1968

*May 14, 15, 16, 17 June 24

SIDMAY LIMITED, G.B.L. HOLDINGS LIMITED, ALDERSHOT APARTMENTS LIMITED, DUNDAS TERRACE APARTMENTS LIMITED, BLACK DUKE INVESTMENTS LIMITED, JOSEPH M. GORDON and BERNARD BENJAMIN (*Plaintiffs*) ..... APPELLANTS;

AND

WEHTTAM INVESTMENTS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Corporation engaged in business of lending money on security of real estate not registered under Act—Validity of mortgages—The Loan and Trust Corporations Act, R.S.O. 1960, c. 222, s. 133(1).

The defendant was a small corporation, incorporated by letters patent under *The Corporations Act,* 1953 (Ont.), c. 19. The objects and powers of the company as set out in its letters patent included owning and dealing in mortgages of realty. It was declared to be a private company with the number of shareholders limited to fifty. At no time did it issue securities or debentures or accept money on deposit or borrow money on the security of its property. The defendant did not limit its investments to first mortgages nor was it concerned that any loan made by it should not exceed two-thirds of the value of the land mortgaged.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

The defendant was not registered under *The Loan and Trust Corporations Act*, R.S.O. 1960, c. 222, but was registered at all relevant times under *The Mortgage Brokers Registration Act*, R.S.O. 1960, c. 244.

Although there was evidence that the defendant was engaged in the business of lending money on the security of real estate there was no evidence that it was doing anything else which could be regarded as carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act* or that it ever held itself out to be a loan or trust corporation within the meaning of that Act.

In an action brought by the plaintiffs for a declaration that a certain mortgage made by the first plaintiff to the defendant and that certain other mortgages collateral thereto were void and unenforceable, the trial judge held that the defendant was carrying on the business of a loan and trust corporation contrary to *The Loan and Trust Corporations Act* and that the effect of that Act was to render the prime mortgage and the collateral mortgages null and void. He decided that no term as to repayment of the moneys advanced could be imposed on the plaintiffs and made the declaration for which they asked. On appeal, the Court of Appeal allowed the appeal and directed a reference to determine the amount owing by the plaintiffs to the defendant under the said mortgages. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The defendant company was not at the relevant times transacting the business of a loan corporation in contravention of s. 133(1) of *The Loan and Trust Corporations Act* and that Act did not invalidate the impugned mortgage.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal dismissed.

Hon. R. L. Kellock, Q.C., and *W. M. H. Grover*, for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *S. G. M. Grange, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a unanimous judgment of the Court of Appeal[1] allowing an appeal from a judgment of Grant J. and directing a reference to the Master at Toronto to determine the amount owing by the appellants to respondent and that in all other respects the action be dismissed.

There is no dispute as to the relevant facts.

[1] [1967] 1 O.R. 508, 61 D.L.R. (2d) 358.

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SIDMAY LTD. et al. v. WEHTTAM INVESTMENTS LTD.

Cartwright C.J.

By an agreement dated May 5, 1964, Sidmay Limited, Gordon and Benjamin agreed to borrow from the respondent the sum of $308,250 on the security of lands in Burlington. This was short-term financing to enable the construction of maisonnettes pending the arrangement of long-term mortgage financing. The term of the proposed mortgage was six months from May 1, 1964, and interest was to be calculated monthly at the rate of 12 per cent per annum on the whole of the loan amount, to be payable at the time of each advance notwithstanding that the total loan amount had not been advanced. Pursuant to the said agreement the plaintiff Sidmay Limited executed and delivered to Wehttam the mortgage in question in this appeal. It is dated May 8, 1964, and contemplates the advance of $308,250. It provides for payment of interest at 12 per cent per annum monthly on the whole of the principal amount. The mortgage contains a covenant by the mortgagor to pay and also a guarantee by the plaintiffs Gordon and Benjamin to pay the amount loaned. Moneys were advanced under the mortgage by the mortgagee to the mortgagor or to third persons on the direction of the mortgagor. There is a disagreement between the parties as to whether the full amount of $308,250 was advanced but this question will be determined on the reference directed by the judgment of the Court of Appeal.

The appellants or some of them also executed and delivered to the respondent the following mortgages as collateral security for payment of the mortgage for $308,250 referred to above:

(a) Collateral mortgage Black Duke Investments to the respondent dated June 5, 1964;

(b) Collateral mortgage from G.B.L. Holdings Limited to the respondent dated August 5, 1964;

(c) Collateral mortgage from Dundas Terrace Apartments Limited to the respondent dated August 5, 1964;

(d) Collateral mortgage from Aldershot Apartments Limited to the respondent dated August 11, 1964.

