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Article 8

Sidmay Ltd. et al. v. Whettam Investments Ltd. (1966), 54 D.L.R. (2d) 194,[1966] 1 O.R. 457, (1967), 61 D.L.R. (2d) 358 (Ont. C.A.)

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MORTGAGES

Sidmay Ltd. et al. v. Whettam Investments Ltd. (1966), 54 D.L.R. (2d) 194; [1966] 1 O.R. 457; (1967), 61 D.L.R. (2d) 358 (Ont. C.A.)

MORTGAGES—ILLEGALITY.

NOTE:

The decision in the *Sidmay* case becomes more significant when one considers the consequences that would have arisen had the decision at trial been upheld. Thus, in addition to dealing with the reasons given by the Court of Appeal, the writers discussed at length the judgment of Grant J. at trial.

Perhaps no case decided within the last few years has caused as much controversy as the *Sidmay* case.[1] The implications of the trial decision threw both the business community and the legal profession of Ontario into a state of uncertainty regarding the consequences of non-registration under "lending" statutes. At trial, failure to register under the *Loan and Trust Corporations Act*[2] resulted in a windfall to a borrower; however, the Court of Appeal unanimously reversed this decision.[3] It is the purpose of this note to examine the efficacy and reasoning of these results.

Background and Facts

At trial, the plaintiff brought an action for a declaration that a mortgage given by the defendant Company was null and void as against the plaintiff mortgagor since the defendant had failed to register under the *Loan and Trust Corporations Act.* The defendant was in the business of lending money on the security of real estate; to this end, it was registered under both the *Corporations Act*[4] and the *Mortgage Broker's Registration Act.*[5] Since Whettam Investments

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1 *Sidmay Ltd. et al. v. Whettam Investments Ltd.* (1967), 61 D.L.R. (2d) 358 (Ont. C.A.).

2 R.S.O. 1960, c. 222, s. 133.

3 *Supra,* note 1.

4 R.S.O. 1960, c. 71, s. 3(1).

5 R.S.O. 1960, c. 244.

Ltd. was not restricted by the terms of its charter to five shareholders, but rather to fifty, it did not fall within the provisions of section 3(2) of the *Corporation Act* (Ont.). Had it fallen within this section, there would have been no necessity for registration under the *Loan and Trust Corporations Act.*

In this case, there was a mortgage made to the plaintiff Company in good faith for the value of $308,250.[6] Subsequently the plaintiff Company discovered that the defendant had failed to register.[7]

Decision

Trial: (a) The mortgage was declared illegal, void and unenforceable.[8]

(b) Common law allowed the plaintiff to retain legal title to the land, and also to keep possession of the loan.[9]

(c) Equity did not apply so as to put the plaintiff on terms.[10]

Court of Appeal: The mortgage was found to be valid[11] [Wells J.A. concurred with Kelly J.A.; Laskin J.A. wrote a separate opinion].

Issues and Arguments

I Ultra Vires

Although not mentioned at the trial nor on Appeal, the doctrine of corporate *ultra vires* in the *Bonanza Creek*[12] sense deserves some discussion. Assuming that this doctrine is applicable, rather than the common law rule of illegality, then it seems that the defendant could enforce the mortgages or force the plaintiff to repay the loan on the basis of money had and received.[13] Furthermore the defendant could assert the doctrine of tracing as laid down in *Sinclair v. Brougham.*[14]

Under Part I of the *Corporations Act* (Ont.) incorporation is pursuant to letters patent and *ultra vires* in the *Bonanza Creek* sense would apply. Also section 1(b) of the *Loan and Trust Corporations Act* defines a loan corporation as an "incorporated company." As a result the defendant might have argued *ultra vires.* However, section 2 of Part I of the *Corporations Act* (Ont.),[15] specifically states that this part does not apply to a company coming within the meaning of the *Loan and Trust Corporations Act.* As well, incorporation under

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6 There were in fact a number of mortgages amounting to $308,250.

7 *Supra,* note 2.

8 Sidmay Ltd. et al. v. Whettam Investments Ltd. (1966), 54 D.L.R. (2d) 194 at 205.

9 *Id.,* at 210.

10 *Id.,* at 209.

11 *Supra,* note 1, at 374-5, 383.

