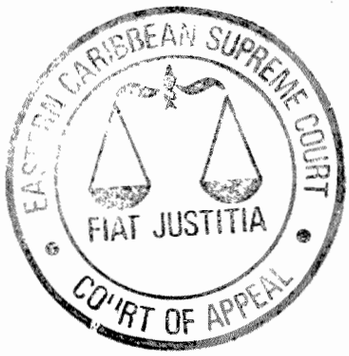
GRENADA:



IN THE COURT OF APPEAL

(CIVIL JURISDICTION)

CIVIL APPEAL NO. 1 OF 1982

BETWEEN:

LA CHAUSSEUR BEACHETTES GRENADA LIMITED

AND

LEWIS COLTON JOHN THOMAS — DEFENDANTS/APPELLANTS

AND

EVERSLEY WILLIAM GITTENS — PLAINTIFF/RESPONDENT

BEFORE: The Honourable Mr. Justice J. O. F. Haynes, P.
The Honourable Mr. Justice N. Liverpool
The Honourable Mr. Justice F. G. Smith

APPEARANCES: H. M. Squires for Appellants.
C. A. St. Bernard for Respondent.

1982: November 18; 1983: May 26

J U D G M E N T

HAYNES, P.:

In this judgment with which Liverpool J.A. and Smith J.A. concur, I shall refer to the respondent as "the plaintiff", to the appellants jointly as "the defendants" and to them separately as "the Company" and "the defendant Thomas".

The Facts:

Although, the defendant Thomas' sister and his daughter were the majority shareholders of the company, he, as managing director, was

/ their .....

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their man of business. He and the plaintiff knew each other well. Each in his field was an experienced man; the former, as a real estate agent, and the latter as a "financier", his own description of his occupation. Prior to 1972, they had a number of financial transactions including mortgages of the sister's Corinth Estate for $115,000 in 1970 and of the defendant Thomas' La Tante property for $36,000 in 1971.

On 23rd May, 1972, the defendant Thomas for and on behalf of the Company signed a demand promissory note in favour of the plaintiff for $66,300 to bear interest at 10 percent; on 3rd April, 1973, another one was signed by him for $86,100 also to bear interest at 10 percent then a third on 24th October, 1974, for $120,000 to bear interest at 12½ percent. Finally, as far as this litigation is concerned, on 12th September, 1975, a fourth one was signed for $155,000 to bear interest at 3 percent. But this time the plaintiff obtained real security. For, on the same date, an indenture of legal mortgage of the Company's property to secure payment of that sum was executed by the Company as Borrower, the defendant Thomas as Surety and the plaintiff as Lender. I set out below material portions of the Deed:

> "WHEREAS
>
> 1. The Company is seized in unencumbered fee simple in possession of the property described in the schedule hereto.
>
> 2. The surety is the managing director of the Company engaged in the development of a resort property called or known as "La Chausseur" situate in the parish of Saint David in Grenada.
>
> 3. The Lender has from the time advanced to the surety various sums of money amounting in the aggregate to the sum of one hundred and fifty five thousand dollars ($155,000.00) evidenced by promissory notes but otherwise unsecured.
>
> 4. The Company hereby expressly admits that the surety acted at all material times as the agent of the Company having borrowed the said sum of money for and on behalf of the Company and expended the same on the development of the aforesaid property called or known as "La Chausseur".
>
> 5. The said sum of one hundred and fifty thousand dollars ($155,000.00) is still outstanding and owing by the Surety and the Company to the Lender.

/ 6. At the .....

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6. At the request of the Company and the Surety the Lender has agreed to forbear in the collection of the said debt on condition that the Company furnishes him with further and additional security in manner hereinafter appearing.

NOW THIS INDENTURE WITNESSETH AS FOLLOWS:-

In consideration of the sum of one hundred and fifty-five thousand dollars ($155,000.00) advanced to the surety for and on behalf of the Company (the receipt whereof the Company and the payment whereof as aforesaid the surety hereby respective acknowledges) the Company and the surety jointly and severally covenant with the Lender to pay to the Lender on the thirty-first day of December one thousand nine hundred and seventy six the said sum of one hundred and fifty five thousand dollars ($155,000.00) with interest thereon from the date hereof at the rate of three dollars per centum per annum.

For the consideration aforesaid the Company as beneficial owner hereby conveys unto the Lender all that property originally part of La Sagesse Estate and now forming part of the property called or known as "La Chausseur" situate in the Parish of Saint David in the island of Grenada which is described in the Schedule hereto TO HOLD the said property UNTO AND TO THE USE of the Lender in fee simple subject to the proviso for redemption hereinafter contained."

Sir Dennis Henry, a quite reputable solicitor, handled the legal formalities, and the defendant Thomas paid the expenses of $2,500.

Nothing was paid on to 31st day of December, 1976, either as capital or as interest. So the plaintiff launched these proceedings to recover $161,420.82 as the sum due for such capital and interest to that date, together with interest on the capital sum of $155,000 down to date of payment of the judgment. He claimed personal judgment against the defendants, and in default of payment, leave to enforce the security. In defence, the defendants admitted the mortgage, but not the non-payment of capital or interest. They pleaded that, on grounds to be discussed later in this judgment, all the transactions including the mortgage were moneylending ones, and were harsh and unconscionable; so they should be reopened and, either set aside and the $2,500 refunded, or, payment thereunder should be adjusted to a lesser sum to be paid as capital and interest. They claimed to be entitled to such relief both at law and in equity.

/ The Case .....

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The Case for the Plaintiff:

At the trial which opened over three years later, only the plaintiff and the defendant Thomas gave evidence. Unfortunately, perhaps, Sir Dennis Henry was then no longer resident here in Grenada. The plaintiff's examination-in-chief was brief. He tendered the mortgage deed and said:

> "The sum of $155,000 is a total culminating sum of money lent to defendants over a period of time on different pronotes. The pronotes presented to his lawyer by the No. 2 defendant when this mortgage was being executed consisted of one for $66,300 another for $86,100 and another for $120,000 and the final one made up the day we went to the lawyer was $155,000.00 Ex. EW.G. 1 is the mortgage securing that note. All these were retired when E.W.G. 1 was prepared."

The cross-examination, in effect, reopened the transaction. Under it, the plaintiff gave his account of the circumstances of each. He said:

> "The pronote for $155,000 was made up very day we went to the lawyer 12th September, 1975. The pro-note was made up earlier in the day and the mortgage E.W.G. 1 later in the said day . . . Previous to that there was a pronote for $120,000 dated 24th October, 1974, and 12th September, 1975 the interest on $120,000 was 12½ percent per annum. The figure reached $155,000 because interest on a previous mortgage of $36,000 at rate of 12½ percent and interest on the $86,100 note at 12½ percent and an additional loan of $20,000. He gave me a post dated cheque and I gave him my cheque for that amount. That post dated cheque was issued by No. 2 on 23rd May, 1972. I gave him mine same day. The cheque was post dated to be cashed a year after . . . The $20,000 is included in the $120,000. There was also a $7,000 loan. This was at the end. I never went to No. 2 Defendant's home to see him when he was sick and ask him to sign E.W.G. 1 . . . I did visit when he was sick. We are pals. On that visit it was not to do business.
>
> No. 2 gave me note in 1973 for $86,100. There are figures at the back of the document. I see the photocopy of the note. It was my handwriting at the back. I see written there $36,000 at 12½ per cent from 3rd April, 1973 to 3rd April, 1974. That was not taken into account, we scratched that out. All we took into consideration was interest on the $36,000 and the $20,000 cheque. From the time the defendant had $20,000 to date of $120,000 note interest on the $20,000 at 10 percent per annum was about $4,800. That post dated cheque was never cashed, No. 2 defendant took it back and involved it in the $120,000 mortgage. Interest that is included in the $155,000 is calculated from pronotes of $120,000 mortgage. E.W.G. 1 Photocopy of pronote for $86,100. Marked "A" for identification. On back of that note has figures for computation of $120,000.

/ No. 2 gave .....

