

7/82

IN THE PRIVY COUNCIL

No. 12 of 1980

ON APPEAL
FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN: -

MERCANTILE CREDITS LIMITED

Appellant

- and -

JOHN NICHOLAS COMBLAS
and ARSINOI COMBLAS

Respondents

RECORD OF PROCEEDINGS

[Faint, illegible text]

INGENTOE, SANBLER, SUMNER & CO.
27/Le Dover Street,
London, W.1.

Solicitors for the Appellant

Solicitors for the Respondents

ON APPEALFROM THE FULL COURT OF THE SUPREME COURTOF SOUTH AUSTRALIA

B E T W E E N:

MERCANTILE CREDITS LIMITED

Appellant

- and -

JOHN NICHOLAS COMBLAS
and ARSINOI COMBLAS

Respondents

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No.	Description of Document	Date
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VIII

No.	Description of Document	Date
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IX

No.	Description of Document	Date
46.	Affidavit of Philip John Dorman sworn on the 13th day of February 1980	13th February 1980
47.	Affidavit of Allan Charles Breakwell sworn on the 13th day of February 1980	13th February 1980
48.	Formal order with conditional leave to appeal to Her Majesty in Council	14th February 1980
49.	Affidavit of Philip John Dorman sworn on the 15th day of February 1980 together with Exhibit "PJD1"	15th February 1980
50.	Master's Certificate as to payment into Court of security	15th February 1980
51.	Associate's certificate	18th February 1980

IN THE PRIVY COUNCIL

No. _____ of 198

ON APPEAL

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

No. 1
Plaintiffs'
amended
Statement of
Claim filed
pursuant to the
order of
Deputy Master
Teesdale-Smith
made on the 9th
day of
November 1978

9th November
1978

10

RECORD OF PROCEEDINGS

No. 1

PLAINTIFFS' AMENDED STATEMENT OF CLAIM
DATED THE 9TH DAY OF NOVEMBER 1978
FILED PURSUANT TO THE ORDER OF
DEPUTY MASTER TEESDALE-SMITH

AMENDED STATEMENT OF CLAIM

(Writ issued the 4th day of August 1977)

(filed pursuant to the order of Deputy Master
Teesdale Smith made on Thursday the 9th day of
November, 1978)

20

1. The defendant is a limited company incorporated in the State of New South Wales and carrying on business in the State of South Australia as a foreign company being registered in pursuance of the provisions of the Companies Act 1962-1973.

2. On the 6th day of August 1976 the defendant loaned the sum of \$57,581.00 to the male plaintiff the repayment of which was secured by a consumer mortgage dated the 6th day of August 1976 over a Mack Prime Mover Registered No. SA RIH-446 (hereinafter called "the vehicle").

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No. 1
 Plaintiffs'
 amended
 Statement
 of Claim
 filed
 pursuant to
 the order of
 Deputy Master
 Teesdale-
 Smith made
 on the 9th
 day of
 November
 1978

9th November
 1978
 (continued)

3. On the 6th day of August 1976 both plaintiffs executed Memorandum of Mortgage Registered No. 3929270 over the whole of the land comprised and described in Certificate of Title Register Book Volume 3876 Folio 17 in favour of the defendant to further secure and guarantee the due performance of the consumer mortgage by the male plaintiff. The said Memorandum of Mortgage was to secure repayment of the amount of \$16,000.00 being portion of the moneys owing to the defendant by the male plaintiff pursuant to the terms of the consumer mortgage.

10

4. Between the 6th day of August 1976 and the 25th day of November 1976 the vehicle broke down with mechanical failure on several occasions and the male plaintiff defaulted in payment of the instalments due to the defendant pursuant to the consumer mortgage as and when the same fell due and owing thereunder.

5. The consumer mortgage wherein the defendant is described as Mortgagee and the male plaintiff as Mortgagor included the following terms:-

20

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

30

"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."

40

6. On the 25th day of November 1976 the male plaintiff agreed with the defendant to and did deliver the vehicle to O.G.R. Distributors of Main North Road, Para Hills West for sale. The defendant agreed to

advise the male plaintiff as to the male plaintiff's indebtedness to the defendant pursuant to the consumer mortgage after such sale. It was an express or alternatively an implied term of the said agreement that the vehicle would only be sold and would not be otherwise used or operated at all.

10 7. Neither of the plaintiffs ever received any notice from the defendant or from any other person as to the balance due and owing by the male plaintiff consequent upon sale of the vehicle or otherwise pursuant to the consumer mortgage.

20 8. By a written Notice of Intention to Exercise Power of Sale contained in Memorandum of Mortgage No. 3929270 to the plaintiffs which said notice is dated the 25th day of July 1977 the defendant specified an amount of \$40,223.89 as being due and owing by both plaintiffs as at the 6th day of July 1977 and being all principal interest and other moneys secured thereunder.

9. The plaintiffs say:-

30 (a) By reason of Clause 9 of the consumer mortgage the defendant had to comply with the provisions of Part III of the Consumer Transactions Act 1972 as amended before obtaining possession of or selling the said vehicle or recovering as a debt the amount due under the consumer mortgage after taking possession or sale of the vehicle.

(b) Further and alternatively Clause 12 of the consumer mortgage is void for repugnancy and the provisions of the Consumer Transactions Act 1972 as amended apply to the consumer mortgage.

40 10. The defendant has never complied with the provisions of Part III of the Consumer Transactions Act 1972 as amended with respect to taking of possession or sale of the vehicle.

11. The defendant intends unless restrained by injunction from so doing to sell the property comprised in Certificate of Title Register Book Volume 3876 Folio 17 in purported pursuance of

No.1
Plaintiffs'
amended
Statement of
Claim filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made on the
9th day of
November 1978

9th November
1978
(continued)

No. 1
 Plaintiffs'
 amended
 Statement
 of Claim
 filed
 pursuant to
 the order of
 Deputy Master
 Teesdale-
 Smith made
 on the 9th
 day of
 November
 1978

9th November
 1978
 (continued)

Memorandum of Mortgage No. 3929270.

12. After taking possession of the vehicle by its agent O.G.R. Distributors Pty. Ltd. the defendant whether by itself or its agents in breach of the term referred to in paragraph 6 hereof and without the plaintiffs' knowledge or consent operated the vehicle inter alia in the State of Western Australia for profit by reason whereof the plaintiffs have sustained loss and damage.

12A. The plaintiffs plead Section 44(1)(d) of the Consumer Transactions Act 1972 as amended and say:

10

(i) That Memorandum of Mortgage No. 3929270 referred to in paragraph 3 hereof is an agreement binding the plaintiffs as guarantors to permit the defendant as mortgagee or any person acting on behalf of the defendant as mortgagee to enter upon premises for the purpose of taking possession of or inspecting the goods the subject of the consumer mortgage referred to in paragraph 2 hereof such goods being subject to a mortgage within the meaning of Section 44(1)(d) aforesaid.

20

(ii) That Memorandum of Mortgage No. 3929270 is void by reason of the said agreement not having been executed by the plaintiffs in the presence of a legal practitioner independent of the defendant as mortgagee and certified by such legal practitioner in the manner prescribed by Section 44(1)(f) and (g) of the Consumer Transactions Act 1972 as amended.

30

(iii) The plaintiffs say that part VIII of the Consumer Transactions Act 1972 as amended applies to the terms of the said Memorandum of Mortgage No. 3929270 by force of statute irrespective of whether part III of the said Act applies to the said Consumer Mortgage between the male plaintiff and the defendant.

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PARTICULARS

(a) The said Memorandum of Mortgage includes

the following terms:

"The mortgagor hereby covenants with the mortgagee as follows:

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

10 (b) The said Consumer Mortgage includes the following term:

"4. The mortgagor agrees that the general covenants and powers set out in subsections (1) to (7) inclusive of Section 11 of the Bills of Sale Act 1886 as amended shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the mortgagee."

20 (c) By reason of subsections (5) and (6) of Section 11 of the Bills of Sale Act 1886 as amended the defendant as grantee is granted by implied covenants and powers in his favour (inter alia) the right, by itself or its agents, to enter upon the premises of the grantor to inspect and/or to seize and take possession of the goods, the subject of the Bill of Sale.

30 (d) That the female plaintiff is a guarantor within the meaning of the Consumer Transactions Act 1972 (as amended) in that the said Memorandum of Mortgage No. 3929270 together with the said Consumer Mortgage are a Consumer Credit Contract or a purported Consumer Credit Contract within the meaning of the said Act by reason of the contents of the said documents.

40 13. The plaintiffs plead section 55b of the Law of Property Act 1936 as amended and say that the defendant has by reason of the matters aforesaid disentitled itself from any relief against the plaintiffs.

No. 1
Plaintiffs'
amended
Statement of
Claim filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made on the
9th day of
November 1978

9th November
1978
(continued)

No. 1
 Plaintiffs'
 amended
 Statement
 of Claim
 filed
 pursuant to
 the order of
 Deputy Master
 Teesdale-
 Smith made
 on the 9th
 day of
 November
 1978

9th November
 1978
 (continued)

AND the plaintiffs claim:

- (1) A declaration that the said Notice of Intention to Exercise Power of Sale is void.
- (1A) A declaration that Memorandum of Mortgage No. 3929270 is void, the provisions of Section 44(1) of the Consumer Transactions Act 1972 as amended not having been complied with as to the manner of execution and certification thereof. 10
- (2) A declaration that the defendant having failed to comply with the provisions of Part III of the Consumer Transactions Act is disentitled from exercising any rights pursuant to Memorandum of Mortgage Registered No. 3929270.
- (3) A declaration that in the events that have happened the plaintiffs are not indebted to the defendant in any sum. 20
- (4) An injunction restraining the defendant whether by itself its servants agents or otherwise howsoever from selling or otherwise howsoever dealing with the whole or any part of or interest in the land comprised and described in Certificate of Title Register Book Volume 3876 Folio 17 or from occupying or using the said land in any way so as to interfere with the plaintiffs' interest therein. 30
- (5) Alternatively to (3) an account of what moneys (if any) are due from the male plaintiff to the defendant either pursuant to section 55b of the Law of Property Act 1936 as amended or otherwise.
- (6) An account of profits received by the defendant or its agents in the wrongful use of the vehicle.
- (7) Damages for conversion.
- (8) Further and other relief. 40
- (9) Costs.

THIS AMENDED STATEMENT OF CLAIM is filed and delivered this 9th day of November 1978 by NICHOLAS NIARCHOS of 27 Leigh Street, Adelaide. Solicitor for the Plaintiffs.

No. 1
Plaintiffs'
amended
Statement of
Claim filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made on the
9th day of
November 1978

No. 2

9th November
1978
(continued)

DEFENDANT'S AMENDED DEFENCE FILED PURSUANT TO
THE ORDER OF DEPUTY MASTER TEESDALE-SMITH
MADE THE 9TH DAY OF NOVEMBER 1978

FURTHER AMENDED DEFENCE (as further amended by
leave granted by Deputy Master Teesdale Smith
on the 9th day of November 1978)

No. 2
Defendant's
amended
Defence filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made the 9th
day of
November 1978

(The Statement of Claim referred to herein is the plaintiffs' fifth amended Statement of Claim filed pursuant to the Order of Deputy Master Teesdale Smith made herein on the 9th day of November, 1978)

1. The defendant admits the allegations contained in paragraph 1 of the Statement of Claim.

2. The defendant does not admit the allegations contained in paragraph 2 of the Statement of Claim but says that on the 6th day of August 1976 the defendant loaned the sum of \$37,581.00 to the plaintiff Nicholas Comblas, the repayment of which was secured by a mortgage over a Mack Prime Mover, registered number S.A. RIH-446. The terms of the said loan and the mortgage were reduced to writing and the defendant will refer to the written agreement for its other terms and conditions.