12 This case decided that even though a company went beyond its stated objects, since it was created pursuant to letters patent and had the capacity of a natural person, any of its transactions would still be enforceable. The only penalty this company could suffer would be a revocation of its charter through proceedings by way of a writ of *sciere facias,* instituted by the Attorney-General.

13 Bonanza Creek Gold Mining Co. v. R., [1916] 1 A.C. 566.

14 [1914] A.C. 857; [1948] Ch. 465.

15 R.S.O. 1960, c. 71.

the *Loan and Trust Corporations Act* is effected by virtue of registration and *ultra vires* in the *Bonanza Creek* sense would not apply.[16]

Furthermore, it would seem absurd that a company, by relying on *ultra vires,* could extricate itself from an illegal act. *Ultra vires* and illegality are two distinct and separate principles of law. It is no answer to the defendant to say that a valid *ultra vires* act will exclude the consequences of non-registration, as even a natural person has limitations imposed by law on his capacities—one of these being, that when he commits an illegal act he is subject to the penalty applicable. In the case of *Re Mutual Investments,*[17] where a company was acting in violation of the *Loan and Trust Corporations Act* Riddell J., looked only to illegality and not to *ultra vires.*

Thus, on the basis of the above arguments, it is highly doubtful if the doctrine of *ultra vires* could be successfully invoked.

II Illegality

Under section 133 of the *Loan and Trust Corporations Act,* loan corporations, loaning land corporations, and trust companies are prohibited from carrying on their business unless registered under the Act. No mention is made of what happens to transactions carried out by companies that have not complied with the registration requirement. It could be argued in favour of the defendant company that, although the business itself was illegal, its transactions with the plaintiff company were not illegal but enforceable.

In the case of *Montreal Trust Co. v. Abitibi Power and Paper Co. Ltd.,*[18] where the defendant company had entered into a contract in contravention of section 133 of the *Loan and Trust Corporations Act,*[19] Kingstone J. held that this Act did not apply. Although the main ground of the decision was based on the fact that this transaction was an isolated one, most of Mr. Justice Kingstone's judgment was concerned with the question of what would have been the effect on the transaction itself had the defendant company fallen within the Act. Kingstone J. emphatically stated that the mortgage was not illegal as there was nothing in the statute invalidating the transaction itself.[20]

In rendering his trial decision, Mr. Justice Grant did not refer to the above case, but rather looked to the case of *Commercial Life Assurance Co. v. Drever*[21] which seems to discount Kingstone J.'s obiter. In this case, Locke J. referred to the earlier case of *Bartlett v. Vinor*[22] where Holt C.J. said that a penalty under a statute implies a prohibition and any contract made under such statute is, as a result,

16 *Supra,* note 12.
17 56 O.L.R. 29.
18 [1937] O.R. 939.
19 R.S.O. 1927, c. 223, s. 135(1) (section 133 of the present Act).
20 [1937] O.R. 939, 946.
21 [1948] S.C.R. 306.
22 (1693) Carth. 252.

void even though the statute does not expressly say so.[23] The *Commercial Life* case, however, involved a specific prohibitory provision in a statute[24] and could have been decided without any reference to Holt C.J.'s remarks—at best, Locke J.'s allusion to *Bartlett v. Vinor*[25] was obiter.

In his judgment Grant J. referred to a number of cases[26] which, like the *Commercial Life* case, dealt with statutes including specific prohibitory sections *vis à vis* the transactions as well as the entire business. It is submitted, that Grant J. should have recognized the distinction between the *Loan and Trust Corporations Act* and the statutes dealt with in the above cases. Under the former Act, there are no specific prohibitory sections as regards the transaction; thus, it seems that it was open to Grant J. to follow Kingstone J.'s interpretation in the *Montreal Trust* case.[27]

Grant J.'s finding that the contract itself was illegal was discounted by Mr. Justice Kelly in the Court of Appeal.[28] Kelly J. stated that even assuming the defendant had been operating its business in contravention of section 133 of the *Loan and Trust Corporations Act,* this would not of itself have invalidated the transaction; since there is no mention in the Act of avoiding or rendering null such a contract. It is submitted that the conclusion reached on appeal is correct; however, it is perhaps unfortunate that the Court did not refer to the *Montreal Trust* case as authority for this proposition.

