

IN THE PRIVY COUNCIL

No. 12 of 1980

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF

SOUTH AUSTRALIA

B E T W E E N :

MERCANTILE CREDITS LIMITED

Appellant

and

JOHN NICHOLAS COMBLAS and
ARSINOI COMBLASRespondents

CASE FOR THE APPELLANT

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JOHN NICHOLAS COMBLAS and Respondents
ARSINOI COMBLAS

C A S E F O R T H E A P P E L L A N T

A. INTRODUCTORYRecord

1. This is an appeal from a final judgment dated 21st November 1979 of the Full Court of the Supreme Court of South Australia (King C.J., White and Walters JJ) in an action in which the present respondents (Mr. and Mrs. Comblas) were plaintiffs and the present appellant (Mercantile Credits) was defendant; the Full Court allowed an appeal by Mr. and Mrs. Comblas against a judgment of Wells J. sitting in the Supreme Court at first instance. pp.119-120

20 sitting in the Supreme Court at first instance. pp.84-86

The action brought by Mr. and Mrs. Comblas concerns a loan of \$37,581 made by Mercantile Credits to Mr. Comblas to finance his purchase of a motor vehicle and the construction of the documents evidencing the transaction. The loan to Mr. Comblas was made in terms of a document entitled "Credit Contract - Consumer Mortgage" (the Truck Agreement) and with the further security (to the extent of \$16,000) of a mortgage over pp.124-127
p. 135

Record

pp. 131-134 real estate (The Real Property Mortgage) of Mr. and Mrs. Comblas; a copy of the Truck Agreement is annexed to the Real Property Mortgage. Mr. Comblas having defaulted under the Truck Agreement and the vehicle having been possessed and sold by Mercantile Credits, Mr. and Mrs. Comblas sought (inter alia) a declaration to avoid liability for the deficiency between the amount of the loan (and interest and other charges) and the amount which has been recovered by Mercantile Credits; 10
Mr. and Mrs. Comblas also sought as a consequence to restrain Mercantile Credits from enforcing the mortgage security in respect of their real estate. Wells J. dismissed the claim of Mr. and Mrs. Comblas but on appeal the Full Court held that Mr. and Mrs. Comblas have no further liability under the Truck Agreement or the Real Property Mortgage and directed the discharge of the latter mortgage.

B. THE ISSUE

2. The question at issue is whether a liability 20
for a deficiency remains in Mr. and Mrs. Comblas based upon the personal covenant of Mr. Comblas in terms of the Truck Agreement or whether Mercantile Credits (having exercised its power of sale in respect of the vehicle) has exhausted such rights as it may have been entitled to under the Truck Agreement.

C. THE CIRCUMSTANCES OF THE ACTION

3. On 6th August 1976 Mercantile Credits lent to Mr. Comblas the sum of \$37,581.00 in terms of the Truck Agreement (which gave security over a vehicle namely 30
a Mack Prime Mover) and as part of the transaction Mr. and Mrs. Comblas also executed in favour of Mercantile Credits a mortgage (No. 3929270) of real estate dated 12th August 1976 by way of additional security to the extent of \$16,000.

p. 51,
ll. 38-42

p. 52, l. 10
p. 74,
ll. 13-16

4. The amount which in terms of the Truck Agreement was to be paid by Mr. Comblas to Mercantile Credits was as follows:- Record

Principal	37,581.00
Credit charges	<u>19,542.36</u>
	57,123.36

p. 124, 1.20

The credit charges were expressed to be at a rate of 22.30% per annum. The document provided for

p. 124, 1.22

10 by 48 monthly instalments each of \$1190.07, the first payment to be made on 6th September 1976.

p. 124, 1.23

The document also provided that in the event of early determination of the Truck Agreement, Mr. Comblas would be entitled to a rebate of credit charges.

p. 126,
11. 33-34

5. In fact Mr. Comblas only paid \$214 to Mercantile Credits (on 29th October 1976).

p. 151, 1. 9
p. 52, 1. 21

20 On 25th November 1976 Mr. Comblas delivered the vehicle to O.G.R. Distributors (from whom he had originally purchased it). This delivery was made by arrangement with Mercantile Credits; the Trial Judge, Wells J. found that Mr. Comblas voluntarily surrendered the vehicle to Mercantile Credits but White J., with whom Walters J. agreed, said that the question of whether the truck had been returned voluntarily was not altogether clear although it was not necessary to decide the question.