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No. 2 gave a pronote for $120,000 . . . I told him we should put all our bits and pieces together. We should bring in the $20,000 cheque and interest. I had a credit for him at that stage for interest that was calculated on the Corinth mortgage. That was about $10 or $12,000. There was also interest due on La Tante mortgage. When everything was taken into consideration it worked out to a little less than $120,000 . . . When No. 2 gave me pronote for $155,000 I gave him back pronote for $120,000.

On 3rd April, 1973, I gave No. 2 a memo signed by me in relation to some interest. This is the memo marked "B" for identification. As at 3rd April, 1974, interest due on La Tante and Corinth were included in the $86,100; Principal $66,300 for which there was a pronote also interest thereon. The $66,300 note was given back to No. 2 when note for $86,100 was executed. All these prior notes were brought into to Mr. Henry's office when $155,000 mortgage was being executed.

The $66,300 was an accumulation of prior mortgages, previous pronotes and interests. The correctness of the $66,300 was settled with No. 2 before note for that amount was issued. Interest on $66,300 which was in $86,100 would be from date of execution of $66,300 note to date of $86,100 pronote. Not true the $66,300 included a cheque for $25,000. A $55,000 pronote came into the $66,300 . . .

All the accounts I kept were the mortgage deeds, pronotes and the post dated cheques. We were in a good understanding. No. 2 never asked me for an account except when the big case came. No. 2 then asked me for post dated cheques. Whatever documents, cheques, notes I found I gave to my lawyer. On pronote of 23rd May, 1972, no money was paid. The only cheque issued to me was the post dated cheque issued to me by No. 2 which I returned to him. The cheque I issued to him was cancelled when he cashed it and returned to me. I can't find it now . . .

As far as I remember a very small amount of money was advanced to defendant on $86,100 pronote. I don't recall any money being advanced on the $120,000 notes. On the $155,000 mortgage, I advanced $7,000 to defendant. I had given him a $10,000 before. The last money I gave him was $7,000 for which he gave me a pronote. That was also left with lawyer Dennis Henry . . . When defendant gives me a post dated cheque he won't give me a note. The interest I charge varies. If it's a mortgage I always take into account that he is re borrowing interest. For mortgages I charge 3 or 4 percent because it is secured. If its an ordinary pronote I take 10 percent and in very few instances 12½ percent.

Interest on the Corinth mortgage was included in the $86,100 but was taken out when $120,000 note was entered into. It was about $10 or $12,000. Pronote for $86,100 was given on 3rd April, 1973. Corinth mortgage was settled on 29th May, 1973, fully. So when $120,000 was issued interest on Corinth mortgage was not included as that was settled. $120,000 was 24th October, 1974. On that date I gave credit to defendant for the interest that was included in the $86,100."

/ As Counsel .....

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As Counsel, for good reason no doubt, did not question the witness on the transactions in order as they happened, his answers read disjointedly. But, in answer to the Court, the plaintiff gave a more connected account. He said:

> "The sum of $155,000 started with a $30,000 pronote then came with the $55,000 pronote with interest plus a $10,000 cheque that was issued same day of the $55,000. That went on to $66,000 which included interest on the $55,000 and a small cheque for about $9,500. That was on 23rd May, 1972. I then gave him a cheque for $20 or $25,000 against which he gave me the assignment as security for both the $20,000 and $55,000. Next there was $86,100. Following that was $120,000 made up of the $86,100 less interest on Corinth about $12,000 less a payment of $3,000 paid by Lett, plus the post dated cheque for $20,000 with interest accrued. Cheque was issued in 1972. Between $120,000 and $155,000 he had 2 cheques, one for $10,000 and one for $7,000 then $155,000 which was $120,000 plus accrued interest plus the two cheques, plus the interest on these cheques. All these were calculated with Mr. Thomas and myself in his office and pronote was issued. Interest rates on pronotes are between 5 percent, 7½ percent, 10 percent. In two or three instances it was 12½ percent. All the mortgages were ranged between 2½ percent to 3 percent per annum."

The Case for the Defendants:

The defendant Thomas' evidence conflicted much with the plaintiff's. He said, in a lengthy examination-in-chief:

> "I am a Surveyor and Real Estate Agent and Businessman. I know plaintiff very well. I have had dealings with him regarding money-lending since about 1964. I ceased borrowing money from plaintiff about 1973 but was having other transactions. . . I deny owing plaintiff $155,000. I categorically deny this on behalf of myself and No. 1 defendant. On 12th October, 1970 I borrowed $25,000 from plaintiff which was merged in a larger mortgage that amounted to $115,000. On 15th October, 1971 I again borrowed $36,000 on a mortgage referred to as the La Tante Mortgage. It was a second mortgage. On 23rd May, 1972 plaintiff came to my office at Grenville Street and demanded interest on the loans and tendered a cheque to me bearing my signature for $25,000. I was a bit confused But I saw my signature on the cheque so I could say nothing. He told me he was doing business with Chase Manhattan Bank, Barbados, and they were charging him 15 percent interest on the money he borrowed therefore I had to pay him 10 per cent on the 15 percent to make it 25 percent. He added $36,000 and cheque $25,000 to the $115,000: amounting to $176,000. He calculated interest at 25 percent for period 18 - 19 months and told me I had to give him a pronote for $66,300. On 3rd April 1973 plaintiff came to my office and told me Corinth transaction would not be forthcoming and asked for a new note. I gave him a new note for $86,100. On 29th May, 1973 Corinth transaction came through and I paid plaintiff $136,250 as follows: $100,000 transfer of

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mortgage Deed, $36,250 cheque. Along with that he was paid an extra $3,000 credited from sale of land - April 1972 to Kenneth Lett. No type of refund or anything was given to me by plaintiff.

On 24th October, 1974 plaintiff came to me and demanded a renewal of pronote of $86,100. I was not very anxious to give it as I started to figure something was wrong. On 6th September, 1975 plaintiff came to my office like a raging lion demanding payment for $120,000. This $120,000 was the renewal note after $86,100. This was calculated at 12½ percent interest. When plaintiff came to renew $66,230 - note I asked him for it. He refused and said he needed it for his records. As a result I got him to give me a certificate that I paid off $66,230 with interest on La Tante and Corinth Mortgage making a total of $86,100. This is the note tendered and marked Ex. LCJT 2. Between $86,100 and $120,000 interest was calculated directly at 12½ percent. I got back the pronote for $86,100. This is the note tendered and marked Exh. LCJT 2. On 24th October, 1974 plaintiff came and asked to renew $86,100 note. I gave him a note for $120,000. It was $86,100, interest on La Tante mortgage, and interest on $86,100 and some other item making a total of $117,000. We rounded it off to $120,000. This is the memo prepared by me tendered and marked Ex. LCJT 3. The interest rate there I think is more than 12½ percent per annum.

On 6th September 1975 plaintiff came and demanded security for $120,000. He demanded security for the $120,000. He demanded La Sagesse Estate. He told me he was coming on Sunday 7th September, 1975 to see the property. I told him he can come but he won't get any security. At 6 a.m. on 7th September, 1975 I got up to go to the bathroom and I fell on a block of wood from diabetic coma. I was picked up by two young ladies in the house and they treated me. After about one hour of spasms I saw threshold death. I was taken to Dr. Friday's Clinic, I was treated for an hour. I felt a little better. I rang plaintiff and told him I couldn't keep the appointment. I went home and again called him to tell him I couldn't see him. To my amazement around 1 p.m. plaintiff came and said he wanted to see the land. I sent him to Jean Jeffrey in charge of land and he went. On Monday morning whilst in office Mr. Dennis Henry called me. I went to his office and in one breath he told me I owed Gittens and why I don't pay. I told him I don't have security. Plaintiff said I had La Sagesse. Plaintiff told me I could put anything in the Deed. I felt extremely sick and told them to do what they liked. That is how the deed came about.