III Statutory Interpretation

(a) *Under the Loan and Trust Corporations Act*

Grant J. held that the plaintiff company fell within a class of persons protected by the *Loan and Trust Corporations Act.* It is submitted, if considered as a whole, it becomes evident that this act is designed to protect shareholders and creditors but not borrowers. If this interpretation is correct, what in effect Grant J. did in giving the plaintiff the $309,250 was to harm the interest of the shareholders and creditors—the very persons the Act is supposed to protect.

Mr. Justice Grant quotes section 4(1g) of the Act to illustrate his contention. This section provides that satisfactory security is to be taken for the *fidelity* of persons in control of the funds of the

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23 *The Loan and Trust Corporations Act,* R.S.O. 1960, c. 222, s. 161.
24 *The Real Estate Agent's Licensing Act,* R.S.A. 1942, c. 318.
25 *Supra,* note 22.
26 Kocotis v. D'Angelo, [1958] O.R. 104, Victorian Daylesford Syndicate Ltd. v. Dott [1905] 2 Ch. 624, Brown v. Moore (1902), 325 C.R. 93.
27 Kingstone J.'s decision was referred to in MASTEN AND FRASER COMPANY LAW OF CANADA (4th ed.) 1941), pp. 407-8. Montreal Trust Co. v. Abitibi Power and Paper Co. Ltd. et al. [1938] O.R. 81, 82, Montreal Trust Co. v. Abitibi Power and Paper Co., Ltd. et al. [1938] O.R. 589, Montreal Trust Co. v. Abitibi Power and Paper Co. Ltd. et al. [1940] O.W.N. 307, 308, Montreal Trust Co. v. Abitibi Power and Paper Co. Ltd. et al. [1943] A.C. 536, 539.
It should also be noted that Kingstone J.'s statements were not brought to the attention of Grant J. However, it still remains that this is an argument that could have been used.
28 *Supra* note 1 at 375.

corporation. In fact, this is to protect shareholders and creditors—not borrowers like the present mortgagor who has already received the loan money and no longer needs protection. The safeguards that this mortgagor needs are safeguards in areas such as unconscionable interest rates and false advertising; however, these considerations are not in issue here. It is interesting to note that Mr. Justice Kelly stated that the *Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410 is the type of legislation that persons in the plaintiffs' position can look to for protection.[29]

Section 43 of the *Loan and Trust Corporations Act* is another section, similar to section 4(1g), in that requires persons who are in control of the corporation's funds to furnish security, again providing for the protection of shareholders and creditors. Also, section 4(1i) is definitely for the protection of creditors as it restricts the company so that it cannot reduce the number of shareholders to less than twenty-five.[30] Under section 8, $300,000 of stock must be subscribed for by at least twenty-five subscribers each having shares of an aggregate value of at least $1,000—obviously creditors are concerned with the amount of paid up capital held by the loaning corporations, whereas mortgagors, on receiving their loans are not concerned with this at all. Grant J. refers to section 19 which requires shareholders' meetings at specified times. Again, this provision deals with the internal organization of the company and is in the shareholders' interests. It is submitted, on the basis of these provisions, that the whole Act is designed to protect shareholders and creditors. It certainly affords no protection to a debtor mortgagor, a point which Mr. Justice Grant completely ignored.

The Court of Appeal completely reversed Mr. Justice Grant on this issue and held that the plaintiff was not of a class of persons which fell within the protection of the Act.[31] There are a number of approaches a court may utilize in interpreting a statute: historical, functional, etymological, and the approach known as searching for legislative intent. Mr. Justice Kelly employed the historical and functional tests. From a functional point of view he was in agreement with the opinion expressed above—that the sections discussed at trial were for the protection of shareholders and creditors not borrowers. In discussing this, Kelly J.A. stated:

> . . . The provision with respect to minimum capital, limitation on borrowing powers fixed relation to paid-up capital, restriction on the type and size of loans entitled to be made, provisions for the furnishing of financial information, description of the type of security to be accepted for loans, are indicative of an intention to afford protection to those whose money, in one form or another, comes into the hands of a corporation which proposes to invest that money in its own name and which holds itself out as engaged in the business of lending that money. None of the provisions of the Act are appropriate for the protection of a borrower.[32]

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[29] *Id.*, at 373.

[30] This section also entitles creditors to sue shareholders for the unpaid balance of their shares.

[31] *Supra* note 1 at 372-374.

[32] *Id.*, at 373.

