

IN THE PRIVY COUNCIL

## O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF  
SOUTH AUSTRALIAB E T W E E N :

MERCANTILE CREDITS LIMITED

Appellant

- and -

JOHN NICHOLAS COMBLAS and  
ARSINOI COMBLASRespondents

10

## CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal by leave of the Full Court of the Supreme Court of South Australia (King C. J., Wells and Sangster JJ) from a decision of the Full Court of the Supreme Court of South Australia (King C. J., Walters and White JJ) dated 21st November 1979 allowing with costs an appeal of the abovenamed respondents (hereinafter called respectively "Mr. and Mrs. Comblas") from the judgment of Wells J. dated 21st February 1979 and declaring that the abovenamed appellant (hereinafter called "Mercantile Credits") is not entitled to recover any monies from Mr. and Mrs. Comblas or either of them pursuant to the express terms of an agreement between Mr. Comblas and Mercantile Credits dated the 6th day of August 1976 or pursuant to Memorandum of Mortgage Registered No. 3929270 dated the 12th day of August 1976 wherein Mr. and Mrs. Comblas are mortgagors and Mercantile Credits is mortgagee with consequential orders as to discharge of the said mortgage and an injunction restraining Mercantile Credits from dealing with the land and the subject of the mortgage until its discharge.

pp. 120 1. 25-  
121 1. 25pp. 119 1. 10-  
120 1. 20pp. 84 1. 12-  
86 1. 10

20

Ex P1 pp. 123-  
127Ex P2 pp. 131-  
136

30

2. The questions raised by the appeal relate to the construction and enforceability of certain documents, the first a document entitled "Credit Contract - Consumer Mortgage",

Ex P1 pp. 123-  
127

RECORD

Ex P1 pp. 131-136

pp. 16 1. 40-17 1. 52

pp. 18 11. 1-44

pp. 28 1. 50-29 1. 30

pp. 34 11. 20-53

pp. 39 11. 1-50

Ex P5 p. 139

Ex P5 p. 140

Ex P4 p. 137

Ex P4A p. 138

Wells J. pp. 76 11 4-26

White J. pp. 106 11. 14-26

the second the said Real Property Act mortgage taken by Mercantile Credits as collateral security for the repayment of monies by Mr. Comblas to Mercantile Credits in repayment of advances made by Mercantile Credits to Mr. Comblas to finance his purchase of a truck. Mr. Comblas not having paid monies in terms of the Credit Contract - Consumer Mortgage and Mercantile Credits having taken possession of and sold the truck, questions arose as to the Comblas' liability under the said Credit Contract - Consumer Mortgage and Real Property Act mortgage (if any) for the deficiency between the amount of Mercantile Credits' advance and interest and other charges and the amount recovered by Mercantile Credits on sale of the truck.

10

3. Mr. and Mrs. Comblas commenced the proceedings from which this appeal proceeds seeking (inter alia) a declaration to avoid liability for the said deficiency and an injunction to restrain Mercantile Credits from enforcing the Real Property Act mortgage security in respect of their real estate. Wells J. dismissed the claim but on appeal the Full Court held that Mr. and Mrs. Comblas had no further liability under the Credit Contract - Consumer Mortgage or the Real Property Act mortgage and directed discharge of the latter mortgage

20

p. 90 11. 1-5

p. 94 11. 16-17

p. 98 1. 20

p. 90 11. 1-5

p. 94 11. 16-17

p. 98 11. 20-25

p. 99 11. 30-40

p. 102 11. 11-

p. 103 1. 24

Ex P1 p. 127 11. 42-46

4. The Full Court unanimously held that the South Australian Consumer Transactions Act 1972 (as amended) had no application to the transaction or the documents which implemented it but that the South Australian Consumer Credit Act 1972 (as amended) applied.

5. The Credit Contract - Consumer Mortgage, which was prepared on behalf of Mercantile Credits on its printed form and which was proffered to Mr. Comblas for signature contained many references to the said Consumer Transactions Act. In particular Clause 9 provided:

30

"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 net balance due within the meaning of Section 29 of the said Act. "

40

RECORD

As the Consumer Transactions Act had no application the document was inappropriate to the transaction. Mercantile Credits in an attempt to meet the situation included in its printed form Clause 12 which provided that where the Consumer Transactions Act was inapplicable any reference to any provision of it "shall be disregarded in the interpretation of this agreement and treated as inapplicable".

p. 90 11.14-15

p. 90 11.16-17  
Ex P1 p.127 11.  
58-62

10 6. The Chief Justice held that Mercantile Credits having resorted to the security over the chattel by taking possession of and selling it its right thereafter to recover any deficiency could only arise, if at all, under the provisions of Clause 9 of the Credit Contract - Consumer mortgage. The Chief Justice further held that the application of Clause 12 to Clause 9 of the Credit Contract - Consumer Mortgage left no basis for the computation of the sum said to be recoverable by Mercantile Credits and that therefore no monies were recoverable by Mercantile Credits from Mr. Comblas. 20 The Chief Justice held that it was unnecessary to decide whether Clause 9 was severable from the remainder of the Credit Contract - Consumer Mortgage provisions as the collateral Real Property Act mortgage by way of additional security was in any event unenforceable. If the Credit Contract - Consumer Mortgage was void for uncertainty there was nothing to secure; if it survived then the alleged deficiency was irrecoverable by reason of the unenforceability of Clause 9 the other covenants being spent; the obligations secured by the Real Property Act mortgage being either void or spent Mr. and Mrs. Comblas were entitled to a discharge of the mortgage.