No new pronote was made for the $155,000. I told plaintiff only way I will sign mortgage is if plaintiff return $120,000 note. I got that note. I got no credit for interest paid on Corinth Estate. The interest on Corinth Mortgage included in the $86,100 is $10,900. I signed the mortgage at Mr. Henry's Chambers. When I signed plaintiff and my secretary also signed. Between the $120,000 and $155,000 transactions I had no business with plaintiff. I deny a note for $55,000 when $66,000 was issued. No post dated cheque was included in the $86,100. No cash was advanced. No cash was advanced on the $120,000 note. That note was $86,100 with interest at the rate of 12½% per annum etc. Between the $66,000

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> note and the $155,000 mortgage no cash was received but I see on one of the notes that I received a cheque for $6,000. I really don't know about that. I had no discussion with anyone or any lawyer before I signed the mortgage. Mr. Henry was plaintiff's lawyer. I paid for the deed. Complaining that neither I nor No. 1 defendant owe plaintiff a cent. Asking Court to return me my $2,500 and cancel the mortgage. Plaintiff charges interest according to how he slept the night before. Sometimes mortgage interest is 3%, 2%, 2½%. Plaintiff wrote Mr. Henry a letter and sent a copy to me."

His cross-examination was brief. He told Counsel that:

> "Mortgage deed basis of claim, was prepared by Lawyer Denis Henry. I told Mr. Henry I did not want my name at all in the mortgage. I decided to sign the mortgage to get away from plaintiff. I only have $10,000 shares in No. 1 defendant Company. I don't owe plaintiff any money so there isno need for an account. The mortgage deed is a false document. I took no steps to set it aside. I was waiting for plaintiff to raise it. If he didn't raise it I won't raise it. I wrote on LCJT 3 at the bottom and signed it. I never got the cheque for $6,000 written. I now say I don't remember that cheque. I now say I don't know anything about it. I signed to it. I see this letter. I wrote it. Tendered and marked Ex. LCJT 4. I do million dollar business in this field."

That was the case for the defendants. And it was on those facts mainly that claim for relief both at law and in equity rested. So it is both relevant and necessary at this stage of the judgment, to consider what the law is and what the principles of equity are on the issues.

The Statutory Claim to Relief:

In the first place, any claim for statutory relief at law will have been based on the Moneylenders Ordinance 1915 (Cap. 192. Counsel did not, either in the court below or in this court, refer to any other relevant legislation; and this judgment proceeds on the assumption that none other is applicable. For the purposes of this case, the relevant provisions (Sections 1 to 5) reads as follows:-

> "1. No person shall directly or indirectly charge or receive the loan of money or under any agreement or security in respect of money lent a rate of interest or discount exceeding twelve and a half per centum per annum.
>
> 2. In any suit, action or other proceedings concerning a loan of money or any agreement or security in respect of money lent, wherein

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it is alleged that the amount of interest paid or claimed exceeds the rate of twelve and a half per centum per annum, including the charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable costs and charges, the Court may reopen the transaction and take an account between the parties, and may, notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation, re-open any account already taken between the parties, and relieve the person liable from payment of any sum in excess of the said rate of interest; 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 in respect of the transaction.

3. Where money has been lent or an agreement or security has been made or taken in respect of money lent before the day on which this Ordinance comes into force, any interest becoming due on or after the said day in respect of any such loan, agreement, or security shall not be at a rate exceeding twelve and a half per centum per annum.

4. The provisions of this Ordinance shall apply to any transaction which, whatever its form may be, is substantially one of money lending.

5. Any person who charges or received for the loan of money or under any agreement or security in respect of money lent a rate of interest exceeding that authorised by this ordinance shall be liable on summary conviction to a fine not exceeding four hundred and eighty dollars or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment."

These provisions are not difficult to interpret. The basis for relief is the allegation supported by the proof that the amount of interest paid or claimed exceeds 12½ percent; if so, then the court has jurisdiction to adjust the amount payable to that rate, (with consequential refunds, if any, and, if it thinks it just and reasonable to do so in the circumstances, to release the security altogether or partly or to revise or alter it. For example, after such adjustment it might appear that what in fact remains due and payable, is not so much (particularly if the borrower is otherwise solvent) as to justify retaining the security of all or to the contractual extent, to protect the lender. A breach of the maximum legal rate of interest is made a criminal offence. But although there is illegality, the

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loan is not wholly void and unenforceable. It can be enforced in its adjusted form. And to get relief, proof is not required that the transaction is, for any reason, "harsh and unconscionable".

But there is an aspect of this interpretation which ought not to be left unconsidered in this judgment, although it has not been raised at any level of hearing. And that is this. If a strictly literal interpretation is given to Section 2, this might be said to confine its application to cases where a rate of interest exceeding 12½ percent is charged in the transaction the subject matter of "the suit", action or other proceeding" before the court, (here, the mortgage for $155,000) authorising then the reopening of that transaction and any earlier closed ones connected to it. So, in such a case as this, where the mortgage interest is only 3 percent, it might be argued that Section 2 would not apply even if in fact the principal debt of $155,000 reached that figure because in one or more of the earlier transactions a rate of interest higher than 12½ percent was charged. In my judgment such an interpretation should not be given to Section 2.

In this regard B.S. Lyle Ltd. v. Pearson (1941) 3 A.E.R. 128 is a helpful authority. The case involved the interpretation of Section 1 of the English Moneylenders Act 1900 which provided as follows:

> "Where proceedings are taken in any court by a money-lender for the recovery of any money lent . . . 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, premiums, 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 reopen 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, reopen any account already taken between them and relieve the person sued from the 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 [illegible] has been paid, or allowed in account by the debtor, may order the [illegible] to repay it; and may set aside, either wholly or in part, or [illegible] any security given or agreement made in respect of money lent by the moneylender."

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The plaintiffs, registered moneylenders, loaned a borrower a sum of £100 on March 1939 on a promissory note with interest at 150 percent, and on June 13, 1939, a further £200 at the same 150 percent rate of interest. In January, 1940, when the sum of £490 was owing on both in respect of principal and interest, they took a new note for this amount with interest at only 25 percent. It was contended that the court had no power to reopen the transactions previous to the last note of January, 1940, which, being at a moderate rate, could not be attacked. Counsel's reasoning was that, unless the transaction sued on itself charged what appeared to be an excessive rate of interest there could be no reopening. The trial judge agreed and gave judgment for the plaintiff. The Court of Appeal allowed an appeal, Goddard L.J. saying (at page 131) that there was no authority for the proposition that --

> "the Moneylenders Act 1900 can be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the moneylender can get out of any inconvenience and difficulties into which that may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note charging some low rate of interest on that, and then suing the defendant upon it as soon as he has defaulted."

I would say that Section (1) of the Moneylenders Act 1900 and Section 2 of the Moneylenders Ordinance 1915 are sufficiently similar to justify the same conclusion here.

So, if the trial Judge concluded on such of the defendant Thomas' own evidence as he believed, that, in one or the other of the earlier transactions of 23rd May 1972, 3rd April 1973, or 24th October 1974, the plaintiff charged a rate of interest exceeding 12½ percent, the defendants would be entitled to some relief under Section 2 of the local Ordinance 1915, in so far as this would be reflected in the amount of the capital mortgage debt of $155,000.

The Position at Common Law:

Further, the position at common law on the question of compound interest (that is, the charging of interest upon interest) also arose

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for consideration on the defendant's evidence, and indeed on the plaintiff's also. The problem has two overlapping aspects; one, whether interest could at all be lawfully charged upon interest, and two, whether interest in arrears could lawfully be added to arrears of capital, and interest charged on the joint total? And in either case, if not, what is to be done about it? For, as I understand the pleadings of the defence, their evidence and the submissions on their behalf both here and in the court below, relief is also claimed at law (and also in equity) on the ground partly, if not separately, that the plaintiff was wrongfully charging interest upon interest — and was converting interest into principal all the way from the first promissory note of 23rd May, 1972, to the last on 12th September, 1975, and in the mortgage deed itself. In fact, I gather the defendants to be contending that the bulk of the $155,000 (if not all of it) was interest piled upon interest.. So it will be convenient here to discuss how the courts both at common law and in equity deal with the matter, although I am not now considering the defendant's claim for relief in equity as it stood at the close of the evidence.

