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SUPREME COURT OF VICTORIA — COURT OF APPEAL

WALTONS CREDITS LIMITED v LANE

Crockett, Byrne and Harper JJ

26 October, 6 November 1992 — [1992] ASC 57,976

CIVIL PROCEEDING – CONSUMER CREDIT – MONEY LENDER – CONSUMER IN ARREARS WITH REPAYMENTS – VISIT BY EMPLOYEE OF MONEY LENDER – RE-FINANCING AGREEMENT SIGNED – AGREEMENT TO PAY AMOUNT OWING PLUS STAMP DUTY AND INTEREST – WHETHER AGREEMENT A "BORROWING OF MONEY" – WHETHER EMPLOYEE AN "AGENT" – WHETHER AGREEMENT ILLEGAL: *MONEY LENDERS ACT* 1958, S25(3).

Section 25(3) of the *Money Lenders Act* 1958 ('Act') provides;

> "No money lender or any other person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money lender..."

1. Where an employee of WC Ltd (a money lender) visited L. and obtained agreement to enter into a Re-financing Agreement to repay arrears plus stamp duty and interest—

(a) the agreement on its proper construction amounted to the making of a loan and a "borrowing of money from a money lender"; and

(b) the employee was an "agent" of the money lender.

2. Accordingly, the agreement breached the prohibition in S25(3) of the Act and was not enforceable.

THE COURT: [1] The respondents (who are husband and wife) on 8 September 1980 entered into a re-financing agreement with the appellant – a licensed money lender. The amount re-financed was $2,911.22. After taking into account stamp duty and interest the total sum to be paid by the respondents was $4,953.60. This sum was repayable by 258 weekly instalments of $19.20. The respondents having allegedly fallen into arrears, a proceeding was commenced in the Magistrates' Court Melbourne by the appellant on 1 November 1989. The claim was for $1,215.37 said to be owing pursuant to the terms of the re-financing agreement. The hearing took place on 15 February 1990. Later that month the magistrate dismissed the claim. He gave written reasons for his decision.

The ingenuity of the respondents' counsel enabled him to allege fatal contravention by the appellant of no fewer than six enactments. They were the *Money Lenders Act* 1958, the *Consumer Affairs Act* 1972, the *Stamps Act* 1958, the *Credit Act* 1984, the *Credit Administration Act* 1984 and the *Trade Practices Act* 1974. Requests for particularisation of the alleged contraventions led to the abandonment of reliance upon the terms of the latter three statutes. However, the respondents in the meantime managed to add the *Limitation of Actions Act* 1958 to the list. The proceeding may be fairly described as technical in nature.

In the event, the magistrate relied only upon the defence resting upon the *Money Lenders Act* in order to find for the respondents. He held that the transaction was **[2]** governed by the terms of that Act and, further, that it breached the prohibition to be found in s25(3). That sub-section (*inter alia*) provides that -

> "No money lender or any other person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money lender ..."

That finding of the magistrate brought ss(6) into play. That provision is in these terms:

> "Where it is shown that a money lending transaction entered into was brought about by a contravention of or a failure to comply with the provisions of this or the next succeeding section (whether the person

> offending has been convicted thereof or not) the transaction shall, notwithstanding that the money lender was duly licensed, be illegal in so far as it provides directly or indirectly for the payment of any interest, unless the money lender proves that the contravention or failure occurred without his consent or connivance."

As the magistrate found that the principal had "well and truly" been paid in respect of money borrowed by the respondents at the invitation of the appellant's agent or canvasser, it followed, so he held, that the transaction related at the time of the issue of proceedings solely to the payment of interest and so was illegal. Accordingly the claim was dismissed. Being aggrieved at this result the appellant pursuant to s109 of the *Magistrates' Court Act* 1989 sought from and was granted by Master Barker leave to appeal to the Supreme Court on questions of law. Those questions as formulated were twofold, viz.:

> "(1) Was the learned Magistrate wrong in law in finding that the Re-Finance agreement was a borrowing of money within the provisions of Section 25(3) of the *Money Lenders Act* 1958? **[3]**
>
> (2) Was the learned Magistrate wrong in finding that the Appellant's agent was 'an agent or canvasser for the purpose of inviting the Respondents to borrow money' or to enter into any transaction involving the borrowing of money from the Appellant?"

The appeal was duly heard and determined by a judge in this court. The judge answered both questions of law in favour of the respondents. Accordingly the appeal was dismissed. It is from that order of dismissal that the appellant now appeals to the Full Court pursuant to s10(2) of the *Supreme Court Act* 1986. It is thus for this court now to determine whether his Honour was correct in answering the two questions as he did.