p.76,11.22-25
p.53,11.12-26
p.106,11.14-23

30 Thereafter Mercantile Credits assessed the worth of the vehicle, sold it at a price of \$20,000 and credited the proceeds of sale to Mr. Comblas' account; a rebate of the interest charges in his favour was also allowed; Mr. Comblas was debited with the costs associated with the sale.

p.40,11.2-7
p.151, 1.22

At the conclusion of the transaction the records of Mercantile Credits showed that Mr. Comblas owed \$20,223.89.

p.151, 1.23

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p.54,11.15-19
p.58,11.8-15

Mercantile Credits has notified Mr. and Mrs. Comblas of its intention to exercise a power of sale under the Real Property mortgage.

p.1, 1. 16

6. On 4th August 1977 Mr. and Mrs. Comblas commenced the present proceedings by writ of summons issued out of the Supreme Court of South Australia. The action was tried before Wells J. on 13th, 14th and 21st December 1978; on 21st February 1979 His Honour delivered judgment whereby he dismissed the claims of Mr. and Mrs. Comblas.

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7. Mr. and Mrs. Comblas thereupon appealed to the Full Court of the Supreme Court of South Australia which heard argument upon the appeal on 11th, 12th and 16th October 1979 and on 21st November 1979 delivered reasons for judgment for allowing the appeal.

D. ANALYSIS OF THE SECURITY DOCUMENTS

pp. 124-127

8. The Truck Agreement comprises a printed form in which the details of the particular transaction have been inserted by way of a schedule. The document refers to the Consumer Credit Act 1972-1973 and the Consumer Transactions Act 1972-1973 (being South Australian Statutes).

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p. 124

This legislation (inter alia) amends the law relating to Hire Purchase and Moneylenders; Wells J. decided that the Consumer Transactions Act of its own force did not, in the relevant respects, apply to this particular transaction and the Full Court reached the same conclusion. However, the Truck Agreement itself refers to that legislation; it is of the essence of the present case to construe the Truck Agreement in the light of the references to the legislation.

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p.77,11.27-29

p.90,11.1-5

p.99,11.32-40

9. (1) Relevant passages from the Truck Agreement are as follows:

...."The Mortgagor" /i.e. Mr. Comblas with his
executors administrators and assigns/ IN
CONSIDERATION of the loan of /the principal
sum of \$37,581/.the whole of which is a
contemporaneous advance within the meaning
of the Bills of Sale Act 1886 as amended
lent to the Mortgagor by the Credit Provider
/i.e. Mercantile Credits and its successors
and assigns/ HEREBY TRANSFERS ASSIGNS AND
SETS OVER unto the Mortgagee /i.e. Mercantile
Credits/ all and singular the personal
chattels described /i.e. one 1971 Mack Prime
Mover/ ... and also all other personal
chattels which may at any time be acquired
by the Mortgagor being additional parts or
substituted parts of the said personal
chattels...unto the Mortgagee subject to the
provisos terms agreements and conditions herein
expressed or implied PROVIDED THAT if the
Mortgagor shall pay to the Mortgagee the
principal sum TOGETHER WITH the total amount
of the credit charge /\$19,542.36/ by the
instalments and at the times and in the manner
set out in...the Schedule and shall duly pay
all other moneys becoming payable to the
Mortgagee hereunder then these presents shall
become void. IT IS HEREBY EXPRESSLY PROVIDED
AND PARTICULAR ATTENTION IS DRAWN TO THE FACT
THAT THE MORTGAGOR UNDERTAKES PERSONAL
LIABILITY TO PAY ALL AMOUNTS PAYABLE HEREUNDER
AND THAT SUCH LIABILITY IS ADDITIONAL TO ANY
LIABILITY UNDER ANY SECURITY INCLUDING THIS
SECURITY TAKEN BY THE MORTGAGEE IN RESPECT OF
THIS CREDIT CONTRACT If default is made
by the Mortgagor in the payment upon the due
date of any sum payable to the Mortgagee
hereunder the Mortgagor shall pay to the

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Mortgagee simple interest on that sum from the date of default until the sum is paid at the rate of interest /i.e. 22.30 per cent per annum/

If this credit contract is determined and any amount is outstanding hereunder the total amount of the credit charge that shall be payable hereunder shall be the total amount of the credit charge less the statutory rebate.

The Mortgagor HEREBY COVENANTS AND AGREES with the Mortgagee in the terms of Clauses 1 to 14 inclusive set out hereunder and on the reverse hereof.

