Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*

Indexed as: Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills (H.C.J.)

68 O.R. (2d) 641
[1989] O.J. No. 794
Action No. 6833/81

ONTARIO
High Court of Justice
O'Leary J.

May 24, 1989.

*On appeal to the Ontario Court of Appeal (File No. 410/89).

Consumer protection — Interest — "Written or printed contract" to express interest at annual rate if payable at percentage for any period less than yearly — Promissory note with interest payable at 2% monthly not enforceable — Interest Act, R.S.C. 1970, c. I-18, s. 4.

Section 4 of the Interest Act, R.S.C. 1970, c. I-18, provides that where interest is made payable by the terms of any written or printed contract at a percentage for a period less than a year, no interest is recoverable exceeding 5% per annum unless the contract contains an express statement of the annual rate. A solicitor drafted promissory notes for the plaintiffs, four of which provided for interest at an annual rate of 18% before demand and 2% monthly thereafter; the fifth provided for interest at 2% monthly. In none of the notes was the monthly rate of 2% expressed as an annual rate. The plaintiffs, having failed to recover the full interest from the makers of the notes, brought a successful action against the solicitor. Following release of the reasons for judgment against the solicitor, further argument was heard.

Held, judgment affirmed.

It was absurd to suppose that a sophisticated business person would not know the annual equivalent of two per cent per month, but it was impossible to interpret the words of s. 4 to reach any other result than that the notes were not enforceable.

Cases referred to

V.K. Mason Construction Ltd. v. Bank of Nova Scotia (1985), 16 D.L.R. (4th) 598, [1985] 1 S.C.R. 271, 35 R.P.R. 118, 58 N.R. 195; Hossack v. Shaw (1918), 42 D.L.R. 130, 56 S.C.R. 581; revg in part 40 O.L.R. 475, 39 D.L.R. 797; revg 39 O.L.R. 440, 36 D.L.R. 760; Bellamy v. Timbers (1914), 31 O.L.R. 613, 19 D.L.R. 488

Statutes referred to

Interest Act, S.C. 1897, c. 8

Interest Act, R.S.C. 1970, c. I-18, ss. 2, 3, 4, 5 -- now R.S.C. 1985, c. I-15, ss. 2, 3, 4, 5

Money-Lenders Act, R.S.C. 1906, c. 122, ss. 6, 9, 10

Pawnbrokers Act, C.S.C. 1859, c. 61

Small Loans Act, S.C. 1939, c. 23

SUPPLEMENTARY REASONS for judgment in an action against a firm of solicitors for damages for negligence.

L.H. Mandel, Q.C., and R.M. Bogoroch, for plaintiffs.

Brendan O'Brien, Q.C., and W. Cipollone, for defendants.

O'LEARY J.:— Following the release of my reasons for judgment in this action on March 9, 1989 [reported ante, p. 165], Mr. O'Brien expressed concern that I had ignored, misconceived or failed to appreciate his arguments. I directed the local registrar at London not to issue judgment and I gave Mr. O'Brien permission to make written submissions, which he has done. After considering those submissions I am satisfied that my reasons of March 9th adequately explain why I declined to accept Mr. O'Brien's arguments. Nevertheless, I add these further words to my reasons, not to convince Mr. O'Brien that my decision was correct, but to satisfy him I have considered his arguments.

Those arguments suggest that Mr. O'Brien has a sense of justice that the courts are not empowered to fulfill. He would give to the courts the right to ignore laws that are outmoded or at least no longer necessary and that produce unfairness or absurdity. It is for this reason that Mr. O'Brien's arguments are so seductive. They are approached sympathetically, even hopefully, so the absurd result may be avoided.

It is absurd to think that a sophisticated businessman will not know the per annum interest he has contracted to pay if the interest in the contract is expressed as being 2% per month.

I accept that if there are two reasonable interpretations as to the meaning of words in a statute, the court must choose the interpretation that avoids absurdity. In my view, Mr. O'Brien's arguments do not lead to the conclusion that there is a reasonable interpretation of the meaning of the words in s. 4 of the Interest Act, R.S.C. 1970, c. I-18 [now R.S.C. 1985, c. I-15] that avoid the absurdity. Rather, his arguments suggest that the court should accept an unreasonable interpretation of the meaning of the words used in s. 4 in a thinly disguised refusal to follow the obvious meaning of those words because they lead to an absurdity.

If a piece of legislation can be ignored whenever a judge arrives at the Cartesian conclusion that in the unerring light of reason it is clearly and distinctly absurd, then we have justice according to men and not according to law. The absurdity caused by s. 4 of the Interest Act does not arise only where promissory notes are involved but would likewise result when the monthly but not the per annum interest rate is set out in any written contract. This leads Mr. O'Brien to

argue, as indeed he must, if his absurdity argument is to go anywhere, not only that s. 4 does not apply to promissory notes but that it does not apply to money-lending transactions at all.

Section 4 states in effect that its provisions apply to "any written ... contract" and in my view it would take clear words elsewhere in the Interest Act or in some other federal statute to exclude money-lending transactions from its provisions. There are no such words elsewhere. Nor in my view does the wording of s. 4 conflict with the wording of any other federal statute. The mere fact that different statutes treat the same subject-matter (in this case interest rates) in different ways for certain purposes or in certain instances is not to create a conflict. Nor do they conflict when one provides that its provisions are not to apply when the other statute says otherwise or where one provides that its provisions are to apply in spite of the other statute. In such cases Parliament has by so providing removed what would otherwise be a conflict.

Section 4 of the Interest Act was enacted in 1897 [S.C. 1897, c. 8]. The Pawnbrokers Act passed prior to 1906 [C.S.C. 1859, c. 61], the Money-Lenders Act passed in 1906 [R.S.C. 1906, c. 122] and the Small Loans Act passed in 1939 [S.C. 1939, c. 23], did not provide that the requirement of s. 4 of the Interest Act that the per annum rate of interest be stated in any written contract, could be ignored. But even if it could be said that those statutes created separate codes for the treatment of interest rates for the transactions covered by them, there certainly can be no suggestion that those codes applied generally and so conflicted with s. 4 in matters or amounts outside of the purview of those statutes.

If Parliament has treated in a special way loans under $500 made by money-lenders (the Money-Lenders Act) and loans under $1,500 made by money-lenders (the Small Loans Act), such treatment does not suggest that s. 4 of the Interest Act is not to apply to other money-lending transactions.

The Interest Act puts no limit on the interest rate that may be charged on money owing. The other Acts mentioned do. The Money-Lenders Act, 1906 permits a maximum of 12% per annum on loans by money-lenders under $500; the Small Loans Act permits interest of up to 2% per month on the first $300, 1% per month on the amount between $300 and $1,000 and 1/2% per month on the amount between $1,000 and $1,500 on loans by money-lenders. Under s. 4 of the Interest Act, if the annual interest rate is not set out the lender can collect only 5% interest. Under the Money-Lenders Act and the Small Loans Act, the court can reduce the over-all credit charges to 12% and the rate allowed respectively. Section 4 of the Interest Act applies only to written contracts. The Money-Lenders Act and the Small Loans Act apply to all bargains whether in writing or not. In my view, no absurdity or conflict arises because the remedies under the three Acts are different. It is sheer speculation as to why the requirements and remedies stipulated for by Parliament in 1939 are so different to those stipulated for by it in 1897.

Indeed, I would find it remarkable if Parliament after concerning itself about interest charged under "contracts" (s. 4 of the Interest Act) and interest charged on small loans by money-lenders (the Money-Lenders Act, the Small Loans Act) had left unprotected those who borrowed larger amounts. Surely one who borrowed over $500 was in need of as much protection in 1897 as one who bought a farm implement and had to pay the purchase price over a period of time. In my view, neither logic nor the wording of the other statutes give reason to doubt that s. 4 of the Interest Act was intended to apply to money-lending transactions.

I find even less merit in the argument that sophisticated borrowers are not entitled to the protection of s. 4 of the Interest Act. Parliament did not so stipulate. If it so intended it could have restricted the application of the section to the naive though that would have made it virtually impossible to determine when s. 4 applied. If the sophisticated are not entitled to the protection of s. 4, the Supreme Court of Canada could have decided the s. 4 issue in V.K. Mason Construction Ltd. v. Bank of Nova Scotia (1985), 16 D.L.R. (4th) 598, [1985] 1 S.C.R. 271, 35 R.P.R. 118, on that basis alone and would not have had to deal with the question as to whether or not the transaction was in essence a mortgage on real property. Rather, it appears that Parliament in an effort to make sure that the naive would know the annual interest rate they were being charged, simply required that all written contracts set out the per annum interest rate charged therein.

I will not repeat my reasons for concluding that promissory notes fall within s. 4 of the Interest Act. I will deal more specifically with the following arguments raised by Mr. O'Brien.