From his reasons for judgment it appears that his Honour, when dealing with the first question of law, concluded that it was open to the magistrate to find that the original loan was discharged by the re-financing agreement and that a new agreement was entered into and that under that new management they were to be treated as having borrowed the principal referred to in the agreement. It would follow that that agreement was a transaction that involved the borrowing of money.

With regard to the second question his Honour held that it was open to the magistrate to find (as he did) that the Re-Financing Agreement was entered into at the invitation of a person acting on behalf of, i.e. the agent of, the appellant.

The grounds upon which the appellant seeks to rely in support of the appeal now before us have been expressed as follows: **[4]**

> "1. The learned Judged erred in law in concluding that it was open to the Magistrate to conclude that the Respondents had, by entering the Re-Finance Agreement of 8 September 1980 ('the Re-Finance Agreement') borrowed money from the Appellant, or entered into any transaction involving the borrowing of the money from the Appellant, within the meaning of s25(3) of the *Money Lenders Act* 1958 ('the Act') when:
>
> (a) There was no, or no sufficient, evidence before the Magistrate or the learned Judge or any borrowing (within the meaning of that sub-section), or of any transaction involving the borrowing (within the meaning of that sub-section), of money from the Appellant when the Re-Finance Agreement was made or at any time thereabouts.
>
> (b) The only evidence relied on by the learned Judge in concluding that the Respondents had been invited to borrow money from the Appellant, or to enter into a transaction involving the borrowing of money from the Appellant, was the Re-Finance Agreement which, however, neither constituted nor evidenced any such borrowing or transaction and the learned Judge thereby erred in law in arriving at his said conclusion.
>
> 2. The learned Judge should have found, and erred in law in not finding, that the Re-Finance Agreement was not, and was not on its proper construction or operation capable of constituting, a borrowing of money or transaction involving the borrowing of money (within the meaning of that sub-section).
>
> 3. The learned Judge erred in law in concluding that it was open to the Magistrate to find that an employee of the Appellant was an agent or canvasser for the purpose of inviting the Respondents to

borrow money, or to enter a transaction involving the borrowing of money, from the Appellant, when:
(a) the only evidence before the Magistrate, and the learned Judge on appeal, was that the relevant person was— **[5]**

(i) a member of the Appellant's staff employed to collect instalment payments and to arrange re-scheduling of existing terms of payment agreements;

(ii) a traveller who collected payments, visited with catalogues, and from time to time invited the second Respondent to enter agreements to finance purchases;

(b) there was no, or no sufficient evidence before the Magistrate or the learned Judge of any borrowing of money, of any transaction involving the borrowing of money, of any invitation, or of the employment of any agent or canvasser within the meaning of, or for any of the purposes referred to in sub-section 25(3) of the Act.

4. The learned Judge erred in law in concluding, and there was no evidence or no sufficient evidence to conclude, that an employee or an employee traveller of the Appellant was:-
(a) an agent or canvasser employed for either of the purposes referred to in sub-section 25(3) of the Act; or

(b) an agent or canvasser within the meaning of that sub-section."

The starting point for an examination of the questions submitted to his Honour and his answers to them must be the Re-Finance Agreement itself. It is in the form of a printed offer addressed to the appellant for acceptance by it should it approve the offer. The printed terms are seven in number and are as follows:

"1. I/We acknowledge my/our indebtedness to you for the amount shown below as 'Amount to be Re-Financed', being the total of the amounts owing by me/us under my/our account(s), as set our below, and that in terms of the contract(s) under which such indebtedness arose the Amount to be Re-Financed **[6]** is presently payable on demand by you.

2. (a) I/We hereby offer to pay you the Principal (being the amount to be Re-Financed plus the Stamp Duty shown below) and interest, as referred to below.
(b) I/We will pay you interest on the Principal outstanding from time to time at the rate shown below.
(c) I/We will pay you consecutive weekly instalments of the amount shown below as 'Weekly Instalment' firstly in satisfaction of accrued interest and secondly in repayment of the Principal. The first of such weekly instalments shall be paid within one week from the date of the making of the Loan and subsequent instalments on the same day of each consecutive week until the whole of the Principal and interest has been fully paid. For the purposes of the *Money Lenders Act* 1958 (as amended) the 'date of the making of the Loan' shall be the date shown below.

3. This offer may be accepted by the signature below of any employee of Waltons Credits Limited and such acceptance shall bind you to accept payment of the 'Total' by the said instalments, subject to Clause 4 below.

4. In the event of default in payment on the due date of any instalment or part thereof:
(a) At your option the whole of the balance of the Principal remaining unpaid shall become immediately due and payable.
(b) I/We shall pay to you interest in the sum in default from the date of default until the sum is paid at a rate not exceeding the rate payable on the Principal apart from any default.

