Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965) Article 6

4-1-1965

Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 572

R. J. A.

Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 572

Keywords
constitutional law

Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 572.

Introduction

The Supreme Court of Canada has recently considered the validity of the *Ontario Unconscionable Transactions Relief Act*[1] and declared it to be legislation essentially in relation to annulment or reformation of a contract. *A.-G. for Ontario v. Barfried Enterprises, Ltd.*, as the case was originally cited, began as an application under the Ontario Act for relief against the terms of a mortgage for a face amount of $2,250.00 with interest at seven per cent. per annum. The sum actually advanced was $1,432.50, the difference between that amount and the $2,250.00 being made up of a commission of $67.50 and a bonus for $750. The constitutional issue arose for the first time in our Ontario Court of Appeal,[2] when the mortgagee contended that the Act was unconstitutional because it contravened head 19 of Section 91 of the British North America Act, which assigned legislative authority in the field of "interest" to Parliament. Essentially, the decision of Schroeder J.A. was based on a broad interpretation of "interest" in that section. He defined it as including any compensation for the loan. Further, he found that the fundamental object of the Act was "to provide a remedy to a borrower to enable him to have the terms of . . . a contract modified."[3]

Since such a remedy would inevitably reduce "interest" as here defined, the Court of Appeal concluded that the legislation was in pith and substance related to interest and that it was in direct conflict with Section 2 of the federal Interest Act.

Decision

The Supreme Court of Canada attacks this decision on its two major grounds. Judson J., speaking for a majority of the Court, rejects the broader definition of "interest" and considers the legislation, legislation properly in relation to annulment or reformation of a contract.

(i) *Interest within Section* 91(19)

The majority decision proceeds on the finding that all of the items which the Ontario Act mentions as forming the cost of the loan,[4] except discount and interest itself, are not "interest" within Section 91. The Court seeks to substantiate this by pointing to day to day accrual as a touchstone of "interest" as it appears in the

1 R.S.O. 1960, c. 410.
2 [1962] O.R. 1103.
3 *Supra*, footnote 2, p. 1117.
4 Section 1(a) of the Act includes interest, discount, bonus, commission, brokerage fees, premium and dues.

section. Reference is made to a statement of Halsbury[5] which, on closer analysis, appears to support no such proposition.

In order to exclude bonuses from the subject matter of "interest" the Court relies on its earlier decision in *London Loan and Savings Co. v. Meagher*[6] and in *Asconi Building Corp. v. Vocisano.*[7] Judson J., considers that the former case decided that for the purpose of Section 6 of the Interest Act a bonus is not interest. The ratio of Smith J.'s decision in the *Meagher* case is that before the operative portion of Section 6 applies, the mortgage document must, on its face, come within one of the plans of payment there set out. On the actual facts of the *Meagher* decision, the mortgage document contained no reference to the bonus which had been fixed by prior agreement as part of the consideration for the loan. It is an acceptable reading of the case that it stands for the proposition that, for Section 6 to apply, the item which in fact makes up a portion of what is termed "principal" should be mentioned as compensation of one type or another (but not necessarily as interest) in the mortgage document itself. There would then be a blended payment on the face of the mortgage.

The *Asconi* case, according to the Supreme Court, recognized that since the *Meagher* decision, it must be inferred that the Ontario case of *Singer v. Goldhar*[8] relied upon by Schroeder J.A. for the wider interpretation of "interest", must be considered as overruled. Oddly enough, both Kerwin C.J.[9] and Rand J.[10] expressly said that the *Meagher* decision treated bonus as interest for the purpose of Section 6. The decision in the *Asconi* case itself in fact appears only to recognize that for Section 6 to apply, the portion of the alleged blended payments that is not principal must be mentioned in the mortgage document as compensation of some sort.[11]

Even if one concedes that these cases establish that a bonus is not interest for the purpose of Section 6, it does not follow that a bonus is not "interest" with head 19 of Section 91 of the British North America Act. The Interest Act is only a particular use made

[5] The statement in Vol. 27 of the 3rd edn. at p. 7 is that "interest accrues de die in diem even if payable only at intervals . ." This, and the case of *Re Rodgers' Trust* (1860) 1 Drew & Sm. 338, which is given as authority, it is submitted only establish that if what is termed "interest" is payable at intervals only, it is nevertheless an accumulation of each day's interest and accrues de die in diem.

[6] [1930] S.C.R. 378.

[7] [1947] S.C.R. 358.

[8] (1924) 55 O.L.R. 267.

[9] *Supra,* footnote 7, p. 366.