3. The defendant does not admit paragraph 3 of the Statement of Claim, but says that both of the plaintiffs executed a Memorandum of Mortgage, registered number 3929270, over the whole of the land comprised and described in Certificate of Title Register Book Volume 3876 Folio 17 to secure the repayment to the defendant of an amount of \$16,000.00

9th November
1978

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- No. 2
Defendant's
amended
Defence
filed
pursuant to
the order of
Deputy
Master
Teesdale-
Smith made
the 9th
day of
November
1978

9th November
1978
(continued)
- being part of the moneys owing to the defendant by the first plaintiff pursuant to the terms of the agreement referred to in paragraph 2 hereof.
4. The defendant does not admit the allegations contained in paragraph 4 of the Statement of Claim except that it admits that the first plaintiff did not make the payments of the instalments due to the defendant pursuant to the agreement referred to in paragraph 2 hereof between the 6th day of August 1976 and the 25th day of November 1976 as and when the same fell due and owing. 10
5. The defendant does not admit paragraph 5 of the Statement of Claim but says that the written agreement referred to in paragraph 2 hereof contained terms in the form of the terms set out in paragraph 5 of the Statement of Claim.
6. As to paragraph 6 of the Statement of Claim the defendant admits the allegations contained therein except that it denies that the indebtedness of the plaintiff was pursuant to a consumer mortgage and says that it was pursuant to the agreement referred to in paragraph 2 hereof and that it does not admit the express or implied term referred to therein. 20
7. The defendant does not admit the allegations contained in paragraph 7 of the Statement of Claim but says that the balance due and owing by the first plaintiff to the defendant was notified to the first plaintiff by a notice in writing dated the 25th day of July 1977. The defendant denies that it was obliged to give any notice to the plaintiffs or to either of them pursuant to the agreement or otherwise. 30
8. As to paragraph 8 of the Statement of Claim the defendant admits that it gave a Notice of Intention to Exercise Power of Sale contained in Memorandum of Mortgage No. 3929270 to the plaintiffs which said notice is dated the 25th day of July 1977 but it does not admit the other allegations in paragraph 8. The defendant will refer to the said written Notice for its terms. 40

9. The defendant denies each of the allegations contained in paragraph 9 of the Statement of Claim.

No. 2
Defendant's
amended
Defence
filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made the 9th
day of
November 1978

10. The defendant denies that any of the provisions of the Consumer Transactions Act 1972-1973 apply to the transaction between the plaintiffs and the defendant which is the subject of this action, and in particular the defendant denies that the agreement dated the 6th day of August 1976, which is referred to in paragraph 2 above, is a consumer mortgage within the meaning of the Consumer Transactions Act 1972-1973 on the grounds that the said agreement of the 6th day of August 1976 is not a consumer credit contract within the meaning of the said Consumer Transactions Act 1972-1973 because the principal thereunder exceeded \$20,000.00.

9th November
1978

11. The defendant denies that any of the provisions of the Consumer Transactions Act 1972-1973 are incorporated as contractual terms into the terms of the agreement referred to in paragraph 2 hereof either expressly or impliedly and relies (inter alia) upon clause 9 of the said agreement which is referred to in paragraph 5 above.

12. If any of the provisions of the Consumer Transactions Act 1972-1973 were incorporated as contractual terms into the said agreement between the parties (which is denied) the said terms were varied by an agreement between the male plaintiff and the defendant on or about the 25th day of November 1976 in which in consideration of the defendant agreeing not to exercise its powers the first plaintiff orally or impliedly agreed to deliver the vehicle to O.G.R. Distributors for sale and after such sale to pay any deficiency under the agreement referred to in paragraph 2 above to the defendant.

13. The defendant denies that the Memorandum of Mortgage number 3929270 is a guarantee within the meaning of the Consumer Transactions Act 1972 on the grounds that the said agreement of the 6th day of August 1976 is not a consumer credit contract within the meaning of the Consumer Transactions Act 1972-1973 as the principal thereunder exceeded \$20,000.00, and that the transaction in law is not a guarantee.

14. The defendant denies that it was obliged to comply with the provisions of any Sub-sections 27(3)

No. 2
 Defendant's
 amended
 Defence
 filed
 pursuant to
 the order of
 Deputy
 Master
 Teesdale-
 Smith made
 the 9th
 day of
 November
 1978

and 27(5) of the Consumer Transactions Act 1972-1973 in respect of the transaction which is the subject of this action.

15. The defendant does not admit paragraph 10 of the Statement of Claim.

16. The defendant admits paragraph 11 of the Statement of Claim except that its sale will be in pursuance of, and not in purported pursuance of, the Memorandum of Mortgage No. 3929270. The defendant will not seek to rely in any way upon the notice referred to in paragraph 8 of the Statement of Claim in exercising such power of sale.

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9th November
 1978
 (continued)

17. As to paragraph 12 of the Statement of Claim the defendant does not admit that O.G.R. Distributors was its agent or that it took possession of the vehicle by its agent O.G.R. Distributors. The defendant denies that it by itself or its agents operated the vehicle inter alia in the State of Western Australia for profit and that by reason whereof the plaintiffs sustained loss and damage. If the term referred to in paragraph 6 of the Statement of Claim was a term of an agreement between the parties (which is not admitted) the defendant denies that it was in breach of it.

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17A. As to paragraph 12A of the Statement of Claim the defendant:

- (1) Repeats paragraph 13 above.
- (2) Denies that there was a purported credit contract between the parties.
- (3) Denies that the plaintiffs or either of them were guarantors as alleged or at all.
- (4) Denies the alleged meaning and effect of the Memorandum of Mortgage No. 3929270, but will refer to that Memorandum for its meaning and effect
- (5) Admits that the said Mortgage was not executed by the plaintiffs in the presence of a legal practitioner independent of the defendant and was not certified by such legal practitioner in the manner prescribed by Section 44(1)(f) of the Consumer Transactions Act 1972 as amended.

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- (6) Denies that Part VIII of the said Act applies and that the said Mortgage is void by reason of Section 44(1) of the said Act or at all.
- (7) Denies each and every other allegation contained in paragraph 12A of the Statement of Claim as if the same were set out herein and specifically traversed.

No. 2
Defendant's
amended
Defence
filed
pursuant to
the order of
Deputy Master
Teesdale-Smith
made the 9th
day of
November 1978

9th November
1978
(continued)

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18. The defendant denies that Section 55b of the Law of Property Act 1936 as amended is applicable to the true facts of this matter and denies that it has disentitled itself from any relief against the plaintiffs as alleged in paragraph 13 of the Statement of Claim.

20

19. As the defendant admits that the notice of intention to exercise its power of sale dated the 25th day of July 1977 is void and of no effect, it is unnecessary in the circumstances that declarations to that effect should be made as sought in paragraph 13(1) of the Statement of Claim.

20. The defendant denies that the plaintiffs are entitled to the relief sought by them in subparagraphs 14(2) to (9) inclusive of the Statement of Claim or to any part thereof.

THIS FURTHER AMENDED DEFENCE is filed and delivered the 10th day of November 1978 by LAMBERT & SOLOMON of 120 Wakefield Street, Adelaide. Solicitors for the Defendant.

No. 3(a)
Transcript
of Evidence
before the
Honourable
Mr. Justice
Wells on the
13th and 14th
days of
November
1978
Witnesses
for the
Plaintiffs
COMBLAS
John
Nicholas
Examination

TRANSCRIPT OF EVIDENCE TAKEN BEFORE
THE HONOURABLE MR. JUSTICE WELLS
ON THE 13TH AND 14TH DAYS OF NOVEMBER
1978 AND THE 21ST DAY OF DECEMBER 1978

No. 3(a)

WITNESSES FOR THE PLAINTIFFS

COMBLAS JOHN NICHOLAS - EXAMINATION

BEFORE THE HONOURABLE MR. JUSTICE WELLS
AT ADELAIDE ON MONDAY 13TH NOVEMBER 1978
AT 10.30 A.M.

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APPEARANCES:

MR. ANGEL appeared with MR. NIARCHOS on behalf of the Plaintiffs.

MR. LUNN appeared on behalf of the Defendant.

MR. ANGEL opens for the plaintiffs.

EXHIBIT P1 Copy of document of 6 August 1967, tendered by MR. ANGEL. Admitted.

EXHIBIT P2 Memorandum of Mortgage, tendered by MR. ANGEL. Admitted.

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EXHIBIT P3 Notice of Intention, tendered by MR. ANGEL. Admitted.

MR. ANGEL CALLS:

John Nicholas COMBLAS,
35 Queen Street,
Alberton.
(Unemployed)

SWORN

EXAMINATION BY MR. NIARCHOS:

Q. Looking at exhibit P.1, looking at the foot of each page of that document, can you see the signature at the bottom of that first page, headed The Schedule, do you recognise the signatures there.

30

- 10
 A. Yes.
 Q. Is that your signature.
 A. Yes, that is my signature.
 Q. Looking at the first page, do you recognise the signature there as being your own.
 A. I do.
 Q. Do you remember signing that document.
 A. Yes, I remember signing it.
 Q. It was in relation to the purchase of a Mack Prime Mover. Was that a document relating to finance provided to you.
 A. That's correct.
 Q. Looking at P.2, the Mortgage, the last page, do you see the signature there. That is your own.
 A. Yes, I do.
 Q. That is at the foot of the document headed Memorandum of Mortgage.
 A. Yes.
 20
 Q. Do you remember signing that document.
 A. Yes.
 Q. Was that signed by you in front of a Justice of the Peace.
 A. It was.
 Q. Did anyone else sign that document at the same time as you.
 A. Yes.
 Q. Who was that.
 A. My wife.
 30
 Q. Does her signature appear under your own.
 A. Yes, it does.
 Q. That document related to the same transaction, did it.
 A. That's right.
 Q. Do you recall whether you signed both the documents on the same day or not.
 A. No. I don't recall whether I did on the same day or not.
 Q. Do you know what date you did sign it.
 40
 A. No, I don't remember that.
 Q. Did you read both of the documents before you signed them.
 A. Yes, we read them.
 Q. You read them.
 A. Yes, I read them.
 Q. That is both the documents.
 A. Yes, both of them.
 Q. Having signed the documents did you in fact begin to drive this Mack Prime Mover.
 50
 A. Yes, I did.

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- Q. You understood you had to pay instalments to Mercantile Credits.
A. That's correct.
Q. Did something happen to the Mack Prime Mover.
A. Yes, it did.
Q. It in fact broke down on more than one occasion.
A. That is correct.
Q. Did you endeavour to repair it without success. 10
A. Yes I did.
Q. Were you in default of paying your instalment with Mercantile Credit.
A. Yes, I was.
HIS HONOUR:
Q. I take it that was your only business at that time.
A. That is correct.
Q. You were just an independent transport operator. 20
A. That is right.
Q. Was that the only truck you had at the time.
A. That's right, the only one.
Q. Did it break down interstate on more than one occasion.
A. It did.
Q. Did you discuss the situation of your instalment payments with anyone at Mercantile Credits. 30
A. Yes, I did.
Q. Do you know the names of the persons with whom you discussed the situation.
A. Well, I think Mr. Duff or Daff. I don't know which way it is said. I think there was a woman also but I don't remember her name.
Q. When you first became in arrears in your instalments did you receive any contact from Mercantile Credits. 40
A. Yes, I did.
Q. In what way.
A. By letter.
Q. Do you remember any documents that you received at this time from Mercantile Credits.
A. I believe whatever documents I had I gave to you.
Q. Do you know of any document that you have got in relation to the contact from that firm.
A. I had some telegrams and letters. 50

- Q. Do you know what those documents said at this stage.
- A. I believe the letter stated that I should return the vehicle because I had not paid the instalments.
- Q. Did you go to the offices of the Mercantile Credits and discuss the situation with them.
- A. Yes.
- Q. You spoke to a Mr. Daff.
- 10 A. Yes.
- Q. Was this while the truck was still in your possession.
- A. Yes.
- Q. As a result of this discussion what was decided between yourself and Mercantile Credits.
- A. It was decided - the first time it was decided to allow me to keep the truck and see if I could meet the payments.
- 20 Q. What was said to you about that.
- A. I believe - going back two years, I can't really remember exactly what it was now.
- Q. What was the effect of it. You could keep the truck.
- A. I could keep going with the truck to see if I could catch up with my payments.
- Q. Were you given an extension of time.
- 30 A. Yes. It would have been.
- Q. Did you in fact do that.
- A. Yes, that's correct.
- Q. When was this in relation to your first taking possession of the truck. How long after.
- A. I think it was roughly about six weeks.
- Q. That you first went in there.
- A. Yes, I think so.
- Q. Did you then operate the truck again.
- 40 A. Yes, I did.
- Q. Were you able to meet your instalments.
- A. No, I wasn't.
- Q. Do you again discuss the matter with anyone.
- A. Yes, I did.
- Q. Was it again Mr. Daff that you spoke to.
- A. I think it was Mr. Daff and the lady again.
- Q. Was it in the offices of Mercantile Credits.
- A. Yes.
- Q. On this occasion what caused you to go into the offices. Was there any letter from Mercantile Credits.
- 50 A. Yes, there was, I believe, a letter.