In medieval England the taking of usury involved the sin of avarice. It was not the lending of money or the circumstances under which it was lent that mattered. It was the obtaining of profit from the use of money, that society frowned upon. So interest was not allowed at law or in equity. But medieval concepts gradually had to give way before the impulse of commercial and industrial activities. Business men needed to borrow money from those able and willing to lend it for the purpose of such activity. And the latter would demand some return for the loss of the use of the money they lent until repaid. The judgment of the Privy Council in Kasumu & Others v. Baba-Egbe (1956) 3 W.L.R. 575 at page 583 has useful references to this topic.

So interest came to be regarded as damages or compensation for the loss of the use of money lent. And eventually a series of judgments, both at common law and in Chancery, clearly laid down the law in both jurisdictions by the middle of the nineteenth century. Parties could

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validly contract for the payment of interest: Carlton v. Bragg (1812) 13 R.R. 451, or for compound interest, that is, the payment of interest upon interest: Morgan v. Mathers (1792) 4 E.R. 5000, Fergusson v. Fyffe (1812) 8 E.R. 121 and Ex parte Beven (1803) 32 E.R. 588, and for turning interest in arrears into principal bearing interest in its turn: Ossulston v. Yarmouth (1709) E.R. 388. Conway v. Shrimpton (1710) 2 E.R. 671 H.L. and Newell v. Jones (1830) 4 C & P 124. But it is important to note as relevant to these cases that, as regards the payment of compound interest and turning interest in arrears into principal, either was allowable in law only if the agreement to do it was made after simple interest on the debt was already due, payable and in arrears. For an original term in a contract of loan to pay compound interest on it in the future was void: Broadway v. Morecraft (1729) 25 E.R. 377; Ex parte Bevan (supra); and an original term in a mortgage that on nonpayment of the interest on a fixed future date it should be turned into principal and bear interest was also void. For instance, in Ossulton v. Yarmouth where a mortgage had a proviso that if the interest was behind six months, then that interest should be accounted principal and carry interest, the Lord Chancellor said:

> "the proviso is decreed to be vain, and of no use" because "an agreement made at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal."

None of this is legislative law. The English Usury Acts (1713 - 1854) which fixed maximum legal rates of interest on loans were silent on these two matters. And so it our Moneylending Ordinance 1915. So if the plaintiff was to get relief at law on the ground that the mortgage debt of $155,000 was made up entirely or mainly of interest upon interest and of interest turned into principal, the trial judge had to be satisfied that this happened and that it happened in circumstances which made it unlawful, and void having regard to the principles laid down in the cases just cited.

The Claim in Equity:

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Finally, there was the claim to relief in equity. What was and is the law on this? In England prior to the Usury Acts, during their force, and after their repeal in 1854, the Court of Chancery exercised a jurisdiction to give relief of a kind in cases of contracts which they held to be unconscionable bargains. Some were cases of actual fraud, others involved fraud in the equity sense, that is, an unconscionable use of power arising out of the attendant circumstances and conditions: see Halsbury's Laws of England, 3rd Edition, Vol. 17 page 682, para. 1314. Its most frequent application was to sales or other dispositions of property. And in Singh v. Singh (1978) 25 W.I.R. 410 the Guyana Court of Appeal dealt fully with the nature and extent of that jurisdiction. But it was applied also to moneylending transactions, although not generally.

In the first place, equity did not interfere merely because the interest or charges were high or excessive. In Webster v. Cook (1867) 16 L.T. 821, 824, where a person of full age had agreed to pay £5 percent per month on a sum of £400 advanced, the Court refused to interfere, Lord Chelmsford, L.C., saying that:

> "The interest exacted by the defendant is certainly of an excessive kind, and is calculated to create a prejudice against him. But the plaintiff is not a young man, and is fully capable of taking care of himself. He knew that the defendant was a money-lender, and he himself states that he had had dealings with the defendant for four years previously, and, if the plaintiff chooses to enter into an agreement of this kind, in which he can impute no fraud or unfair dealing, I do not see what right equity can have to interfere with the transaction, although it may be regarded with no favour."

In Bennett v. Bennett December 8, 1876 (unreported) where a borrower under no pressure whatever agreed to pay interest at the rate of 60 percent, Jessel M.R. refused relief, saying that a man was allowed by law to be a fool and "he may agree to pay 100 percent if he likes"; and in Wilton & Co. v. Osborne (1901) 17 T.L.R. 431, a claim by a money-lender on a promissory note on which the interest charged was found to be 160 percent, Ridley J. said at page 432:

> "It appears to be well established by a series of decisions that a Court of equity will not grant relief

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> in such cases merely because the charges or interest are excessive."

So the defendants here can claim no relief in equity even if they proved the allegation of excessive interest on that ground alone.

Secondly, until 1880, the reported cases all dealt with relief against unconsiconable bargins made with heirs, reversioners, and expectants during the lives of their parents or other ancestors on the security of their expected interests in the property of those persons. In Chesterfield v. Jansen (1751) 28 E.R. 82, Lord Hardwicke put the jurisdiction in these words (at page 100) -- that equity could relieve against such fraud "which infects catching bargins with heirs, reversioners or expectants in the life of the father" where there was "fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other or extortion or advantage taken of that weakness" (page 103). And in Gwyne v. Heaton (1778) 1 Bro. C.C. 1, 9, Lord Thurlow, speaking in a case involving an expectant heir said:

> "There is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant against the effect of his own conduct . . . The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargin made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle and repressed."

For too often in such cases usurious interest was charged which (and the capital) the borrower could not pay off at all, but which the moneylender expected to extort from a wealthy parent or to get out of the inheritance when realised. So it was usually an expectant heir or a remainder man or a reversioner borrower who applied for and got relief from the Court of Chancery.

But in Nevil v. Snelling (1880) 15 Ch. D. 677, Denman J. examined the authorities and concluded that the jurisdiction was not so confined. In that case the plaintiff, 23, the third son of a Marquis was not an expectant heir and had no property in possession or reversion. He was

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entirely dependant on his father with whom he lived and who gave him an annual allowance of £400. He became heavily indebted to the defendant a moneylender on renewed promissory notes bearing outrageous interest. On his allowance he could not keep up with all the due payments of capital and interest. The defendant knew this from the start. He really hoped to force payment from the father to avoid the exposure attendant on the son being made bankrupt. Eventually the plaintiff sought relief in equity from the improvident transactions, which had started when he was still an infant to meet betting losses, not fully understanding the nature of the contract then. And some of the renewals were made under threats of exposure and bankruptcy. Counsel for the defendant argued strongly that, as plaintiff was not an expectant heir within the meaning of the cases where relief had been given in equity, his case had to fail on any view of the facts. But Counsel for the plaintiff submitted that once there was fraud in equity or unfair dealing, the Court could interfere.

Denman J. dealt with the point at length. And he said at page 432 --

> "I can find no case which decides that the interference of the court is limited to cases in which the dealings have been with expectant heirs or reversioners or to cases in which the dealing has been one in relation to the expectancy."

And working out a guiding principle, he said (page 702 - 703) that --

> "The real question in every case seems - to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established -- that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress, sometimes infancy, has been imposed upon, and transactions, though ratified at the full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look at all the circumstances. In some cases may result the conclusion that there exists mere inadequacy of price, or exorbitance of interest charged, in which case the transaction will not be interfered with. But in others, taking the whole history together, it may present so many features of unconscientiousness, extortion,

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> and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction, at all events so far as to restrain the profits - of the money lender within fair and reasonable bounds."

and His Lordship concluded (at page 705) that --

> "nor do I entertain any doubt that, upon the general principles of Equity, which lay it down that unfair and unconscionable dealings with a person whose position renders him too weak to resist rapacity, and avarice, and unfair dealing, are within the jurisdiction of the Court, and ought to be repressed, I ought to make the decree prayed for in the statement of claim."

So he made certain monetary adjustments after reducing the rate of interest.