(a) Section 2 of the Interest Act refers to "contract or agreement whatever" in an effort to spread the net widely, but s. 4 uses the words "written or printed contract" confining the section to the printed forms of contract used in time payment purchase contracts

I have already stated why I am of the view there is nothing to confine s. 4 to such purchase contracts. Neither in my view can it be argued from the wording used in the two sections that Parliament had in mind different contracts in s. 2 than in s. 4 except of course s. 4 is restricted to written contracts and s. 2 is not.

Rather, the legislative draftsman of the era appears to have often used two words when one would do. Surely the words "agreement whatever" used in s. 2 include a contract and the word "contract" could have been omitted without altering the meaning of the section. Likewise, the word "contract" could have been used in place of "agreement". Indeed in s. 3 of the Interest Act the draftsman used the word "agreement" by itself and it cannot be suggested that he was not including all contracts.

In my view, the draftsman simply used many unnecessary words in s. 4 when he used the words "written or printed contract, whether under seal or not". The words "written contract" would have said as much.

(b) The word "contract" in s. 4 must be given the meaning attached to it in common and ordinary use; the man on the street would not call a promissory note a contract

The word "contract" denotes in law a bargain or agreement in which each party has received consideration for his act or his promise. The majority of the public may not know what a contract is or may have a quite improper understanding of its nature. It is not what the public generally think a contract is that is relevant here. When a statute provides that certain consequences flow from the making of a contract it is not the public understanding or misconception about a contract that a court must consider. The court must give the word the legal meaning it has had for centuries for there is no room or excuse for supposing that Parliament intended not to use the word in its ordinary legal sense but intended rather some public misconception of it if such could be ascertained. It is then irrelevant in this case as to what uninformed and misinformed members of the public think the words "contract" and "promissory note" mean. I suspect, however, a

goodly number of the public would think of or describe a contract as being a bargain or agreement. If a judge were to ask one of that group who had loaned someone $10,000 and received in return a promissory note at 10% whether he had the contract in writing, he would quickly produce his promissory note.

(c) When Parliament intends to speak of negotiable instruments it says so specifically; accordingly, since negotiable instruments are not mentioned in s. 4 they are not covered by it

I have already referred to the verbosity of the legislative draftsman in drafting the Interest Act. It appears to have continued in the Money-Lenders Act. Section 6 refers to "any negotiable instrument, contract or agreement, concerning a loan of money". Section 9 refers to "any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender".

Section 10 reads:

> 10. In the case of any such negotiable instrument made before the thirteenth day of July, one thousand nine hundred and six, and maturing after the said date, and in the case of any such contract or agreement made before the said date and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date of maturity or performance, as the case may be.

It surely cannot be argued that Parliament thought there could be a contract without an agreement or that a binding agreement to pay interest could exist without there being a contract to do so.

In my view the sections referred to would mean exactly the same if either the word "agreement" or "contract" had been used in place of the words "negotiable instrument", "contract" and "agreement". For example, if s. 10 read: "In the case of any such contract made before the thirteenth day of July, 1906 and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date for performance", it would mean the same as it does with the extra words included.

No conflict arises between s. 4 of the Interest Act and the provisions of the Money-Lenders Act simply because negotiable instruments are specifically identified in the Money-Lenders Act.

Likewise, no conflict arises between s. 4 of the Interest Act and the provisions of the Money-Lenders Act and the Small Loans Act simply because only the two Acts last named make provision that a bona fide holder of a negotiable instrument that violates those Acts can collect the full interest provided therein against the maker of the note, who can in turn seek reimbursement of the overpayment from the money-lender. The Interest Act which has no such provision simply treats differently the bona fide holder of a larger promissory note than is treated the bona fide holder of a small note under the Money-Lenders Act and the Small Loans Act.

In my view, as stated earlier, differences in two Acts do not amount to conflict. I repeat what I said at p. 13 of my reasons of March 9th [p. 173 O.R.], that where two statutes do not conflict one gets little help in interpreting the meaning of one statute by examining the words used by Parliament in the other. While Mr. O'Brien has referred to the differences as conflicts I do not understand him to mean that one must run afoul one statute to abide by the other; or that what is

legal or sufficient under one statute is illegal or insufficient under another. Rather, as to whether "contract" in s. 4 of the Interest Act includes a promissory note, Mr. O'Brien's position is that Parliament specifically included negotiable instruments in the Money-Lenders Act and then exempted a bona fide holder from the penalty imposed, while in the Interest Act it did neither. Nevertheless, the fact negotiable instruments are not specifically mentioned in s. 4 of the Interest Act while they are mentioned in the Money-Lenders Act and the fact both the Money-Lenders Act and the Small Loans Act make provision for the protection of bona fide holders of negotiable instruments while the Interest Act does not, gives some though small support to the argument that s. 4 of the Interest Act was not intended to apply to promissory notes. I cannot reach the conclusion, however, that Parliament could not have intended such an anomaly bearing in mind that the Money-Lenders Act and the Small Loans Act deal only with small amounts loaned by "money-lenders".

I now deal very briefly with a submission by Mr. O'Brien in regard to Hossack v. Shaw (1918), 42 D.L.R. 130, 56 S.C.R. 581 (S.C.C.), and Bellamy v. Timbers (1914), 31 O.L.R. 613, 19 D.L.R. 488 (S.C.A.D.). In my reasons of March 9th, at p. 8 [p. 170 O.R.], I stated:

> In Hossack promissory notes for $275, $325, $950, and $2,500 were sued on. Only the note for $950 stipulated for any interest. There was an oral agreement that the notes for $275 and $2,500 would bear interest at 2% per month. The defendant said in a letter that the interest on the note for $325 was to be 2% per month.

Mr. O'Brien states in his written submissions:

> Examination of the Supreme Court of Canada printed Appeal Case reveals that with respect to the borrowing of the sum of $2,500.00 on the 26th of November, 1914, the parties entered into a written agreement that the note covering this loan would bear interest at 2% per month with no reference to an annual rate. ... the defendant Hossack sought relief by way of set-off on what he claimed were payments of interest at an excessive rate and to support this claim for set-off he filed an Affidavit showing payments of interest at 2% per month which he claimed were excessive and he attached to his Affidavit a schedule showing an accounting setting forth the difference between what he believed to be a reasonable rate (8% per annum) and the rate actually paid (2% per month). In the result, he calculates an overpayment of $1,258.46 (see Hossack's Affidavit at Page 5 of the Appeal Case). Hossack was a lawyer and he was represented by a well known Toronto law firm (the successor to which still exists). The significant thing is that if Hossack or his lawyers thought that Section 4 of the Interest Act applied, he would have shown 5% instead of 8% in his accounting. ... no one connected with this case mentioned, at any point, Section 4 of the Interest Act, including Hossack, his lawyers, the trial judge, the Court of Appeal judges and the judges in the Supreme Court of Canada. The conclusion seems inescapable that they did not think that Section 4 would apply to a money lending case or to a promissory note, ...

This would be a powerful argument if the promissory notes before the court in Hossack could have been affected by either s. 4 or s. 5 of the Interest Act.

While it is true (as appears in the Appeal Case) that in Hossack the parties entered into a written agreement on November 26, 1914, which provided that a note given that day for $2,500 would bear interest at 2% per month, that was not the note sued on. Rather, the $2,500 note sued on was one dated October 26, 1915.

Idington J. stated at p. 131 in Hossack v. Shaw:

> The $2,500 note bore no rate of interest as expressed on its face and such contract as existed relative thereto does not seem to extend to renewals of which that sued on seems to have been one of many.
>
> The same would seem to hold good of the two smaller notes sued upon.

Clute J., the trial judge, stated (39 O.L.R. 440 at p. 441, 36 D.L.R. 760 at p. 761):

> The plaintiffs claim interest upon each and all of the notes at 2 per cent. per month, but only one of the four notes produced bears interest at that rate, namely, the $950 note.

It is clear from the reasons of Clute J. that there was only an oral agreement that the notes for $2,500 and $275 would bear interest at 2% per month. While the defendant said in a letter that the interest on the note for $325 was to be at the rate of 2% per month, such letter would only be evidence that such was to be the interest rate. I would not constitute a written contract to pay interest at 2% per month.

It is for this reason I have concluded that s. 4 of the Interest Act could not have applied to the notes for $275, $325, and $2,500. As for the note for $950 which did set out the interest as being 2% per month, that interest rate was held to apply only until the note was due and it became due when demand for payment was made a few days after it was given. See Idington J., pp. 131-2:

> The note for $950 reads at end thereof: "Int. 2% per mo. till paid." It is dated November 22, 1915. There appears in the case a letter of July 22, 1915, which refers no doubt to the original note for same loan which expressly provides for interest at the rate of 2% per month until paid, but I cannot see how that can be extended to renewals, for it is not so expressed.
>
> The note sued on, therefore, must in such case, stand on what it expresses. It has been held that such like expressions mean, prima facie, when due, but this note is on demand. And the evidence shews such demand was made within a few days after given.

I therefore concluded that s. 4 of the Interest Act could only have affected the interest on the $950 note for a few days and therefore had little application to the promissory notes before the court in that case.

Neither could the defendant in Hossack claim for the return of interest beyond 5% per annum that he had paid on any old notes that had contravened s. 4 of the Interest Act. He was not being sued on those old notes, rather on the four notes on which he had not yet paid interest.

