

SMITH AND ANOTHER v. THE COMMISSIONER OF STAMP DUTIES

[M.301/80]

1981. Supreme Court: Everett J.

Feb. 9, March 4, 1981.

Stamp Duties — What transactions or instruments are liable — Loans — “Loan instrument” — Rate of interest — To what “interest” extends — “Legal costs payable to legal practitioner” — Solicitor mortgagee — His firm charging percentage on interest for legal costs of administering mortgage and keeping mortgage account — Whether “legal costs” or included in interest — Stamp Duties Act 1931 (22 Geo. V No. 19), s. 60A(1) (as reprinted as at 1st July, 1981).*

Stamp Duties — Appeal, case stated, etc. — Objection to assessment — Appeal to a judge on summons — Procedure on hearing — Stamp Duties Act 1931, s. 22 — Supreme Court Civil Procedure Act 1932 (23 Geo. V No. 58), s. 6(3)†.

Words, Phrases and Maxims — “Legal costs” — Stamp Duties Act 1931, s. 60A(1).*

The *Stamp Duties Act* 1931, by Pt. IV, Div. IIIA, imposes duties on “loan instruments”, defined in s. 60A(1) as instruments constituting or evidencing the terms of certain loans, if the rate of interest exceeds 14% p.a., “interest” being defined in the same subsection to include all

* *Stamp Duties Act* 1931, s. 60A — (1) For the purposes of this Division, unless the contrary intention appears —

“interest”, in relation to a loan, includes any amount (by whatever name called) which is in excess of the principal of the loan and which has been paid or is to be paid or payable in consideration of or otherwise in respect of the loan, and, without limiting the generality of those words, includes ... but does not include legal costs payable to a legal practitioner, valuation fees ...

† *Supreme Court Civil Procedure Act* 1932, s. 6 — (3) Any jurisdiction, whether original or appellate, which is conferred on or vested in the Court ... or a judge ... shall ... be exercised (so far as regards procedure and practice) in the manner provided in this Act and in the Rules of Court: or if no provision, or no appropriate provision, as to the exercise of any such jurisdiction is contained in this Act or in the Rules of Court, then such jurisdiction shall be exercised in such form, mode, and manner as the Court or a judge may direct.

payments above the principal sum, not including "legal costs payable to a legal practitioner" and certain fees.

Legal practitioners lent moneys which they held for investment under an instrument of mortgage in which it was provided that the mortgagor would pay on each day appointed for the payment of interest "the Mortgagee's legal costs of administering this Mortgage and keeping the mortgage account which" was fixed as 3% of each payment of interest.

Only if these payments were reckoned as "interest" would the mortgage interest rate exceed 14% per annum, in which case additional duties became payable.

Held, that the costs were costs for legal work done by and payable to a legal practitioner whether payable by the mortgagee or the mortgagor and because of its definition not to be included in the "interest".

The *Stamp Duties Act*, 1931 (Tas.), by ss 21 and 22, provides for an appeal against an assessment of duty to a judge by summons but makes no provision for the manner thereof.

Held, that the *Supreme Court Civil Procedure Act* 1932 (Tas.), s. 6(3), applied to such appeals and the judge should give directions as to their form, mode, and manner.

ORIGINATING SUMMONS.

By memorandum of mortgage dated 9th October, 1980, Mr and Mrs G. W. J. Dobson, borrowers, agreed to pay Messrs V. R. Smith and C. R. Leslie, mortgagees, (the appellants) the principal sum of \$2,500 in the manner and at the times therein set forth.

The appellants were two of the partners in a firm of solicitors carrying on business in the name of "Dobson, Mitchell and Allport".

The memorandum provided that subject to the right of the mortgagees to determine another rate in accordance with a special provision, the interest rate should be 14% per annum provided the mortgagors paid interest at such rate "on or before the due date for each half-yearly payment of interest ... together with the sum payable under cl. 2.7 for that period."

Clause 2.7 of the memorandum provided:

"2.7 That the mortgagor will pay to Messrs. Dobson Mitchell and Allport on each half yearly date appointed for payment of interest under this Mortgage and upon repayment of this Mortgage the Mortgagee's legal costs of administering this Mortgage and keeping the mortgage account which until fixed by the Mortgagee at another amount shall be an amount equivalent to three (3) per centum of the amount of interest falling due for payment to the Mortgagee on that date."

An affidavit of Mr Leslie contained the following assertions:

"4. That it is common practice in Tasmania for solicitors to make a charge for administering and managing mortgage securities.