This judgment has stood now for over a century. In Wilton and Co. v. Osborne Ridley J. agreed with the law it laid down. The learned Judge said (at page 432) --

> "Every case has, indeed, to be judged by its own circumstances; but unless the borrower be of the class known as expectant heirs (which requires distinctive consideration) the rule is that, assuming him to be of full capacity, relief will not be granted unless it can be shown that he has been over-reached, tricked, or deceived, and that the moneylender has taken an unfair and undue advantage of his weakness and necessities. The general rule is that neither excess of interest nor exorbitance of charges will suffice unless the element of unfair dealing is found to have existed. The authorities for this principle are fully set out in the judgment of Mr. Justice Denmann in "Nevil v. Snelling" (15 Ch.D., 679), and I do not think it necessary here to go through them. That case was decided in 1880, and I have not been able to find a later decision in which in any way alters the conclusions at which he arrived - conclusions which I agree, result from the authorities here quoted";

and later (ibid) -

> " . . . in relieving from bargains for the repayment of loans, equity considers not improvidence, folly, and imprudence, but unfairness, overreaching, or coercion to constitute a proper ground for its interference. Thus it seems to me clear that this case is not one of those in which a Court of equity would have interfered. The defendant was not overreached, nor was advantage taken of his necessities. He exercised his own volition and he made terms. The bargain was improvident and foolish, but no pressure was put upon him which can be called undue or unfair. Therefore he would not have obtained relief in a Court of equity . . ."

Then in re A Debtor (1903) 1 K.B. 705, C.A. Collins M.R. expressed much the same view when he said (at page 729) --

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> "the Courts of Equity used to give relief in special cases when the parties stood in a particular relation to each other, or upon the ground of fraud or undue pressure upon the borrower, but they did not regard excessive interest alone as a ground for setting aside a bargain in the absence of some particular relation between the parties, as, for instance, if the borrower was an expectant heir."

And see Samuel v. Newbold (1906) A.C. 461 per Lord Macnaghten at page 468.

So it was for the trial Judge to decide whether any evidence of the defendant Thomas which he accepted as true, proved such a degree of unfairness, overreaching, coercion, pressure of undue advantage or of other features of unconscientiousness as would be sufficient to move a Court of equity to interfere in his favour.

The Trial Judge's view:

So much for the law. I go back to the narrative of events. The trial Judge reserved his decision at the close of the addresses. A question of relative credibility was involved. Credibility of testimony is, of course, not to be confined to the personal honesty of a witness; it involves not only his demeanour in the witness-box, but also his powers of recollection, observation and expression, the probability or improbability of his evidence itself as well as its consistency or inconsistency with undoubted facts or documents in the case. Here, as regards some of the disputed facts, plain perjury had been committed on one side or the other; while as regards others, the conflict might possibly have resulted from mistaken or faulty recollection due to the passage of time, and the absence of any admissible notes or book entries to aid their memory. In such a case, the trial Judge had to be very watchful of the manner and demeanour of the two men as each testified to help him determine his credibility and the reliability of his evidence.

He was. And this is what he said about it in his judgment:-

> "At the end of his testimony I felt myself highly impressed at the manner in which the Plaintiff testified and as to his general demeanour. He was subjected to a very thorough and meticulous

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examination from Counsel for the Defence and at no stage did he flinch. I am satisfied that he did his utmost in so far as it was humanly possible to remember the details of the many transactions. I found he gave his answers with the frankness and honesty becoming a gentleman. His only hesitancy was when trying to remember a detail. He was as polite to Defence Counsel as he was to his own Counsel and to the Court. I find his testimony unimpeachable.

The No. 2 Defendant, a man who from his evidence has been involved in million dollar transactions, in his evidence for the defence, attacked the validity of the mortgage deed the subject of this claim. He claims that the deed is a false one and that neither he nor the No. 1 Defendant owe the Plaintiff any money. In examination-in chief, on behalf of himself and the No. 1 Defendant he categorically denies owing the Plaintiff $155,000 and in that respect he states that he doesn't owe the Plaintiff any money. Nowhere in his pleading did he attack the validity of that deed.

I found him to be a most dishonest witness. He had no respect for the truth and lied blatantly when it suited his purpose. The manner in which he testified and his general demeanour left much to be desired. His hostility to Counsel for the defence in cross-examination, his hesitancy and prevarications in his answers among other things revealed to this Court that it would be a most dangerous exercise to rely on his testimony and wherever his evidence conflicted with that of the plaintiff I would prefer to accept that of the plaintiff.

I reject completely the allegations of the No. 2 Defendant that the mortgage deed is a false one. The document on the face of it shows it to be a valid document properly executed and there is absolutely no evidence to the contrary. In the same breath that the No. 2 Defendant was saying the document was false he was also saying that he told the plaintiff he will only sign the mortgage if the plaintiff returned the $120,000 promissory note and then he admits he got the note. He also admits that his Secretary also signed with him and that he in fact paid for the Deed. This Surveyor, Real Estate Agent and Business-man seeks to insult the intelligence of this Court by telling the Court under cross-examination by Counsel for the plaintiff that he decided to sign the Deed to get away from the plaintiff. What absolute rubbish coming from a man of presumably high business intelligence. He admits that he took no steps to set the deed aside and that if the matter was not brought to Court by the plaintiff he would not have raised it. I found this witness' respect for honesty appalling.

I also found the witness' recollection as to the details of the transactions very hazy and that he gave his evidence as to those details recklessly in support of his case. His evidence, in my view, cannot be relied on in preference to the plaintiff's in this regard."

The plaintiff had kept no records. He said so. As a result, his answers in the witness-box at times did not give certain particular

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figures and details of information which he ought and should have been in a position to give, and were not always clear or consistent. Moreover, his evidence of loans of $7,000, $10,000 and $20,000 sums included in one or the other of the promissory notes, was not supported either by the production of the returned cheques or by some written evidence. Nonetheless the trial Judge, weighing it all, found him to be a frank and honest witness, who at all times, tried to give truthful answers to the best of his recollection. On the other hand, he was most unfavourably impressed by the defendant Thomas, who, he thought, was dishonest, prevaricating and at times reckless in giving his answers. He accepted the plaintiff's evidence in preference to the defendant Thomas' wherever they conflicted. He found that every transaction was entered into in the circumstances narrated by the plaintiff, that the principal sum named in every promissory note was made up as the plaintiff said it was, that the defendant Thomas agreed to it all, and that the interest charged never exceeded 12½ percent. He held that on the facts the defendants were not entitled to any relief either at law or in equity. So he gave judgment for the plaintiff as prayed. Hence this appeal, in the notice of which the defendant complained that --

> "1. The judgment is against the weight of the evidence and the plaintiff has not proven his case.
>
> 2. The judgment offends in law against the Money-lending Ordinance Cap. 192 of the Revised Laws of Grenada 1958 Edition and in particular section 3 thereof as well as in equity;"

and prayed for: An order to open the transactions leading up to and including the mortgage for $155,000.00 and for relief to the defendants as prayed for in the Defence and Counterclaim to the action.

Principles on which Appellate Court will act:

Counsel for the defendants submitted under ground one, that the trial Judge's material findings of fact should be reversed. The principles on which an appellate court of re-hearing such as this should act in reviewing the decision of a judge of first instance on a pure question of fact are by now clear and well defined. The cases

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are legion and should be well-known. But it has been my experience both in this Court, short though it has been, and elsewhere of greater length, that, more often than not Counsel embark on a challenge to a trial Judge's findings of fact and present arguments to maintain that challenge, with an approach and in such a form as to suggest that the relevant principles or some of them might have been ill-perceived or overlooked. So it might be helpful to think about them afresh.