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Q. Did you yourself see the letter.
 A. Yes, I read the letter.
 Q. Do you know where that letter is now.
 A. I think I gave it to you. I am not sure.
 Q. Was it received by you or someone else
 on your behalf.
 A. It was received by my wife.
 Q. You weren't at home when it came.
 A. No, I was not.
 Q. Did you go to the office of Mercantile
 Credits with your wife on this occasion. 10
 A. I believe I did.
 Q. You can recall your wife being with you.
 A. Yes.
 Q. When you went into the offices of
 Mercantile Credits was the situation of
 your instalment payments discussed again.
 A. Yes, it was.
 Q. Were you in there for some considerable time.
 A. Yes. 20
 Q. Do you know how long.
 A. I would say about an hour and a half.
 Q. As a result of your discussion what was
 decided on that occasion.
 A. That I could still keep the Mack and I
 was given an extension of time to meet
 the payments.
 Q. How long.
 A. A month, I believe.
 HIS HONOUR: 30
 Q. Had the truck been breaking down since the
 first visit.
 A. It continuously broke down.
 Q. What was the trouble with it.
 A. All sorts. Something wrong with the motor,
 the engine brake, the diff. split. One
 continuous thing after another, either
 mechanically -

XN.
 Q. You were given an extension of time. 40
 A. That's correct.
 Q. On the second discussion.
 A. Yes.
 Q. Did you do anything after that with the truck.
 A. Well, I did do another trip with it and it
 still broke down. I believe I rang
 Mercantile Credits and told them.
 Q. Do you know who you spoke to on this occasion.
 A. I think it was Mr. Daff. I am not sure.
 Q. What was said. 50
 A. I said to him, since it was continually
 breaking down I was going in there to discuss
 the matter with them, which I did. This is by
 phone first. Then I went to their office

- and it was decided to take it back.
I had already taken it back.
- Q. Decided between whom.
A. Between me and Mr. Daff, I think it was.
Q. That it would be taken back where.
A. To O.G.R. Roberts.
Q. O.G.R. Distributors.
A. Where I got it from.
Q. O.G. Distributors was where you
10 originally saw the prime mover and
arranged finance for it.
A. Yes.
Q. They were the dealers.
A. Yes.
Q. When you said take it back, back to
the dealers where you originally got it.
A. Yes.
Q. Were you actually speaking to someone
in the office.
20 A. In the office.
Q. Do you recall what was said between you
and the person in Mercantile Credits
as to when they should take the truck
back.
A. Not exactly. I don't remember what was
actually said there.
Q. Was it suggested to you or your own
suggestion you take the truck back.
A. I said since it was always breaking down
30 I going to take it back to them.
Q. By 'them', whom do you mean.
A. To Mercantile Credits.
Q. As a result of your suggestion what
was said to you.
A. Well, to take it back to O.G. Roberts.
Q. You were told where to take it back.
A. That's right.
Q. What did you do as a result of that.
A. I took it back. I believe it was
40 7.30 one evening.
Q. Do you know the date.
A. I don't recall the date I took it back.
I think on the 25th or 27th.
Q. Of what month.
A. November.
Q. 1976.
A. That's correct.
Q. You drove the truck into O.G.R.
Distributors yourself.
50 A. Yes.
Q. Did you leave it with someone who was
working at O.G.

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- A. I drove it in their yard. I believe the blokes in there were working on repairs at the time. I saw the foreman there. I told him I had left it there and to tell the manager, Brian Emberson to ring Mercantile Credits next day and tell them I had left it there, so they would know I did take it back.
- Q. Did you yourself go into the offices of Mercantile Credit that night or the next day. 10
- A. No, I believe - I am not sure - I rang them up and told them I had left it there.
- Q. When, the next morning or the next day.
- A. Yes, the next day it was.
- Q. And did you subsequently go into the offices.
- A. I am not sure now that I did or not.
- Q. Can you recall being in the offices of Mercantile Credits after the vehicle was taken back to O.G.R. Distributors.
- A. Yes, I believe I was. 20
- Q. Were you with your wife on that occasion.
- A. Yes.
- Q. And on this occasion after the vehicle had been taken back were you given any documents by anyone at Mercantile Credits.
- A. No, I don't think I was.
- Q. Did you see whether your wife was handed any documents on this occasion.
- A. No.
- Q. When you went in on this occasion do you know who you spoke to at Mercantile Credits. 30
- A. No, I don't remember who it was.
- Q. Was it Mr. Duff - was he one of the people you spoke to or can't you recall at all.
- A. No, I can't recall virtually who it was now.
- Q. But what was the effect of your discussion with them on that occasion.
- A. It was discussing about whether once it was sold to see how much was left on it, the balance of what it was sold for and what we had to pay or what should happen with it thereafter. 40
- Q. You were discussing what was going to happen with the prime mover and what you would owe.
- A. That's correct.
- Q. Did you sign any documents or were you asked to sign any documents on this occasion.
- A. I don't think so.
- Q. Did you see your wife sign any documents.
- A. I don't remember really. 50
- Q. After this meeting you left with your wife, did you receive any other documents from Mercantile Credits.

- A. I think I received a letter from them.
 Q. How long afterwards.
 A. I should think it was about a fortnight I think.
 Q. And was this letter something you received yourself at home or someone else received on your behalf.
 A. I think I received it.
 Q. Do you have that letter with you.
 A. I haven't got the letter with me.
 Q. What was the effect of the letter.

OBJECTION Mr. Lunn objects on the grounds that the whereabouts of the letter is not known

QUESTION WITHDRAWN

XN

- Q. Do you know where the letter is now.
 A. Well I think I would have gave it to you, I think.
 Q. Did you at any time receive any documents through registered post from Mercantile Credits.

A. Yes I did.

Q. This is before you took the truck back or afterwards.

A. I don't remember now if it was before or after.

Q. There was an occasion when a document was received through registered post.

A. That's correct.

Q. Now do you know was there more than one occasion when you received registered documents from Mercantile Credits.

A. No. I received one registered - another letter that was not.

Q. Looking at exhibit P3, do you recognise that document, is that a document that you received.

A. No, I don't think I did receive this one. I don't really remember but I don't think so.

Q. If you look at the date on that document it is the 25th July 1977, does that help you remember.

A. 25th July. No.

HIS HONOUR

Q. You see what it is.

A. Yes I see what it is.

Q. Did you receive a document at any time to that effect.

A. No, I don't believe I did.

XN

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- Q. Do you know that Mercantile Credits wanted to sell your house at one stage.
A. Do I know?
Q. Yes.
A. I knew they had the mortgage on it and that.
- HIS HONOUR
Q. You knew, I take it, that the mortgage could mean - could mean they might want to sell your house.
A. Yes, I should say it would have been that way. 10
Q. What counsel is asking you is did it come to that. Did you at any time think that they wanted to sell your house in fact.
A. Well I had thought that all along, since I had not been able to meet my payments.
Q. But not at any particular time.
A. No, not any one particular time.
- XN
Q. Could you look at this document which is a photocopy and it is headed at the top 'Mercantile Credits'. Can you see that. 20
A. Yes.
Q. Looking at that document, have you at any time received a document - not that particular document, but a document in the same form as that, addressed to yourself.
A. I don't really remember now.
Q. You can't recall at all.
A. No.
- M.F.I. P4 Document dated 16th November 30
1976, marked P4
- XN
Q. Look at this document, Mr. Comblas, and it is a document a copy headed again Mercantile Credits, do you recall having received or been handed a document, the same as that not that particular one, but in the same form, receiving that from Mercantile Credits.
A. No.
Q. You didn't or you can't recall. 40
A. No, I don't recall. I don't think I did receive it though.
- M.F.I. P5 Document dated 25th November
1976, marked P5.

NO FURTHER QUESTIONS

COMBLAS JOHN NICHOLAS - CROSS EXAMINATIONCROSS-EXAMINATION BY MR. LUNN

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- 10 Q. Did you only ever make one payment to
 Mercantile Credits under the consumer
 credit transaction we are talking about
 in this case.
 A. Yes I believe I only made one.
 Q. And was that a \$214.
 A. Pardon?
 Q. Was that a \$214.
 A. I don't remember, but I would think.
 Q. You didn't ever pay the cost of the
 land broker who prepared the mortgage,
 did you.
 A. The land broker?
 Q. Yes.
 A. I think a land broker who made that
 mortgage in Port Adelaide. I don't
 really recall it now.
 20 Q. Do you remember being asked to pay \$113
 to a Mr. Duncan who prepared the mortgage.
 A. No I don't recall it.
 Q. And did you ever pay anything to Mr. Duncan
 for the preparation of a mortgage.
 A. I don't really remember now.
 Q. About November 1976 did you lose your
 driving licence.
 A. In November?
 Q. Yes.
 30 A. 1976?
 Q. Yes.
 A. No, I did not.
 Q. Did you lose your driving licence at
 about that time.
 A. November 1976 - about that time?
 Q. Yes.
 A. No, I did not.
 Q. Did you ever tell anyone from Mercantile
 Credits in November 1976 that you had lost
 your driving licence.
 40 A. No I did not. I do remember telling them I
 didn't have a licence to drive a semi -
 not losing my licence.
 HIS HONOUR
 Q. When did you tell them that.
 A. Because -
 Q. I said when.
 A. Around November 1976.

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Q. Well how were you going to drive it if you didn't have a licence.

A. Well I had a driver to drive it who had a class three licence to do so.

XXN

Q. Had you ever personally driven the semi trailer that was the subject of this transaction.

A. Had I ever drove it?

Q. Yes.

A. I did drive it bob-tail, without a trailer - just a prime mover which my licence allowed me to drive such.

Q. But otherwise when you were having a trailer towed, you had to employ a driver, is that correct.

A. That is quite correct.

Q. And did you in fact have another job yourself during the time the truck was making trips with loads.

A. No, I did not.

Q. Are you able to say whether on 17 November 1976 you and your wife went to the offices of Mercantile Credits and had a conversation with Mr. Daff and a Mrs. Saler.

A. Well, Mr. Daff, yeah, and the lady's name I don't remember, as I mentioned earlier.

Q. Are you able to say whether it was 17 November, or not.

A. I can't say - it is going back, what, nearly two years now.

Q. And did you then have a long conversation about your general financial position.

A. I remember we had a discussion about that matter, it was for a good - fair time, hour and a half, something like that.

Q. And was it then said to you by the people from Mercantile Credits that they would give you another month to see if you could work out your financial problems.

A. That's right, I believe.

Q. And that conversation on 17 November, that is the first conversation you had with Mr. Daff and Mrs. Saler, was anything said about returning the truck to O.G.R.

A. The first conversation?

Q. Yes.

A. Well, I can't really remember it now, what -

Q. Well, at that time did Mercantile Credits tell you that they could repossess the truck because you hadn't made your payments.

A. This possibly could have been so.

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- Q. And did they also tell you that you could take the truck back to O.G.R.
- A. Yeah, they told me to take it - that I could take it back to -
- Q. When you took the truck back to O.G.R. did you ask O.G.R. to put a price on it.
- A. Yes, I did ask the workshop foreman, I believe, to tell the manager there to tell Mercantiles I took it there and to price it.
- Q. I think you have said that you took the truck to O.G.R. about 7.30 one night, is that correct.
- A. One evening, that's correct.
- Q. Did you get a telegram from Mercantile Credits on the following day.
- A. I remember I received two telegrams, but whether it was then, I can't actually recall now.
- Q. Do you remember whether you, on the day after you took the truck back, went into Mercantile Credits as a result of receiving a telegram.
- A. No, I don't remember it. I could have.
- Q. Do you remember after having taken the truck back to O.G.R. whether you had a further long discussion with Mr. Daff and Mrs. Saler.
- A. Yeah, I believe we did have a discussion.
- Q. And did that discussion last for about three hours.
- A. Discussions we had there I think lasted hour and a half, hour and three-quarters, at the most, I believe.
- Q. And at this discussion on the day after you took the truck back to O.G.R. did Mr. Daff tell you that you could either surrender the truck or it would be repossessed by Mercantile Credits.
- A. No - he did tell me to take it back to O.G.R.
- Q. But the conversation I am referring to, wasn't the truck already at O.G.R. when the conversation took place.
- A. Oh, this was after the truck was returned?
- Q. Yes.
- A. I can't really recall now virtually what was said or what was - that time.

