

1966 CarswellBC 172, 63 W.W.R. 359, 60 D.L.R. (2d) 495

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Miller v. Lavoie

Miller et al. v. Lavoie et al

British Columbia Supreme Court

Wilson, C.J.S.C.

Judgment: November 30, 1966

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Counsel: *K. S. Fawcus*, for plaintiffs.

*H. Smilie*, for defendants, Lavoie.

*T. W. Wai*, for defendant, Unicom.

*I. L. Robertson*, for defendant, Western Glass Co.

Subject: Contracts; Corporate and Commercial

Construction Law --- Construction and builders' liens — Priorities — Between types of creditors — Prior mortgagees and lienholders — Bona fide mortgage monies.

Creditors and Debtors --- Interest — Usury — Excessive rate of interest.

Equity — Relief against Excessive Interest on Mortgage Loan — Whether Bargain Harsh and Unconscionable — Principles — Contracts Relief Act.

In an action for foreclosure of a mortgage defendant invoked the provisions of the *Contracts Relief Act*, 1964, ch. 11 which, by sec. 3, empowers the court to grant relief where it finds that the cost of a loan is excessive and the transaction harsh and unconscionable. Defendant was buying under agreement for sale a parcel of land for which the price was \$6,500 payable at the rate of \$50 per month with interest at the rate of seven per cent per annum. His equity in the land was approximately \$300. He began to build a house on the land and had poured concrete footings and built framing to a value of \$3,500 at the time of the action. Wishing to pay off the agreement for sale defendant, whose credit rating was very poor, borrowed \$6,500 from plaintiffs on the security of the land and unfinished building; his interest rate on the loan worked out at 30 per cent per annum. The evidence showed that defendant was under no pressure to pay off the agreement for sale but chose to do so, by borrowing from plaintiffs, of his own free will.

It was *held* by Wilson, C.J., after reviewing the authorities, that the relief sought could not be granted; that the rate of interest in view of the risk involved and the security offered, was not excessive within the meaning of the

Act, nor could it be said that the contract was harsh or unconscionable; the intent of the Act was to empower the courts to protect unsophisticated and defenceless persons against the exactions of conscienceless persons who sought to take advantage of them, and not to relieve against the burden of contracts made under no pressure and with eyes open merely because such contracts might be acts of folly: *Samuel v. Newbold*, [1906] A.C. 461, 75 LJ Ch 705; *Poncione v. Higgins* (1904) 21 T.L.R. 11, at 12; *Re Scott & Manor Inv. Ltd.*, [1961] O.W.N. 210, 1961 Can Abr 656 applied.

**Wilson, C.J.S.C.:**

1 In this matter the defendants invoke the provisions of the *Contracts Relief Act*, 1964, ch. 11, and particularly sec. 3 thereof which reads thus:

3. Where, in respect of money lent, the Court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the Court may

(a) reopen the transaction, take an account between the creditor and the debtor, and relieve the debtor from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of the principal and the cost of the loan;

(b) 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 and relieve the debtor from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of the principal and the cost of the loan;

(c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

(d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

2 The action is for the foreclosure of a mortgage on land given by the defendants Lavoie to the plaintiffs on January 12, 1965. The principal sum purported to be payable was \$6,999.59, the rate of interest set out in the mortgage was two and one-half per cent per month after April 7, 1965. The principal and interest at two and one-half per cent per month from April 7, 1965, were due and payable on April 21, 1965.

3 Actually, since only \$6,500 were advanced by the plaintiff, this works out as a mortgage at about two and one-half per cent per month or 30 per cent per annum, the three months interest for the period between January 12, 1965 and April 7, 1965, having been charged in advance by being added to the principal sum due under the mortgage.

4 The defendant Georges Lavoie at all times acted as the agent of the defendant Hannelore Lavoie with her authority to do so.

5 The defendant Lavoie is rather grandiloquently described in the mortgage and in the pleadings as a heating technician. He is a man who, as he said in evidence, undertakes contracts as an electrician. I would not, using modern jargon, call him a large operator.