5. That the charge last referred to is made against the

mortgagee client but in some cases is recoverable from the mortgagor under the terms of the mortgage.

6. That the method of calculation of the charge referred to above varies between different solicitors but common methods of calculating the charge are as follows:
 - a) as a percentage of the amount of interest collected.
 - b) as a percentage of the amount of the principal of the loan.
 - c) as a flat fee unrelated to the principal or interest of the mortgage.
7. That the first named Appellant and I are two of the seven partners in the firm of Dobson Mitchell and Allport which firm usually charges for administering mortgages in the manner referred to in sub-paragraph (a) of paragraph 6 of this affidavit.
8. That the payment covenanted to be made under clause 2.7 of the annexed Memorandum of Mortgage marked "A" is intended to be by way of indemnity only to the mortgagees for costs charged by Dobson Mitchell and Allport for the services rendered by the firm described in that clause."

Annexed to Mr Leslie's affidavit were copies of correspondence between the Commissioner of Stamp Duties and the solicitors for the appellants which, formal parts omitted, were as follows:

"Messrs. Dobson, Mitchell & Allport, 4th September, 1980
Solicitors,
HOBART.

Stamp Duties Act, 1931 (Tas.)

Re: Liability for inclusion as interest for the purposes of the Section of amounts paid under Cl. 2.7 of Standard Mortgage Instruments of your firm.

I have given further consideration to this matter, subsequent to my discussion with Mr Leslie.

What is to be included as 'interest' is set out in Section 60A(1) of the Act and includes, in relation to a loan, any amount (by whatever name called) which is in excess of the principal of the loan and which has been paid or is to be paid or payable in consideration of, or otherwise in respect of the loan, and without limiting the generality of these words, includes the obtaining of the loan, or the giving of any security in respect of the loan . . . to any person . . . under which that amount or any part of that amount is directly or indirectly payable to the lender . . . but does not include legal costs payable to a legal practitioner.

It appears to me that in part this is an arrangement whereby collection commission properly chargeable against the

lender has been shifted to the cost of the borrower and prima facie, there is some argument for it to be included as interest.

The Tasmanian Act is basically the same as the N.S.W. Act and the question is canvassed by D. Graham Hill in the supplement of Stamp, Death, Estate and Gift Duties (N.S.W., Commonwealth and A.C.T.) para 82A/3, pages 16/3 and 16/4.

Before I proceed to treat payments under Cl. 2.6 of your firm's mortgage instruments in this manner, I will allow you to make any comments you wish.

(H. D. M. Timothy)

COMMISSIONER OF STAMP DUTIES."

"The Commissioner of Stamp Duties, 10th September, 1980
State Taxation Branch,
15 Victoria Street,
HOBART. 7000

Stamp Duties Act, 1931 — Section 60A(1)

Re: Liability for inclusion as interest for the purposes of the section of amounts paid under Clause 2.7 of Standard Mortgage Instrument of Dobson, Mitchell & Allport

We acknowledge your letter of 4th instant in connection with the above matter and appreciate your communication prior to taking steps to assess the instruments.

Our view of the provision is that it has no application to the above amounts charged for two reasons, each of which is separately adequate to dispose of the matter.

First it appears to us that the payment is specifically excluded from the definition of 'interest' in that it constitutes legal costs payable to a legal practitioner. Our firm is engaged in legal practice and we certainly regard all fees paid for our services as being legal costs. If it is sought to distinguish between the nature of various fees paid to the firm, it appears to us that the Act does not provide any criteria for doing so. Nor are we aware of any determination which characterizes some fees paid to a legal practitioner as 'legal costs' whilst attaching another identity to other payments.

Secondly we consider that the proper construction of the definitions of 'interest' and 'loan' leads to the conclusion that the payment in question is excluded from the statutory concept of 'interest'. It appears to us that a 'loan' is a sum of money advanced paid or forborne as distinct from the terms upon which the sum of money is lent. If this be accepted, then it can readily be seen that the charge in question is a payment made not 'in consideration of or otherwise in respect of *the loan*' but a payment made in respect of the interest payable under the terms

upon which the loan is advanced. This construction has the advantage of excluding from the statutory concept of 'interest' all sums paid pursuant to covenants in the mortgage not related to the principal sum but related to matters such as payment of Rates, Land Tax, insurance premiums and ordinary maintenance of buildings. To adopt the construction which you appear to favour would, we suggest, even require you to take into consideration the licence fee covenanted to be paid in a mortgage of licensed premises. It would surprise the writer if Parliament intended these payments to be included in the concept of 'interest' although one must admit that such a construction would have a salutary effect on revenue so far as the Government is concerned. The construction which we are advocating obviously will catch payments made in the nature of negotiation or procuration fees or renewal fees as no doubt it was intended to.