p. 90 11.28-37

p. 91 11.1-52  
p. 92 11.1-4  
p. 92 1.5-30

20 7. White J. (with whom Walters J. concurred) held that the operation of Clause 12 of the Credit Contract - Consumer Mortgage so emasculated Clause 9 as to render it void for uncertainty. He held that if Mr. and Mrs. Comblas had any obligation to pay any deficiency it had to arise under Clause 9 of the agreement, the subject matter of the security having been possessed and sold. White J. further held that Clause 9 being 30 meaningless and going to the heart of the bargain it was not severable and therefore the whole Credit Contract - Consumer Mortgage was void for uncertainty. In the alternative White J. held that even if the remainder of the Credit Contract - Consumer Mortgage could stand without Clause 9 in the events which happened there was no method of calculating the debt and hence no default by Mr. Comblas under any relevant covenant. That being so no liability was incurred under the Real Property Act mortgage

p.107 11.25-109 1.9

p.108 1.28-34

p.115 11.16-19

p.115 11.20-29

RECORD

and it therefore followed Mr. and Mrs. Comblas were entitled to the relief claimed.

8. Mr. and Mrs. Comblas respectfully adopt the conclusions and the reasoning in support thereof of the members of the Full Court of the Supreme Court of South Australia.

9. Mr. and Mrs. Comblas respectfully submit -

(a) that the Consumer Transactions Act does not apply to the transaction, and -

(i) therefore Clause 9 of the Credit Contract - Consumer Mortgage is so emasculated by Clause 12 thereof that Clause 9 is void for uncertainty; 10

(ii) that Clause 9 is so material a provision in Mercantile Credits' contract form that there should be inferred an intention not to make a contract that would operate without it and that Clause 9 is inseverable from the remainder of the Credit Contract - Consumer Mortgage and the covenants embodied therein (including the personal covenant to pay even if independent of Clause 9 in form) are all unenforceable; Brew v. Whitlock (1967) V.R. 803; 118 C.L.R. 445; Amoco v. Rocca (1975) A.C. 561; Article by McGarvie J. "Illegality and Severability in Contracts" (1977) 13 Uni. W.A.L. Rev. 1-24; 20

(iii) the Credit Contract - Consumer Mortgage and the Real Property Act Mortgage are inter-dependent and therefore the whole transaction is unenforceable; the Credit Contract - Consumer Mortgage and Real Property Act mortgage comprise one transaction and fall as one transaction; Amoco v. Rocca (1975) A.C. 561; Manks v. Whiteley (1912) 1 Ch. 735 at 754; (1914) A.C. 132; 30

(b) (i) alternatively Clause 9 of the Credit Contract - Consumer Mortgage attracts and embodies Part III of the Consumer Transactions Act (the requirements of notice before sale); 40

(ii) Clause 12 of the Credit Contract - Consumer Mortgage is bad for repugnancy therewith' Adamastos Shipping v. Anglo-Saxon Petroleum (1959) A.C. 133;

(iii) Part III of the Consumer Transactions Act was not complied with by Mercantile Credits which is therefore unable to recover any deficiency from Mr. and Mrs. Comblas;

10 (c) in any event, although not pleaded, Elder v. Auerbach (1950) K. B. 359 at 371, 372 Mercantile Credits' proffering the documents containing misleading references to the Consumer Transactions Act and Consumer Credit Act to Mr. Comblas for execution was in contravention of Section 52 of the Commonwealth Trade Practices Act thereby rendering the entire transaction unenforceable. Hornsby Building Information Centre Pty. Ltd. v. Sydney Building Information Centre Pty. Ltd. 18 A.L.R. 639; Puxu v. Parkdale Furniture 31 A.L.R. 73; Henderson v. Pioneer Homes Pty. Ltd. 29 A.L.R. 597. Mr. and Mrs. Comblas, mindful that this submission relates to questions of federal law and mindful of Their Lordships' remarks in Cadbury-Schweppes v. Pub Squash (1981) 1 W.L.R. 193 at 206-207, respectfully submit that in the event that this appeal were otherwise to be allowed the matter be remitted back to the Supreme Court for further consideration of this submission.

30 10. Mr. and Mrs. Comblas respectfully submit that the judgment and reasons therefore in the Court below were correct and that this appeal should be dismissed with costs for the following, amongst other

R E A S O N S

40 (1) The Consumer Transaction Act not applying in the circumstances of the transaction; Clause 9 of the Credit Contract - Consumer Mortgage read down by Clause 12 thereof is void for uncertainty; Clause 9 is inseverable from the other covenants embodied in the Credit Contract - Consumer Mortgage; the Credit Contract - Consumer Mortgage is inseverable from the Real Property Act mortgage, and therefore Mr. and Mrs. Comblas are not liable on the express terms of either document.

RECORD

- (2) Alternatively Clause 9 of the Credit Contract - Consumer Mortgage incorporates the notice before sale provisions of Part III of the Consumer Transactions Act ; Clause 12 of the Credit Contract - Consumer Mortgage is void for repugnancy with Clause 9; Part III of the Consumer Transactions Act not having been complied with by Mercantile Credits the transaction is unenforceable against Mr. and Mrs. Comblas.

10

DAVID ANGEL

No. 12 of 1980

IN THE PRIVY COUNCIL

---

---

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 COMBLAS Respondents

---

---

CASE FOR THE RESPONDENTS

---

---

Egerton, Sandler, Summer & Co.,  
17/18 Dover Street,  
London W1X 4QQ.  
ref: GD. 01.49.7571

Agents for the Respondents