Section 5 of the Interest Act reads as follows:

5. If any sum is paid on account of any interest not chargeable, payable or recoverable under section 4, the sum may be recovered back or deducted from any principal or interest payable under the contract.

The defendant could not then recover back or have deducted from or out of the money owing on the new notes any overpayment he made on the old notes. Such deduction can only be made from the money owing under the contract under which the overpayment was made. The principal amounts of the new notes did not include unpaid interest on the old notes, as in the case before me.

There was no reason then for anyone to raise a s. 4 defence in Hossack.

As stated in my reasons of March 9, 1989, I have no reason to think that s. 4 of the Interest Act could have had any application in Bellamy v. Timbers. I note, however, that it appears that prior to 1907 some solicitor must have felt s. 4 of the Interest Act applied to promissory notes given to a money-lender for he advised the money-lender to change his notes to read 24% per annum instead of 2% per month as they had read previously.

I regret, however, I have been unable to accept any argument that would relieve the defendants from liability.

The result is both absurd and a miscarriage of justice. The result has been dictated by the wording of s. 4 of the Interest Act. That section no longer fulfills (if it ever did) any useful purpose. If a debtor is so lacking in mathematical knowledge that he cannot appreciate that 2% per month is the equivalent of 24% per annum, then he is probably so lacking in mathematical concepts that he does not know that 100% equals a whole, and will not realize what a large portion 24% is of that whole. In any event, the section attempts to protect the few by creating the virtual certainty that those who have no need of such protection will be able to unjustly take advantage of it.

I will contact the Law Reform Commission of Canada with the request it consider whether s. 4 of the Interest Act should be repealed.

Judgment affirmed.

Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills

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68 O.R. (2d) 165
[1989] O.J. No. 340
Action No. 6833/81

ONTARIO

High Court of Justice
O'Leary J.

March 9, 1989.

Consumer protection — Interest — "Written or printed contract" to express interest at annual rate if payable at percentage for any period less than yearly — "Contract" includes promissory note — Interest Act, R.S.C. 1970, c. I-18, s. 4.

Professions — Barristers and solicitors — Negligence — Standard of care — Promissory notes partially unenforceable because of failure to comply with Interest Act — Solicitor negligent — Interest Act, R.S.C. 1970, c. I-18.

A solicitor drafted five promissory notes for the plaintiff, payable on demand, which were partially unenforceable because of their failure to comply with s. 4 of the Interest Act, R.S.C. 1970, c. I-18, which provides that where interest is made payable "by the terms of any written or printed contract" at a percentage for a period less than a year, no interest is recoverable exceeding 5% per annum unless the contract contains an express statement of the annual rate. Four of the notes provided for interest at an annual rate of 18% before demand and 2% monthly thereafter. The fifth provided for interest at 2% monthly. In none of the notes was the monthly rate of 2% expressed as an annual rate. The plaintiff was unable to recover the full interest provided. It brought an action against the firm of solicitors claiming damages for negligence.

Held, the solicitor was negligent and the plaintiff was entitled to recovery for its loss.

A promissory note is a "contract" within the meaning of s. 4. A reasonably competent solicitor, undertaking to draft a promissory note, should have known of, and taken account of, s. 4. Consequently, the defendant was liable for the plaintiff's loss.

Cases referred to

Barbour v. Paradis (1929), 68 Que. S.C. 31; John Deere Plow Co. v. Agnew (1913), 10 D.L.R. 576, 48 S.C.R. 208, 4 W.W.R. 277, 17 B.C.R. at p. 544; Hossack v. Shaw (1918), 42 D.L.R. 130, 56 S.C.R. 581; revg in part 40 O.L.R. 475, 39 D.L.R. 797; revg 39 O.L.R. 440, 36 D.L.R. 760; Bellamy v. Timbers (1914), 31 O.L.R. 613, 19 D.L.R. 488; Cruickshank v. Murphy Campbell Co. (1958), 13 D.L.R. (2d) 250; Douville v. Guyon, [1967] Que. S.C. 378; Union Finance Co. Ltd. v. Couture, [1967] R.P. 37; Royal Bank of Canada v. Reed, [1983] 2 W.W.R. 419, 42 B.C.L.R. 256, 21 B.L.R. 64; Dunn v. Malone (1903), 6 O.L.R. 484; V.K. Mason Construction Ltd. v. Bank of Nova Scotia (1985), 16 D.L.R. (4th) 598, [1985] 1 S.C.R. 271, 35 R.P.R. 118, 58 N.R. 195; Central Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161, 69 N.R. 321; Bannerman Brydone Folster & Co. v. Murray, [1972] N.Z.L.R. 411; Thomson v. Thomson (1927), 59 O.L.R. 661, [1927] 1 D.L.R. 653; Re A.J.F. Investments Ltd. and Vellco Investments Ltd. (1985), 49 O.R. (2d) 628, 40 R.P.R. 14

Statutes referred to

Canada Corporations Act, R.S.C. 1970, c. C-32, s. 21(1)

Interest Act, R.S.C. 1970, c. I-18, ss. 4, 5 -- now R.S.C. 1985, c. I-15, ss. 4, 5

Judicature Act, R.S.O. 1980, c. 223 (repealed by s. 187(1) of, and replaced by Courts of Justice Act, S.O. 1984, c. 11)

Money-Lenders Act, R.S.C. 1906, c. 122, ss. 6, 8, 9

Small Loans Act, R.S.C. 1970, c. S-11, ss. 3, 11 (both repealed 1980-81-82-83, c. 43, s. 1)

ACTION for damages for negligence.

L.H. Mandel, Q.C., and R.M. Bogoroch, for plaintiffs.

Brendan O'Brien, Q.C., and W. Cippolone, for defendants.

O'LEARY J.:— The plaintiffs claim they suffered damages through the negligence of their solicitors, the defendants. The complaint is that Mr. Stambler, a solicitor, drafted five promissory notes for the plaintiffs, without taking into account the provisions of s. 4 of the Interest Act, R.S.C. 1970, c. I-18 [now R.S.C. 1985, c. I-15], with the alleged result the plaintiffs were unable to collect, under the notes, the total interest provided for in the notes.

Four of the promissory notes drafted by Mr. Stambler provided for interest at the rate of 18% per annum prior to demand for payment and 2% per month after default in payment. These notes did not contain a statement of the yearly or per annum interest rate to which a rate of 2% per month is equivalent. The fifth note provided for an interest rate of 2% per month both before and after default and again the equivalent per annum rate was not spelled out. All the promissory notes were stated to be payable on demand.

Section 4 of the Interest Act reads as follows:

> 4. Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.

Promissory notes are not specifically mentioned in s. 4 and for s. 4 to apply to them a promissory note must be a written or printed contract. While Mr. O'Brien argues that promissory notes are not contracts, I conclude that they are. I set out below some of the opinions and authorities that lead me to that conclusion:

> All negotiable instruments are contracts in writing, and the law relating to written contracts applies to them, subject to certain rules developed by the law merchant which form exceptions to the rules of common law, and apply only to negotiable instruments.

(James McLoughlin, LL.M. (Lond.), Introduction to Negotiable Instruments (London, Butterworths, 1975), p. 24.)

Section79 As bills and notes are, in many particulars, properly regarded merely as highly formalized and specialized forms of contract, it is appropriate that capacity to incur liability as a party to a bill or note is co-extensive with capacity to make any other commercial contract.

. . . . .

Section81 A further manifestation of the contractual nature of bills and notes is the requirement that as between immediate parties there must be valuable consideration for the promise of payment.

(Canadian Encyclopaedic Digest (Ont. 3rd), vol. 3, pp. 17-79 and 17-80.)

290. Presumption of consideration: It has been already stated that bills of exchange and promissory notes, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration.

(Halsbury's Laws of England, 3rd ed., vol. 3, para. 290, p. 175.)

These, e.g., bills of exchange, cheques, promissory notes, are documents which both are, and evidence contractual transactions ...

(G.H.L. Fridman, M.A., B.C.L., LL.M., The Law of Contract in Canada (Toronto, Carswells, 1976), p. 414.)

In Barbour v. Paradis (1929), 68 Que. S.C. 31 (S.C.), the court throughout its reasons treats a promissory note as being a contract. Speaking about the note, we find at p. 33:

The contract is therefore made in one country, and to be performed in another ...

. . . . .

See also Dicey, Conflict of Laws, 4th Edition, page 677.

"The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed, in all cases where interest is expressly or implied to be paid. Thus a note made in Canada, where interest is six per cent, payable with interest in England where it is five per cent, bears English interest only, and if payable in a foreign country, they may bear any rate of interest, not exceeding that which is lawful by the laws of that country."

It seems clear that the interest and the method of computing it is more than a matter of form, which would be governed by the law of the place where the contract was made, but is a matter of the substance of the contract and as such must be governed by the law of the place where the contract was to be performed.