Your comments upon the foregoing would be appreciated in due course, and the writer would be happy to discuss the matter with you should you wish to do so.

DOBSON, MITCHELL & ALLPORT

"Messrs Dobson, Mitchell & Allport, 15th September 1980
Solicitors,
HOBART

Stamp Duties Act, 1931 — Section 60A(1)

Re: Liability for inclusion as interest for the purposes of the Section of amounts paid under Clause 2 of Standard Mortgage Instruments of your firm.

I acknowledge your reply of 10th September 1980 and I have considered your submission that in your view, the provision has no application in relation to amounts paid under the above clause.

I am not convinced that the charges in question could be regarded as legal costs. In my view, legal costs are restricted to payments for those services which are not allowed to be performed by law other than by a barrister and solicitor admitted under the Legal Practitioners Act.

The collection of payments due under a mortgage and the application of them can be undertaken by any person with or without a legal background.

It still appears to me that the payments are in consideration of or otherwise in respect of the loan.

The lender could require the borrower to pay him personally, but if for his convenience he instructs the borrower to pay his solicitor who requires a charge for the service, and the

borrower is then required as a condition of the agreement to pay that charge, then the lender has had the benefit of that additional payment which has been applied by his direction and consent by Clause 2 in payment of his charges of collection.

(H. D. M. Timothy)

COMMISSIONER OF STAMP DUTIES."

"Messrs. Dobson, Mitchell & Allport,
Solicitors,
HOBART

7th October 1980

Stamp Duties Act, 1931 — Section 60A(1)

Re: Liability for inclusion as interest for the purposes of the Section of amounts paid under Clause 2 of Standard Mortgage Instruments of your firm.

Further to our telephone conversation when you informed me that, in your opinion, I had not answered the second point made in your letter of 10th September 1980, I consider that if the payments in question are not legal fees and they are payments of amounts to which the lender is entitled and applied by his direction to meet your charges, then the payments are made in respect of the loan and not in respect of the interest, when your arguments are not relevant. I understand that the clause under consideration is or was intended to be inserted in your firm's mortgages but I cannot conceive of its inclusion on the insistence of the borrowers, and as you are not otherwise a party to the arrangement, it can only be as agent for the lender and is a service to him for a cost and my previous arguments apply.

The mortgage could also be caught under Clause 3.14 in that the rate of interest is not wholly ascertainable, but I am prepared to ignore that clause subject to endorsement on the instrument of a requirement that it be re-assessed if the rate of interest is varied.

Drawn in the same manner, further mortgages would be subject to duty under Section 60A.

(H. D. M. Timothy)

COMMISSIONER OF STAMP DUTIES."

P. R. Cranswick for the appellants.

D. Colquhoun-Kerr for the respondent.

Cur. adv. vult.

MARCH 4.

EVERETT J., after referring to the *Stamp Duties Act 1931*,

ss 21(1), 22(1), and the facts, and setting forth cl.2.7 of the memorandum of mortgage, continued:

I am satisfied that the general purpose of cl.2.7 was to provide an indemnity in favour of the investing client in respect of such charges, although there was no written agreement to this effect between such client and the appellants or other partners in the firm.

It is common knowledge that during recent years there has been a gradual, indeed inexorable, increase in rates of interest payable by borrowers, whether from banks and other institutional sources or from private supplies of finance for lending, such as investments by solicitors on behalf of clients. Parliament recognized the existence of such escalation as one of the facts of contemporary business practice. It enacted the *Stamp Duties Act (No. 2) 1978* ("the 1978 Act"), whereby it provided, by new Division IIIA, for the imposition of substantially higher stamp duty on "loan instruments" (as defined in s. 60A(1) of the 1978 Act) under which, in effect, the rate of "interest" as also defined in s. 60A(1) of the 1978 Act exceeded the "prescribed rate" (expressed to be a rate of 14% per annum). The rate of such duty was fixed by s. 5 of the 1978 Act in the form of the following new item in the second Schedule to the Act:

Description of Instrument	Duty or rate payable	By whom payable
"20A Loan instrument within the meaning of section 60A(1)	An amount equal to 2 per cent of the loan to which the loan instrument relates. (Any remaining fractional part of 1 cent shall be disregarded)."	By the lender.