Generally, the decision of an appellate court whether or not to reverse conclusions of fact reached by a trial Judge sitting alone, must be affected by the nature and circumstances of the case under consideration, and there are strict limitations on the power to do so. Where his finding was influenced wholly or mainly or substantially by the demeanour of the witness in the witness-box, the Court will seldom interfere; and that is the class of case with which this judgment is concerned. Where demeanour played a part but not one of such critical importance, the Court may interfere more readily. In cases where the trial judge gives reasons (other than manner and demeanour) for his conclusions, (Lucky v. Tewari (1965) 8 W.I.R. 363 PC) or the issue was not the finding of primary facts but the drawing of inferences from admitted or undisputed ones (Whitehouse v. Jordan (1981) 1 A.E.R. 267), the Court will be free to examine those reasons or inferences, and if they are unsatisfactory or wrong, to reach a different conclusion of its own. If the court is convinced that the judgment of the trial judge is wrong, it should give the right one. But, without being so convinced, it may be satisfied that, at the trial, there was a failure in the due judicial process to which litigants were entitled, for example, in the weighing of their respective cases and contentions or by some material misdirection of fact or law. If so, and it resulted in a substantial wrong or miscarriage of justice, a new trial might justly be ordered. And this Court could do so of its own volition even though in this case Counsel has not argued for it, if, from our own perusal of the record we are satisfied that there ... such a

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failure. Jones v. Hough (1880) 5 Ex. D. 115, 128. But in the circumstances here, there appears to be no grounds for such an order. Either the judgment must be reversed or the appeal dismissed.

There is no presumption that the judgment is right. It is true that in Colonial Securities Trust Co. Ltd. v. Massey (1896) 1 Q.B. 38 C.A., Lord Esher M.R. did say that there was. But shortly after, in Reikmann v. Thierry (1895) 14 R.P.C. 105, the House of Lords thought it necessary to deny this. The case is cited in Dearman v. Dearman (1909) 7 C.L.R. 549, a decision of the High Court of Australia, in the judgment of Mr. Justice Isaacs who referred (at page 559 - 560) to a passage from the speech of Lord Halsbury L.C., where His Lordship said:

> "But, my Lords, I must add that I am entirely unable to yield to the argument which has been, not unnaturally, pressed upon us by counsel. I say not unnaturally, since more than one of the learned Judges have given countenance to it by observations made in the course of their judgments. I mean the argument that there is a presumption that we ought not to interfere with what the Judge of first instance has done. I absolutely refuse to acquiesce in any such argument. The hearing upon appeal is a rehearing, and I do not think there is any presumption that the judgment in the Court below is right."

Lord Macnaghten and Lord Davey concurred in this observation.

What Counsel challenges here are findings of primary fact on conflicting oral testimony. We are asked to express a contrary opinion on the credibility of conflicting witnesses whom we have not seen or heard of questioned. In a good many cases the judge, in choosing between the witnesses, is helped by the weight and balance of the probabilities or by the probative significance of some documentary exhibit or of some unquestionable objective fact. The balance of probability on the whole might be so strong, or the concurrent documentary evidence or the objective fact might so clearly support one view or contradict the other, as, in every case, to point unmistakeably or at least sufficiently to where credibility lay. But the probabilities might be evenly balanced, or the documentary evidence or objective fact (if any) might not clearly affirm one story or the other; if so, then the trial Judge may have to rely on the manner and demeanour of the witnesses

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as they testify, wholly or mainly. If so, then he would have relied on material which cannot and does not appear on the printed record for appellate review and assessment. Yet, on appeal, our jurisdiction is to rehear the case, which we can do only by reading the evidence and hearing Counsel on it. The disadvantage the Court suffers in that situation is manifest.

A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving an answer, a nuance in his expression, can often lead a Judge to find a significance in words actually used by a witness that cannot be attributed to them as they appear in reproduction in print, and could show candour or reveal partisanship. And so the material most valuable in helping the Judge in coming to his decision, might be utterly beyond the reach of the Court of Appeal. In Powell v. Streatham Manor Nursing Home (1935) A.C. 243, 267 - 8 Lord Wright drew attention to what every experienced Judge or advocate knows:

> "As the evidence proceeds through examination, cross-examination and re-examination the Judge is gradually imbibing almost instinctively, but in facts as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse. He will not necessarily distrust a witness simply because he finds him inaccurate in some details; he can give such inaccuracy its proper place, particularly if he sees that the witness is tired or antagonized or confused or perhaps impatient, and especially if the matter of the inaccuracy is of minor or collateral importance. But such inaccuracies may appear in a very different light when pointed to as isolated passages in the shorthand notes and abstracted from the human atmosphere of the trial and from the totality of the evidence. The Judge will form his impression from the whole personality of the witness; he can allow for the nervous witness, standing up in a crowded Court or worried by the strain of cross-examination. The Judge may be deceived by an adroit and plausible knave or by apparent innocence, for no man is infallible; but in the main a careful and conscientious Judge with his experience of Courts is as likely to be correct in his impressions as any tribunal."

And Lord Macmillan in the same case spoke words probably applicable to this one, when he said (at page 256 - 7):

> "Where the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interest of the parties cannot but affect their testimony, this House

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> has always been reluctant to differ from the Judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error. The reasons for that reluctance are founded on common sense. It is only the written evidence which reaches this House; the other evidence which the Judge of first instance tells us that he has relied upon cannot be reproduced or subjected to review here."

Because this is so, if the evidence as a whole can reasonably justify a conclusion of fact arrived at on conflicting oral testimony, this could cause an appellate Court to take tho view that, without having seen or heard the witness, it is not in a position to come to any different conclusion on the printed transcript. And so it might not interfere, not necessarily because it is convinced that the trial judgment is right, but because it is not convinced that it is wrong. Many cases of high authority illustrate this. Most of them are well-known. It is sufficient to mention three only -- Wood v. Haines (1917)/D.L.R. 166 P.C.,[33] Powell v. Streatham Manor Nursing Home (1935) A.C. 243 and Onassis v. Vergottis (1968) 2 Lloyd's Law Reports 403 H.L. which merit close reading. In every case, as in this one, there was a stark conflict of oral testimony, and the issue of fact depended on the relative credibility of the plaintiff and the defendant or their witnesses; in every case, as in this one, impressed by his or her demeanour, the trial Judge believed the plaintiff to be truthful and the defendant or his witnesses to be untruthful; in Wood v. Haines and in Powell's case Court of Appeal reversed the judgment in favour of the plaintiff, holding that on the discrepancies in the evidence, the probabilities and some documents, the trial Judge should have believed the defendant (in Wood v. Haines) and the defendant's witnesses (in Powell's case); and in Onassis v. Vergottis, they ordered a new trial on the ground that, in choosing between witnesses, the trial Judge relied too much on demeanour and did not give sufficient weight to the probabilities and the documentary evidence. In every case, the final court (the Pricy Council in Wood v. Haines and the House of Lords in the others) reversed the Court of Appeal and restored the trial judgment. The Court of Appeal's interference with it,

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their Lordships held, was not justified, lacking as they did the initial advantage of seeing and hearing the witnesses. In Wood v. Haines, Lord Wrenbury said -- "it must be an extraordinary case" for an appellate tribunal to interfere in such circumstances; in Powell v. Streatham Manor Nursing Home, Lord Wright observed that "the Court of Appeal has no right to ignore what facts the Judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing"; and in Onassis v. Vergottis, Viscount Dilhorne explained the reason why, when he re-stated the position that "the greatest weight has to be attached to the findings of the Judge who saw and heard the witnesses". In such cases the Court of Appeal is usually guided by the impression made on him as to who was truthful and who was not.

But even so, it would be wrong to say, as some passages in a few cases have been read to mean, that, once a trial Judge says (or it is understood) that a question of fact was decided by him on his personal estimate of the witnesses, an appellate court of rehearing can or should probe the matter no further. That is not so. The duty of the Court still is, then, to reconsider the evidence before the trial Judge so as to make up its own mind, carefully weighing and considering his findings. His view of the demeanour of a witness could be ill-founded and mistaken and there may obviously be other circumstances, apart from manner and demeanour, which may show whether a piece of evidence is credible or not, and these circumstances may be so compelling as to warrant the Court differing from the trial Judge on the credibility of witnesses whom the Court has not seen or heard. Not surprisingly, the cases where this has happened are not many.