Before discussing Mr. Justice Kelly's use of the historical approach, it should be mentioned that this type of analysis has been frequently ignored or overlooked by Ontario courts in the past. It is submitted that a correct application of this approach should reinforce the functional approach, leading to the same result. By attacking a problem on these two levels and arriving at the same conclusions on both planes, a court will reach an authoritative result.

Mr. Justice Kelly's method involved the tracing of the development of statutes dealing with building and friendly societies that were established in the early part of the nineteenth century.[33] These statutes culminated in the present *Loan and Trust Corporations Act*.[34] It should also be noted that loan companies such as Whettam Investments had their origins in these friendly and building societies. The friendly societies were in actuality mutual insurance funds set up for the benefit of contributors and their families; while building societies were to help contributing members to build homes.[35] Since 1854 legislators have often sought to protect the creditors and members of such societies through various statutes. Credit unions and mutual assistance funds, it was thought, would be of benefit to "industrious classes",[36] and thus incidentally benefit the well being of the community as a whole. As mentioned above, Kelly J.A. pointed out that the *Loan and Trust Corporations Act* developed from the former statutes dealing with friendly and building societies. Thus it logically follows that the Act was designed to protect the shareholders and creditors of Whettam Investments, rather than borrowers, such as the plaintiff.[37]

It is submitted that the method used and result reached by the Court of Appeal were excellent—it is hoped that this type of analysis may be used more frequently in the future.

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[33] *Id.*, at 367.

[34] *Id.*, at 367. (see diagram)

[35] *Id.*, at 367.

[36] *Id.*, at 368.

[37] Kelly J.A. at page 372, stated:
"While the earlier loan companies Acts may have been intended to encourage their loaning activities to help in the development of the country, the incorporation into a single Act of the provisions of the Acts as to building societies, loan companies and trust companies, in my view indicates that the purpose of that Act was to exercise a form of control over the incorporation and operation of corporations which lend to the public funds drawn from a wide clientele of depositors, debenture holders and other persons in a creditor relationship to the corporation to the end that some measure of protection may be offered to those who entrust, or are exposed to solicitation to entrust, their funds to the corporation. In seeking for a legislative purpose for bringing such diverse operations under the same umbrella, the recognizable common denominator is the intention to protect the money of the public deposited with, loaned or entrusted to or invested in, the corporations made subject to the provisions of the Act for the purpose of enabling the corporation to lend such money mainly on the security of mortgages on real estate."

(b) *General Guidelines:*

In the case *Coloquhoun v. Brooks*,[38] Lord Herschell said that when looking for legislative intent one should view a statute in its entirety. Looked at in isolation, section 133 of the *Loan and Trust Corporations Act* seems to encompass people in general (i.e. it seems that any one could bring an action under this section); however, when viewed as a whole, only a particular class of persons should be allowed to bring an action and succeed in having a transaction declared illegal and void—creditors, and shareholders.

In *Way v. City of St. Thomas et al.*,[39] Teetzel J. stated,

> It is another well settled rule of construction that when the language of the legislature admits of two constructions and if construed one way would lead to obvious injustice, the courts act upon the view that such a result could not have been intended unless the intention has been manifested in express words.[40]

Again it is to be noted that there is no specific prohibitory section *vis à vis* transactions under the *Loan and Trust Corporations Act.*

IV Delimitation and Scope of the Defendant's Business (Not argued at trial)

The defendant was incorporated as a private company pursuant to the *Corporations Act* (1953);[41] therefore, by virtue of section 23 of this Act it had certain ancilliary powers, namely:

> To invest and deal with moneys of the company not immediately required for its objects in such manner as it may be determined.[42]

As well, the defendant was registered under the *Mortgage Brokers Registration Act*,[43] thus allowing it to carry on the business of lending money on the security of real estate.[44] Whettam conceded that it did not fall within section 3(2) of the *Corporations Act* (Ont.) as by its charter it was not restricted to five shareholders. Even though the defendant was registered under the *Corporations Act* (Ont.) and the *Mortgage Broker's Registration Act*, the plaintiff argued that the defendant initially had the choice of registration under either section 3(2) of the *Corporations Act* (Ont.) or the *Loan and Trust Corporations Act.*[45] As mentioned above, section 3(2) was not open to the defendant; therefore, the plaintiff contended that the defendant was obliged to register under the *Loan and Trust Corporations Act.* In dealing with this argument the court stated, that if any meaning