The practical result of the 1978 Act is that if the rate of "interest", as defined, under a "loan instrument" exceeds 14%, then stamp duty at a rate of 2% of the principal sum secured by the mortgage has been, from the commencement of the Act on 1st January, 1979, payable *by the lender*, compared with the considerably lesser rate previously payable *by the borrower* in accordance with then existing item 22 of sch. 2 to the Act, as amended by Act No. 56 of 1975 — "\$3 or ¼% of the amount secured, whichever is the greater".

Although the actual amount of duty in dispute was relatively small, I was informed by counsel for the appellants, without any expressed dissent by counsel for the respondent, that the proceedings constituted a test case with respect to the interpretation of the word "interest" in s. 60A(1) of the Act [the definition of which his Honour set forth].

The primary point at issue is the proper meaning of the words “legal costs” in such definition. If they embrace the management costs referred to in cl. 2.7 of the memorandum of mortgage, then the prescribed rate of interest is not exceeded; otherwise the interest rate does exceed the prescribed rate and the much higher rate of duty is payable.

As I have indicated counsel made preliminary submissions as to the character of an appeal for which s. 22 of the Act provides.

Mr Cranswick, counsel for the appellants, submitted that it was doubtful whether or not the provisions of the *R.S.C.* 1965, O. 76, r. 74, applied to the determination of the appeal, and that what he termed the “threshold” question was whether or not the matter came within the categories of appeals referred to in O. 76, r. 67. He argued generally that the appeal could only take the form of a hearing *de novo* because there had not been a prior hearing — only an exchange of correspondence between the Commissioner of Stamp Duties and the firm of Dobson, Mitchell and Allport. Mr Cranswick finally submitted that s. 22 of the Act appeared to indicate a summary appellate application and that the *Supreme Court Civil Procedure Act* 1932 (Tas.), s. 6(3), (“the 1932 Act”) should govern the procedural basis for the determination of the appeal. [His Honour set forth that subsection, and continued.]

Sections 21 and 22 of the Act were enacted after the 1932 Act, namely, by Act No. 13 of 1954.

Mr Colquhoun-Kerr, counsel for the respondent, also submitted that the appropriate procedural provision was s. 6(3) of the 1932 Act.

I agree with the submissions of counsel. I consider that, in the absence of any provision in the 1932 Act or the Rules of Court with respect to the exercise, “so far as regards procedure and practice”, of the jurisdiction conferred by s. 22 of the Act, the correct procedural basis for the hearing and determination of the appeal is “such form, mode and manner” as the judge directs.

Reference was made in argument to the decision of Gibson J. in *In re the Medical Act* 1959, [1966] Tas. S.R. 61, in which his Honour held that the right of appeal to the Supreme Court under s. 26 of the *Medical Act* 1959 was a right of appeal in the strict sense. However, that case is clearly distinguishable because of the provision in s. 26 of the *Medical Act* 1959 (Tas.) whereby the right of appeal is expressed to be “in accordance with the Rules of Court.”

I indicated to counsel during the hearing the tentative view I had reached with respect to s. 6(3) of the 1932 Act and directed that an affidavit of the second-named appellant, with the annexures thereto, was admissible, so far as it was relevant, in determining the appeal and that *viva voce* evidence also was admissible. I remain of that opinion.

[His Honour again referred to the evidence and continued:] The

definition of "interest" is identical in effect with that in the New South Wales *Stamp Duties Act*, 1920, but significantly different from the definitions in the corresponding statutes of other Mainland States. Counsel informed me that there is no reported judicial decision with respect to the definition of "interest" in either the New South Wales or Tasmanian statutes nor have I been able to trace any.

I approach consideration of the legal issue by emphasizing that the 1978 Act is a statute which imposes a pecuniary burden of a new character so far as the Tasmanian Parliament is concerned.

As is stated in *Maxwell on the Interpretation of Statutes*, 12th ed., at p. 256:

"It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: the subject is not to be taxed unless the language of the statute clearly imposes the obligation — *Russell v. Scott*, [1948] A.C. 422, per Lord Simonds; *D'Avigdor-Goldsmid v. I.R.C.*, [1953] A.C. 347 — and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words — *I.R.C. v. Wolfson*, [1949] 1 All E.R. 865, per Lord Simonds."