[10] *Ibid.,* p. 369. See also, Kellock J. at p. 372.

[11] The Court reasoned that since the payment of bonus and interest was fixed by prior agreement only, these became debts under the mortgage agreement and part of the principal said to be advanced, so that neither was, as consideration for the loan, secured by the mortgage document. This does not recognize that a bonus is not interest for the purpose of Section 6 but only that a bonus exacted in an agreement collateral to the mortgage document is not secured as such but as principal, by the mortgage itself.

by Parliament of a wider authority.[12] It is submitted that the subject matter of "interest" includes any compensation for the use of money. The term, as Schroeder J.A.[13] pointed out, is "precise and unambiguous and . . . should be expounded in its natural and ordinary sense". The broader definition of "interest" has, in fact, been recognized, both in the federal Money Lenders Act of 1906[14] and by our present Small Loans Act.[15]

This premise of the majority's argument in the *Barfried* decision involves a confusion between interest under the Interest Act and "interest" as descriptive of a federal legislative subject matter under the British North America Act. Moreover, accepting this narrow interpretation of head 19 of Section 91, there would seem to be nothing[16] to prevent the province from legislating on the cost of a bonus (excluding "interest" itself) as such without regard to the element of unconscionability.

Scope of Section 91(19)

Both Judson J. and Cartwright J. conclude that the Unconscionable Transactions Relief Act is valid provincial legislation in relation to civil rights[17] since it deals with reformation of a contract. In the words of Judson J.: "It is not the rate or amount of interest which is the concern of the legislation, but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor." If a bonus is not "interest", this conclusion is somewhat easier to accept. But, apparently, from the language of Judson J., even without this narrower interpretation of head 19 of Section 91, the substance of the Act would have been viewed in the same way. If this legislation is concerned simply with the circumstances surrounding a transaction which might render an amount of interest agreed upon, excessive, it must still be in relation to "interest". Head 19 of Section 91 must include these circumstances just as it includes the stipulation as to amount of interest itself. This legislation, then, to be valid, must be in relation to something other than the conditions which may combine to render an amount of interest excessive. It is submitted that the soundness of the Supreme Court's decision is based upon three propositions:

(1) it depends upon the recognition that the element of unconscionability and the circumstances which are relevant to prove its existence are things apart from the element of excessive cost and the circumstances through which it may be proved;

(2) it must be that the authority to legislate in relation to this element of unconscionability, as so defined, is left with the provinces; and

---

[12] *Supra*, footnote 6, p. 383.
[13] *Supra*, footnote 2, p. 1106.
[14] Statutes of Can. 1906, c. 32.
[15] R.S.C. 1952 c. 251.
[16] The possibility of conflicts of legislation is not here considered.
[17] See *Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96.

(3) for this decision to have any practical validity, there must be a willingness by the courts to search for the element of unconscionability when applying the Act, in circumstances which are relevant.

The first of these propositions it will be convenient to discuss with the third.

Generally it is true that the courts have required, before granting relief under the Ontario Act, both that the cost be excessive and that the transaction be harsh and unconscionable. Beyond this, however, there is considerable doubt, especially surrounding the question as to whether a finding in the circumstances that the cost is excessive, will in itself satisfy the requirement of unconscionability.[18] This unsettled state results from a failure to distinguish between circumstances which give rise to excessiveness of cost and those which have a bearing only on the element of unconscionability. In the English decision of *Carrington's Ltd. v. Smith*,[19] which dealt with the English Moneylenders Act of 1900,[20] it is said that in determining whether interest is excessive, one must consider whether the borrower thoroughly understood the transaction. This factor, it is submitted, should only be relevant to a consideration of unconscionability. The fact that a borrower in one transaction does not understand a particular term, whereas a borrower in another does, should not in itself be grounds for labelling the consideration exacted in the first transaction excessive.

On the other hand, there are decisions[21] which proceed on the basis, for example; that an absence of risk in the mind of the lender may alone be sufficient reason for declaring an agreement to be harsh and unconscionable. The absence of any risk of non-payment and other factors such as the nature of any security given, although they may help to determine excessiveness of cost, should not also be used to label the charging of a usurious interest unconscionable. There are additional circumstances which give rise to the element of unconscionability.[22] This particular type of confusion, in fact, has more disastrous consequences than the kind found in *Carrington's Ltd. v. Smith*. Once the factors which should determine only excessiveness

---

[18] Compare—*Poncione v. Higgins* 21 T.L.R. 11, 12 and *Carrington's Ltd. v. Smith* [1906] 1 K.B. 79, 88.