5. We, the abovenamed, shall be jointly and severally liable hereunder.

6. A certificate purporting to be signed by the Secretary or any Director of Waltons Credits Limited as to the fact and date of acceptance of this offer shall for all **[7]** purposes be prima facie evidence of such facts.

7. I/We acknowledge that this Note or Memorandum was signed by me/us before the making of the said Loan."

Apart from details of names and dates which were completed on the document and to which no further reference need be made, there are additionally set out in the document what are described as "Details of Account(s) to be Re-Financed". They appear in the document in the following form:

Type	No.	Balance as at 31/7/80	Rebate Allowed	Balance to be Re-Financed
AD	34	2978.88	76.66	2911.22

Amount to be Re-Financed		2911.22
Stamp Duty		61.13
(Sub-Total) Principal		2972.35
Interest Rate 27 per centum	(simple) calculated to amount to	1981.25
	Total:	4953.60

Weekly Instalment 19.20 Term in Weeks 258

The details in the boxes have been handwritten and were, of course, supplied by the appellant's representative. The principal relevant oral evidence which was not in dispute before us was to the effect that -

> (i) the respondents' offer to enter into a re-financing agreement was procured from them at their home by an employee of the appellant who called on behalf of the appellant regularly at the home of the respondents; **[8]**
>
> (ii) the duties of that employee which he was employed to discharge included collection of instalment payments due to the appellant and arranging from time to time the re-scheduling of existing terms payments agreements;
>
> (iii) the usual practice was for the appellant's staff upon arranging a signature to a re-financing agreement to hand forthwith to the customer a copy of that agreement.

The critical question is whether s25(3) has been contravened by the appellant. The appellant addressed two arguments which are those raised in the questions before the primary judge. First, that neither the Re-Finance Agreement nor its implementation was a "borrowing of money" within the meaning of s25(3). Second, that the prohibition contained in that sub-section is not directed to employees.

In support of its first submission the appellant has contended that the re-financing agreement did no more than extend the time for repayment of an existing loan and that no new borrowing of money was involved despite the fact that interest and stamp duty were added to cover the extension. It was pointed out that nothing in the Act deems the re-financing agreement to operate other than according to its terms and that it was not open to the judge to hold as he did that the respondents should be "treated" as having borrowed the principal referred to in the re-financing agreement.

[9] The appellant also relied on the purpose of the enactment. This, it was said, was to ensure that borrowers were adequately informed of the terms of the loan and of the provisions of the Act which protect borrowers. "Loan", "lend" and "lender" are widely defined and would encompass a transaction to extend payment of an existing loan, even on different terms as to payment. However, there is, it is said, no definition of "borrower". It ought, therefore, be given its ordinary meaning: *Rees v Regent Insurance Ltd* [1963] VicRp 76; [1963] VR 570 at 577. It can be seen, so it was argued, that s25(3) is concerned with canvassing for new business, not the extension or re-arrangement of existing loans. For example, the expressions "invite" or "enter into" suggest a relationship to new loan transactions rather than transactions involving existing loans or mere extensions. So, too, should the terms "borrow" and "borrowing" be construed. The "borrowing" referred to in the sub-section is prospective and does not include money originally borrowed. It was also said that the re-financing agreement contained merely a substituted promise for the repayment of the very money which had already been advanced. Finally, the provision being penal (see ss(5) of s25), it should be strictly construed.

We are unpersuaded by those contentions. We are clearly of opinion that an examination of the terms of the agreement itself establishes that the arrangement between the parties was one for the borrowing by the respondents of moneys or amounted to the entry into a transaction involving the borrowing of the moneys from the appellant.

[10] It is, we think, obvious from the nature of the agreement that it must have introduced provisions significantly different from those of the original agreement. This would particularly be so in relation to the period over which repayments were to be made and the amount of the instalments. At all events the failure of the appellant to prove the terms of the previous agreement allowed the magistrate to find that the variation was not limited to an extension of time for repayment of the loan. Moreover, it is apparent from the agreement that what is to be re-financed by it is not merely the balance of the then indebtedness but the sum owing plus stamp duty and interest. There clearly could not have been any obligation pursuant to the earlier agreement to pay that stamp duty or that interest sum.

We are of opinion that clause 2(c) of the Re-Finance Agreement places the matter beyond doubt. By that clause it is provided that the "date of the making of the loan" shall be the date shown on the agreement, i.e. the date of the making of the Re-Finance Agreement. Then the payment of the weekly instalments of $19.20 is to commence from the making of the loan. The loan to which those repayments relate must be that constituted by the agreement, that is to say a "new" loan. In truth the agreement on its proper construction amounted to the making of a loan to the respondents to enable them to repay their indebtedness under the original agreement. Consistently with this construction the appellant's "statement of charge account" (the weekly ledger entries in relation to the respondent's account with **[11]** the appellant) which was received in evidence in the Magistrates' Court treats the transaction as one of a new loan with the original agreement for loan being treated as having been discharged. This interpretation is further confirmed by clause 7. *Ex hypothesi* by its term, the reference to "the said Loan" in that clause must, in our opinion, be a reference to a loan made by the re-financing agreement. Cases such as *BS Lyle Ltd v Chappell* [1932] 1 KB 691; [1931] All ER 446 and *Roberts v IAC (Finance) Pty Ltd* [1967] VR 231; [1967] VicRp 26; upon which the appellant relied are, we think, distinguishable on their facts.

