovery of $1250 pursuant to section 15 of the Act is dismissed;

(ii) The Claimant is ordered to pay 75% of the 1st Defendant's costs to be assessed if not agreed.

Dated this 24rd day of October, 2019.

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Shona O. Griffith
Judge of the Supreme Court
Belize.

SCHEDULE I

BELIZE

MONEYLENDERS ACT
CHAPTER 260

REVISED EDITION 2011

SHOWING THE SUBSTANTIVE LAWS AS AT 31st
DECEMBER, 2011

This is a revised edition of the Substantive Laws, prepared by the Law Revision Commissioner under the authority of the Law Revision Act, Chapter 3 of the Substantive Laws of Belize, Revised Edition 2011.

CHAPTER 260
MONEYLENDERS
ARRANGEMENT OF SECTIONS
PART I
Preliminary

1. Short title.
2. Interpretation.

PART II

Registration and Licensing of Moneylenders

3. Licenses to be taken out by moneylenders.
4. Certificate required for issue of moneylender's
   Excise license.
10. Moneylender's excise licence.
11. Penalty for contravention of provisions of this Act.
13. Moneylender's contracts.
14. Prohibition of compound interest and provision as to default.
15. Prohibition of charge for expenses on loans by moneylenders.
19. Display of effective annual interest rates on loans.
24. Power to relieve borrower from harsh transactions.
25. Power to grant relief at instance of borrower or surety
26. Presumption that interest excessive.
27. Application and construction of sections 24 to 26.
32. Power of court to determine contract.

2.–(1) In this Act, unless the context otherwise requires,

"**interest**" does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges or expenses, but except as aforesaid, includes any amount, by whatever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan;

"**moneylender**" includes every person whose business is that of money lending, who advertises or announces himself or holds himself out in any way as carrying on that business, but does not include,

(a) any registered society within the meaning of the Friendly Societies Act, Cap.317 or any society registered or having rules certified under the Building Societies Act, Cap.310;

(b) anybody corporate, incorporated or empowered by a special enactment to lend money in accordance with such special enactment;

(c) any person *bona fid*e carrying on the business of banking or insurance or *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(d) anybody corporate for the time being exempted from this Act by Order of the Minister made and published pursuant to regulations made by the Minister;

3. Every moneylender, whether carrying on business alone or as a partner in a firm, shall,

(a) register himself as such with the summary jurisdiction court in the judicial district in which the money lending business is to be carried on, and obtain from that court a certificate under this Act; and

(b) take out annually, in respect of every address at which he carries on his business as such, an excise licence which shall expire on 31st December in every year.

4.– (1) A moneylender's excise licence shall not be granted except to a person who has registered and holds a certificate granted to him in accordance with the provisions of this Act, authorising the Financial Secretary to issue the licence to that person, and a separate certificate shall be required in respect of every separate licence.

(2) Every moneylender's excise licence issued in contravention of this section shall be void.

(3) A certificate under this section shall be granted by the summary jurisdiction court having jurisdiction in the judicial district in which the moneylender's business is to be carried on.

(4) Every certificate granted to a moneylender shall show his true name and the registered name under which, and the registered address at which, he is authorised by the certificate to carry on business as such.

(5) A certificate shall not authorise a moneylender to carry on business at more than one registered address, or under more than one registered name, or under any name which includes the word "bank", or otherwise implies that he carries on banking business.

(6) A certificate shall not authorise a moneylender to carry on business under any name except,

- *(a)* his true name;
- *(b)* the name of a firm in which he is a partner, not being a firm required by the Business Name Act, Cap. 247, to be registered; and
- *(c)* a business name, whether of an individual or of a firm in which he is a partner, under which he or the firm has, at the passing of this Act, been registered for not less than one year under the Business Names Act, Cap. 247.

(7) Every certificate shall be prepared in duplicate, both bearing the same number, one of which shall be delivered to the registered moneylender and the other entered into a "Register of Moneylenders' Certificates".