6 He had a very small equity in a piece of land near Tsawwassen under an agreement for sale requiring him to pay a total of \$6,500 at the rate of \$50 per month. He had paid \$200 as first payment but was in arrears on his monthly payments so that his equity was about two or three hundred dollars. There is no evidence that he was being pressed or was in distress about the payments on this lot. In fact, on his own evidence, he was able to use sums from his own earnings on commencing to build a house on the lot, in paying an employee and buying materials.

7 On January 12, 1965, he had built a foundation for his house and had substantially framed it. The plaintiffs were told he had done the work as "his own contractor" and that a man working on the lot was his employee. This was later found to be untrue. He had, in fact, granted a contract to Unicom Manufacturing Co. Ltd. to build the house and the man at work was an employee of that firm.

8 The value of the lot with the uncompleted building as it stood on January 12, 1965, was, according to one of the plaintiffs, about \$10,000 and I accept this as substantially correct.

9 Lavoie had, in November, 1964, asked the plaintiffs to obtain for him a loan of \$6,500 to pay off the principal sum due on his agreement for sale. Why should this apparently rational man want to replace an easy agreement for sale, bearing seven per cent interest and payable at a tolerable \$50 per month, over a term of years, with a mortgage, carrying 30 per cent interest and payable in three months? I cannot answer this question to my own satisfaction, but I can give his reasons. He had, he says (and he told the plaintiffs this), an arrangement with Northwest Mortgage Co. to make him a building loan of \$22,500. He had in his mind the idea that Northwest would advance him, as what is called in the mortgage business a "first draw" on the mortgage, a sum sufficient to pay off the mortgage he proposed to give to the plaintiffs. I do not see how the plaintiffs, experienced money lenders, could have believed this. Payments of mortgage money on building loans are made on the basis of value added by work done. But also the defendant Georges Lavoie told the plaintiffs (and this is not contradicted by Lavoie) that he had a sum of \$7,000 due him under a judgment in a lawsuit. This sum he could get at any time, but he did not want to accept it because he hoped on appeal or settlement to get twice as much.

10 The plaintiffs looked into his credit rating and found that it was, as they told the defendant, "terrible."

11 In November, 1964, the defendant had, in writing, Ex. 3, appointed Continental Mortgage Co. Ltd., controlled and managed by the plaintiffs, his agent to procure a loan of \$6,500 and had agreed to pay a procuration fee of \$65. But, although they tried, they never procured a mortgagee, they made the loan themselves to the full knowledge of the defendant, and they never claimed the procuration fee. If they had a duty as agents I think they discharged it by advising him to accept the \$7,000 he said he could obtain from litigation and use it to pay off the agreement for sale, making the loan unnecessary. He rejected this advice, saying he hoped to obtain twice as much and insisted on the loan.

12 An attempt has been made here to portray the plaintiffs as seeking this mortgage with full knowledge that the security was more than sufficient and with the eventual aim of owning the property for the \$6,500 advanced. I do not think this is just. These gentlemen are money lenders, not philanthropists, and I discount their evidence that they merely wanted to help the defendants. With their eyes open they advanced \$6,500 on a property worth, as they say, \$10,000. But, of course, the land value was, as they say, \$7,000 and the added value was in the form of a building in the first stages of construction, not a very sound risk. The defendant's covenant, in view of his credit record, had no value. Therefore this was no ordinary loan. I say this with realization that the defendant had bought the property for \$500 less than its value with a minuscule down payment. How he had

achieved this, I do not know, but I can say, from the evidence, that no mortgagee will ordinarily advance a sum near to total land value and that the risk here, all things considered, was a more than ordinary risk, when one considers the defendant's reputation as a credit risk and when one counts in the short term, the possible period of redemption, taxes, accruing interest, and the rather unsubstantial equity of redemption, consisting largely of a building in an elementary stage of construction. This was, I think, no seven per cent loan (the prevailing rate for sound construction loans at the time).

13 I have heard the evidence of experts as to the prevailing rates for risk loans at this time. The rates quoted range as high as 50 per cent. They range down to 12 per cent and 18 per cent. The rates quoted were generally for second mortgages.