We also think that the validity of the conclusion to which we have come can be demonstrated, as the respondent's counsel suggested it could, by asking the question – what rights and obligations in relation to the initial contract of loan existed after the entry by the parties into the Re-Finance Agreement? Clearly there were none as the terms of the latter contract make plain. If that is so then the later agreement did amount to a "borrowing of money from a money lender".

The second question with which this appeal is concerned is whether the evidence established that the re-financing was entered into at the invitation of an agent or canvasser employed by the appellant (or any person on its behalf) for that purpose.

The appellant submitted it was not so established. It was said that this was so as the appellant's employee was neither an "agent" nor a "canvasser" within the meaning of s25(3). This argument was put on two bases. First, that, **[12]** as a matter of construction, only representatives of a money lender who were not employees were caught by the prohibition. Second, the alleged representative, in any event, was not employed for the purpose of inviting a person to borrow money. In this connection it was maintained that the evidence failed to establish that he was employed for that purpose his role being confined to the sale of goods, and the collection of payments. Without going to the specific passages in the evidence it is sufficient for us to say that we consider that the evidence was sufficient so as to sustain the finding that the person in question was employed for the purpose of inviting the respondents to borrow money and that is what he in fact did. This additional argument raised by the second question is unsustainable. The primary point raised by that question rested for its success upon an examination of certain of the terminology to be found in s25 of the Act.

The argument of the appellant may be summarised as follows. Money lending is a lawful activity. A money lender must, in many cases, conduct this activity by inviting the public to borrow money: see s25(1). This will of necessity often be achieved by using the services of a representative. On its face the prohibition contained in s25(3) is not limited in terms of location. If "agent" were to be given its ordinary grammatical meaning the prohibition would effectively strike at a lawful commercial activity. The mischief with which the prohibition is concerned is that of anonymous representatives inviting the public to borrow money from money lenders whose identity is **[13]** concealed. This objective is best achieved by reading down the word "agent" so that it extends to representatives, but not to employees strictly so-called, of the money lender.

We are unable to accept this submission. Section 25 which was enacted in Victoria in 1938 was taken from the English *Money Lenders Act* 1927. Each of these statutes included a section which imposed very severe restrictions upon the soliciting of business by a money lender. Sub-section (1) prohibits unsolicited advertising circulars. Sub-section (2) restricted the content of advertising by a money lender in newspapers, magazines, handbills, or other printed paper, or by wireless telegraphy, cinematograph or lantern slides. Sub-section (3) prohibited invitations by agents or canvassers. Although sub-s(2) has been repealed and sub-s (1) has been redrafted, the scheme of the legislation is evident. We see nothing in it to suggest that it was directed to the mischief described by counsel for the appellant. Moreover, if it were, we do not see the adoption of the legal distinction between an employee and an independent contractor or other agent as meeting it. It should be noted that a consequence of the acceptance of counsel's argument would be that the word "agent" in line two of the provision under consideration would have a meaning different from that which it has in line ten. Although this latter part was introduced by amendment in 1946, we think that the draftsman would have intended such a result.

We think that there is no justification for drawing a distinction between those of a money lender's **[14]** employees who are "staff" and those who might not be so describable. The distinction is too fine and, if intended by the legislature, might have been expected to have been the subject of indisputable clarity of expression. This is particularly so when one who has offended against the section's prohibition is guilty of a criminal offence. It is unnecessary to determine whether the employee was a "canvasser". We are inclined to think that he was. He was a "door to door salesman". See *General Accident Fire and Life Insurance Corporation Ltd v Commissioner of Pay Roll Tax* (1982) 42 ALR 365; [1982] 2 NSWLR 52; (1982) 56 ALJR 775; (1982) 2 ANZ Insurance Cases 60-484; 13 ATR 372. However, we are satisfied that the employee was certainly an agent. This conclusion is sufficient to dispose of the second question also adversely to the appellant. The appeal is dismissed.

APPEARANCES: For the appellant/plaintiff Waltons Credits: Mr G Ritter, QC with Mr M Lapirow, counsel. Lewis Walker, solicitor. For the respondents/defendants Lane: Mr J Larkins QC, counsel. Geelong Community Legal Service Inc.