(8) The duplicate delivered to the moneylender, or a certified copy of the duplicate entered into the register, shall be received in all courts as evidence that the moneylender is registered, and a statement in writing signed by the clerk of the court to the effect that the name of the moneylender does not appear in the register shall be sufficient evidence that the moneylender is not registered, unless the contrary is shown.

(9) A certificate shall come into force on the date specified therein, and shall expire on the next following 31st day of December.

10. – (1) Subject to this Act, a moneylender's excise licence shall be in the form prescribed by the Minister, and shall be issued by the Financial Secretary on payment of the appropriate duty.

(2) A moneylender's excise licence shall be taken out by a money-lender in his true name, and shall be void if it be taken out in any other name, but every moneylender's excise licence shall also show the moneylender's registered name and registered address.

11. Every person who ,

- *(a)* takes out a moneylender's excise licence in any name other than his true name;
- *(b)* carries on business as a moneylender without having in force a proper moneylenders excise licence authorising him to do so;
- *(c)* being licensed as a moneylender, carries on business as such in any name other than his registered name, or at any other place than his registered address or addresses; or
- *(d)* enters into any agreement in the course of his business as a moneylender with respect to the advance or repayment of money, or takes any security for money in the course of his business as a moneylender, otherwise than in his registered name; commits an offence and shall be liable on summary conviction to a fine of two thousand dollars.

Provided that, on a second or subsequent conviction of any person (other than a company) for an offence under this section, the court may, *in lieu* of or in addition to ordering the offender to pay the penalty aforesaid, order him to be imprisoned for a

period not exceeding six months, and an offender being a company shall on a second or subsequent conviction be liable to a fine of not less than ten thousand dollars.

13. – (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.

14. 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 charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan.

PART IV

Regulation of Money lending Transactions

15. Any agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or, in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly

19. Every moneylender shall display in a conspicuous and prominent place in the public part of his offices, the effective annual rate of interest he charges and all other charges and fees he levies, on loans.

24.– (1) Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the 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, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable.

(2) If any such excess has been paid, or allowed in account, by the debtor, the court may order the creditor to repay it, and may set aside, either wholly or in part or may revise or alter any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security, may order him to indemnify the borrower or other person sued.

25. Any court in which proceedings might be taken for the recovery of money lent by a moneylender 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, whether or not 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 repayment of the loan or any installment thereof, may not have arrived, or that the moneylender's right of action for the recovery of the money lent is barred.

26.– (1) Where, in any proceedings in respect of any money lent by a moneylender 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 rate forty-eight *per centum* per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of section 24 of this Act, 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 forty-eight *per centum* per annum, is excessive.

(2) Where a court re-opens a transaction of a moneylender under section 24 of this Act, the court may require the moneylender to produce any certificate granted to him in accordance with this Act, and may cause such particulars as the court thinks desirable to be endorsed on any such certificate, and a copy of the particulars to be sent to the authority by whom the certificate was granted.

27. 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.

32. Without prejudice to the powers of a court under sections 24 and 25 of this Act, if at the time when proceedings are taken by a moneylender in respect of a default in the payment of any sum due to him under a contract for the loan of money, any further amount is outstanding under the contract but not yet due, the court may determine the contract and order the principal outstanding to be paid to the moneylender with such interest thereon, if any, as the court may allow up to the date of payment.

SCHEDULE II

THE MONEY-LENDERS ACT, 1900

(63 & 64 Vict. C. 51)

ARRANGEMENT OF SECTIONS

Section

1. Re-opening of transaction of money-lender

An Act to amend the Law with respect to Persons carrying on business as Money-Lenders [8th August, 1900]

1. Re-opening of transactions of money-lender. – (1) Where proceedings are taken in any court by a money-lender for the recovery of any money lent after the commencement of this Act, of the enforcement 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, 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, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

2 Any court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have 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 repayment of the loan, or any instalment thereof, may not have arrived.

3 On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

4 The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

5 Nothing in the foregoing provisions of this section shall affect the rights of any bona fide assignee or holder for value without notice.

6 Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

7 *(Applies to Scotland)*