On the question of whether a promissory note is a contract, Mr. O'Brien referred to:

(1) The words of Sir Charles Fitzpatrick C.J. in John Deere Plow Co. v. Agnew (1913), 10 D.L.R. 576 at p. 577, 48 S.C.R. 208 at p. 219, 4 W.W.R. 277 (S.C.C.):

As to whether a promissory note is a contract, see Pothier, "Lettre de Change", Bugnet ed., vol. 4, pp. 473, 474: --

"La lettre de change appartient a l'execution du contrat du change; elle est le moyen par lequel ce contrat s'execute; elle le suppose et l'etablit, mais elle n'est pas le contrat meme.

The words written in French have been translated as follows:

The Bill of Exchange pertains to the execution of the contract exchange; it is the means by which the contract is executed. It presupposes and establishes the contract, but it is not the contract itself.

(2) Fridman, The Law of Contract in Canada, 2nd ed. (1986), p. 177:

One vital development was the emergence and recognition of negotiable instruments, namely bills of exchange, cheques, promissory notes. These are documents which both are, and evidence contractual transactions.

[Footnote 92]

There is some dispute over whether such documents are contracts. They are treated as such under the Bills of Exchange Act, R.S.C. 1970, c. B-5, provisions for the purposes of the conflict of laws, i.e., where was the bill made, and it would seem, also for the purpose of the Interest Act, R.S.C. 1970, c. I-18, s. 4, which regulates the amount of interest that may be charged: see Barton v. Paradis, [1930] C.S. 31; Douville v. Guyon, [1967] S.C. 378 (Que. S.C.); Can. Permanent Trust Co. v. Kowal (1981), 32 O.R. (2d) 37 (Ont. H.C.) per Boland J.; compare Massey Manufacturing Co. v. Perrin (1892), 8 Man. R. 457 (Man. Q.B.); see also the dissenting judgment of Maloney J. in Kobi's Cabinets Ltd. v. Can. Permanent Trust Co. (1980), 27 O.R. (2d) 717 (Ont. H.C.); upheld on appeal (1980), 115 D.L.R. (3d) 256 (Ont. C.A.). But they were not contracts for the purposes of a British Columbia statute which dealt with companies, because the British North America Act, 1867, assigned jurisdiction over bills of exchange to the Parliament of Canada, but assigned contracts to provincial legislatures: John Deere Plow Co. v. Agnew (1913), 48 S.C.R. 208 at 226 (S.C.C.) per Idington J.; compare ibid. at p. 219 per Fitzpatrick C.J.: promissory notes were not contracts but were made in performance of an obligation to pay amounts specified in the notes under a contract.

John Deere Plow Co. v. Agnew is certainly not authority for the proposition that a promissory note is not a contract. Rather the case decided that even if a promissory note is a contract, it could not be affected by the provincial legislation there in question because a promissory note falls within the legislative jurisdiction of the federal government. If anything the reasons of the court support the proposition that a promissory note is a contract. At p. 577 D.L.R., p. 219 S.C.R., the Chief Justice stated:

A note executed, made payable and delivered to the payee in the province may be a contract made there by the maker of the note, but it is not a contract made by the

> appellants who assumed no obligation with respect to it.

Idington J. stated at p. 581 D.L.R., p. 225 S.C.R.:

> Hence it seems to me that the kind of contract involved herein is one over which the legislature enacting the disabling sect. 168, which is relied on, has no more authority than it has over the other corporations and contracts founded on any of the subjects enumerated in sect. 91 over which Parliament has exclusive legislative authority.

and at p. 582 D.L.R., p. 226 S.C.R.:

> I admit the word contract might include promissory notes, but when we read it in light of all these considerations I have referred to, I conclude it does not.

Duff J. stated at p. 584 D.L.R., pp. 229-30 S.C.R.:

> The contracts, therefore, in respect of which an extra-provincial company which is not licensed or registered under the Act is disabled from enforcing by action in the Courts of British Columbia by virtue of the provisions of sec. 168 are contracts made in "course of or in connection with" some business which the company in whole or in part "carries on" in that province.

In regard to the statement in The Law of Contract in Canada to the effect that there is some dispute over whether a promissory note is a contract, I am unable to discover the basis for that statement. The cases referred to by the author do not raise such dispute.

Mr. O'Brien submits that even if a promissory note can be said to be a contract, it is a special kind of contract (a negotiable instrument) and s. 4 of the Interest Act does not apply to it. In particular he submits that the Supreme Court of Canada in Hossack v. Shaw (1918), 42 D.L.R. 130, 56 S.C.R. 581 (S.C.C.), and the Appellate Division of the Supreme Court of Ontario in Bellamy v. Timbers (1914), 31 O.L.R. 613, 19 D.L.R. 488 (S.C.A.D.), had before them promissory notes that provided for monthly interest rates without stipulating annual interest rates, and those courts did not even mention s. 4 of the Interest Act, thereby indicating that s. 4 does not apply to promissory notes.

Because the court in Hossack v. Shaw did not specifically state in its reasons that the notes before it made no mention of an annual interest rate, I have confirmed through the Registrar of the Supreme Court of Canada that in fact no annual interest rate was set out in those notes. My review of the decision and that of Clute J. at trial (39 O.L.R. 440, 36 D.L.R. 760) leads me, however, to the conclusion that s. 4 could have had little, if any, application to the promissory notes before the court in that case.

In Hossack promissory notes for $275, $325, $950, and $2,500 were sued on. Only the note for $950 stipulated for any interest. There was an oral agreement that the notes for $275 and $2,500 would bear interest at 2% per month. The defendant said in a letter that the interest on the note for $325 was to be 2% per month. In regard to the three promissory notes last mentioned, the plaintiff was not suing on a printed or written contract that provided for interest and so s. 4 of the Interest Act could have had no application to these notes.

The note for $950 was a demand note and provided for interest at 2% per month until paid. According to Idington J. at p. 132 D.L.R., p. 583 S.C.R., demand for payment was made within a few days after the note was given. The court held that a provision that a certain interest rate is to apply until a note is paid means that the interest rate is to apply only until the note is due. The note became due when demand for payment was made and so the 2% per month rate could only have been effective for a few days, and that is the only period to which s. 4 of the Interest Act could have had any application. The court held that after maturity the statutory interest rate of 5% per annum applied.

There is good reason then why the Supreme Court of Canada made no mention of s. 4 of the Interest Act in Hossack. In any event, there were no pleadings in the case. The defendant raised in his affidavit only that the transaction was harsh. A s. 4 defence was not raised.

In Bellamy v. Timbers, the note sued upon was dated May 10, 1907, fell due four months after date, was for the sum of $162.71 with interest after due date at the rate of 12% per annum. That note did not on the face of it offend either s. 4 of the Interest Act or the Money-Lenders Act, R.S.C. 1906, c. 122, which Act limited the interest that could be charged by money lenders after July 13, 1906, on loans under $500 to 12% per annum. The difficulty from the plaintiff's perspective was that the figure of $162.71 had been arrived at by charging interest at 24% per annum on a $50 loan made to the defendant in 1901 and included interest at 24% per annum from July 13, 1906 to September 10, 1907. Prior to July 13, 1906, the rate of 24% per annum was legal but after that date it was not.

According to the plaintiff's evidence, which seems to have been accepted, a number of years prior to May 10, 1907, on the advice of his solicitor, he changed his notes to read 24% per annum instead of 2% per month as they had read previously. I have read the reasons of the trial judge carefully and I am unable to conclude that any of the notes which existed between 1901 and May 10, 1907, ran afoul s. 4 of the Interest Act by failing to set out the per annum rate of interest being charged.

On appeal, Riddell J. states at p. 625:

> ... the dealings between the plaintiff, who is a money-lender, and the defendant, an illiterate, began as far back as 1901.
>
> In that year the plaintiff lent the defendant $50 -- adding to the $50 lent interest at 24 per cent per annum; he obtained a note for the sum, and interest thereon after maturity at 2 per centum per month.

There is no indication where Riddell J. got his description of the notes but it certainly conflicts with the findings of the trial judge.

If the notes did provide for interest at 24% per annum, then the mere fact they provided that interest after default would be at 2% per month would not seem to cause any problem so far as s. 4 of the Interest Act is concerned: see Crawford and Falconbridge, Banking and Bills of Exchange, 8th ed. (1986), p. 1288, n. 33.

I cannot say that in Bellamy s. 4 of the Interest Act could have been used by the defendant to his advantage. In any event, it was not argued and I therefore cannot draw the conclusion that the Appellate Division felt it had no application to promissory notes.

I have not been referred to any case where it has been held that s. 4 of the Interest Act does not apply to promissory notes. On the other hand, there is considerable authority that it does. In Barbour v. Paradis, supra, the Quebec Superior Court held that because of s. 4 of the Interest Act, only 5% per annum interest could be charged on a note that stipulated for interest in the amount of $10 a week on a principal amount of $500 without stating the per annum interest rate. In Cruickshank v. Murphy Campbell Co. (1958), 13 D.L.R. (2d) 250, (B.C.S.C.), Lett C.J.S.C. considered s. 4 applied to promissory notes but held that the note there under consideration did not contravene s. 4. See also Douville v. Guyon, [1967] Que. S.C. 378 (S.C.), and Union Finance Co. Ltd. v. Couture, [1967] R.P. 37, where the courts held that s. 4 applied to promissory notes. In Royal Bank of Canada v. Reed, [1983] 2 W.W.R. 419, 42 B.C.L.R. 256, 21 B.L.R. 64 (B.C.S.C.), Lander L.J.S.C. in a British Columbia action treated the matter as if s. 4 applied to promissory notes, though not to the note before him.