38 (1889), 14 A.C. 493, 506:
"it is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute to consider any other parts of the Act which throws light upon the intention of the legislature and which may show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."
39 (1906), 12 O.L.R. 240.
40 *Id.*, at 244.
41 *The Corporations Act*, 1953 (Ont.), c. 19 (now R.S.O. 1960, c. 71).
42 *Supra*, note 41, s. 22(1).
43 R.S.O. 1960, c. 244.
44 *Id.*, s. 1(6).
45 R.S.O. 1960, c. 222.

were to be given to the defendant's charter, then its business could not be encompassed by the *Loan and Trust Corporations Act*, since that type of business was strictly prohibited in its Letters Patent.[46] Mr. Justice Kelly, while admitting he would find difficulty in delimiting the scope of the defendant's business, rightly pointed out that the defendant did have certain scope in the field of lending money[47] without registering under the *Loan and Trust Corporations Act*. Further, he pointed out that, with a strict etymological application of the *Loan and Trust Corporations Act*, many companies, not now required to be registered in order to lend money on the security of real estate, would have to register.

V Equity

In reversing the decision of Mr. Justice Grant, the Court of Appeal held that the mortgage was valid; however, in order to discuss the equity issues involved, the Appellate Court had to assume that the mortgage was illegal.[48] If this assumption had not been made, there would have been no justification for discussing equity as a separate issue, as the parties would have been left to their common law remedies relating to mortgages.

At trial, after deciding that the mortgage was illegal and void, Grant J. refused to put the defendant on terms.[49] In *Lodge v. National Union Investment Co.*,[50] the plaintiff sought to recover certain securities and money that he had given an unregistered money lender for the renewal of certain bills. Parker J. ordered the mortgagee to give up the securities, but he also made the plaintiff repay the monies the plaintiff had borrowed. He reached this conclusion since the action was based on an equitable claim and not a legal one—thus applying the maxim, "He who seeks equity must do equity."

In the case of *Chapman v. Michaelson*,[51] the plaintiff sought a declaration that a certain transaction under the *Money-Lenders Act* [1900] was void since the defendant money-lender was taking security otherwise than in his registered name. Eve J., in considering whether he should put the plaintiff on terms before granting him judgment, distinguished the *Lodge* case on the grounds that the plaintiff in the present case was basing his claim in common law and not in equity. Therefore, he felt that the maxim, "He who seeks equity must do equity", did not apply.

In the *Sidmay* case, the plaintiff brought an action for a declaration that the mortgage was illegal and void. By doing this the plain-

46 *Supra* note 1 at 364.
47 *Id.*
48 *Id.*, at 375.
49 In reaching this conclusion Grant J. relied mainly on the cases of: Chapman v. Michaelson [1908] 1 Ch. 238, Cohen v. J. Lester Ltd. [1948] 4 All E.R. 188, Kasumu v. Baba-Egbe [1956] 3 All E.R. 266 as effectively overruling the decision of Parker J. in Lodge v. National Union Investment Co. Ltd. [1907] 1 Ch. 300.
50 [1907] 1 Ch. 300.
51 [1908] 1 Ch. 238.

tiff contended he was seeking pure common law relief and was not asking the court to exercise any equitable jurisdiction. However, the problem here is largely one of semantics, since what in effect the plaintiff is seeking is to get his land back, because, until the declaration is granted, the legal title to the land is in the defendant company. At common law, the rule was that where there was an illegal contract the court would let losses lie where they fell; however, if the plaintiff were asserting any equitable claim the court, as in the *Lodge* case, would be justified, in its discretion, putting the plaintiff on terms—thus, setting aside the common law rule.

On appeal, the court looked at the substance of the relief sought and not merely to the words used in the pleadings. Mr. Justice Laskin stated:

> . . . in seeking a declaration that the mortgage it gave was void, it is seeking the aid of the Court to restore to it what it gave up for the advance received from the mortgagee. In effect, the plaintiff seeks rescission of the transaction by way of benefit to itself alone.[52]

As Laskin J.A. rightly pointed out, the plaintiff, in the present case, is really asking for rescission of the contract and not merely for a declaration. This type of relief is positive and equitable. As a result, there is no reason why the plaintiff should not be made to repay the money lent as a condition precedent to getting his land back. The correctness of Mr. Justice Laskin's view is borne out by Denning J. (as he was then) in *Nelson v. Larbolt*[53] where he stated:

> It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in light of their combined effect . . . Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework.[54]

This principle, as stated by Denning J., may well be what Mr. Justice Kelly had in mind when he restricted the case of *Chapman v. Michaelson* to its own peculiar facts.[55]

In his judgment, Mr. Justice Grant held that the plaintiff company was one of the class of persons for whose benefit the *Loan and Trust Corporations Act* was passed.[56] In the *Lodge* case, Parker J. stated:

> It seems reasonably clear at any rate in equity, *if not at law*, a person taking advantage of the exception arising from the fact that he *belonged to the class for whose protection the statutes were passed* (Italics added) could not assert any right unless he himself was prepared to do what the court considered fair to the defendant.[57]

He went on to say:

> As I understand it, the decision amounts to this, that anyone who seeks relief *either at law or in equity* (Italics added) and for the purpose of that relief is obliged to set up an illegal contract, and rely on the excep-

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[52] *Supra* note 1 at 385.
[53] [1948] 1 K.B. 339.
[54] *Id.*, at 343.
[55] *Supra* note 1 at 381.
[56] For this reason Grant J. held that the plaintiff was entitled to its declaration.
[57] *Supra*, note 50, at 307.

> tion arising by reason of his being within the protection of the statute imposing the illegality, is in fact bringing an equitable action, and will therefore, be put on terms with regard to the relief granted.[58]

If the *Lodge* decision still stands,[59] then it seems that the plaintiff was asserting the equitable exception as stated by Parker J. It is arguable that before any person can get a declaration that a contract is illegal he must demonstrate to the court's satisfaction that the prohibitory statute was passed for his benefit. If the plaintiff does not show that he is one of a class for whom the statute was passed, then qua him he will not be entitled to a declaration that the contract is illegal and void. For example, in the *Sidmay* case, it would be absurd to assume that a person not envisaged by the Act,[60] could come into court and claim the benefit of the statute. As far as Mr. Justice Grant is concerned, the plaintiff is a person protected by the *Loan and Trust Corporations Act.* As a result of this, it would seem to follow that the person is asserting the equitable exception in the *Lodge* case and should have been put on terms.[61]

Even if Mr. Justice Grant had put the plaintiff on terms,[62] it must be remembered that although any person, if he is one for whose benefit a statute was passed, and if he is seeking a declaration of illegality, must of necessity be in equity, this is not to say that the court will automatically put him on terms. For instance, if the defendant has perpetrated any fraud or misrepresentation, or has been guilty of any high-handedness, the court, in its discretion, may refuse to put the plaintiff on terms.

As has been mentioned, the Court of Appeal came to the opposite result than that reached at trial.[63] Mr. Justice Laskin refused to grant the plaintiff relief as it was not one of a class of persons for whose benefit the Act was passed.[64] Mr. Justice Kelly also quashed the conclusion reached at trial when he stated:

> . . . I do not consider . . . that a party to an illegal contract may come to the Court for a declaration of illegality unless he is able to qualify as belonging to the class for the benefit of which the contracts were made to be illegal. To be able to invoke the Court's aid in the gaining of relief from the consequences of their conduct in the contract freely made, the respondents must demonstrate that they are of the class in whose favour an exception is made to the general rule of non-access to the Courts. The respondents are not of this class and so are not entitled to the relief they seek by having the contract, voluntarily made, declared to be illegal.[65]

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58 *Id.*, at 308.

59 Grant J. seemed to think that Lodge v. National Union Investment Co. Ltd. had been effectively overruled by Kasumu v. Baba-Egbe. This aspect of the decision will be discussed later.

60 *Loan and Trust Corporations Act*, R.S.O. 1960, c. 222.

61 This argument could also be applied to Chapman v. Michaelson, where the plaintiff, although seeking a declaration of illegality, asserted that the *Money-Lenders Act* was for his benefit. As a result, perhaps the distinction between this case and the *Lodge* case is invalid.

62 *Supra*, note 8 at 206.

63 See Statutory Interpretation argument.

64 *Supra* note 1 at 385.

65 *Id.*, at 381.