The respondent was incorporated on July 10, 1956, by letters patent under *The Corporations Act,* 1953 (Ont.), c. 19. The objects and powers of the respondent as set out in

its letters patent include owning and dealing in mortgages of realty. It was declared to be a private company with the number of shareholders limited to fifty. The respondent is a small corporation; except for a qualifying share held by a Mr. Gotfrid all its shareholders are members of the family of one Matthew Elman. At no time did it issue securities or debentures or accept money on deposit or borrow money on the security of its property; it did not advertise; its business was carried on from Mr. Elman's residence.

The respondent did not limit its investments to first mortgages nor was it concerned that any loan made by it should not exceed two-thirds of the value of the land mortgaged.

The respondent was not registered under *The Loan and Trust Corporations Act,* R.S.O. 1960, c. 222, but was registered at all relevant times under *The Mortgage Brokers Registration Act,* R.S.O. 1960, c. 244.

Although there was evidence that the defendant was engaged in the business of lending money on the security of real estate there was no evidence that it was doing anything else which could be regarded as carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act,* or that it ever held itself out to be a loan or trust corporation within the meaning of that Act.

The statement of claim delivered by the appellants is a lengthy document but, in view of a reference having been directed to ascertain the amount owing on the mortgage and the claim that the mortgage transaction is unconscionable having been withdrawn, the claim requiring consideration is pleaded as follows in paras. 24 and 25 and clause (a) of the prayer for relief in the statement of claim:

> 24. The plaintiffs further allege that the said mortgage referred to in paragraph 6 and the said collateral mortgages referred to in paragraphs 10, 11 and 15 hereof were taken by the defendant in the course of carrying on the business of lending money on the security of real estate, which the said defendant was prohibited from carrying on by virtue of the provisions of *The Loan and Trust Corporations Act,* R.S.O. 1960, chapter 222 and the plaintiffs allege that the said mortgages are accordingly void and unenforceable.
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> 25. The plaintiffs plead the provisions of sections 1(h), 2, 133 and 161 of the said *Loan and Trust Corporations Act* and sections 1(f), 2, 3 and 340 of *The Corporations Act,* R.S.O. 1960, chapter 71.

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Cartwright C.J.

THE PLAINTIFFS THEREFORE CLAIM:

(a) a declaration that the said mortgage from Sidmay Limited to the defendant dated the 8th day of May, 1964 and the said collateral mortgages are void and unenforceable;

Grant J. held that the defendant was carrying on the business of a loan and trust corporation contrary to *The Loan and Trust Corporations Act* and that the effect of that Act was to render the prime mortgage and the collateral mortgages null and void. He decided that no term as to repayment of the moneys advanced could be imposed on the plaintiffs and made the declaration for which they asked in clause (a) quoted above. He made no order as to costs.

The Court of Appeal held that the defendant was not carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act* and that in any event the effect of that Act was not to render the mortgages invalid. The Court of Appeal went on to express the opinion that if the mortgages were held to be illegal and void the declaration asked for by the plaintiffs should not in any event be made except on the condition of the payment back to the defendant by the plaintiffs of the moneys advanced by the defendant.

Kelly J.A. after a careful review of many decisions and of the history of the statutes which may be regarded as the predecessors of *The Loan and Trust Corporations Act*, hereinafter referred to as the Act, came to the following conclusions:

1. That the defendant was not at the relevant times transacting the business of a loan corporation in contravention of s. 133(1) of the Act and that the Act does not invalidate the impugned mortgage.

2. That even if it were held that the defendant had contravened s. 133(1), the plaintiffs were not entitled to relief because they are not persons for whose protection the prohibition in s. 133(1) was enacted.

3. That even if the plaintiffs had not been barred from the relief they claimed on the grounds set out in 1 and 2 above the Court should grant them that relief only on the terms that they repay to the defendant the moneys they had borrowed from it.

Wells J.A., as he then was, agreed with Kelly J.A.

Laskin J.A. opened his reasons as follows:

I have had the privilege of reading the reasons for judgment of my brother Kelly and I agree with him that *The Loan and Trust Corporations Act*, R.S.O. 1960, c. 222, does not invalidate the impugned mortgage. I am also in substantial agreement with him on the alternative view that he has taken of the case, but would like to express my own opinion thereon.

I share the view, held unanimously by the Court of Appeal, that the Act does not invalidate the impugned mortgage and I find myself so fully in agreement with the reasons of Kelly J.A. for reaching this conclusion that I am content to adopt them and will not attempt to repeat or summarize them. This is sufficient to dispose of the appeal and consequently I refrain from dealing with grounds 2 and 3 above upon which also Kelly J.A. was prepared to base his judgment. I do not intend by this to cast any doubt upon the validity of his reasons; but while it was desirable for the Court of Appeal to consider these alternative matters in case on a further appeal there should be disagreement as to ground 1 there is now no necessity to consider them.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendant, respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.