That citation is followed by a reference to the following extract from the judgment of Rowlatt J. in *Cape Brandy Syndicate v. I.R.C.* [1921] 1 K.B. 64, at p. 71:

"... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The expression by Rowlatt J. of the proper approach to the construction of a taxing statute was specifically endorsed by Viscount Simon when the Appellate Committee of the House of Lords decided *Canadian Eagle Oil Co. Ltd. v. The King*, [1946] A.C. 119, at p. 140.

Such judgments are in accordance with the decision of the High Court of Australia in *Anderson v. Commissioner of Taxes (Vic.)* (1937), 57 C.L.R. 233. In that case Latham C.J. at p. 239 cited the following words of Lord Russell in *I.R.C. v. Westminster (Duke)*, [1936] A.C. 1, at p. 24, 25:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's views of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a

statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington v. A.-G.* (1869), L.R. 4 H.L.100, at p. 122: 'As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'"

In the same case, in a joint judgment Rich and Dixon JJ. said at p. 243:

"In *Brunton v. Commissioner of Stamp Duties*, [1913] A.C. 747, at p. 760, Lord *Parker of Waddington*, speaking for the Privy Council, says: 'The intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous language and cannot be inferred from ambiguous words.' This rule he again emphasized in *A.-G. v. Milne*, [1914] A.C. 765, at p. 781, where he said, in the House of Lords: 'The *Finance Act* is a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words'. In *Ormond Investment Co. v. Betts*, [1928] A.C. 143, at p. 151, Lord *Buckmaster*, although differing from the majority of their Lordships and holding that in the particular case the Crown had satisfied the burden lying upon it, described the rule as a 'cardinal principle . . . a principle well known to the common law that has not been and ought not to be weakened — namely, that the imposition of a tax must be in plain terms'. He added: 'The subject ought not to be involved in these liabilities by an elaborate process of hair-splitting arguments.' Lord *Atkinson*, who agreed in the decision of the House, expressed the rule as follows: 'It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so-called equitable constructions of them are not permissible' [1928] A.C., at p. 162."

It is well known that most firms of solicitors invest moneys for clients on their instructions and that such investments very often take the form of mortgages of real property, usually first mortgages but, according to the wishes of the client, at times second mortgages. In many cases solicitors are authorized to invest the moneys on trust for the clients in the names of some of the partners of the firm, as

mortgagees, as in the present case, or in the name of a company of which the partners are the shareholders and directors. Such an arrangement with a client will almost always involve the solicitors in the obligation of “managing” or “administering” the transaction during its currency — that is, for example, checking that the mortgage loan continues to remain a safe investment; collecting interest by the due dates and accounting therefor to the client; where appropriate, ensuring that insurance premiums are duly paid; and taking any other action which may be necessary, in the interests of the client lender, to maintain the investment as a safe and financially sound one; for example, in the present case the mortgagors covenanted to keep the property the subject of the mortgage “in repair and to pay rates and taxes and other outgoings”, and the mortgagees have the right to vary the rate of interest payable. In most cases these duties no doubt can be carried out with little difficulty; in other cases they may be onerous. In all cases, however, the responsibility remains with the solicitors who carry out the management and they are legally liable for any negligence in the course of such management.

Against that background, familiar to lawyers, the exception in the definition in the 1978 Act of “interest” — “legal costs payable to a legal practitioner” — has to be construed.

I accept the submissions of counsel for the appellants that the language in which the exception is expressed is broad and general; that no categories of legal costs are specified; that an *ad valorem* basis for determining such costs is not expressed or implied and that the words should be given their ordinary meaning.

Counsel for the respondent, although not supporting the Commissioner’s view expressed in the second paragraph of his letter to the solicitors for the mortgagees of 15th September, 1980, argued that for costs to be “legal costs” there must be a solicitor-client relationship and the work must be within what he described as “the professional legal function.” He relied on two decisions.

First, *In re Inderwick* (1883), 25 Ch.D. 279. The judgment of the English Court of Appeal recognized that, in the context of the *Solicitors’ Remuneration Act*, 1883 (Tas.) there may be in practice a difference between professional work as a solicitor and work which is done independently of the professional relationship of solicitor and client. But on analysis, the decision does not, in my view, assist in the interpretation of the exception in the definition of “interest” in the 1978 Act. The facts bore no relation to those of the present case and the legal basis for the decision was the practice in England at the time with respect to an *ex parte* order for the taxation of a solicitor’s bill of costs.