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pp.126-127 (2)

Extracts from the Mortgagor's covenants (Clauses 1 to 14 referred to above) are as follows:

p. 126, 11.45-46

Covenant 1(a) "to pay to the Mortgagee the principal sum and the credit charge in accordance with the Schedule and any other moneys hereby secured"

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p.127, 11.36-39

Covenant 7 "It shall be lawful for the Mortgagor to retain possession of the goods until default shall be made in the expressed or implied terms, covenants, conditions or agreements of this security. Upon payment by the Mortgagor to the Mortgagee of all moneys hereby secured the Mortgagee will at the cost and request of the Mortgagor execute a discharge of this security."

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p.127,
11. 42-46

Covenant 9. "Where the Mortgagee has taken possession of the Goods comprised in this security or where the Mortgagor has returned the Goods to the Mortgagee pursuant to Section 30 of the Consumer Transactions Act 1972 as amended the Mortgagee shall have the right subject to

the provisions of Part III of the said Act to recover from the Mortgagor as a debt the amount (if any) by which the value of the Goods at the time of taking possession or return is less than the nett balance due within the meaning of Section 29 of the said Act."

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Covenant 10 (d). "For the purposes of the Bills of Sale Act 1886 as amended the Mortgagor and the Mortgagee shall be and shall be deemed to be the "grantee" and the "grantor" respectively."

p.127,
ll. 50-51

Covenant 12. "No provision of the Consumer Credit Act 1972 as amended or the Consumer Transactions Act 1972 as amended shall be treated as incorporated herein by agreement and any reference to any provision of one or other or both of those Acts shall be disregarded in the interpretation of this agreement and treated as inapplicable unless solely by operation of one or other or both of those Acts the provision applies to this agreement or to things done thereunder."

p. 127,
ll. 58-61

Covenant 13. "This instrument is to be read and interpreted as not inconsistent with the operation of the provisions of the Consumer Credit Act 1972 as amended and the Consumer Transactions Act 1972 as amended and if any provision or part of a provision hereof shall be invalid or unenforceable then the validity and enforceability of the remainder hereof shall be in no way affected thereby."

p. 127,
ll. 62-64

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10. The Real Property Mortgage executed by Mr. and Mrs. Comblas (referred to jointly as the Mortgagor) was expressed

p. 135,
ll. 15-36

"In consideration of their desire to render the said land available as additional security but only to the extent of SIXTEEN THOUSAND DOLLARS (\$16,000) to Mercantile Credits ... for the payment of the instalments secured by and the performance of the covenants contained in a certain Consumer Mortgage dated 6th August 1976 and made between the said JOHN NICHOLAS COMBLAS and the said MERCANTILE CREDITS LIMITED a copy of which is annexed hereto, the Mortgagor hereby covenants with the Mortgagee as follows:-

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(1) That the Mortgagor will at all times keep observe and perform each and every covenant respectively contained in the said Consumer Mortgage.

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...

AND for the better securing to the Mortgagee the repayments in manner aforesaid of the said Consumer Mortgage and the performance of the said covenants the Mortgagor does hereby mortgage to the Mortgagee all their estate and interest in the said land above described...."

E. THE REASONS FOR JUDGMENT WITHIN THE SUPREME COURT

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11. Wells J. held that the Consumer Transactions Act did not apply to the transaction (as the principal sum involved exceeded the \$20,000 upper limit within which that Act operated in the relevant respect). His Honour further held that despite the reference to Section 29 of the Consumer Transactions Act Covenant No. 9 of the Truck Agreement should be read so as to excise the reference to that section as follows:

p. 77,
ll. 24-29

p. 78,
ll. 20-23

"Where the mortgagee has taken possession of the goods comprised in this security or where the mortgagor has returned the goods to the mortgagee...the mortgagee shall have the right...to recover from the mortgagor as a debt the amount (if any) by which the value of the goods at the time of taking possession or return is less than the net balance due...."

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p. 77,
ll. 33-41

In so deciding His Honour decided that references Record
in the Truck Agreement to the Consumer Transactions p.77,11.33-41
Act should be treated as integrating the agreement p.78,11.40-50
with the Act but only where it already applies to
the transaction in the ordinary course.