MR. LUNN CALLS FOR A NOTICE OF 16 JANUARY, 1978
FROM MERCANTILE CREDITS TO THE PLAINTIFFS
(PRODUCED BY MR ANGEL)

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Q. Looking at the notice of 18 January, 1978 produced to you, do you recognize having received that document.

A. The time - whatever documents I did receive, I can't actually remember it now, but whatever I did, I gave to my lawyer.

Q. Well, you can't say whether you received that or not.

A. Well, at this stage I don't remember really, so I wouldn't like to say no or yes.

M.F.I. D1 Notice of 18 January 1978
 marked D1 for
 identification

Q. Looking at Exhibit P1, at the time you signed that document, did you receive a copy of part of it.

A. A copy of this contract?

Q. Yes.

A. Yes, I received a copy of the contract.

Q. Did you receive a copy of the part of it that is marked 'Thirteenth Schedule'.

(NOT ANSWERED)

HIS HONOUR

Q. Do you know which part he means by that.

A. No, I don't.

XXN

Q. Looking at the page marked 'Thirteenth Schedule' at the top, are you able to say whether the copy that you received contained writing to that effect on it.

A. No, I don't really remember what was wrote on it.

MR LUNN CALLS FOR DOCUMENT DISCOVERED BY THE PLAINTIFFS WHICH IS DESCRIBED IN THE PLAINTIFFS' LIST OF DOCUMENTS AS 'ONE PAGE DOCUMENT HEADED "THE SCHEDULE" DATED 8 AUGUST, 1976'.

(PRODUCED BY MR ANGEL)

XXN

Q. Do you recognize this document which Mr Niarchos has just taken from his file as being the document which you received from Mercantile Credits on about 6 August, 1976.

A. Whether I received this one?

Q. Yes. Do you recognize your signature on the bottom of that document.

A. Yes, the signature is mine.

Q. And do you remember receiving a green copy of that document when you signed up for the truck.

A. I possibly did receive one, but I don't remember, anyhow.

Q. Are you able to say whether in addition to the green document there was another sheet you received.

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A. Whatever I received from them I gave to my lawyer. Whatever I had. I don't remember going back two years.

HIS HONOUR:

Q. You don't dispute that you received a document like that.

A. No.

EXHIBIT D2

Green Sheet, part of P.1
(Tendered by Mr. LUNN)

10

HIS HONOUR: It will be admitted for the time being simply on the basis of acknowledgement of the signature.

MR. LUNN: I call for a letter of 23 December 1977 from Lambert and Solomon to the plaintiff.

PRODUCED

XXN

Q. Looking at that letter, do you recognize that as being a letter which was received by you.

20

A. Yes, I think I did receive a letter like this.

EXHIBIT D3

Letter dated 23 December 1977 from Lambert and Solomon to the plaintiff.
(Tendered by Mr. LUNN)

Q. Do you now have the telegrams which you received from Mercantile Credits.

30

A. No, I haven't got them myself, if at all. I have maybe - if we had them I think I gave them to my lawyer, if not I haven't got them.

MR. LUNN: I call for production of any telegrams from Mercantile Credits.

NOT PRODUCED

NO FURTHER QUESTIONS

NO RE-EXAMINATION

WITNESS RELEASED.

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MR. NIARCHOS CALLS:

George Milton,
 1 Owen Street,
 Plympton.
 (Real Estate Agent and Interpreter)
 SWORN AS INTERPRETER

MR. NIARCHOS CALLS:

ARSINOI COMBLAS,
 35 Queen Street,
 Alberton.
 (Cleaner, Queen Elizabeth Hospital) SWORN

10

EXAMINATION BY MR. NIARCHOS:

- Q. You are the wife of John Comblas, who is in court.
- A. Yes.
- Q. In August 1976 your husband entered a contract to buy a truck, is that right.
- A. Yes.
- Q. Did you yourself sign a document which was part of the agreement. 20
- A. Yes.
- Q. Looking at exhibit P.2, the last page, do you recognise your signature.
- A. Yes.
- Q. At the foot of the page, is that right.
- A. Yes.
- Q. Your husband signed that document as well.
- A. Yes.
- Q. And there was another man there who signed as a witness. 30
- A. No.
- Q. There is another signature on that page, your husband's, your own and someone else's signature on the left side of the page at the bottom. Did you see someone sign there.
- A. I don't know, possibly. Someone we went to P.M.G.
- Q. Did you read that document before you signed it. 40
- A. No.
- Q. Can you read English.
- A. No.
- Q. Did you read any part of it.
- A. No.
- Q. Are you born in Greece.
- A. Yes.
- Q. Do you speak and understand Greek.
- A. Yes
- Q. Was that document read over to you in Greek by someone before you signed it. 50
- A. No, I don't think.

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Q. Did you know what the effect of that document was, what it concerned.

A. No.

HIS HONOUR:

Q. I take it you knew it had something to do with the truck that your husband was getting.

A. Yes.

10 XN.

Q. Did you know whether it had anything to do with your house.

A. Yes. I didn't want it by my husband want it.

Q. It concerned your house, that document, did you know how it affected your house.

A. All I know I put my name.

HIS HONOUR:

20 Q. Did you know, madam, that that document there in some way had something to do with your house. In some way.

A. Yes.

XN.

Q. Do you know what it had to do with your house. Do you remember you signed it.

A. I don't know what to say. I don't know.

HIS HONOUR:

30 Q. You tell me what you think that document did. What did you think about it.

A. We thought we mortgaged the house to borrow some money and have the truck to work.

XN.

Q. Did you think in fact you were raising money on the house. That you were borrowing money to pay for the truck.

A. Yes.

Q. After you signed that document you know your husband got the truck and he was working the truck.

40 A. Yes.

Q. Do you know that the truck broke down on a number of occasions.

A. Every day. We park in front of the yard. For several days we couldn't use it.

Q. There was a lot of trouble with the truck.

A. A lot of trouble every day.

Q. You know your husband wasn't paying for the truck to Mercantile Credits.

A. He didn't have any money.

50 Q. I am asking from what you know yourself: did you go into Mercantile Credits with your husband to talk to the people there about the truck and the payments.

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- A. Yes. Myself and from my husband.
(At this stage Mr. Niarchos instructs
interpreter to ask witness to wait until the
question is asked before she replies.)
- Q. What was the answer.
- A. She asked me to say the first time she went
or the second time.
- Q. You went in there on a number of occasions
and spoke to people at Mercantile Credit
and your husband was with you. Is that right. 10
- A. Yes.
- Q. On any of these occasions before you went in,
did you receive a telegram or letter asking
you to contact Mercantile Credit.
- A. I got a letter and I went by myself.
- Q. Was there a letter - was that received
by letter or telegram.
- A. Letter by registered mail.
- Q. Did you yourself sign the receipt for the
registered mail. 20
- A. Yes, I think I did sign.
- Q. Looking at the document shown to you,
Exhibit D4, that is a copy only. The document
you received by registered post, was it the
same as that but not a copy.
- A. I can't remember. Possibly so.
- Q. The document that you received. Do you
remember reading the whole of the document.
- A. She said, I got a copy of that form and I
went to the Mercantile Office and told them 30
that the truck is not working.
- Q. On the occasions that you went with your
husband to Mercantile Credit, did you discuss
the payments that was in arrears and whether
they would give him more time to pay.
- A. Yes.
- Q. And you talked with the people there for a
long time.
- A. Yes.
- Q. And on one of these occasions was there a 40
discussion between your husband and the people
in Mercantile Credit as to what would be done
with the truck, if he couldn't meet his payments.
- A. Yes. May I say what I did discuss.
- HIS HONOUR: Yes.
- XN.
- A. She said, they told me if the truck is not
in working condition we can sell it. Possibly
\$20,000 and we get the money we should get.
- Q. Was the truck with you - at the time of this 50
conversation was the truck still with your husband.
Did he still have the truck.
- A. Yes.

- Q. Well, after that date, on a subsequent date, did you go in again at the time when the truck - when your husband had given the truck back.
- A. I can't remember. Possibly we gave it back because we had been many times.
- Q. On any date you did go in there, had the truck already been given back.
- 10 A. I can't remember. I did tell you the other day. I did tell you the other day. I can't remember.
- HIS HONOUR
- Q. Madam, at one time you knew from your husband that he was giving the truck back.
- A. I did say that to them. I said to my husband 'If the truck is not good -'. 'And if the truck is not good, let's give it back'.
- 20 Q. And did your husband give it back.
- A. Yes, they said 'Bring it back'.
- Q. And did your husband tell you that he had given it back.
- A. Yes.
- Q. And after your husband told you that he had given it back one day later, did you go again and see the Mercantile Credits.
- A. Possible, we might.
- XN
- 30 Q. After the truck had been given back, did you yourself receive any letters or documents from the company Mercantile Credits.
- A. Somebody call in and put a paper on the door.
- Q. Looking at P3, is that the document that you referred to as having been posted on your house.
- A. I think there were more papers.
- 40 HIS HONOUR
- Q. But with the papers was that paper.
- A. To tell you the truth my husband took these papers and took to our solicitor.
- XN
- Q. Apart from that letter or the document that you said was put on your door, was there any other occasion when you received documents from Mercantile Credits.
- 50 A. I don't know. They told me to go to see a solicitor.
- Q. When you say 'they'. who do you mean.
- A. I think the man who sits at the back and a woman.

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MR. LUNN: Mr Daff at the back.

XN

A. I think this is the man. I think because
 I have seen him many times.

HIS HONOUR: Agreed by counsel to be
 Mr. Daff.

XN

Q. Mrs Comblas, you said that you went to
 Mercantile Credits offices on a number
 of occasions. You went once alone
 and also on other occasions with your
 husband.

10

A. Yes. I have been once and I signed the
 papers and I have been once by myself and
 possible I went with my husband too.

Q. On any of the occasions that you went into
 the offices of Mercantile Credits were you
 handed any papers or documents by anyone
 working at Mercantile Credits.

A. No. I asked the amount of money and they
 hide the paper so I didn't see, I could
 not see it. If I knew the amount was
 so much I will never sign.

20

Q. Looking at the document, P5, in front of
 you, that is a copy. Have you ever seen
 a document in the same form as that in the
 offices of Mercantile Credits on any of the
 occasions that you went in there.

A. They never show me anything.

Q. You didn't ever recall seeing that document
 in particular.

30

A. They never said to me 'See this paper', and
 someone to translate to me. (WITNESS IN OWN
 WORDS - Because my husband want the truck
 and I feel soft my husband, I put my name.)

NO FURTHER QUESTIONS.

COMBLAS ARSINOI - CROSS EXAMINATION

CROSS-EXAMINATION BY MR LUNN

- Q. Looking at MFI D1, notice of 18th January 1978, have you ever previously seen that document.
- A. I can't remember. They never show me anything.

NO FURTHER QUESTIONS
 NO RE-EXAMINATION BY MR NIARCHOS.
 WITNESS RELEASED
 INTERPRETER RELEASED

10

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DAFF ROBERT JOHN - EXAMINATION

MR. NIARCHOS CALLS:
 ROBERT JOHN DAFF
 177 Holbrooks Road,
 Underdale.
 Accountant.

SWORN

EXAMINATION BY MR. NIARCHOS:

- Q. Are you employed by Mercantile Credits.
- A. Yes.
- Q. And in November 1976 were you employed there as an accountant.
- A. No. I was employed there as a collection officer.
- Q. And when were you first employed by Mercantile Credits.
- A. 1st November 1976.
- Q. And until when were you the collection officer.
- A. Until the 30th June 1977.
- Q. And from that date what have you - what position have you had.
- A. Branch accountant.
- Q. During the period that you have been employed with Mercantile Credits have you been involved in the file of John Nicholas Comblas and the agreement that he had concerning a Mack prime mover.
- A. Yes.