Mr. O'Brien also submitted that it is apparent from other legislation that when the Parliament of Canada intended to regulate the interest that could be charged on negotiable instruments it said so specifically, from which he argued that since negotiable instruments are not specifically referred to in s. 4 then the section was not intended to apply to them. He pointed out that in the Money-Lenders Act, R.S.C. 1906, c. 122, s. 6 thereof stipulated that it applied to "any negotiable instrument, contract or agreement, concerning a loan of money"; and that s. 8 relieved a bona fide holder of a negotiable instrument from the penalty provided in s. 6, permitting such holder to collect the interest rate provided in the note, but giving the payer of the note the right to recover from the money-lender the interest paid in excess of the amount allowed by s. 6.

Section 9 of the Money-Lenders Act refers to "any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender", from which Mr. O'Brien argues that Parliament must have considered that a contract did not include a negotiable instrument.

Section 3 of the Small Loans Act, R.S.C. 1970, c. S-11, stipulates that no money-lender shall in respect of any loan charge more than the interest rate set out in the section. Clearly, the expression "any loan" would cover a loan by way of a negotiable instrument. But s. 11 of the Small Loans Act exempts a bona fide holder of a negotiable instrument from the provisions of s. 3.

Section 21(1) of the Canada Corporations Act, R.S.C. 1970, c. C- 32, reads in part:

> 21(1) Every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the company, by any agent, officer or servant of the company within the apparent scope of his authority as such agent, officer or servant, is binding upon the company.

Again, Mr. O'Brien submits the wording of this subsection indicates Parliament felt there was a distinction between a contract and a promissory note.

In short, it is Mr. O'Brien's submission that when Parliament intended to regulate the interest that could be charged on negotiable instruments it made it explicit that it so intended and provided relief to any bona fide holder in due course that came into possession of the negotiable instruments. Since s. 4 of the Interest Act neither refers to negotiable instruments, nor provides protection for bona fide holders of such instruments, then Parliament did not intend s. 4 of the Interest Act to apply to negotiable instruments.

I believe it to be of little help in interpreting the meaning of one piece of legislation to examine the words used by Parliament in another piece of its legislation, unless of course the two pieces of legislation appear to conflict. Here it is not suggested that s. 4 of the Interest Act conflicts with other legislation passed by Parliament.

It has been recognized by the courts at least as far back as 1903 that s. 4 of the Interest Act is consumer protection law. In Dunn v. Malone (1903), 6 O.L.R. 484 (Div. Ct.), Street J. said at p. 488:

> The Act of 1897 was passed in the public interest for the protection of persons borrowing money upon personal security of any nature. Such persons, as is well known, are frequently necessitous, and are willing to pay high rates for money. The policy of the law as it now stands is to allow the borrower and the lender to agree upon any rate of interest, and the borrower having agreed to it must pay it, provided the rate per annum is stated in the contract. This proviso is his only protection, and it is introduced to prevent his being kept in the dark by the lender as to the real rate of interest per annum which he is agreeing to pay. It is a part of the general public law, and is intended to prevent imposition being practised by lenders upon borrowers in certain cases.

I can think of no reason why Parliament would seek to protect a borrower from being kept in the dark as to the true interest rate when borrowing under a written contract generally, but would deny him that protection when borrowing against his promissory note. Words camouflaging the true interest rate can be inserted just as easily in a promissory note as in a more lengthy document.

It may well be as was stated by Wilson J. in V.K. Mason Construction Ltd. v. Bank of Nova Scotia (1985), 16 D.L.R. (4th) 598 at p. 609, [1985] 1 S.C.R. 271 at p. 287, 35 R.P.R. 118 (S.C.C.), that "[a] sophisticated commercial borrower ... is in scant need of protection by being informed of his rate of interest at the annual ... rate". But there is nothing in s. 4 to suggest that it applies only to the naive and not to the sophisticated borrower. The section on its face applies equally to all borrowers and it would be almost impossible to determine when s. 4 applied if it were otherwise.

I conclude, therefore, that the word "contract" in s. 4 of the Interest Act includes a promissory note. Not only is such conclusion arrived at by giving the words used in the section their ordinary meaning, but also by paying heed to the opinions of judges and other jurists.

I turn now to the issue of negligence. While there are several plaintiffs, since Herbert Perlmutter represented all of them in his dealings with the defendants I will for convenience treat him as being the sole plaintiff unless it is necessary to do otherwise.

Most of the relevant events occurred on January 11, 1978. Herbert Perlmutter was born in 1922 and had been a practising chartered accountant since 1950. He had been active since 1972 in the lending of money and for several years prior to 1978 had been lending money to a company by the name of Context Systems Inc. controlled by a practising solicitor, one George Mitches. Not only Context Systems Inc. but also George Mitches, Peter Mitches, Philip Mitches and Albert Edgar Jeffery signed or were purported to have signed the promissory notes which Mr. Perlmutter received as security for his loans to Context. Mr. Jeffery was also a practising solicitor and a man of considerable wealth. It was Mr. Jeffery's signature that Mr. Perlmutter considered to be the gilt-edged security for his loans.

Prior to January 11, 1978, the promissory notes which Mr. Perlmutter received as security for his loans were prepared by George Mitches. Some of those notes contravened s. 4 of the Interest Act in that some of them stipulated for an increased interest rate after default calculated on a monthly basis but without stating the per annum equivalent for such rate, while some others provided for interest on a monthly basis both before and after default without setting out the equivalent per annum rate.

There is no suggestion in the evidence that George Mitches or indeed any of those who signed those notes was aware that they contravened the Interest Act. Quite the contrary in fact, for Mr. Perlmutter had sued on one such note when it went into default in 1975 and obtained default judgment on it. The fact he had been forced to sue on one of the notes did not deter Mr. Perlmutter from continuing to lend money to Context presumably because Mr. Perlmutter felt certain of his security as long as Mr. Jeffery was responsible to repay him.

On Friday, January 8, 1978, George Mitches asked Mr. Perlmutter to lend Context a further $35,000. Mr. Perlmutter agreed to do so. It was also agreed that the interest rate which had been at 15% per annum on four notes securing part of the existing indebtedness should be increased to 18% and that the $35,000 to be advanced would be secured by a new note which would consolidate and increase two existing notes which provided for interest at the rate of 2% per month. This arrangement necessitated the redrawing of the existing notes.

Because with the further advance the debt of Context would be increased to a total of approximately $360,000, Mr. Perlmutter decided to have his solicitors draw up the new notes. He attended on his solicitors on Monday morning, January 11, 1978, without an appointment and spoke first with Edward Richmond telling him that he was lending a further $35,000 to Context and that George Mitches wanted the money in a hurry. He showed Mr. Richmond the existing notes which were to be updated and changed. Mr. Richmond inquired of him if he had advanced all the money covered by the notes to all that had signed them and when he said he had not, that some of his cheques had been made out to George Mitches in trust, Mr. Richmond cautioned him that he might be faced with a defence by Mr. Jeffery that he had not received consideration for his promise to pay. Mr. Richmond then took Mr. Perlmutter to see Mr. Stambler for the drafting on the new notes, alerting Mr. Stambler to the possible problem in enforcing the old notes and suggesting that a clause be added to the new notes which would approve of the way money had been theretofore advanced. Since Mr. Perlmutter indicated the matter was urgent, Mr. Stambler dropped what he was doing and set about drafting the new notes in the presence of Mr. Perlmutter. Neither Mr. Stambler nor Mr. Perlmutter was aware of the provisions of s. 4 of the Interest Act. The new notes drafted by Mr. Stambler violated s. 4 of the Interest Act in the same way the old notes had. Four of the new notes stipulated for interest at the rate of 18% per annum

but after default interest at the rate of 2% per month. The other new note stipulated for interest at 2% per month both before and after default. All the notes were payable on demand. None of them contained a statement of the per annum rate to which 2% a month is equivalent.

While drafting the new notes Mr. Stambler expressed some concern about the words in the old notes which dealt with default. Those words read as follows:

> Provided however, that in the event of default of payment of the said principal and interest, this note shall continue to bear interest at the rate of 2% per month until the full amount of principal and interest and costs are paid in full.

Mr. Stambler testified that it was the provision for costs in the default clause that he was unhappy with because the word "costs" did not denote a sum certain. He said that he could not recall that the increased interest stipulated for in the default clause caused him any concern. He testified that he warned Mr. Perlmutter that in his view he could not recover on that clause but that he did not state the reason why he was of that view. He testified: "I warned him, it may not be enforceable, that is as far as it went. It was passed over quickly."