[19] [1906] 1 K.B. 79 and see *Blair v. Buckworth* [1908] 24 T.L.R. 474, 476.

[20] 63 & 64 Vict., c. 51.

[21] See *Saunders v. Newbold* [1905] 1 Ch. 260.

[22] For the nature of circumstances which may help in determining the issue of unconscionability, see *Part v. Bond*, 93 L.T. 49. Generally, a transaction will be harsh and unconscionable if there is something in the nature of undue influence or unfair advantage exerted or taken by the lender, and which destroys the apparent consent of the borrower; that is, something in the relationship between the two which renders the position of the borrower *vis à vis* the lender, subordinate in some way.

See also: *McCabe v. Jeffrey* (1917) 40 O.L.R. 476; *Stephen Investment Ltd. v. Le Blanc* (1963) 37 D.L.R. (2nd) 346; *Levene v. Greenwood* 20 T.L.R. 389; *Halsey v. Wolfe* [1915] 2 Ch. 330; *Blair v. Buckworth* (1908) 24 T.L.R. 474; *Lewis v. Mills* (1914) 30 T.L.R. 438.

of cost are used to determne unconscionability as well, the latter, as a necessary requisite, is in danger of disappearing altogether.

If this should happen, so much of the Supreme Court's decision as is supported by the proposition that the Ontario statute, even without the narrow definition of "interest", is legislation in relation to civil rights and not in relation to "interest" would be destroyed for all practical purposes. As noted above, regulation of the circumstances of a transaction which may render interest excessive would appear to be within the competence of the federal legislative authority under head 19 of Section 91. Only the determination of unsconscionable conduct on the part of a lender, in charging an excessive amount of compensation, can possibly be regarded as an object of provincial legislation under property and civil rights. This is one reason that the distinction between these two elements of excessive cost and unconscionability must remain. Another is that a failure to recognize the latter as a distinct element may give rise to more far-reaching economic results. Liberal use, or even threatened use, of the Ontario Act, without sufficient attention being given to a finding of unconscionability, might well, for example, involve an interference with the central government's control of credit rates by its operations in the money market. Without the recognition of this element as a distinct requisite of the Act, the practical effect will be that the authority of the Provincial Legislature would seem to be extended to the point where it could do indirectly what it could not do directly by a general fixing of maximum interest rates. Any connection that may exist between the elements of excessive cost and unconscionability, would be more properly stated by the proposition that an excessive cost in particular cases may be evidence of harsh and unconscionable dealing. Martland J., in his dissenting judgment in the Supreme Court, may have had this in mind when he suggests that there may be cases in which "the transaction is harsh and unconscionable because of the excessive cost of the loan". This lack of complete identity between the circumstances necessary to establish both the elements may be important, especially where the cost is excessive but not so excessive as to constitute irrebuttable evidence of unconscionability. Even this would not be a sufficient safeguard however, as there is a possibility that the courts, while purporting to treat excessive cost as only some evidence of unconscionability, will treat it as conclusive proof of the presence of unconscionable dealing.

The solution must therefore be that factors other than those which point to excessive cost must be found before the Act applies. Only if the Ontario Act is so applied as to preserve the factor of unconscionability will the Supreme Court's decision that the element of unfair dealing is at the heart of the Act be justified.

It has already been suggested that a finding that the substance of the Act is essentially of a provincial nature cannot be supported

by an unrealistic separation of the circumstances rendering an amount of interest excessive from the field of "interest".

However, the authority to legislate on the factors which render a transaction unconscionable belongs to the provinces, and is not removed from the field of property and civil rights by inclusion within the subject-matter of "interest". It has been suggested[23] that Parliament might exercise its exclusive legislative authority over the field of "interest" to pass legislation containing provisions to prevent harsh transactions. In other words, Parliament could, in an Act dealing generally with the subject of interest, attempt to prevent transactions which are harsh because of the amount of interest agreed upon. This does not mean, however, that the federal body could legislate on transactions which they might deem harsh for reasons other than excessiveness of compensation. Such legislation is within the competence of the provinces, and it is in this area of reformation of contract that the substance of the Ontario Act will appear to fall, so long as the proper circumstancees are considered in determining the presence of unconscionability.