Secondly, *Holman v. Deol*, [1979] 1 N.S.W.L.R. 640. However, Lee J. in that case merely had to determine whether or not a

solicitor, acting in his capacity as such, was within the expression "trader" as defined in the *New South Wales Consumer Claims Tribunals Act*, 1974. The decision is not in any way an authority for the true construction of the words "legal costs" in the 1978 Act, appearing as they do in a taxing statute.

It was further argued for the respondent that the functions referred to in cl.2.7 of the memorandum of mortgage could be described as "legal" functions and that the word "legal" had been inserted in the exception "simply to give character" to the nature of the functions for the performance of which costs payable to a legal practitioner are excluded from the statutory definition of "interest". This argument does not persuade me that Parliament contemplated such a restricted concept of "legal costs". Moreover it ignores certain fundamental facts. If cl.2.7 were not included in the memorandum of mortgage, the solicitors for the mortgagees would be entitled to charge their client — the lender — for administration during the currency of the mortgage and such charges would be subject to taxation. As was argued by counsel for the appellants, in managing a mortgage investment solicitors are subject to the obligations imposed by the *Solicitors' Accounts Rules* made pursuant to provisions in the *Law Society Act* 1962 (Tas.). Further, I accept his submission that if the relevant "costs" in this case are not "legal costs" as that expression is used in the 1978 Act, then cl.2.7 of the memorandum of mortgage is ineffective to impose any obligation on the mortgagors to pay the charge of three per cent. This latter argument is not, of course, decisive, but it indicates the practical effect of interpreting the words "legal costs" as they are used in the 1978 Act in the restricted way advanced on behalf of the respondent.

Counsel for the appellants also relied, in support of his argument that the scope of the words "legal costs" should be interpreted in a "broad fashion", on the decision of Jacobs J. in *Oates v. Major Acceptance Corporation Pty. Ltd.*, [1964] N.S.W.R. 1195, at pp. 1201-2. But in that case a definition of "legal costs" was contained in the New South Wales *Moneylending Act*, 1941, and his Honour's decision in respect of "legal costs" was dependent on his view as to the scope of such statutory definition.

In my opinion the expression "legal costs payable to a legal practitioner" should be interpreted on a plain, natural and simple basis. It means "costs for legal work payable to a legal practitioner." For a very long time, solicitors have been managing mortgage accounts for clients. I do not doubt that whether the lender or the borrower has paid them, the costs of carrying out such work have always been fairly and accurately described as "legal costs", an expression which, so far as I am aware, has not previously given rise to doubts as to its import or disputes as to its application. If Parliament had intended that there should be some unspecified

limitations of the extent of "legal costs payable to a legal practitioner", so that the exception in the definition of "interest" in the 1978 Act would not be applicable, I consider it would not have failed to state clearly the precise nature and extent of such limitations and that it would not have used, without express qualification, such a well-known phrase as "legal costs". When the average person speaks of paying "legal costs" he means simply "money I owe to a lawyer for work he has done." It was not suggested that the mortgagors in the present case, who can be assumed to be "average persons", were at any time in doubt as to the nature and extent of their obligation under cl. 2.7 of the memorandum of mortgage.

Moreover, Parliament reserved a right to the executive to enlarge by regulation the scope of the exception to the statutory definition of "interest".

For these reasons I consider that the appellants are entitled to succeed on their primary argument as to the construction of the relevant words in the 1978 Act.

In an alternative submission on behalf of the appellants it was argued that "interest" as defined in the 1978 Act was confined to the initial loan and did not extend to the management of the mortgage account thereafter; further that the common law definition of "interest" as "a recompense to the lender for the use of his money" (cf. Pannam, *"The Law of Money Lenders"*, p. 238) should be borne in mind in determining the proper construction of "interest" in the 1978 Act and the scope of the exception in the definition. This argument was advanced to the Commissioner in the penultimate paragraph of the letter dated 10th September, 1980, to him from the appellants' solicitors. But in view of the opinion I have reached in relation to the appellants' primary argument, I do not find it necessary to consider the alternative submission.

The result is that judgment should be entered for the appellants against the respondent.

I shall hear the parties with respect to the form of the judgment and on the question of costs, in particular the appropriate scale for costs in view of the amount at issue and the nature of the proceedings.

Appeal allowed.

Solicitors for the appellants: *Dobson, Mitchell & Allport.*

Solicitor for the respondent: *J. R. M. Driscoll*, Crown Solicitor.

P.J.A.W.