Mr. Perlmutter testified that Mr. Stambler said while drafting the new notes that the stipulation for costs might not be effective but mentioned no other concern about the inclusion of that word. He testified Mr. Stambler also said that the 2% per month rate after default might be a penalty and not enforceable but that he did not indicate it would have any negative effect on the notes so he, Mr. Perlmutter, told him to leave it in.

Whatever Mr. Stambler said about the default clause, it is clear he did not suggest that by increasing the interest rate after default, the rate stipulated for prior to default might not be collectable for the period after default.

Mr. Perlmutter testified that when the wording of the new notes was being dictated by Mr. Stambler to his secretary, the secretary said "shouldn't the 2% per month be 24% per year" and that he, Mr. Perlmutter, said to leave it the way it was. Once again it is quite clear that Mr. Stambler did not raise any concern that the interest rate was being expressed on a monthly basis rather than at an annual rate.

As was stated by Le Dain J. in Central Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481 at pp. 523-4, [1986] 2 S.C.R. 147 at p. 208, 75 N.S.R. (2d) 109 (S.C.C.):

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.
>
> . . . . .
>
> The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient

> knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.

Mr. Stambler was called to the Bar in 1959 and prior to 1978 had been engaged in a commercial practice with emphasis on mortgages and the realization of securities. His practice involved the drafting of contracts, including promissory notes that provided for the payment of principal amounts plus interest. He was aware of the provisions of the Interest Act in so far as they related to mortgages on real estate but was unaware of the content of s. 4 of that Act. While he had read s. 6 of the Act and presumably those other sections which relate to mortgages on real estate, he had not read s. 4, or at least he had not read further than the opening phrase which reads "except as to mortgages on real estate".

Solicitors called by both the plaintiffs and the defendants testified at the trial. Those called by the plaintiffs testified that a reasonably competent solicitor engaged in a commercial practice should have been aware in 1978 that because of s. 4 of the Interest Act interest on promissory notes had to be stated on an annual basis. Two of the solicitors called by the plaintiffs said the matter of urgency in the drafting of the notes made no difference because the problem was an obvious one and could be so easily and quickly corrected.

The solicitors called by the defendants testified that in 1978 a solicitor of reasonable competence and diligence would not have thought that s. 4 of the Interest Act applied to promissory notes and would not have checked or considered s. 4 before drawing a note. One of the solicitors called by the defendants said that various reasonably competent solicitors in 1978 would have given a variety of opinions as to whether s. 4 applied to promissory notes. It was the general thrust of the evidence of the solicitors called by the defendants that prior to 1978 they had never heard of s. 4 being raised as a defence to a claim made on a promissory note and the possible applicability of s. 4 to promissory notes was not even considered.

I accept the opinion I have referred to that was expressed by the solicitors called by the plaintiffs. But even if all the solicitors called to testify had given the same opinion as those called by the defendants, I would still have concluded that in 1978 a solicitor of reasonable competence, engaged in a commercial practice would have been aware that s. 4 of the Interest Act necessitated that the annual rate of interest be disclosed in a promissory note. Such a solicitor would have known that "interest" is a subject-matter within the jurisdiction of the Parliament of Canada and would have made himself familiar with the federal legislation on interest set out in the Interest Act and in particular that portion which related to the manner in which interest had to be expressed in contracts. The Interest Act is short and relatively uncomplicated and it is difficult to imagine how a solicitor could feel he is competent to draft contracts providing for interest payments without knowing that s. 4 requires the annual rate of interest charged be stipulated. In my view, the provisions of s. 4 are so basic and fundamental and a knowledge of them so necessary to the drafting of contracts that provide for the payment of interest that any reasonably competent solicitor practising in the field of commercial law anywhere in Canada must be aware of them. Very simply, a solicitor who practises commercial law is responsible, if he undertakes to draft a promissory note, to see to it that it expresses the interest rate in a form that is enforceable.

Even if it could be said that a reasonably competent solicitor practising in commercial law might not have concluded on reading s. 4 that the word "contract" included promissory notes (a proposition I cannot accept), at the very least such a solicitor could not have excluded without researching the point, the possibility that it did include promissory notes. If he had researched the point he would have found no authority to the effect that s. 4 did not apply to promissory notes and he would have found considerable authority that it did. If he still was in doubt he would nevertheless have considered it his duty to avoid the problem by setting out the annual interest rate (when drafting notes), unless the client after being informed of the problem insisted otherwise.

I conclude therefore that Mr. Stambler was negligent. The negligence of Mr. Stambler did not begin on January 11, 1978, although that is the day it took effect. The negligence arose when Mr. Stambler first began drawing contracts that provided for interest payments, without having made himself familiar with the provisions of the Interest Act in regard to such contracts. If he had made himself aware of the provisions in s. 4 as was his duty to do if he intended to draft such contracts, then he would have realized immediately on January 11, 1978, when he saw the old promissory notes that were presented to him by Mr. Perlmutter that they infringed s. 4. In his drafting of the new notes he would have pointed out the problem to Mr. Perlmutter and would have corrected it by stating the interest to be 24% per annum in place of 2% per month on the note that provided for interest before and after default at 2% per month. In regard to the four notes that called for interest on a monthly basis after default only, he would have stated that rate on a per annum basis. He should also, in my view, have told Mr. Perlmutter that by increasing interest after default he was attempting to impose a penalty and that the notes should stipulate for the same interest rate after as before default. I am satisfied on all the evidence that Mr. Perlmutter as a reasonable businessman would have followed Mr. Stambler's advice and would have directed these changes be made.

If s. 4 applies to promissory notes, Mr. O'Brien submits that for a number of reasons, whether viewed individually or collectively, Mr. Stambler is to be excused for not knowing about the content of s. 4 or at least in not applying such knowledge when he drafted the promissory notes. A short summary of these arguments and my reasons for rejecting them follows:

(1) The most important, indeed the paramount task, confronting Mr. Stambler on January 11, 1978, was to include in the promissory notes a clause that would bind Mr. Jeffery to repayment of all the funds already loaned by Mr. Perlmutter even though because of the way he had made out the cheques when the money was advanced he might be unable to show that the moneys he loaned had ever gotten into the hands of Context or Mr. Jeffery. Mr. Stambler performed that task so efficiently that he saved Mr. Perlmutter from the loss of the funds he had already loaned. It was little more than chance or fortune that prompted Mr. Perlmutter to have the defendants update his old notes. While updating them, the defendants discovered and cured a problem that would have cost Mr. Perlmutter the loss of all the money he had loaned. It would now be the height of injustice, bordering on tragedy, that having saved for Mr. Perlmutter the money he had loaned, the defendants should now be held liable to Mr. Perlmutter because he could only collect 5% per annum interest on those moneys where his new notes stipulated for a much higher return but expressed as 2% per month.

If the court had some general power to ensure fairness and justice, then there would be merit to this argument. The court, however, must impose justice according to law and such justice may be

far removed from ideal justice. While the evidence is less than clear on the point, I am prepared to assume that but for the clause ratifying the method in which the moneys had previously been advanced, Mr. Perlmutter would have lost all the money he had loaned plus the interest thereon. Not only would he have had difficulty showing that the moneys loaned were received by or used for the benefit of Context, which was the intended recipient of the loans, but Jeffery was later able to establish that his signature had been forged 13 times on cheques and notes purportedly signed by him.

The clause drafted by Mr. Stambler which saved Mr. Perlmutter from the loss of the money he had loaned reads as follows:

> THE SAID Albert Edgar Jeffery hereby acknowledges having been advanced the original principal sum and confirms that any of the said principal sum not actually paid to him was advanced on his behalf in accordance with his direction and authority.

Because of this clause, Mr. Jeffery's defences of forgery and lack of consideration, raised when he later was sued on the new notes, proved ineffective. The ironic thing is, if the defendants had not discovered the problem and corrected it, Mr. Jeffery's defences of forgery and lack of consideration would have prevailed, their negligence in regard to s. 4 of the Interest Act would have been immaterial and they could not have been held liable to Mr. Perlmutter in that regard.

There is no rule of law, however, that because a solicitor through his diligence has saved a client from great misfortune the solicitor is thereby absolved from his duty of care. That duty remains the same no matter how much the solicitor has gained for the client.

(2) Mr. Stambler was informed that the drafting of the promissory notes had to be done in a great hurry and he did quickly draft them in Mr. Perlmutter's presence. A solicitor forced by the client to work against the clock will be excused if he forgets or fails to take into account an obscure legal principle: see Bannerman Brydone Folster & Co. v. Murray, [1972] N.Z.L.R. 411.