20

30

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- Q. Were you the officer responsible for the collection of the instalments on that contract.
- A. Yes.
- Q. In that position did you, over a period of time, interview Mr. Comblas.
- A. Yes.
- Q. On that contract and the payment of instalments.
- A. Yes. 10
- Q. And did you take certain steps for the collection of the money owing on the contract.
- A. Yes.
- Q. Can you now recall the circumstances of the conversations you had with Mr Comblas or anyone else on the file.
- A. Yes.
- Q. Can you recall when you first had contact with Mr Comblas over this matter.
- A. May I have a look at my notes here? 20
- Q. What notes are you wishing to refer to.
- A. The ledger card - I have my notes on the back.
- Q. The ledger card is what, the ledger card of Mercantile Credits.
- A. Yes.
- Q. Are they notes made by you.
- A. Yes.
- Q. And these notes, were they made at about the time that these incidents occurred.
- A. Yes. 30
- PERMISSION TO REFER TO NOTES, MR LUNN NOT OBJECTING
- A. What do you want?
- HIS HONOUR
- Q. The first occasion.
- A. On 17 November was the first occasion.
- Q. 1976.
- A. Yes.
- XN
- Q. On 16 November did you take any action in respect of this matter. 40
- A. Yes, a Sixth Schedule was sent to Mr. Comblas.
- Q. Did you prepare that document yourself.
- A. Yes - oh, I had it typed and I signed it.
- Q. Your signature would appear on that document.
- A. Yes.
- Q. Did you retain a copy of the document that you prepared.
- A. Yes.
- Q. Is that on your file. 50
- A. Yes.
- Q. Do you produce it.
- (WITNESS PRODUCES DOCUMENT)

- 10 Q. Is that an exact copy of the document that you prepared.
 A. That is the duplicate copy made at the time.
 Q. The original document, was that forwarded to Mr. Comblas.
 A. Yes.
 Q. By registered post.
 A. By certified mail.
 Q. Did you arrange that.
 A. Yes.
 HIS HONOUR
 Q. This is a counter copy.
 A. Yes.
EXHIBIT P4A Copy of Sixth Schedule, tendered by MR NIARCHOS. Admitted.
- 20 XN
 Q. Looking at P4, is that in fact a photocopy of the document that you forwarded by the certified mail.
 A. Yes.
EXHIBIT P4 M.F.I. P4 tendered by MR NIARCHOS. Admitted.
- 30 Q. Was that in fact forwarded on 16 November 1976 by certified mail.
 A. Yes.
 Q. And you mentioned on 17 November something else happened in the matter, what was that.
 A. Mr and Mrs Comblas called in to the office and Mrs Saler and myself interviewed them.
 Q. Mrs Saler, was she an officer of Mercantile Credits.
 A. Yes.
 Q. What was her position.
 A. She was collection officer.
 Q. Did you speak to Mr. Comblas.
 A. Yes.
- 40 Q. And Mrs Saler and Mrs Comblas were there as well.
 A. Yes.
 Q. And on this occasion did you discuss Mr Comblas' financial position.
 A. Yes.
 Q. And his ability to pay the instalments.
 A. Yes.
- 50 Q. Did you discuss the fact that the truck had broken down on a number of occasions.
 A. Yes.
 Q. And what was the result of the discussion.

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- A. Well, Mr Comblas said that he had a driver driving the truck and he had a job which was going to help to pay for the truck, hoping that there would not be any more repairs needed on the truck.
- Q. And as a result of the discussion what was decided.
- A. That Mr Comblas carry on like that, or in that manner, and Mr Kelly granted a month's grace to make the instalments. 10
- Q. Now Mr Kelly, what was his position in the company.
- A. He was the Adelaide branch manager of Mercantile Credits.
- Q. And Mr and Mrs Comblas left, having been given one further month extension.
- A. Yes.
- Q. Did you take any further action on the file after that date. 20
- A. Yes.
- Q. What.
- A. On 25 November I received a 'phone call from Mr. Maddern, from O.G.R. Distributors.
- Q. Do you know what his position was at that time.
- A. I am not sure whether he was a salesman or stock controller.
- Q. And what were you told.
- A. There was a note on the windscreen requesting O.G.R. Distributors to put a price on the truck.
- Q. You mentioned 'the windscreen', the windscreen of what. 30
- A. Of the Mack truck.
- Q. This is the Mack truck which was the truck operated by Mr Comblas.
- A. That is right, yes.
- Q. And what further discussion took place between yourself and Mr Maddern.
- A. I asked Mr Maddern to keep the truck there and I sent a telegram to Mr Comblas asking him to contact Mercantile Credits immediately. 40
- Q. And did you arrange for that personally.
- A. The telegram - yes.
- Q. Did you take any further action on that date.
- A. Well, Mr Comblas called in and after a discussion it appeared apparent that he would not be able to make the payments on the truck; we suggested that he could voluntarily surrender the goods or we would have to repossess them, and I handed Mr Comblas a demand for delivery of the goods after discussion with him saying that the truck - he thought the truck would be no good and would not be able to make it pay. 50

HIS HONOUR

Q. Just tell me. Mr Maddern spoke to you about the note of the windscreen.

A. Yes.

Q. Did he say where the truck was.

A. It was parked outside of O.G.R.'s yard.

Q. And did Mr Maddern say that he knew why it was there, or did the whole thing come as a surprise to him.

10 A. It came as a surprise to Mr Maddern I think.

Q. That is what you heard from Mr Maddern.

A. Yes.

Q. Now, did you mention these facts to Mr Comblas.

A. Yes.

Q. What did Mr Comblas say.

A. He said that he would ask them to put the price on the truck, and the truck was at O.G.R.'s.

20 Q. So he would take it up there first.

A. Yes.

XN

Q. If you look at that document, P5, marked for identification, that white document, is that a copy of the notice that you handed to Mr Comblas on 25 November, 1976.

A. Yes.

EXHIBIT P5

M.F.I. P5 tendered by MR NIARCHOS. Admitted.

30 Q. That was the conclusion of the interview with Mr and Mrs Comblas on that day.

A. Yes.

Q. Subsequently did you make any other arrangements for the sale of the truck through O.G.R. Distributors.

A. No, not myself personally.

Q. Did you have anything further to do with this matter.

A. Yes, on 26 January, 1977.

40 Q. Yes.

A. I sent a telegram to Mr Comblas to contact myself at Mercantile Credits.

Q. Was there any contact between yourself and Mr Comblas.

A. No, and then - sorry, it was on 15 June that I requested a Mr Evison, who was a financial representative of Mercantile Credits, to call on Mr Comblas and ask - and find out if anything had happened, or what arrangements could be made for the repayment of the debt.

50 Q. 15 June, 1977.

A. Sorry - yes - that was after the telegram was sent in January.

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HIS HONOUR:

Q. There was a gap of some five months when nothing happened.

A. Yes.

XN

Q. Did you have anything to do with cancelling the comprehensive insurance on the truck.

A. We were informed by David Stevens and Associates that there was insurance on the truck and because it was re-possessed we should apply to have the insurance refunded.

10

Q. When was this.

A. I do have a letter.

Q. Letter dated 3 June 1977.

A. It may be. Yes, 3 June 1977.

Q. That document is a copy of your letter to David Stevens and Associates asking for cancellation of the policy.

20

A. That's right.

EXHIBIT P.6

Letter dated 3 June 1977 to
 David Stevens and Associates
 (Tendered by MR. NIARCHOS)

Q. Was that the first action taken as far as you are aware to cancel the comprehensive insurance.

A. Yes.

Q. Was there a refund received on the cancellation.

A. Yes.

Q. When was this.

30

A. It was received on 20 November 1977.

Q. What was the amount received.

A. \$1,603-07.

Q. You didn't have any contact from Mr. Comblas yourself at all after that.

A. No.

Q. Did you take any action yourself on the collection of the money subsequent to June 1977. The balance due.

A. Balance due. We were trying to get someone to make an offer on the truck because we were aware that Mr. Comblas was out of work.

40

Q. Were there any offers on the truck between 25 November 1976 and 25 July 1977 as far as you are aware.

A. No.

Q. Is there any mention in any of the document you have of the pricing of the trucks between those two dates.

A. Mr. Comblas believed that the unit was about \$14,000, was worth about \$14,000.

50

- Q. What I am asking you is when the truck had been delivered to O.G.R. on the 25th July did Mercantile Credits obtain any offers or arrange for the valuation of the truck.
- A. 25 July 1977. There was a valuation done by O.G. Roberts on 12 August 1977.
- Q. Go back to the dates I have mentioned.
- A. 25 July 1977? No.
- Q. Nothing til that date.
- A. No.
- Q. What is the practice of Mercantile Credits, what was the practice during this period when a vehicle has been re-possessed, as to the valuation of the vehicle.
- A. The practice of Mercantile Credits was to get a proper valuation and it was Mercantile Credits aim to get at least three offers on the vehicle, on any re-possessed vehicle, and accept the highest three independent offers to buy.
- Q. Did Mercantile Credits itself value the vehicle.
- A. There was no-one at Mercantile Credits who was capable of really - you mean assess the vehicle?
- Q. Yes.
- A. There was no-one at Mercantile Credits qualified to assess the vehicle.
- Q. Was it the situation that Mercantile Credits would employ someone to value the vehicle independently.
- A. Yes.
- Q. Did that occur.
- A. A valuation was asked from O.G. Roberts Distributors of the truck.
- Q. When was this asked for.
- A. This was done on 12 August 1977.
- Q. Nothing before then.
- A. No.
- Q. Was there any documentary evidence retained at Mercantile Credits after the re-possession noting what had happened to the vehicle since re-possession.
- A. Up until the date of sale or after the date of sale.
- Q. From the date of re-possession until the sale.
- A. The vehicle was at O.G.R. Roberts and there was no authorisation for it to be moved from there.
- Q. Was there any documentary evidence relating to contact between Mercantile Credits and O.G.R. Distributors. Any document or any

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- discussions or anything like that between
 Mercantile Credits and O.G.R. Distributors
 between 25 November 1976 and 25 July 1977.
- A. Mr. Kelly - I don't know whether there is any
 documentary evidence. Mr. Kelly did sight the
 truck on two occasions.
- Q. The branch manager of Mercantile Credits.
- A. Yes.
- Q. You have no idea of what Mr. Kelly saw
 or what Mr. Kelly did. 10
- A. No.
- Q. Did you have an inspector employed at
 Mercantile Credits whose job it was to
 value such vehicles for re-sale.
- A. We usually tried to get an independent valuer.
- Q. Was the vehicle at any time independently valued
 to your knowledge by O.G.R. Distributors.
- A. Only by O.G.R. themselves.
- Q. O.G.R. Distributors were the dealers who sold
 the vehicle in the first place. 20
- A. Yes.
- Q. For what sum was the vehicle insured.
- A. By Mercantile Credits, I don't know. There
 may be a copy of the insurance here. There
 is a copy of the cover note from Westminster
 Insurance. It was insured for \$32,000.
- Q. \$32,000. Is there a document called re-
 possession advice which is retained on
 the file following -
- A. Yes. 30
- Q. Is that on your file.
- A. Yes, re-possession backing card?
- Q. No, re-possession advice.
- A. Yes, is that the one headed Dun and
 Bradstreet, Australia.
- Q. No, re-possession advice.
- A. Yes.
- Q. That is a document retained by Mercantile
 Credits and details the pricing of the
 vehicle and the final balance which might
 be due by the person who contracted it in
 the first place. 40
- A. Yes.
- Q. Is that document prepared in the normal
 course of such matters.
- A. Yes.

EXHIBIT P.7

Re-possession advice.
 (Tendered by Mr. NIARCHOS)

DAFF ROBERT JOHN - CROSS EXAMINATIONCROSS-EXAMINATION BY MR LUNN

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- Q. Going back to the discussions that you had with Mr and Mrs Comblas, did you explain to Mr and Mrs Comblas what the alternatives were that were open to them.
- A. Yes.
- 10 Q. What do you recollect telling them as to the alternatives open to them.
- A. I told Mr and Mrs Comblas they could either leave it there and voluntarily surrender it or we would have to repossess it.
- Q. Did Mr and Mrs Comblas say anything to you as to which of those alternatives they would accept.
- A. They would leave it there and voluntarily surrender it.
- 20 Q. Did Mercantile Credits take any steps to repossess the truck at that time.
- A. No.
- HIS HONOUR:
- Q. What was that repossession notice given for.
- A. That is an internal memorandum form advising our head office in Sydney.
- Q. You didn't give such a memorandum to the Comblases.
- A. A repossession advice.
- 30 Q. There is a notice there to repossess. Exhibit D5. Have a look at that again. That is the photostat. You have the original. Did you give a copy of that to them.
- A. Yes, on the 25th November. The original.
- Q. Why was it necessary to give them that if they said they would voluntarily surrender.
- A. That was a form that was used in the Collection Department at that time to any of the clients, regardless of whether they voluntarily surrendered or whether we repossessed.
- 40 Q. I see. Why.
- A. It was just a thought at the time in the Collection Department that that was the correct thing to do under the Act.
- Q. That was done on the same occasion when they told you they would voluntarily surrender it.
- A. Yes
- 50 XXN.
- Q. Have you been through the file of Mercantile Credits and the financial records relating to this matter and calculated the amount owed by Mr Comblas to Mercantile Credit

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A. Yes.
Q. Looking at the document now produced to
you, does that correctly summarise the
entries out of the records of Mercantile
Credits by which you have calculated
the amount owing.
A. Yes.
Q. And are you able to say what that amount is.
A. Balance owing.
Q. Yes.
A. \$20,223.89.