Although the case of *Cohen v. J. Lester Ltd.*[66] was not discussed in great detail by the Court of Appeal it would seem to merit some consideration.[67]

In this case the plaintiff had deposited jewellry with a money-lender as security for a loan. A memorandum of the contract did not comply with section 6 of the *Money-Lenders Act*;[68] as a result the court held that the contract was unenforceable, and not illegal, as in the *Lodge* case. Because of this supposed distinction between illegality and unenforceability, the court refused to follow the *Lodge* case which would have put the plaintiff on terms. Grant J., in considering *Cohen v. J. Lester Ltd.*, seemed to feel that if the court could reach this conclusion under an unenforceable contract, then surely where the contract was illegal (a situation that is far more serious) the same result should follow.

However, there has been some doubt cast upon the *Cohen* decision, by Lord Radcliffe in *Kasumu v. Baba-Egbe*[69] where he pointed out that it is not right to give the defendant more satisfaction under an illegal contract than under an unenforceable contract. It could be argued on the basis of what Lord Radcliffe said that the plaintiff in the *Cohen* case should have been put on terms, because the situation in that case was far less serious than the illegality situation in the *Lodge* case where the plaintiff was put on terms. If this is so, perhaps Tucker J. in *Cohen* should have put the plaintiff on terms.

Mr. Justice Grant recognized this fallacy in the law, as pointed out by Lord Radcliffe, and held that where the defendant was party to an illegal contract the plaintiff should not be put on terms. But this is predicated on the assumption that the *Cohen* case was rightly decided and the *Lodge* case has been overruled. If it can be shown that the *Lodge* decision is still valid then the *Cohen* case was poorly decided since the plaintiff in an unenforceable contract should definitely be put on terms.

Both at trial and on appeal the Courts felt that *Kasumu v. Baba Egbe* overruled, or at least diminished the effect of, the *Lodge* case.[70] In the *Kasumu* case, Lord Radcliffe, while considering the applicability of the *Lodge* case, pointed out that according to the decision in *Lodge* a secured creditor is in a more advantageous position than an unsecured creditor; this is so, since an unsecured creditor would have no right to get his loan back, because if he attempts to sue on the contract the court will simply dismiss the claim as being founded on an unenforceable or illegal contract.[71] Furthermore, the debtor has

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66 *Supra*, note 49.

67 On appeal, Mr. Justice Kelly (at page 378) briefly referred to the case of Cohen v. J. Lester Ltd. [1948] 4 All E.R. 188 (in conjunction with Kasumu v. Baba-Egbe [1956] 3 All E.R. 266) as a case which demonstrated the effect of Lodge v. National Union Investment Co. Ltd. [1907] 1 Ch. 300.

68 1927 (U.K.), c. 21.

69 [1956] 3 All E.R. 256, 269.

70 (1966), 54 D.L.R. (2d) 194, 209; (1967), 61 D.L.R. (2d) 358, 378, 384.

71 *Supra*, note 69 at 271.

no reason to come to court since he has nothing which he wishes to get back from the creditor. On the other hand, in the case of a secured creditor, the debtor must come to court in order to reclaim his security—in such circumstances the debtor may be put on terms.[72] As a result of this anamalous situation, both Grant J. and Lord Radcliffe felt that *Lodge* is no longer a proper decision.

Thus, the issue that arises is posed why an unsecured creditor should be in a less favourable position than a secured creditor. It is submitted that the problem presented by this question is more academic than practical for two reasons. In the first place, in modern business practice it is unrealistic to think of unsecured creditors; this is especially so under such statutes as the *Loan and Trust Corporations Act.* Secondly, Lord Radcliffe felt that an unsecured creditor should be put in the same, if not in a better position, than a secured creditor—for the unsecured creditor has supposedly acted in a somewhat "noble" and "gratuitous" manner. Theoretically this view is tenable; however, looking at it practically, any person who lends money without taking security has poor business acumen, and must take any risk attendant to his actions; he certainly does not deserve as favourable a position in the eyes of the court as one who has done everything to protect himself.

It is interesting to note, that the Court of Appeal while stating that the *Lodge* decision had been discredited, was still willing to put the plaintiff on terms had it been decided that the contract was illegal and that he belonged to a class of persons intended to be protected by the *Loan and Trust Corporations Act.*[73] This in effect affirms the *Lodge* case. In extending this anomaly even further, Kelly J.A., while putting the plaintiff on terms, would have required, not only the repayment of the principal sum, but also the repayment of this sum at a suitable rate of interest. On this basis, it is arguable that the Court has extended the principle enunciated by Parker J. in the *Lodge* case. Parker J. had ordered repayment of the principal sum only, and did not deal with interest at all—perhaps to penalize the moneylender to some extent.