In my view, the matter of urgency did not contribute to the failure of Mr. Stambler to consider s. 4 of the Interest Act. For the solicitor aware of the content of s. 4 it is basic that interest must be expressed on a per annum basis when it is provided for in a written contract. Such a solicitor in drafting a promissory note, no matter what the urgency, would not forget this basic principle. For the solicitor without knowledge of s. 4, all the time in the world will not alert him to the problem. In any event, as things turned out, Mr. Stambler had plenty of time to review and dwell on the proper wording of the notes. After dropping everything to draft the notes on the morning of January 11, 1978, on the basis that they were needed before the further $35,000 was advanced by Mr. Perlmutter, later in the day Mr. Perlmutter informed Mr. Stambler through his secretary that after leaving Mr. Stambler's office he had advanced the $35,000 to Mr. Mitches and that the notes could not be signed for some days because Mr. Jeffery was out of town. The defendants who were given the task of seeing to the proper execution of the notes were not able to get them executed until January 30, 1978.

(3) The application of s. 4 to promissory notes and contracts in general was in 1978 an old, obscure and long forgotten legal principle. For most of the time between 1897 and 1978 the section had little practical effect because 5% per annum was a reasonable rate of interest.

I do not draw the inference that the section had been forgotten by commercial lawyers generally simply because some of them obviously did not keep it in mind and because there was not a lot of litigation that raised the section. But even if the majority of commercial lawyers had by 1978 forgotten about or simply ignored s. 4 of the Interest Act, it would still be my view they should not have done so. They were under an obligation, as I have already stated, to know about and apply the basic requirement that the interest rate in a written contract had to be stated on a per annum basis.

(4) The notes which Mr. Perlmutter showed to Mr. Stambler had been drawn by a respected practising solicitor and Mr. Stambler was entitled to repeat their wording.

While a solicitor may be tempted to take a chance that the work of another solicitor has been done without error, he is not protected if in fact his gamble does not prove correct.

(5) Mr. Stambler was under instructions from Mr. Perlmutter to have Mr. Jeffery ratify the old notes and it was necessary to repeat the wording of the old notes in the new notes to accomplish this ratification.

In my view, it is a misconception to say that Mr. Stambler was attempting to get Mr. Jeffery to ratify the old notes. What he hoped to accomplish and what he did accomplish was to get Mr. Jeffery's agreement that he was content with and bound by the way all money had been advanced prior thereto. I have quoted the clause Mr. Stambler put in the notes which accomplished this purpose. It does not contain, nor was there a need that some other portion of the new notes contain the wording of the old notes in regard to interest at a monthly rate.

Mr. George Mitches died in the fall of 1978 and Mr. Perlmutter decided he should collect on his promissory notes. He made demand for payment and when payment was not made he brought action on the notes on November 24, 1978. Mr. Jeffery delivered an affidavit of merits raising the following defences:

1. That the defendant Jeffery did not know and had no way of knowing how much money had been advanced by Mr. Perlmutter to Context, or how much had been repaid to him because he, Jeffery, was only an accommodation party. Having no knowledge of the state of the account, Jeffery asked that the plaintiff prove the advances and the state of the account;

2. that the notes sued on and the prior notes, contravene s. 4 of the Interest Act;

3. that the cost of the loan was excessive and the transaction was harsh and unconscionable.

When being cross-examined on his affidavit of merits and when certain documents were produced for his inspection, Mr. Jeffery denied that he had endorsed a cheque for $35,000 on which cheque he was one of the payees. It also became apparent that the cheques advancing the amounts loaned had been made payable to George Mitches in trust, or to all three of George, Peter and Philip Mitches, but not to Context. That the cheques had not been made payable to Context, Mr. Stambler knew on January 11, 1978. He did not know about the forgeries.

An application was made for summary judgment but was denied by the Honourable Judge Killeen. In dismissing the application for summary judgment, Judge Killeen said he had serious doubts as to whether all, or any, of the funds advanced, ever got into the hands of the principal

borrower and the personal defendants being accommodation parties the case should go to trial. An appeal from the decision of Judge Killeen was dismissed. It would appear, therefore, that summary judgment was denied because Mr. Jeffery raised the very problem with the advances that Mr. Richmond had detected when he spoke to Mr. Perlmutter on January 11, 1978.

Eventually the action came on for trial before Montgomery J. Mr. Claude M.V. Penza, Q.C. acted as counsel for Mr. Perlmutter at the trial before Montgomery J. He testified at the trial of this action that during the trial before Montgomery J. he reached the conclusion that all the defences raised by Mr. Jeffery, including the defence of forgery, would fail, except the defence that the notes did not comply with s. 4 of the Interest Act which defence he felt would succeed.

He said he felt the court would not have granted the rectification of the notes asked for by Mr. Perlmutter, namely, the insertion of an annual rate of interest. He also said he felt the court would not have awarded interest under the Judicature Act, R.S.O. 1980, c. 223, to take the place of the interest lost by the application of s. 4 of the Interest Act. His opinion was that an award of such interest and rectification would both be refused because to grant either request would be to circumvent the provisions of s. 4.

He said he had Mr. Perlmutter calculate interest on the notes at 5% per annum wherever the notes called for interest at 2% per month. The amount owing to Mr. Perlmutter on the six notes being sued on in the actions before Montgomery J. when interest was calculated at 5% per year in place of 2% per month came to approximately $530,000. To avoid the delay in collecting the debt an appeal by Mr. Jeffery would cause, Mr. Pensa recommended to Mr. Perlmutter that he settle his claim for $500,000 and Mr. Perlmutter accepted that advice.

Mr. John Francis, Q.C., assisted by Mr. Peter Griffin, represented Mr. Jeffery at the trial before Montgomery J. Mr. Griffin was called as a witness in the trial before me. He said that after Mr. Jeffery had testified before Montgomery J., Mr. Francis and he reached the conclusion that the only defence that would prevail was that based on s. 4 of the Interest Act.

I conclude that the advice given to Mr. Perlmutter by Mr. Pensa was sound and that Mr. Perlmutter was acting prudently when he accepted that advice and took the $500,000 in settlement of his claims.

In this action, Mr. Perlmutter claims against the defendants for the interest he lost because it had to be calculated at 5% per annum instead of at 2% per month. Mr. O'Brien submits that for a number of reasons even if Mr. Stambler was negligent in failing to draft the notes so as to avoid the consequences that flow from s. 4 of the Interest Act, Mr. Perlmutter is still not entitled to a judgment against the defendants. I will briefly set out Mr. O'Brien's submissions in that regard and my disposition of them.

(1) The s. 4 interest rate problem was only one of many concerns that prompted Mr. Perlmutter to settle his claim for $500,000. As a result, he cannot now establish what portion, if any, of his loss resulted from the alleged negligence of Mr. Stambler in the drawing of the notes.

Because of the s. 4 problem, Mr. Perlmutter was restricted to an interest rate of 5% per year wherever the notes provided for interest at 2% per month. That was the only defence he and his counsel feared when he settled his claim. By the time he made the settlement it was clear that none of the other defences raised had any likelihood of succeeding. It was the s. 4 problem alone

that induced Mr. Perlmutter to settle and so his loss flows directly and clearly from Mr. Stambler's negligence in the drafting of the notes. He was, however, according to his calculations, entitled to recover more than $500,000 even when restricted to interest at 5% a year. To the extent he settled for less than he was entitled to on that basis, such loss was of his own choosing and cannot be visited upon the defendants.

(2) Mr. Perlmutter should not have settled his action. The court would have ordered rectification of the notes by adding the words "24% per annum"; or would have awarded interest under the Judicature Act to take the place of the interest he lost through the operation of s. 4.

I agree with Mr. O'Brien that as a general rule, where the effect of a rule of law or a statute in existence when an agreement is made is to frustrate the intention of the parties, the court has the discretion to rectify the contract to give effect to that intention. The court does not, however, in my view, have the right to rectify an agreement so as to avoid a penalty imposed by a statute. As I mentioned earlier, s. 4 imposes a penalty for the benefit of the borrower if the annual interest rate is not contained in the written contract. Parliament made no distinction between the naive and the sophisticated borrower, and it would be improper for the court to do so. If the court could order rectification of the contract simply because it can be shown the parties really intended the stated interest rate to be effective, then s. 4 would be virtually without effect.

Mr. O'Brien referred to Thomson v. Thomson (1927), 59 O.L.R. 661, [1927] 1 D.L.R. 653, where the Court of Appeal dealt with a claim for reformation of an agreement which ran afoul s. 4 of the Interest Act. In that case the allegation of the plaintiff who was asking the court for rectification, was that there was an oral agreement that the written agreement was to contain a provision that interest was to be paid at the rate of 7% per annum. The court found that there was a complete contradiction between the parties as to the exact terms of the bargain and so it could not rectify the agreement.

I point out, however, the plaintiff was there asking that the written agreement be rectified so that it would contain the words which, according to the plaintiff, by oral agreement it was to contain. Rectification in such circumstances does not simply avoid s. 4. Rather, it makes the agreement read as the parties had agreed it should and the fact that s. 4 is thereby avoided is incidental.

In the case before Montgomery J., however, there was no oral agreement the notes were to contain a clause expressing the 2% per month interest rate at a per annum rate. Rectification in such circumstances would be adding words never agreed to for the very purpose of avoiding the penalty created by s. 4. I do not believe the court has such authority.