10

I seek to tender that calculation. The
alternative is to go through each of the
alternative documents.

HIS HONOUR: On the basis I take it it could
be received. Simply setting out the various
items and debits and credits there referred
to and giving a certain result. Whether they
are all so and whether it should have that
result in law is something we should talk
about later.

20

EXHIBIT 4. Calculation received on
abovementioned basis.

NO FURTHER QUESTIONS.

NO RE-EXAMINATION

CASE FOR PLAINTIFF.

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No. 3(b)

WITNESSES FOR THE DEFENDANT

SALER NANETTE - EXAMINATION

MR LUNN: The defendant's case on the
evidence will be very short. I will be
called two witnesses, firstly, Mrs Saler,
who was the first who saw Mr and Mrs
Comblas in conjunction with Mr Daff; and
also Mr Breakwell, an officer of the
company who will give short evidence as to
the ultimate sale of the truck and the dates
upon which the sale took place and the amount
received by Mercantile Credits.

30

MR LUNN CALLS
NANETTE SALER,
5 Flockhart Avenue,
Valley View.
Assistant Accountant.

40

(Sworn)

EXAMINATION BY MR LUNN

No. 3(b)
 Transcript
 of Evidence
 before the
 Honourable Mr.
 Justice Wells
 on the 13th
 and 14th days
 of November
 1978
 Witnesses for
 the Defendant.
 SALER Nanette
 Examination
 (continued)

Q. In November, 1976, were you employed by
 Mercantile Credits as a collection officer.

A. I was.

Q. Did you meet Mr and Mrs Comblas, the
 parties sitting in Court today.

A. Yes.

Q. Are you now able to recollect the dates
 upon which you saw Mr and Mrs Comblas.

A. After refreshing my mind I can
 remember they came into the office in
 about September, 1976.

Q. Are you able to say the exact date
 at this time.

A. In accordance with the documents and the
 notes I made at the time.

Q. Are they notes which you made on the
 records of Mercantile Credits Ltd. of
 discussions you had with Mr and Mrs Comblas.

A. Yes.

Q. Are you now able to accurately recollect
 the dates of those conversations without
 reference to those notes.

A. 17 September was the first time. I
 actually didn't meet them. I sent out
 telegrams to them at that time.

HIS HONOUR: You may look at your notes to
 refresh your memory.

XN.

Q. Is the first one September or November.

A. The first time I interviewed them was in
 November.

Q. Do you know of something that occurred on
 the 15 November.

A. Yes.

Q. Who came.

A. Mrs Comblas came into the office.

Q. Was Mr Comblas with her.

A. No.

Q. Did you then have a further interview
 on the 17 November.

A. Yes.

Q. Who did you see then.

A. Both Mr and Mrs Comblas.

Q. Who else was present.

A. Mr Daff.

Q. Can you now recollect what was said on
 that occasion.

A. Yes. Discussed - went into detail on their
 particular state of affairs. They are in
 very very deep water regarding finances.
 It seemed as if they had not gone into their
 position very thoroughly before actually taking
 their -

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 (continued)

- Q. And at the end of that discussion was something agreed as to time they could have to pay.
- A. Yes. He asked for an extension of three months, and after discussion with the manager of Mercantile Credits, they had agreed that they could give them another month.
- Q. On the 25th November did you have a further discussion with the Comblas's with Mr Daff present. 10
- A. Yes.
- Q. Was something said in that conversation about the alternatives that were being open to Mr and Mrs Comblas.
- A. Well actually - it is really not that way. They had actually taken the truck to OGR and they had notified us that the truck was there and then I had sent a telegram to Mr and Mrs Comblas to ask them to come in. They came in and as they had actually already give the truck in, we told them that under the circumstances it would be probably better for them to voluntarily surrender because there was no way they could have paid. 20
- Q. Was anything said about what the alternative was to voluntary surrender.
- A. Yes. We would have to repossess.
- Q. And did Mr and Mrs Comblas say what they wanted to do. 30
- A. Yes. They said without any hesitation that it is better to voluntarily surrender as they had already let it go anyway. Mrs Comblas stated emphatically she didn't want the truck.
- NO FURTHER QUESTIONS

SALER NANETTE - CROSS EXAMINATION

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CROSS-EXAMINATION BY MR NIARCHOS

- Q. Mrs Saler, before the Comblas's came in in November, did you send previous telegrams previously to them
- A. Yes.
- Q. Have you sent a telegram on the 17th September 1976 to Mr Comblas.
- A. Yes I did.
- 10 Q. In that telegram had you in fact threatened legal action.
- A. Yes I had. I actually - I don't know whether I threatened legal action - I thought I would issue a sixth schedule.
- Q. Notice.
- A. Yes.
- Q. Sixth schedule of the consumer Credit Transactions Act.
- A. Yes.
- 20 Q. And that was stated in the telegram.
- A. I believe so.
- Q. On the 25th November 1976 you were present and saw Mr Daff hand a notice to Mr. Comblas.
- A. Yes.
- Q. That was notice of the delivery of the truck.
- A. That's right.
- Q. And did someone explain to Mr Comblas what that meant.
- A. Yes.
- 30 Q. What was said to him about that.
- A. From what I recall Bob - Mr Daff, explained to them that it was more or less a formality, that we had to, - it was a document that had to be issued to them even though they had actually given up the truck already. The actual document was to be handed over explaining to them that we had to serve this notice upon them for demand to deliver up the goods.
- Q. Was he told the effect of that notice.
- 40 A. Well at that stage I left. What was discussed any further I wasn't aware of.
- Q. Looking at P5, that is a copy of the notice, that demand of delivery of the truck, is that right.
- A. Yes.
- Q. Is that a copy of the notice that was handed to Mr Comblas by Mr Daff.
- A. Yes.

NO FURTHER QUESTIONS

NO RE-EXAMINATION BY MR LUNN

WITNESS RELEASED.

ADJOURNED 1.05 P.M. TO 2.15 P.M.

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 Allan Charles
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BREAKWELL ALLAN CHARLES - EXAMINATION

RESUMING 2.15 P.M.

MR LUNN CALLS

ALLAN CHARLES BRAKEWELL
 11 Clematis Drive,
 Blackwood.
 Assistant Branch Manager. SWORN

EXAMINATION BY MR LUNN

- Q. Have you been the Assistant Branch Manager of Mercantile Credits Ltd in Adelaide since July 1977. 10
- A. I have.
- Q. Have you played some part in the sale of this truck that is the subject of this action.
- A. Yes, I have.
- Q. Do you have records of your company with you which indicate to you dates and other details of the transactions in which you have been involved.
- A. I do. 20
- NO OBJECTION BY MR ANGEL TO USE OF NOTES.
- Q. Did you receive an offer for the truck in July 1977.
- A. Yes, I did receive an offer.
- Q. And did you also receive a valuation of the truck from O.G.R. Distributors in August 1977.
- A. Yes, I did.
- Q. And then did you subsequently have some negotiations with a Mr Keith Stewart. 30
- A. Yes, I did.
- Q. And was the truck sold by Mercantile Credits to Mr Keith Stewart.
- A. It was.
- Q. When was that sale effected.
- A. The sale was effected in August. Do you want the exact date in August?
- Q. Yes, if you have got it.
- A. I think it was 17 August. The proceeds from the sale went through to the account on 17 November, but the sale was actually effected in August. The exact date I don't have on the file here, but it was some time in August. 40
- Q. How was that sale to Mr Stewart financed.
- A. It was financed through Mercantile Credits.
- Q. And what was the price Mr Stewart agreed to pay.
- A. The price offered by Mr. Stewart was \$20,000 and in view of the fact it was in excess of the valuation it was accepted. 50

- Q. I think you have already said that amount was credited to the account of Mr Comblas on 17 November 1977.
- A. Right.
- Q. Could the witness see exhibit P1. Are you familiar with the form of contract which has been used in P1.
- A. Yes, I am.
- Q. Is that form of contract used generally by your company.
- A. Yes, it is.
- Q. And is it still being used by your company.
- A. It still is.
- Q. Do you acknowledge it is also used by other finance companies.
- A. Yes. I can say that it is used by other finance companies, yes.

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BREAKWELL ALLAN CHARLES - CROSS EXAMINATION

CROSS-EXAMINATION BY MR NIARCHOS

- Q. Are you aware whether there was any valuation obtained on the vehicle, the Mack prime mover, between 25 November 1976 and 25 July 1977.
- A. I am not aware, no.
- Q. What is the situation, that there was no valuation obtained.
- A. I cannot say that there was no valuation obtained. I am not aware that there was a valuation.
- Q. You have the file relating to that before you.
- A. I do, yes.
- Q. And you have looked at the documents in that file. Is the situation that there is no record of any valuation obtained between those two dates.
- A. It would appear that way.
- Q. What is the usual practice of Mercantile Credits on a re-possession - obtaining a valuation.
- A. Once the vehicle is repossessed it is taken to a yard and it is valued by the person operating that yard. He puts a figure on the truck. The truck is then available for sale. We then test the market, so to speak, by accepting offers, having people sight the units and put in an offer

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 (continued)
- themselves on the truck, offers and so forth, and the truck then goes to the person that offers the best money.
- HIS HONOUR
- Q. You said 'accepting offers'. You mean 'receiving offers'.
- A. Receiving, yes.
- XXN
- Q. In this case the vehicle was taken into the yard of O.G.R. Distributors who originally sold it. 10
- A. That's right.
- Q. And they originally sold it for \$29,000 to Mr Comblas.
- A. I will just have to check that. \$29,000 is right, yes.
- Q. Did Mercantile Credits arrange for an independent valuation, that is independent of O.G.R. Distributors, at any time. 20
- A. You mean after repossession?
- Q. Yes.
- A. No, not to my knowledge.
- Q. The valuation from O.G.R. Distributors was what.
- A. \$15,000.
- Q. Did Mercantile Credits question this valuation of O.G.R. Distributors; that is, what it was based on, the depreciation value of the truck over this period.
- A. No. The reason why it was not queried at that stage was that according to the file notes Mr Comblas had told us the truck was worth approximately \$14,000. I received an offer in July, I commenced in Adelaide Branch in July, an offer of \$16,000 which seemed to be fairly close to the mark, so at that stage I requested a quote from O.G.R. 30
- Q. Wasn't that valuation sent to O.G.R.
- A. It was requested from O.G.R.
- Q. Not the valuation, the offer. 40
- A. Which offer do you mean?
- Q. Didn't the \$16,000 come through someone from O.G.R., someone introduced by them. Wasn't it a Mr King.
- A. Quite frankly, I really can't recall. It came via O.G.R. I recall an offer coming through of \$16,000 because I can recall the figure because it was \$1,000 above the valuation price, but the branch manager at the time thought - he said he wouldn't accept the offer even though it was above the valuation. He thought we could get more for it. 50

- Q. Who was the branch manager at this time.
 A. John Kelly.
 Q. Had Mr Kelly valued the vehicle at any time to your knowledge himself.
 A. To the best of my knowledge I can say that he told me that he had sighted the vehicle on a number of occasions. When I told him of the offer of \$16,000 he wasn't interested in accepting the offer.
 10 Q. Could the witness be shown P7, that is a document headed 'Repossession Advice'. That is a document retained following the repossession records kept on that vehicle after repossession.
 A. It is.
 Q. That is the usual practice after a repossession.
 A. Yes, it is. One thing that might be important: this type of advice or form was reintroduced in the company's internal operation as from 1 August. There were, from memory now, possibly 15 of these advices filled out at the time.
 20 Q. Well, one was filled out in relation to that prime mover, and that is the one in front of you.
 A. Yes.
 30 Q. And in that document it is disclosed that there was an inspection of the vehicle in November, 1976 by Mr Kelly, is that right.
 A. Yes, yes.
 Q. And the value placed on the vehicle was \$30,000.
 A. Mm hm.
 Q. Now, that document would be retained by Mercantile Credits as the valuation placed on the vehicle by themselves on an inspection, would that be right.
 40 A. Yes, well, it is a bit difficult, because as I say, I started in - I commenced business - I was transferred from Sydney in July of 1977; the figure that is put on - the figure that was put on there by John Kelly, I really can't - I can't say whether that was his valuation or not.
 50 Q. The document is the usual type of document where a document of this sort is kept.
 A. It is now, from 1 August, yes.