His Honour had previously noted, inter alia, "the p.59, 1.33 -
heart" of the truck agreement as set out in p. 61, 1.29
paragraph 9(1) of this memorandum. Having

10 Mr. and Mrs. Comblas His Honour held that Mr. and
Mrs. Comblas were not entitled to relief.

p.84,11.5-8

12. UPON APPEAL THE FULL COURT held that
Covenant 9 to the Truck Agreement contemplated
that upon Mercantile Credits exercising its right
of possession and sale in respect of the truck
the nett balance thereafter recoverable from Mr.
and Mrs. Comblas should be computed in accordance
with Section 29 of the Consumer Transactions Act
which incorporated a concept of statutory rebates.
20 However (in the view of the Full Court) if reference to
Section 29 was deleted as required by Covenant
No. 12 of the Truck Agreement then there remains no
clause which establishes the method of calculation of
the nett balance which is due; without the aid
of Section 29 there is no basis for computing the
"nett balance" referred to in Covenant 9 and the p. 91,11.11-28
words have no relevant meaning. Accordingly, in p.107,11.25-37
the view of the Full Court Mr. Comblas has no
further liability under the Truck Agreement and
30 the obligations of Mr. and Mrs. Comblas secured p.92,11.27-29
under the Real Property Mortgage are therefore p.115,11.16-29
void and spent. p.94,11.12-18

White J. (with whom Walters J. agreed) also p.114,11.32-40
relied upon the statutory obligation of Mercantile
Credits to set out the terms of the agreement (being

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a Credit Contract) in the body of the document; accordingly he was unwilling to supply terms (by implication) where the law required the same to be express.

pp.119-120

13. The Full Court accordingly declared that Mercantile Credits is not entitled to recover any monies from Mr. and Mrs. Comblas or either of them pursuant to the express terms of the Truck Agreement or the Real Property Mortgage; the Full Court further ordered a discharge of the mortgage and restrained Mercantile Credits from proceeding with a sale of the land comprised in the Mortgage.

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pp.120-121

14. On 15th February 1980 the Full Court of the Supreme Court of South Australia granted to Mercantile Credits final leave to appeal to Her Majesty in Council; the Court further ordered a stay of the previous orders of the Court (referred to in paragraph 13 hereof) pending final determination of such Appeal.

F. MERCANTILE CREDITS' SUBMISSION UPON THIS APPEAL

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15. Mercantile Credits respectfully adopts as part of its argument the whole of the reasons for judgment of Wells J. Mercantile Credits joins issue with the reasons for judgment of the Full Supreme Court; it will argue (inter alia) -

- (1) that the Truck Agreement must be construed in light of the following clause in the body of that document:

p.126,
11.33-34

"If this credit contract is determined and any amount is outstanding hereunder the total amount of the credit charge that shall be payable hereunder shall be the total amount of the credit charge less the statutory rebate." (This clause is referred to below as the "over-rider clause").

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The "statutory rebate" is identifiable in the circumstances by reference to that phrase as defined in the Consumer Credit Act and the Consumer Transactions Act.

The Truck Agreement thus provides upon its face the manner of calculating the credit charges payable by Mr. Comblas upon premature termination of the contract.

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The contract operates as a Bill of Sale (with the covenants implied by the Bills of Sale Act); the document contains sufficient upon its face to fix the amount of Mr. Comblas' liability and to provide the machinery for Mercantile Credits to enforce its rights.

- (2) Having regard to the material abovementioned in this paragraph, Covenant No. 9 when subject to the excision approved by Wells J. merely provides for the recovery of a "nett balance" by Mercantile Credits and the ascertainment of that nett balance may be calculated by application of the "statutory rebate" abovementioned.
- (3) The Bills of Sale Act operates upon the Truck Agreement and provides authority in terms of Section 11 thereof for Mercantile Credits to take possession of the vehicle and to sell it subject to a subsequent accounting to Mr. Comblas as therein provided.
- (4) If (contrary to the above arguments) the difficulties in application of Covenant No. 9 do exist one is entitled to excise such covenant as may be "void for ambiguity and unenforceable at the suit of Mercantile Credits" (to use the phraseology of White J.) p.103,

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If this were done, the obligations as set out in the principal document itself (including the over-rider clause) would still remain so as to leave Mr. Comblas with his agreed liability subject to an adjustment in credit charges to the extent of the statutory rebate.

- (5) The Full Supreme Court has not taken account of the operation of the over-rider clause (see paragraph 15 of this memorandum).

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16. Mercantile Credits respectively submits that the judgment of the Full Court of the Supreme Court of South Australia was wrong and ought to be reversed and that this appeal ought to be allowed with costs for the following, amongst other

REASONS

that upon the proper construction of the Truck Agreement and the Real Property Mortgage a pecuniary liability as aforesaid (or in some other amount) still remains in Mr. Comblas and that Mercantile Credits is entitled in the circumstances to the security provided by the Real Property Mortgage.

H.C. Williams Q.C.