14 It will be noted that before relief is granted under the statute two things must be established: (1) That the cost of the loan is excessive; (2) That the transaction is harsh and unconscionable.

15 The statute is copied from an Ontario statute, *The Unconscionable Transactions Relief Act*, RSO, 1960, ch. 410. I go to *Samuel v. Newbold*, [1906] A.C. 461, 75 LJ Ch 705, a judgment of the House of Lords under an English statute which, at that time, 1906, bore a considerable resemblance to our statute in that relief could be given where the interest charged in respect of the sum actually lent was excessive and the transaction was "harsh and unconscionable or is otherwise such that a Court of Equity would give relief" (p. 469). The words after "unconscionable" are not used in our statute and were, in any case, not accepted by the House of Lords as qualifying the meaning of the words "harsh and unconscionable." Lord Loreburn said at p. 467:

... The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may do so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power.

16 And Lord Macnaghten said at p. 470:

In dealing with the first alternative the Court must be satisfied that the transaction is 'harsh and unconscionable,' that is, as I think the latter part of the section shews, unreasonable, and not in accordance with the ordinary rules of fair dealing. The rate of interest may be so monstrous as to shew that by itself. There may be, as Lord Thurlow said in one case, 'an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it:' *Gwynne v. Heaton* (1778) 1 Bro CC 1.

17 Lord James of Hereford, at p. 473, holds that once the rate is shown to be excessive the burden of proving that the transaction is not harsh and unconscionable is thrown upon the money lender. This seems also to be the effect of the judgment of Lord Atkinson at p. 477.

18 I cite also from *Poncione v. Higgins* (1904) 21 T.L.R. 11, at 12:

Lord Justice Vaughan Williams said that with regard to the Money Lenders Act, 1900, the intention of the Legislature was to deal with cases of persons in financial distress coming to moneylenders to borrow money in order to get out of their financial distress which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the moneylender. The Legislature threw upon the moneylender who chose to advance money to persons in a position of financial distress the obligation not to take advantage of their distress or of their incapacity to negotiate.

19 And further, Cozens-Hardy, L.J. at p. 12 of the same case:

It was possible that the interest might be deemed excessive, and yet the transaction might not be deemed harsh and unconscionable. And it was possible that the interest might be deemed so extravagantly excessive as alone to satisfy the Court that the transaction was harsh and unconscionable. It was obviously not possible to lay down a fixed general rule as to rate of interest. The circumstances of each case must be considered, including the necessities of the borrower, his pecuniary position, the presence or absence of security, the relation in which the money lender stood to the borrower, and the total remuneration derived by the money lender from the whole transaction.

20 Was the rate of interest excessive for the risk involved? I have described the property and said that it was worth \$10,000. But the \$3,500 equity consisted largely of a foundation and framing and, on foreclosure, the class of potential purchasers would be restricted to those persons who wanted to complete a house following the general lines provided by the foundation and framing.

21 One test proposed in *Re Scott & Manor Inv. Ltd.*, [1961] O.W.N. 210, is this — could the loan have been procured for less? The only evidence I have before me, that of the plaintiffs, is that it could not. The only expert called by the defendants, Mr. Ricardo, said that his firm charged 12 per cent to 18 per cent for mortgages. He was not asked what he considered a fair rate for the Lavoie mortgage. The plaintiffs and Mr. Fox, an expert called by them, said that rates for short term financing could be variously two and one-half per cent, three and one-half per cent per month or as high as 50 per cent per annum depending on the risk. Mr. Burnie, another expert, said that the usual rate for a three months loan was 10 per cent of the principal, that is 40 per cent per year. He said other loans were made at 18 per cent to 30 per cent.

22 Thirty per cent per annum seems a very high rate of interest but I have to proceed on the evidence before me and from that evidence I cannot conclude that 30 per cent was an unusual charge for this particular loan. I have no evidence from anyone, including Mr. Fox the plaintiffs' expert, to show me that this particular loan could have been obtained for less and I cannot say that the burden of proving the rate to be excessive has been discharged.