Hvalf Polaris & Another v. Unilever Ltd & Others (1933) 46 Lloyd's Law Reports 29 is one. It was an action for rectification of a written contract. The trial Judge had dismissed it, rejecting the

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evidence of two witnesses for the plaintiff that a material oral term omitted from it, was agreed. He said "their evidence and the manner in which they gave it, was unconvincing". He preferred the conflicting testimony of the single witness for the defendants whose demeanour impressed him favourably. The Court of Appeal did not interfere (1932) 42 Lloyd's Law Reports 212), Slesser L.J. saying (at page 225 - 226) --

> "A decision on the intention of the parties is one of fact and the learned Judge, having heard all the witnesses, has come to the conclusion that Mr. Blom, who acted at all material times on behalf of the defendants, is a witness whom he believes. I can see no ground why this court, who did not see or hear the witnesses, should come to different conclusion of fact."

But the House of Lords did just that. They subjected the printed evidence to a full critical scrutiny and concluded that, when tested against the contemporary documents and the strong probabilities, the trial Judge's opinion as to where credibility lay was mistaken. So they reversed the findings of the trial Judge, and allowed the claim.

Muttouk v. Massad (1943) A.C. 588 is another. The action out of which the appeal arose was brought by the appellant against the respondent for seduction of his 15 year old daughter Mary by the Respondent. They were all Syrians and the Respondent, aged 42, was a leading member of that community. Mary testified to five incidents of sexual intercourse with him giving details as to time, place and the manner of it, as a result of which she gave birth to a child. It was for the expenses of her confinement and the loss of services that damages were claimed. The trial Judge, who tried the case without a jury, said that he had to warn himself how dangerous it was to act on the girl's evidence alone, but, that nevertheless, having watched her demeanour and that of the respondent, he came to the conclusion that she was telling the truth and the respondent's denials were false. So he awarded damages. The West African Court

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of Appeal reversed his findings of fact on the ground that Mary's evidence was wholly incredible and entered judgment for the respondent. Lord Atkin, who read the judgment of the Privy Council upholding the reversal, said that the members of the Court of Appeal were on very strong ground when they dealt with the utter improbability of the details as narrated by the girl and, in all the circumstances, were completely justified in refusing to accept her story, even though it was supported by the trial Judge's satisfaction with the witness's demeanour, especially as there were other circumstances which were inconsistent with its reliability.

Then there is Yuill v. Yuill (1945) 1 A.E.R. 183. It was an appeal from the dismissal of a divorce petition on the ground of adultery at a specified time and place. The trial Judge had accepted the denials of the respondent and co-respondent as against very strong circumstantial proof of it, finding them truthful "upon a careful observation of their demeanour" and having regard to their "type and characteristics". The Court of Appeal allowed the appeal, itself reaching a finding of adultery on the printed evidence. Lorde Greene M.R. said (at page 186) --

> "Puisne Judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced Judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourbale opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be; most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge."

Then he went on to advise in the same passage that --

> "an impression as to the demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question" --

passages approved of in Watt v. Thomas (1947) A.C. 484 by Viscount Simon at page 486 and Lord Thankerton at page 489, and by Lord Morris at page 419 in Onassis v. Vergottis. Other cases include Maharaj v. Samuel & Another (1963) 6 W.I.R. 322 and Volis v. Kozarry & Others (1975) 50 A.L.J.R. 59.

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It is impossible, and indeed undesirable, to lay down anything in the nature of a code as to the circumstances in which an appellate Court should interfere by reversing the judgment of a trial Judge in such cases. But Counsel asked to advise on an appeal or to present it to this Court and this Court itself might usefully adopt the modus operandi of testing the finding as to demeanour against the whole of the evidence of the witness and in the case so as to determine whether, as Lord Reid put it in Benmax v. Austin Motor Co. Ltd. (1955) 1 A.E.R. 326, 328, "the weight of the other evidence may be such as to show that the trial Judge must have formed a wrong impression". For instance, if this exercise demonstrates that the story the trial Judge believed was a glaringly improbable one; or if it is irreconcilably inconsistent with some piece of unimpeachable documentary evidence or with some unchallengeable objective fact or some other undisputed material in the case which the Judge has overlooked or the importance of which he has failed to appreciate; or if there are in it unexplained inconsistencies and discrepancies so grave or weighty and material as to make it inherently unsatisfactory and unreliable, the Court may justifiably interfere.

But unless Counsel by some such or other compelling argument on the printed evidence can demonstrate that the trial Judge erred either in his assessment of the demeanour of the witness or in his reliance on it, the appeal will most likely fail. It will not necessarily be sufficient to persuade every member of the Court that his judgment would have been different. Gross v. Hillman Ltd. & Another (1969) 3 W.L.R. 787 C.A. illustrates this. Nor will it be enough just to raise doubts about the judgment. In Smith v. Gaynor (C.A. No. 72/75) an unreported judgment of the Court of Appeal of Jamaica, the appellant had claimed for the value of a pig alleged to have been killed by a dog owned by the respondent. Although there were flaws in the evidence of the respondent the Resident Magistrate gave judgment in favour of the respondent. In dismissing the appeal

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the Court of Appeal held that a Court of Appeal was not entitled to disturb findings of fact made by a trial Judge which were dependent on his view of the truthfulness or untruthfulness of a witness whom he had seen and heard and the Court of Appeal had not, unless it was completely satisfied that the finding was wrong. "It is not enough that it has doubts -- even grave doubts -- as to the correctness of the findings. It must be convinced that he was wrong", the Court said: see Commonwealth Law Bulletin 1976 page 352.

Counsel challenged strongly the trial Judge's finding of fact that the principal sum of each promissory note was made up as the plaintiff said it was. How could he so find, Counsel asked, on the detailed evidence given in January 1982, when the plaintiff himself in his pleadings (his original reply to the defence and counterclaim dated June 1977 and his amended reply of April 1981) had stated that, as he had kept no record of the transactions and because of the passage of time, he could then give no particulars as to how the amounts in the notes were made up? His evidence at the trial, it was submitted, was either false or unreliable. It is not for this Court to give the correct answer to the question. It is to be noted, however, that the details in respect of the promissory notes were all given during cross-examination, some of which appeared on a memorandum (dated 3rd April 1973, signed by the plaintiff and relating to the note of that date for $86,100) and on the back of that note itself as particulars for the promissory note for $120,000, both the memorandum and a photocopy of the note having been shown to the witness and tendered by Counsl for the defendant. It might well have happened that to some extent the plaintiff's memory was aided by these two documents. And it is to be noted further that the plaintiff was never asked in the witness-box to explain his clearer recollection at the trial. These two points might reasonably be regarded as tending to weaken whatever force the argument might have had.

Counsel also argued, how could the Judge find that the alleged

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cash advances of $7,000, $10,000 and $20,000 or $25,000 (said to be included in the promissory notes) were made in the absence in evidence of any of the returned cheques or other supportive proof? Such evidence, it was submitted, was unsafe to act on. If these sums were excluded it would mean that interest far exceeding 12½ percent per annum was charged on some if not all of these promissory notes. But here it must be considered that the plaintiff said in evidence that one cheque issued to the defendant prior to the note for $66,300 on 23rd May 1972, included in it and returned to him after the defendant had cashed it, he could not find and that the others were left with his lawyer, presumably Sir Dennis Henry. He was not asked what (if any) efforts had been made by him to get them back for the hearing, and the trial Judge clearly accepted his explanation for their non-production.

As regards the promissory note and the mortgage for $155,000 at 3 percent per annum, Counsel asked a third question: why was such a low rate (not 10 or 12½ percent) charged? Counsel submitted that the only reasonable explanation for this was that it was a concession on account of the excessive interest (exceeding 12½ percent) charged in the earlier three transactions. However, the plaintiff's evidence was that the interest he charged varied, for mortgages he charged 2½ percent to 3 or 4 percent as the debt was secured; while as regards ordinary promissory notes it ranged from 5 to 12½ percent; also, in the case of a mortgage he would take into account that "he is re-borrowing interest". Further, the defendant himself in his own evidence did say that for mortgages the plaintiff charged 2 or 2½ or 3 percent.