There is one question left of practical importance. Accepting the fact that the Unconscionable Transactions Relief Act is valid provincial legislation, and that "interest" under head 19 of Section 91 excludes bonuses, does it conflict, or may it conflict in a particular case, with either the Interest Act[24] or the Small Loans Act?[25]

Cartwright J. suggests that "particular cases may arise in which the provisions of the Provincial Act will come into conflict with those of the Dominion (Interest) Act". He foresees a case in which the applicant under the Ontario Act seeks relief from a rate of interest on the amount actually advanced. This would be an accurate prediction if Section 2 of the Interest Act is interpreted as meaning that in no case (unless provided for by that Act or another Act of Parliament) shall a person be prevented from recovering a rate of interest fixed by the parties. It may be that the result of an application of the Ontario Act would be to vary the interest rate only because the transaction was unconscionable (as defined above). However, different purposes of the two enactments for varying interest would not be enough to prevent a conflict in fact.[26] If, though, Section 2 of the Dominion Act concerned only the setting aside of a rate of interest as such without regard to the circumstances surrounding the agreement, there would appear to be no conflict. Such a result might be reached by interpreting the words "agreed upon" in Section 2 to mean that Parliament has found it desirable to provide that only so long as all the requisites for a valid contract as determined by provincial law are present, may a stipulated rate of interest be

[23] See *Lethbridge Irrigation Dist. v. Indep. Order of Foresters* [1940] A.C. 513, 530.
[24] R.S.C. 1952, c. 156.
[25] R.S.C. 1952, c. 251.
[26] See *Att.-Gen. for Can. v. Att.-Gen. for British Columbia* [1930] A.C. 111, 118, and *Royal Trust Co. v. Att.-Gen. for Alberta* [1937] 1 W.W.R. 376, 386.

recovered.[27] Under this interpretation the section would only deal with rates of interest generally and expressly would not cover the field which legislation varying a rate of interest for reasons other than those concerning the rate itself would occupy.

With respect to the possibility of a conflict with the Small Loans Act, no such argument as above is available and in every case where its provisions clash with those of the Ontario Act, the latter will be inoperative to that extent. However, this does not mean that in every transaction where the federal Act applies, the Unconscionable Transactions Relief Act will have no operation. The relevant doctrine of paramountcy of Dominion legislation applies whether the federal legislation with which provincial legislation conflicts, relates, as in this case, to the enumerated classes of Section 91, or is only ancillary to legislation on such subjects.[28] There must, however, be some actual repugnancy or collision between provisions of the two Acts before this result will follow.[29] This is not the case of a field which would otherwise be provincial, having been entirely subsumed under an exclusive federal heading of Section 91. At the beginning, both legislative bodies are on an equal footing so far as the validity of the two pieces of legislation is concerned. It is the fact of existing valid federal legislation which renders provincial legislation either inoperative or *ultra vires*.[30]

Whether this results or not should depend on the actual practical effect of the federal enactment. It is therefore submitted that before the doctrine of the "occupied field" is employed to render the provincial enactment inoperative in a given case, there must be a clash between the two pieces of legislation in an area common to both. The fact that Parliament has occupied a field is only the reason given for declaring provincial legislation inoperative once it is decided that the two enactments collide. This result should not follow simply because Pariament has occupied the field. There may be a conflict in the very terms of the two Acts or it may only be that the provincial Act interferes in some way with the operations of the federal Act, as was the case in *The Reference re The Debt Adjustment Act*.[31] It is submitted, however, that there must be a conflict directly or indirectly before the doctrine of paramountcy applies.

---

[27] This is only one possible interpretation. It is arguable, however, that sections such as the present Section 2, were enacted for the purpose of declaring the Government's policy as regards the old laws on usury. See *Lethbridge Irrigation District v. Independent Order of Foresters* [1940] A.C. 513, 531. That such a purpose existed might, however, be difficult to prove, except from the words of the Act themselves. See: *Att.-Gen. of Canada v. The Readers' Digest Assoc. Ltd.* [1961] S.C.R. 775.

[28] A. H. F. Lefroy: Canada's Federal System p. 123.

[29] See Laskin: Canadian Constitutional Law p. 52, 53.

[30] Whether provincial legislation is rendered inoperative or *ultra vires* depends on whether it is enacted before or after the federal legislation. See *Re Regina v. Dickie* [1955] 2 D.L.R. 757, 776.

[31] [1943] 1 W.W.R. 378.

Conclusion:

These are the major questions raised by the present case. The attempt here has been to define more exactly the scope of the decision and to examine the implications of the constitutional issues considered and the manner in which the Court solves them. The substance of the Unconscionable Transactions Relief Act, as seen by the Supreme Court, is legislation in relation to reformation of a contract. In order to satisfy this characterization of the legislation, it is necessary for the Courts to insist that an applicant under the Act establish unconscionable conduct apart from excessive cost. Only if the Act is so applied will the far-reaching and unintentional implications be avoided and the decision kept within its intended limits.

R.J.A.