23 I think it proper to add that I do not find the contract harsh or unconscionable. The borrower was not in

financial distress or under pressure such that he was compelled to come to the lender to be relieved thereof. This being so the lender was not, *vide Poncione v. Higgins, supra*, in a position to make his own bargain.

24 This court exists for many purposes and one of these purposes is the protection of unsophisticated and defenseless persons against the exactions of conscienceless persons who seek to take advantage of them. This legislation provides one method of exercising that benevolent authority. But the courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly.

25 Mr. Lavoie acted foolishly. He worsened his position by changing the nature of his indebtedness. He chose to discharge an easy debt by contracting a hard one. But he did this with his eyes open and with full knowledge of the nature of the obligation he was incurring. The court cannot relieve him.

26 Mr. Wai appears for the defendant Unicom Manufacturing Company Ltd. which has filed a claim for a mechanics' lien against the mortgaged property. There are other lien claimants and it is generally agreed that the proper order to be made here, for the protection of lien claimants as well as the plaintiffs, is for sale rather than for foreclosure. That being so, Mr. Wai advances certain arguments as to priorities to be observed in the distribution of the proceeds of the sale to his client and to the plaintiffs and he cites sec. 7 (1) of the *Mechanics' Lien Act*, RSBC, 1960, ch. 238, which reads thus:

7. (1) A registered mortgage has priority over a lien to the extent of the mortgage-moneys bona fide secured or advanced in money prior to the filing of the claim of lien, but in proceedings for the enforcement of a claim of lien the Court may order the sale of mortgaged lands at an upset price of not less than the amount secured under all registered mortgages having priority over such claim, costs, and the costs of the sale, and which mortgages shall be satisfied out of the proceeds of the sale according to their respective priorities and in priority to the lien to the extent aforesaid and subject to subsection (2) hereof.

27 It will be remembered that while the mortgage purports to cover an advance of \$6,999.59 the sum actually lent to the defendants Lavoie on January 12, 1965, was \$6,500, the extra \$499.59 being in fact interest for the period from January 12 to April 7 on the \$6,500 advanced. The rates work out at very slightly over the two and one-half per cent per month charged for interest after April 7. Nothing was due and payable until April 21 when the sum of \$6,999.59 plus interest at two and one-half per cent from April 7 became due. Mr. Wai's client filed his lien claim April 6, 1965.

28 Mr. Wai's argument, based on the wording of sec. 7 (1) of the *Mechanics' Lien Act* is this: The mortgage has priority over the lien only to the extent of the mortgage-moneys *bona fide* secured or advanced in money prior to the filing of the claim of lien. Only \$6,500 had been advanced and only for this sum has the mortgagee priority. He has no priority for the interest payable nor for the sum of \$499.59 which was not part of the mortgage moneys since it was not advanced.

29 Mr. Wai's argument in relation to interest is tied to an extent to two dates, April 6, when he filed his lien claim and April 7, when interest first began to run under the mortgage. He says his lien filed April 6 takes priority over interest which did not begin to accrue until April 7.

30 Mr. Wai's whole argument appears to me to be based on a disregard of the word "secured" in sec. 7 (1). The interest at two and one-half per cent per month, although it did not become payable until April 21, was

"bona fide secured" by the mortgage. The \$499.59 added to the principal sum advanced by the mortgagees was not in fact advanced in money prior to the filing of the claim of lien, but it was nevertheless part of the mortgage money *bona fide* secured by the mortgage. If there were fraud involved prejudicing the lien claimant then I could not say that there was *bona fides*. But the addition of interest to principal is not too uncommon a practice of legal usury and I cannot say that the \$499.59 were not mortgage moneys secured by the mortgage.

31 There will be an order for the immediate passing of accounts, and for sale if the amount found due to the plaintiffs is not paid within 30 days of the date of the registrar's certificate. I am prepared, on application, to give any further necessary directions as to sale and as to distribution of moneys. Costs to the plaintiffs.

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