These were the main arguments on the disputed facts they involved, both here and in the court below. It is plain that these reasons advanced for disbelieving the plaintiff on those matters, fall far short of what is required to entitle this Court to reverse the findings of fact of the trial Judge, who, favourably impressed by him in the

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witness-box, accepted the plaintiff as truthful and his evidence as reliable, in spite of these criticisms which were drawn to his attention. So those findings of fact must stand. The interest charged never exceeded 12½ percent. Clearly then there would be no basis for the claim for adjustment of the capital or interest of the mortgage under Section 3 of the Moneylenders Ordinance 1915. Consequently, the appeal so far as it relates to the trial Judge's refusal of such relief, must fail. I myself have not checked the mathematical calculations. But Counsel for the defendants before us conceded that, if the plaintiff's evidence stood, the interest in fact charged in the earlier transaction would not have exceeded 12½ percent. I am content to accept his arithmetic.

But there is the claim for relief based on charges of compound interest. Plainly, the plaintiff's own evidence and the trial Judge's findings of fact involved this, and relatedly, the turning of interest into principal bearing interest. Authorities cited earlier show that compound interest could be charged legally by agreement express or implied. The rationale was stated in Conway v. Shrimpton at page 617 where Lord Chancellor Cowper said -- "It would be very unreasonable that this sum (interest in arrears) should not carry interest according to the agreement, when, if the money had been paid as it ought, it would have produced interest in another place." Here, the evidence the trial judge accepted proved on a balance probability that the payment of interest upon interest was not originally stipulated and would have been agreed on as regards every transaction, after the interest on the previous one fell due and in arrears; similarly, as regards turning interest in arrears into principal bearing interest in turn. Indeed, the defendants never pleaded not did their Counsel even submit otherwise. What Counsel appeared to have assumed was that interest upon interest was and is never allowable. But plainly, as we have seen, this is not so either at common law or in equity. And there are in Grenada no statutory provisions prohibiting such

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contractual arrangements.

As a matter of fact the trial judge dealt with those two matters differently. He ruled that no question of interest upon interest was involved, but that every new promissory note and the mortgage debt represented a fresh loan to the defendants. With respect, I cannot agree with the first part of this ruling which was in the teeth of the plaintiff's own evidence and is plainly wrong. But as regards the second part, the trial judge probably had in mind the authorities to the effect that, where principal and interest are in arrears on a prior promissory note, and that indebtedness though in fact unpaid is treated as paid off and discharged and a new note made for this unpaid sum payable by instalment with interest (B.S. Lyle Ltd. v. Chappell (1931) 48 T.L.R. 119) or the unpaid sum is added to a further advance and a new note made for the total with interest, (Lancashire Loans Ltd. v. Black (1933) All E.R. Rep. 201), in either case, the new transaction is properly and legally regarded as a fresh loan.

These cases were decided under the Money Lenders Act (U.K.) 1927 and an issue in each one was, whether the statutory memorandum of the new contract stated its true nature. In Lyle v. Chappell the parties did this actually: the moneylenders (Lyle Ltd.) wrote out a cheque for the arrears in favour of the borrower, who then indorsed and handed it back, so that it was ultimately deposited into the company's bank account. This, the Court of Appeal held, was not necessary. Lord Justice Scrutton said at page 120: "When the time for payment of the original loan has expired without complete repayment and the time for repayment is extended on altered terms, there is a fresh loan"; and Lord Justice Green at page 121: "It seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards." The pivot of the rulings in that case and the later one of Lancashire Loans Ltd. v. Black appears to be that the original debt, be it of interest only or of principal and interest is deemed to have been satisfied or discharged by payment. If in fact the sum

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owed was first advanced to the borrowers on a promissory note charging interest, who then in fact paid it back to the lender, plainly the advance would be a fresh loan; so, if, instead of doing it that way, the lender just marked the earlier note as "paid" or "settled" and the borrower just signed a new promissory note for the said sum that was due on the old one (or with an additional advance) payable with interest, the result being the same, there would still be, at least notionally, a fresh loan. So I am not prepared to dissent from the trial Judge's description by analogy of the relevant transactions in this case as fresh loans, although they do involve the charging of compound interest and the turning of interest in arrears into principal bearing interest in turn. But, in any event, on the facts the trial Judge found, which there are no good reasons to disturb, no relief could properly have been granted to the defendants on this latter ground only, either at law or in equity.

However, as I understand his case, Counsel also relied on this ground to an appreciable extent as important evidence forming part of the proof that the mortgage transaction was harsh and unconscionable and so was sufficiently unconscientious to warrant the intervention of a Court of Equity either to set it aside or to modify or adjust payment under it. But, as some of the Chancery cases already cited in this judgment show, compound interest was allowed in equity as it was in law in similar circumstances, as well as the capitalisation of arrears of interest. This consideration, if it does not totally destroy its alleged probative value as an unconscientious feature of an unconscionable bargin, must, at least, reduce it considerably. The rest of the evidence relied on under this head can be dealt with just as briefly. There was the evidence led to prove excessive interest charges otherwise. Counsel relied particularly strongly on the defendant Thomas' testimony that, between the transaction of 24th October, 1974, (the promissory note for $120,000 and the mortgage for $155,000 on 12th September, 1975, no further money was loaned, so that

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the $35,000 was purely interest charged on the $120,000 for a period of only a few days over ten months and a half. Even if this was so and the interest there was excessive, again, as the chancery cases show, Equity never interfered merely on that ground. In any event, the trial Judge disbelieved this evidence and accepted the plaintiff's different version that a further advance was made between those two dates. And he disbelieved also all the other evidence for the defence which could possibly be operative to bring the case within or to the degree of unfairness, over-reaching, undue advantage or coercion bespoken in Neville v. Snelling. He disbelieved the evidence of the defendant Thomas that the plaintiff told him he "had" to pay 25% interest on the capital debts of the Corinth and La Tante mortgages (included in the $66,300); "demanded" a renewal of the promissory note for $86,000 which renewal he signed "unwillingly" for $120,000 because he felt "something was wrong"; that, "like a raging lion", the plaintiff "demanded" the La Sagesse Estate as security when the $120,000 promissory note was not met on the due date; and that he signed the mortgage indenture "unwillingly" when he was feeling "extremely sick" after he was injured by a fall following upon a diabetic coma just so as "to get away from the plaintiff" and had told both the plaintiff and Sir Dennis Henry "to do what they liked".

There was no disparity of age or of education or of business experience between the plaintiff and the defendant Thomas; and the latter gave no evidence of any circumstances of financial stress or other situation of such pressure known to the plaintiff, as could reasonably have reduced him to such a state of inequality as Equity might recognise as a basis for relief. If the plaintiff insisted on a higher rate of interest, or on the immediate renewal of an earlier promissory note if it was not met promptly when due, or on compensation for the further loss of the use of his money by way of interest on arrears for so long as he had to wait for payment of it, or on real security for the defendants continued substantial indebtedness, was

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this unconscientious or unconscionable? Was it anything more than ordinary business practice or hard business approach, if one prefers so to describe such action? Was each transaction at the highest anything more than an improvident or foolish deal (if so at all) by a man of full age, and fully capable of taking care of himself, in which there was no fraud or unfair dealing, just as it was in Webster v. Cook (supra)?

These and maybe other questions might have had to be answered if the trial Judge had believed the defendant Thomas' evidence on the material points. Speaking for myself, I have some doubts about the sufficiency of the defendant Thomas' evidence, even if believed, to justify relief in equity. But then it is not necessary to decide whether this is so or not, in the circumstances of this appeal. So far as it relates to the dismissal of the defendant's claim to equitable relief, the point fails.

As a result, this appeal must be dismissed with costs to the plaintiff (respondent) both here and in the Court below.

.....
(J. O. F. Haynes)
PRESIDENT, COURT OF APPEAL.

I concur.

.....
(N. Liverpool)
JUSTICE OF APPEAL.

I also concur.

.....
(F. G. Smith)
JUSTICE OF APPEAL.

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