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- Q. And it records details of an inspection in November, 1976, is that right.
- A. That is right, yes.
- Q. And the incorporation, what is called the Item Expected to Realize \$30,000.
- A. Right.
- Q. Does that mean that that is the valuation placed on a vehicle by Mercantile Credits.
- A. Yes, yes. 10
- Q. And Mr Kelly, do you know him.
- A. Yes, I do.
- Q. Is he still with Mercantile Credits.
- A. No, he is not.
- Q. Do you know where he is now.
- A. Yes, I do.
- Q. Where is that.
- A. Chainex Engineering.
- Q. Is that in Adelaide, or - 20
- A. It is in Adelaide, yes.
- Q. When did he leave the company, do you know - Mercantile Credits.
- A. Yes, I think it was February - February of this year, 1978.
- Q. In November, 1976 was he the branch manager of Mercantile Credits.
- A. Yes, he was.
- Q. Was there any practice enforced with Mercantile Credits where the branch manager would be responsible for valuing vehicles over a certain amount. 21
- A. No, there was not.
- Q. So you can't explain why Mr Kelly would have valued the vehicle in this case.
- A. The person that put a figure on it, the person that puts figures on repossessions has to be a responsible officer, and whether that be the branch manager or somebody in a fairly senior position, it is quite okay.
- Q. And would Mr Kelly have been the most senior officer employed at Mercantile Credits in November, 1976. 22
- A. In Adelaide branch?
- Q. In Adelaide.
- A. Yes.

BREAKWELL ALLAN CHARLES - RE-EXAMINATION

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RE-EXAMINATION BY MR LUNN

Q. Are you aware of Mr Kelly's qualifications, if any, to value trucks.

A. To my knowledge he doesn't have any qualifications to value trucks.

Q. And you were asked about a valuation from O.G.R., was that valuation given by a letter of 15 August, 1977.

10 A. Yes, it was.

EXHIBIT D5

Valuation given by letter dated 15 August, 1977, tendered by MR LUNN.
 Admitted.

NO FURTHER QUESTIONSWITNESS RELEASEDCASE FOR THE DEFENDANTNO CASE IN REBUTTAL

20 HIS HONOUR: I don't know if you have had an opportunity of thinking over what I said. It seems to me that it would be a practical proposition for you to address me on primary fact and for me to make a reference. Have either of you got any strong feelings against that?

MR LUNN: My instructions are to ask your Honour to determine this matter at first instance without any reference of it to the Full Court. To my belief, the matter is not
 30 of such complexity that it perhaps ought to go to the Full Court to have these matters resolved in the first instance.

HIS HONOUR: I don't care how complex it is, as long as I have got some reason to suppose that I will dispose of the matter. You see, what I don't like happening, and it does tend to happen sometimes - I am not suggesting that either of you gentlemen do this - but I have met
 40 this, I give a judgment, and have the person against whom the judgment is given get up straight on his feet without another word and say 'I want leave to appeal' and hasn't even read the judgment. Now, not infrequently I find that counsel have clients that wish the matter to be determined by a court of appeal. In any event, that is why I put this.

MR LUNN: As far as the defendant is concerned, the defendant does not wish the matter to be determined by the Court of Appeal
 50 in any event. It will only be in such

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exceptional circumstance that we would want to go to the Full Court.

The other point is in fact this matter comes on at the present time because of an order for early trial, which was made by Zelling J. and is in fact part of the order running an interlocutory injunction against the defendant refraining it from exercising its power of sale under the mortgage, and the defendant is anxious to have that injunction removed and to proceed to exercise its powers of sale and for that reason I am instructed to seek that the matter proceed before your Honour and be determined. 10

HIS HONOUR: In the circumstances I won't press on with my suggestion unless you have strong feelings about it.

MR. ANGEL: None I wish to express.

MR. LUNN: There is none minor amendment to the defence and that is paragraph 17(a) sub-paragraph 7 on page six of the defence and copy documents. One word has been omitted. The last sub-paragraph. 'Denies each and every allegation' and it should read 'Denies each and every other allegation'. 20

COUNSEL ADDRESS

No. 4
 Reasons
 for Judgment
 of the Honour-
 able Mr. Justice
 Wells dated the
 21st day of
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No. 4

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE WELLS
DATED THE 21ST DAY OF FEBRUARY 1979 30

DELIVERED 21st February 1979

COMBLAS AND ANOR. v. MERCANTILE CREDITS LIMITED

No. 1611 of 1977

Dates of Hearing: 13th and 14th November;
 21st December, 1978

J U D G M E N T of the Honourable Mr. Justice Wells

Securities - Credit contract and consumer mortgage linked with collateral R.P.A. mortgage - operation and effect under Consumer Transactions Act - question whether incorporation of Act effected notwithstanding intention to exclude - statutory interpretation. 40

Counsel for the Plaintiffs: Mr. D.N. Angel
 with Mr. N.
 Niarchos

Solicitor for the Plaintiffs: N. Niarchos

Counsel for the Defendant Company: Mr. R.M. Lunn

Solicitor for Defendant Company: Lambert &
 Solomon

COMBLAS AND ANOR. v. MERCANTILE CREDITS LIMITED

Wells J.

10 These proceedings have given rise to questions
 of no little complexity. A combination of the
 consumer protection legislation applicable to the
 transactions, and the documents in the case, have
 produced some of the most intractable language
 that I have ever encountered.

 Apart from a single issue, to which I shall
 recur, the facts are not in dispute. The legal
 issues, which dominated the hearing, were well
 argued by both counsel, to whom I am indebted.

20 Although it is not as common as it should be
 for a Court to find itself in this position, I
 am able, I think, to state the facts and point up
 the issues by extended reference to the pleadings.

30 Paragraphs 1 and 2 of the Statement of Claim
 state that the defendant is a limited company
 (to which I shall refer as "the company")
 incorporated in the State of New South Wales
 and carrying on business in the State of South
 Australia as a foreign company, being registered
 in pursuant to the provisions of the Companies
 Act 1962-1973; and that, on the 6th day of
 August 1976, the company lent the sum of
 \$57,581.00 to the male plaintiff the
 repayment of which was secured by a "consumer
 mortgage" (in this judgment referred to as
 "CCCM") dated the 6th day of August 1976 over
 a Mack Prime Mover Registered No. SA RIH-446.

40 By its defence, the company admitted para. 1
 and, in effect, the documents referred to in
 para. 2.; it added that the sum lent was
 \$37,581, and this was not disputed at the
 hearing. (So long as this sum exceeded
 \$20,000 - and there is no doubt about that -
 the precise amount does not matter).

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(continued)

Paragraph 3 of the Statement of Claim alleged that on the 6th day of August 1976 both plaintiffs executed Memorandum of Mortgage Registered No. 3929270 (in this judgment referred to as "MRP") over the whole of the land comprised and described in Certificate of Title Register Book Volume 3876 Folio 17 in favour of the defendant to further secure and guarantee the due performance of the consumer mortgage by the male plaintiff. The mortgage was to secure repayment of the amount of \$16,000 being portion of the moneys owing to the defendant by the male plaintiff pursuant to the terms of the consumer mortgage. 10

The defence again, in effect, did no more than admit the document.

By paragraph 4 of the Statement of Claim, the plaintiffs alleged that between the 6th day of August 1976 and the 25th day of November 1976 the vehicle broke down with mechanical failure on several occasions and the male plaintiff defaulted in payment of the instalments due to the defendant pursuant to the consumer mortgage as and when the same fell due and owing thereunder. 20

The defence admitted the non payments, but not the reason for them.

Paragraph 5 of the Statement of Claim referred to the CCCM and quoted two clauses from it (9 and 12):

"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 net balance due within the meaning of Section 29 of the said Act." 30 40

"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."

The company by its defence acknowledged that the CCCM "contained terms in the form of the terms set out in paragraph 5 of the Statement of Claim".

10

The Statement of Claim continues with the story in paragraph 6: it stated that, on the 25th day of November 1976, the male plaintiff agreed with the defendant to and did deliver the vehicle to O.G.R. Distributors of Main North Road, Para Hills West for sale. The defendant agreed to advise the male plaintiff as to the male plaintiff's indebtedness to the defendant pursuant to the consumer mortgage after such sale. It was an express, or alternatively an implied, term of the said agreement that the vehicle would only be sold and would not be otherwise used or operated at all.

20

The defence admitted the factual allegations and the document, but in effect denied that the CCCM was in law correctly referred to as a consumer mortgage.

30

It was alleged by paragraph 7 of the Statement of Claim that neither of the plaintiffs ever received any notice from the defendant or from any other person as to the balance due and owing by the male plaintiff consequent upon sale of the vehicle or otherwise pursuant to the consumer mortgage.

The defence answered that the balance due and owing was communicated to the first plaintiff on 25 July 1977 and denied any obligation to give notice.

40

The crucial parts of the Statement of Claim follow:

"9. The plaintiffs say:-

- (a) by reason of Clause 9 of the consumer mortgage the defendant had to comply with the provisions of Part III of the Consumer Transactions Act 1972 as

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amended before obtaining possession of or selling the said vehicle or recovering as a debt the amount due under the consumer mortgage after taking possession or sale of the vehicle.

- (b) Further and alternatively Clause 12 of the consumer mortgage is void for repugnancy and the provisions of the Consumer Transactions Act 1972 as amended apply to the consumer mortgage. 10

10. The defendant has never complied with the provisions of Part III of the Consumer Transactions Act 1972 as amended with respect to the taking of possession or sale of the vehicle.

11. The defendant intends unless restrained by injunction from so doing to sell the property comprised in Certificate of Title Register Book Volume 3876 Folio 17 in purported pursuance of Memorandum of Mortgage No. 3929270.

12. (I do not reproduce this paragraph because no reliance was placed on it and the facts are otherwise immaterial). 20

12A. The plaintiffs plead Section 44(1)(d) of the Consumer Transactions Act 1972 as amended and say:

- (i) That Memorandum of Mortgage No. 3929270 referred to in paragraph 3 hereof is an agreement binding the plaintiffs as guarantors to permit the defendant as mortgagee or any person acting on behalf of the defendant as mortgagee to enter upon premises for the purpose of taking possession of or inspecting the goods the subject of the consumer mortgage referred to in paragraph 2 hereof such goods being subject to a mortgage within the meaning of Section 44(1)(d) aforesaid. 30
- (ii) That Memorandum of Mortgage No. 3929270 is void by reason of the said agreement not having been executed by the plaintiffs in the presence of a legal practitioner independent of the defendant as mortgagee and certified by such legal practitioner in the manner prescribed by Section 44(1)(f) and (g) of the Consumer Transactions Act 1972 as amended. 40

- (iii) The plaintiffs say that part VIII of the Consumer Transactions Act 1972 as amended applies to the terms of the said Memorandum of Mortgage No. 3929270 by force of statute irrespective of whether part III of the said Act applies to the said Consumer Mortgage between the male plaintiff and the defendant.

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PARTICULARS

- 10 (a) The said Memorandum of Mortgage includes the following terms;

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'The mortgagor hereby convenants with the mortgagee as follows:

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

- 20 (b) The said Consumer Mortgage includes the following term:

'4. The mortgagor agrees that the general covenants and powers set out in subsections (1) to (7) inclusive of Section 11 of the Bills of Sale Act 1886 as amended shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the mortgagee.'

- 30 (c) By reason of subsections (5) and (6) of Section 11 of the Bills of Sale Act 1886 as amended the defendant as grantee is granted by implied covenants and powers in his favour (inter alia) the right, by itself or its agents, to enter upon the premises of the grantor to inspect and/or to seize and take possession of the goods, the subject of the Bill of Sale.

- 40 (d) That the female plaintiff is a guarantor within the meaning of the Consumer Transactions Act 1972 (as amended) in that the said Memorandum of Mortgage No. 3929270 together with the said Consumer Mortgage are a Consumer Credit Contract or a purported Consumer Credit

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Contract within the meaning of the said Act by reason of the contents of the said documents.

13. The plaintiffs plead section 55b of the Law of Property Act 1936 as amended and say that the defendant has by reason of the matters aforesaid disentitled itself from any relief against the plaintiffs."