I am likewise of the view that the court cannot circumvent the penalty contained in s. 4 by awarding interest under the Judicature Act to take the place of that lost through the operation of s. 4. Even if, contrary to my view, the court has the power by rectification or the awarding of interest under the Judicature Act, to neutralize the penalty contained in s. 4, Mr. Perlmutter did not have to push the trial on to completion just to find out if the court would do so. He was entitled to accept reasonable advice in that regard given by his counsel and settle the action on the basis the court would not do so.

(3) Before the plaintiff can ask for a judgment against the defendants, he must be able to assign the notes to the defendants so they can enforce them.

I was referred to no case that supports such an argument and I do not believe the argument to be sound.

(4) Mr. Perlmutter should have added the defendants in this action, as defendants in his action against Jeffery and others on the note if he had any intention of making a claim against them. In any event, he should have informed the defendants about the offer of settlement that he was contemplating accepting before he accepted it, so the defendants could have decided whether or not to pay him what was owing on his notes and take an assignment of them.

I find no merit in this argument. The defendants could have done no better than Mr. Perlmutter in enforcing the notes. They too would have been limited to 5% where the notes read 2% per month.

(5) Concern that he might not be able to collect a judgment from Mr. Jeffery was one factor that led Mr. Perlmutter to settle his action against him.

I am satisfied on the evidence of Mr. Pensa that there was no such concern.

I turn now to the question of damages. Mr. O'Brien submits that the plaintiffs' damages cannot extend beyond the date that summary judgment would normally have been obtained, that is to say about two months after default. This argument is based on the proposition that if all that was wrong with Mr. Perlmutter's claim was the interest rate problem, summary judgment could easily have been obtained with interest calculated at 5% per year where the notes provided a rate of 2% per month. Any delay beyond that date in obtaining judgment must arise from some cause for which the defendants are not responsible.

I do not agree. Mr. Stambler should have foreseen on January 11, 1978, that Mr. Jeffery might well raise defences that would force a trial and thereby extend the period during which the decreased interest rate would apply. Indeed, he was aware on January 11, 1978, that the money or some of it had not been advanced to Context or Mr. Jeffery and he was concerned this might afford Mr. Jeffery a defence. In my view, Mr. Perlmutter is entitled to damages up to the date he settled his claim during the trial before Montgomery J.

Did the stipulation for interest at 2% per month after default in the four notes which provide for interest at 18% per annum before default constitute a penalty? Mr. Perlmutter did not suggest that the increased rate of interest after default was meant to be a genuine pre-estimation of the damage he would suffer if default occurred. Quite the contrary in fact, for he testified that the increased interest rate after default was intended to put pressure on the borrowers to pay the loan. The increased interest rate therefore constituted a penalty and as such was not enforceable.

Mr. Perlmutter could not then, in any event, have collected interest at 2% per month but only at 18% per annum after default on those four notes and his damages must be calculated with this in mind.

Because of the s. 4 problem, Mr. Perlmutter would suffer damages arising from that problem as long as his loan was outstanding. His obligation to mitigate his damages required him then to

recover the money he had loaned as quickly as he reasonably could. This, in my view, he did. He even took less than the interest he calculated he was entitled to under s. 4 to get the money into his hands at an early date. That additional loss he is not asking the defendants to pay.

His damages then are the interest lost on the four 18% notes from the date of default (November 11, 1978) to the date of settlement (November 11, 1980), calculated at the rate of 18% per annum (i.e., 24% less the 6% penalty), less the 5% simple interest provided for by s. 4; and the interest on the 2% per month note from January 11, 1978 to November 11, 1980, calculated at 24% per annum less 5% simple interest.

The stated principal in the five promissory notes drawn and dated January 11, 1978, is as follows:

(1) Bernice Perlmutter --	$ 49,554.36	
(2) Perlmutter Brothers --	92,765.05	
(3) Perlmutter Brothers --	59,308.85	
(4) Herbert Perlmutter --	27,116.90	
(5) Elcano Acceptance Limited --		132,305.93
TOTAL FACE VALUE	$361,051.09	

Those principal amounts were arrived at by computing interest as directed in various prior promissory notes given when money was loaned by the plaintiffs. But some of those prior notes violated s. 4 of the Interest Act and so entitled the plaintiffs to 5% per annum simple interest only. Further, that 5% interest being simple interest did not itself bear interest and did not increase the principal amount owing from time to time.

Section 5 of the Interest Act reads:

> 5. If any sum is paid on account of any interest not chargeable, payable or recoverable under section 4, such sum may be recovered back or deducted from any principal or interest payable under such contract.

I appreciate that s. 5 only permits a debtor to deduct an overpayment of interest "from any principal or interest payable under such contract". (Emphasis is mine.) It might be said that any overpayment of interest on the old notes could not be deducted from amounts owing under the new notes drawn on January 11, 1978, since the overpayment did not occur under the contracts of January 11, 1978.

But the January 11, 1978 notes spell out that the principal amounts of those notes was arrived at by computing interest that fell due under the old notes and the question arises whether such computation was done properly. Further, the new notes seem to perpetuate the state of account that existed under the old notes.

In my view, the new notes were so intertwined with the old notes that the debtor could deduct from the January 11, 1978 notes any interest overpayment paid or calculated under the old notes.

Because of s. 5 of the Interest Act the principal amount of the five January 11, 1978 notes must be taken as being the amount that would have been owing on each of them if interest on the money advanced before January 11, 1978, had been calculated to January 11, 1978, in accordance with s. 4 of the Interest Act.

When calculated as required by s. 4, the principal owing under the five promissory notes as of January 11, 1978, was as follows:

Recalculated

Startingated

Balancegaed

1.	Bernice Perlmutter --	$ 30,426.90
2.	Perlmutter Brothers --	89,188.46
3.	Perlmutter Brothers --	55,361.09
4.	Herbert Perlmutter --	23,993.06
5.	Elcano Acceptance --	128,000.00

$326,969.51

It will be noted that the application of s. 4 of the Interest Act to the prior promissory notes reduces the principal amount owing under the five notes by a total of $34,081.58.

Mr. O'Brien argues that the wording of the promissory notes does not provide for compounding of the interest that fell due under them. The relevant wording of the four notes that provided for interest at 18% per annum is as follows:

> ... together with interest at the rate of eighteen (18%) per cent per annum, payable monthly, and which principal and interest is due and payable on demand.
>
> PROVIDED however, that in the event of default of payment of the said principal and interest, interest shall be calculated and payable at the rate of two (2%) per cent per month, until the full amount of principal, interest and costs are paid in full.
>
> The 2% per month note reads:
>
> ... together with interest at the rate of two percent (2%) per month, payable monthly, and which principal and interest is due and payable on demand. PROVIDED HOWEVER, that in the event of default of payment of the said principal amount and interest, this note shall continue to bear interest at the rate of 2% per month until the full amount of principal, interest and costs are paid in full.

Prior to January 11, 1978, whenever the promissory notes given to the plaintiff provided for interest to be payable monthly the plaintiff compounded the interest monthly. I draw the

inference from the evidence that such compounding of interest was done with the knowledge and agreement of those liable to pay the amounts secured by the notes.

In my view, Mr. Stambler knew or should have known that the plaintiff expected that the notes to be drawn by him would provide for monthly compounding of the interest. If the notes do not so provide, then the fault is Mr. Stambler's and in assessing damages I will proceed on the basis that the notes do provide for monthly compounding of interest.

In any event, I believe the notes do so provide. In regard to the 18% per annum notes, the interest is stated to be "payable monthly". If interest is to be paid monthly it must, of necessity, be calculated monthly so those notes implicitly provide for the interest to be calculated and paid monthly. The wording of those notes in regard to interest after default is "interest shall be calculated and payable at the rate of two (2%) per cent per month". In regard to the 2% per month note, it stipulates that the 2% interest is "payable monthly" and so it likewise calls for the amount to be calculated monthly.

Where the contract provides, as these notes do, either explicitly or implicitly, that interest is to be calculated and payable monthly, the intention of the parties is to create the obligation to pay compound interest: see Re A.J.F. Investments Ltd. and Vellco Investments Ltd. (1985), 49 O.R. (2d) 628, 40 R.P.R. 14 (H.C.J.).

The plaintiffs' loss, calculated in the manner I have described, amounts to $177,947.50. In arriving at that amount, I have accepted the arithmetic calculations of the witness Mario S. Galizia, who made the calculations in the manner requested by me.

It would appear that but for the negligence of Mr. Stambler, the plaintiff would have been able to recover this additional amount from Mr. Jeffery on November 28, 1980.

There will be judgment for the plaintiff then for $177,947.50, together with prejudgment interest from November 28, 1980, at the average prime rate that has existed since then, and costs on a party-and-party basis. I may be spoken to if there are any facts that have not been brought to my attention that could affect either prejudgment interest or costs.

At the opening of trial, counsel for plaintiffs asked that the claim for damages in the statement of claim be amended by increasing that claim to $231,030.06. I allow the amendment though the plaintiffs had already claimed more damages than I have awarded.

Judgment for plaintiffs.