Before leaving the area of equity, one more point should be mentioned. When two parties have entered into a contract bargained at arm's length, it seems that the court may properly leave them to their rights under the contract. As stated by Mr. Justice Laskin, the parties in the present case were in "pari delicto". He said:

> . . . the plaintiff is not a mere amateur in borrowing money on the security of real estate any more than the defendant is an amateur lender, nor is it in the position of having parted with property without the defendant having performed its side of the bargain. In such circumstances, where the parties have bargained at arm's length and have each performed, the Court may properly leave them where they are.[74]

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[72] Lodge v. National Union Investment Co. Ltd., [1907] 1 Ch. 300.
[73] *Supra* note 1 at 387.
[74] *Id.*, at 385.

At trial, Mr. Justice Grant had taken a different approach to this issue. He remarked that Lord Radcliffe found it impossible to apply principles developed in connection with usurious contracts to cases arising under modern legislation. This view is based on the assumption that under current money-lending contracts the illegality is brought about mainly through the fault of the money-lender.[75] This presupposes that under the old usurious contracts the parties were in "pari delicto"; however, under these transactions the money-lender was still in a superior position as he could easily stipulate a wide range of terms. Thus, logically speaking, if terms were imposed under usurious contracts there is no reason for not imposing them under current legislation.

VI Public Policy

Although in the final analysis the appeal was not decided on the basis of public policy, Kelly J.A. makes it plain from the outset that any unfavourable consequences that may have resulted from Mr. Justice Grant's decision should be considered.

It has often been submitted that the courts should disregard the previous case law that is so divided in opinion as to render it useless, and approach the problem of statutory interpretation from a common sense point of view.[76] Common sense, in many instances, would seem to dictate that business done in contravention of a statute is not automatically null and void—i.e. where the consequences would be so severe as to result in an injustice. Perhaps the courts should approach the problem by asking whether the enforcement of the transaction is against public policy. If the contract is declared illegal, what consequences will flow?[77] Is there a penalty provided under the statute? Once these questions have been considered it will not be necessary to search for supposed legislative intent. It is interesting to note that the courts themselves are divided on the question of legislative intent. Some courts assume, that where a penalty is provided, the contract itself is illegal;[78] others think it is not.[79] In some jurisdictions fine distinctions are drawn between *malum prohibitum* and *malum in se* when in the opinion of others this distinction is non-existent.[80] Perhaps the solution to this dilemma would be to disregard the judicial myth of legislative intent and concentrate on a functional approach as embodied in the questions posed above.

In *Sidmay* the Court of Appeal approached the problem from the functional point of view.[81] Mr. Justice Kelly felt that if the trial decision were to be upheld a large amount of conveyancing work would be rendered uncertain. A vendee assignee, or sub-mortgagee

[75] (1966), 54 D.L.R. (2d) 194, 208.
[76] Gecchorn W., *Contracts and Public Policy*, 33 Col. L. Rev. 679.
[77] Tellhock advocates this functional test as laid down in the case of Vita Food Products v. Urius Shipping Company Ltd., [1939] A.C. 277.
[78] Bartlett v. Vinoc, [1693] Carth. 252.
[79] Montreal Trust v. Abitibi Power and Paper Co., Ltd., et al., [1937] O.R. 939.
[80] *Restatement of Contracts* (1932) p. 580.
[81] *Supra* note 1 at 362.

from the defendant would not only be forced to satisfy himself as to the propriety of title, but also would have to make extensive inquiries into whether the defendant was properly registered under the act applicable to the type of business being carried on.[82] To expect a purchaser or assignee from the defendant to ascertain the nature of the transaction and the type of business carried on may be too onerous.

As pointed out by Lord Wright in *Vita Food Products v. Urius Shipping Company Ltd.*,[83] public policy should be looked at in a wide sense. Mr. Justice Kelly quotes *St. John Shipping Corp. v. J. Rank Ltd.*[84] for a similar proposition—when nullification of a bargain would result in a windfall, public policy would dictate that the contract should be enforced.[84]

It is hoped that in the future other courts will see fit to use the type of functional analysis demonstrated by the Ontario Court of Appeal. This type of analysis will often prevent a grave injustice by averting strict technicalities in the law and enabling the court to look at the substance of the problem in its social surroundings.

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