The prayer for relief reads:

- "(1) A declaration that the said Notice of Intention to Exercise Power of Sale is void. 10
- (1A) A declaration that Memorandum of Mortgage No. 3929270 is void, the provisions of Section 44(1) of the Consumer Transactions Act 1972 as amended not having been complied with as to the manner of execution and certification thereof.
- (2) A declaration that the defendant having failed to comply with the provisions of Part III of the Consumer Transactions Act is disentitled from exercising any rights pursuant to Memorandum of Mortgage Registered No. 3929270. 20
- (3) A declaration that in the events that have happened the plaintiffs are not indebted to the defendant in any sum.
- (4) An injunction restraining the defendant whether by itself its servants agents or otherwise howsoever from selling or otherwise howsoever dealing with the whole or any part of or interest in the land comprised and described in Certificate of Title Register Book Volume 3876 Folio 17 or from occupying or using the said land in any way so as to interfere with the plaintiffs' interest therein. 30
- (5) Alternatively to (3) an account of what moneys (if any) are due from the male plaintiff to the defendant either pursuant to section 55b of the Law of Property Act 1936 as amended or otherwise. 40

- (6) An account of profits received by the defendant or its agents in the wrongful use of the vehicle.
- (7) Damages for conversion.
- (8) Further and other relief.
- (9) Costs."

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The company, by its defence, took up the challenges contained in those paragraphs:

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10 "9. The defendant denies each of the allegations contained in paragraph 9 of the Statement of Claim.

10. The defendant denies that any of the provisions of the Consumer Transactions Act 1972-1973 apply to the transaction between the plaintiffs and the defendant which is the subject of this action, and in particular the defendant denies that the agreement dated the 6th day of August 1976, ... is a
20 consumer mortgage within the meaning of the Consumer Transactions Act 1972-1973 on the grounds that the said agreement of the 6th day of August 1976 is not a consumer credit contract within the meaning of the said Consumer Transactions Act 1972-1973 because the principal thereunder exceeded \$20,000.

11. The defendant denies that any of the provisions of the Consumer Transactions Act 1972-1973 are incorporated as contractual
30 terms into the terms of the agreement ... either expressly or impliedly and relies (inter alia) upon clause 9 of the said agreement (set forth later in this judgment).

12. (This paragraph alleged a variation of the contractual terms; the allegation was not pursued).

13. The defendant denies that the Memorandum of Mortgage number 3929270 is a guarantee within the meaning of the Consumer Transactions Act
40 1972 on the grounds that the said agreement of the 6th day of August 1976 is not a consumer credit contract within the meaning of the Consumer Transactions Act 1972-1973 as the principal thereunder exceeded \$20,000.00, and that the transaction in law is not a guarantee.

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14. The defendant denies that it was obliged to comply with the provisions of any of Sub-sections 27(3) and 27(5) of the Consumer Transactions Act 1972-1973 in respect of the transaction which is the subject of this action.

15. The defendant does not admit paragraph 10 of the Statement of Claim.

16. The defendant admits paragraph 11 of the Statement of Claim except that its sale will be in pursuance of, and not in purported pursuance 10 of, the Memorandum of Mortgage No. 3929270. The defendant will not seek to rely in any way upon the notice referred to in paragraph 8 of the Statement of Claim in exercising such power of sale.

17. (This answer proved unnecessary).

17A. As to paragraph 12A of the Statement of Claim the defendant:

- (1) Repeats paragraph 13 above.
- (2) Denies that there was a purported credit 20 contract between the parties.
- (3) Denies that the plaintiffs or either of them were guarantors as alleged or at all.
- (4) Denies the alleged meaning and effect of the Memorandum of Mortgage No. 3929270, but will refer to that Memorandum for its meaning and effect.
- (5) Admits that the said Mortgage was not executed by the plaintiffs in the presence of a legal practitioner 30 independent of the defendant and was not certified by such legal practitioner in the manner prescribed by Section 44(1)(f) of the Consumer Transactions Act 1972 as amended.
- (6) Denies that Part VIII of the said Act applies and that the said Mortgage is void by reason of Section 44(1) of the said Act or at all.
- (7) Denies each and every other allegation 40 contained in paragraph 12A of the Statement of Claim as if the same were set out herein and specifically traversed.

18. The defendant denies that Section 55b of the Law of Property Act 1936 as amended is applicable to the true facts of this matter and denies that it has disentitled itself from any relief against the plaintiffs as alleged in paragraph 13 of the Statement of Claim.

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10 19. As the defendant admits that the notice of intention to exercise its power of sale dated the 25th day of July 1977 is void and of no effect, it is unnecessary in the circumstances that declarations to that effect should be made as sought in paragraph 13(1) of the Statement of Claim.

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20. The defendant denies that the plaintiffs are entitled to the relief sought by them in sub-paragraphs 14(2) to (9) inclusive of the Statement of Claim or to any part thereof."

20 Stated broadly, apart from the single issue of fact referred to, the case shaped itself as a declaration and a demurrer.

30 It now becomes necessary to look more closely at the instruments to be construed. They are: a printed document, duly filled in, dated 6 August 1976 and headed "Credit Contract - Consumer Mortgage" (CCCM); and a typewritten document, dated 12 August 1976 and headed "Memorandum of Mortgage" (MRP), and cast in the form of a mortgage under the Real Property Act 1886 (as amended). The parties to CCCM are the male plaintiff (Mr. Comblas) and the company, and the parties to MRP are both plaintiffs (Mr. and Mrs. Comblas) and the company.

The heart of CCCM runs:

40 "The party named and described in Item A of the Schedule hereto (hereinafter if a natural person with his executors administrators and assigns and if a corporation with its successors and assigns called 'the Mortgagor') IN CONSIDERATION of the loan of the amount of the principal set out in Item G of the Schedule as 'Amount of Principal' (hereinafter called 'the principal sum') 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 named and described in Item B of the Schedule (hereinafter with its successors and assigns

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called 'the Mortgagee') HEREBY TRANSFERS
ASSIGNS AND SETS OVER unto the Mortgagee
all and singular the personal chattels
described in Item C of the Schedule which
personal chattels are now situated at and
usually kept at the premises described in
Item L of the Schedule (hereinafter called
'the said premises') and also all other
personal chattels which may at any time be
acquired by the Mortgagor being additional 10
parts or substituted parts of the said personal
chattels or personal chattels acquired in
substitution for or replacement of the said
personal chattels and all the right title
interest claim and demand of the Mortgagor
to the same to have hold take and receive the
same and the additions substitutions and
replacements hereby assigned (all of which are
hereinafter comprised in and referred to
under the designation 'the Goods') unto the 20
Mortgagee subject to the provisos terms
agreements and conditions herein expressed
or implied PROVIDED THAT if the Mortgagor
shall pay the Mortgagee the principal sum
TOGETHER WITH the total amount of the credit
charge set out in Item H of the Schedule by
the instalments and at the times and in the
manner set out in Item J of the Schedule and
shall duly pay all other moneys becoming
payable to the Mortgagee hereunder then these 30
presents shall become void.

IT IS HEREBY EXPRESSLY PROVIDED AND PARTICULAR
ATTENTION IS DRAWN TO THE FACT THAT THE
MORTGAGOR UNDERTAKES A 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.

An itemized statement pursuant to Section 40
40(1)(b)(v) of the Consumer Credit Act 1972
as amended of any amounts paid or payable by
the Mortgagor is set out in Item F of the
Schedule. 40

For the purposes of Section 40(1) of the
Consumer Credit Act 1972 as amended the rate
at which the credit charge accrues upon the
principal sum is set out in Item I of the
Schedule.

The Mortgagor authorizes and directs the Mortgagee to pay the principal sum to the payee(s) set out in Item K of the Schedule and to the person(s) entitled to payment of the amount (s) set out in Item F of the Schedule and the receipt of such payee(s) or person(s) entitled to payment for such payment shall for all purposes be evidence of such payment.

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- 10 The Mortgagor warrants the correctness and truth of the particulars contained in Items D and M of the Schedule.

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 Mortgagee simple interest on that sum from the date of default until the sum is paid at the rate of interest set out in Item I of the Schedule.

- 20 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."

- 30 The appropriate Schedule was annexed; its exact details are unimportant.

The execution of the document then followed, together with the fourteen printed covenants (referred to just before the execution), only one of which is material.

- 40 "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 at the authorised address of the Mortgagee set out in Item B of the Schedule or at such other address in South Australia as the Mortgagee may from time to time stipulate in writing to the Mortgagor."

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(There were eleven other miscellaneous covenants by the mortgagor: the mortgagor was to keep the goods in order and repair, to insure them effectively, to keep them safely to permit the mortgagee to receive mortgage moneys, to notify the mortgagee of loss or damage, to obey relevant laws the respect to the goods, not to conceal them or part with their possession, to produce them for inspection, and to indemnify the mortgagee).

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Clause 2 contains further miscellaneous covenants on the part of the mortgagor relating to the mortgagor's change of address, what is to be deemed adequate service of a notice or demand, repayment of moneys paid out by the mortgagee by reason of the mortgagor's default, the mortgagee's right to take action, in the mortgagor's name, to protect its right in the goods, and the question of implied waivers.

10

Clauses 3 and 4 read:

"3. If the Mortgagor shall have made a false statement in a material particular in or in connection with this Credit Contract Consumer Mortgage or if (a) The Mortgagor shall make default in payment of any moneys payable hereunder and such default shall continue for 7 days; or (b) the Mortgagor shall commit any breach of the provisions of this Mortgage and shall not remedy such breach within 7 days of its commission; or (c) execution or distress is issued against the Mortgagor or the Mortgagor's goods: then and in any such event the whole of the moneys hereby secured or so much thereof as shall then remain unpaid shall (subject to Section 43 of the Consumer Credit Act 1972 as amended) at the option of the Mortgagee become immediately due payable and recoverable such option to be exercised by notice in writing signed and served in manner provided by Clause 2 hereof.

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4. The Mortgagor agrees that the several covenants and powers set out in sub sections 1 to 7 (inclusive) of Section 11 of the Bills of Sale Act 1886 as amended shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the Mortgagee."

Clause 5 is irrelevant.

Clause 6 reads:

10 "6. The Mortgagee may after exercising its powers of seizing the Goods in its discretion permit the Mortgagor (notwithstanding that the Mortgagor may not have complied with the provisions of Section 29 of the Consumer Transactions Act 1972 as amended entitling him to a return of the goods) to resume possession thereof and in that event the Mortgagor shall hold the Goods as a Mortgagor on and subject to the provisions of this mortgage as if seizure had not taken place but except in so far as the Mortgagee may expressly agree in writing or the Consumer Transactions Act 1972 as amended may otherwise provide the Mortgagee shall not by permitting the Mortgagor to resume possession be deemed to have waived any default by the Mortgagor or any other such event as is referred to in Clause 3 hereof."

Clauses 7 and 8 do not bear on the issues.

Clauses 9 and 10 provide:

30 "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.

40 10. (a) The Laws of the State of South Australia shall apply to this instrument.
 (b) Any proceedings in respect of any cause of action arising hereunder shall at the option of the Mortgagee be instituted heard and determined in a court of competent jurisdiction in Adelaide and such court shall possess territorial jurisdiction to hear and determine such proceedings. (c) Where there are two or more Mortgagors they shall be bound

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hereunder jointly and severally. The Mortgagee's rights may be exercised by its nominees or assigns. (d) For the purpose of the Bills of Sale Act 1886 as amended the Mortgagee and the Mortgagor shall be and shall be deemed to be the "grantee" and the "grantor" respectively."

Clause 11 is a provision for further assurance.

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Clauses 12 and 13 are central to the company's and run:

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"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.

20

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."

30

Clause 14 is unimportant.

The MRP begins with the usual recitals (from which it appears that the plaintiffs are registered proprietors of the mortgaged land - in fact, the matrimonial home - subject to an existing mortgage) and then continues:

"In consideration of their desire to render the said land available as additional security but only to the extent of SIXTEEN THOUSAND DOLLARS (\$16,000.00) to Mercantile Credits Limited of 366 King William Street Adelaide 5000 (hereinafter referred to as 'the mortgagee') which expression when hereinafter used shall include its successors and assigns wherever the context shall so require or admit for the payment of the

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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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- 10 (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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20 PROVIDED always and it is hereby expressly agreed and declared that the covenants provisos powers rights privileges and authorities conferred by 'The Real Property Act 1886 - as amended' and implied in Mortgages in favour of Mortgagees and Mortgagors respectively shall be deemed to be embodied herein except in so far as the same may be inconsistent with or are expressly or by necessary implication modified by the covenants provisos conditions declarations and agreements herein expressed and contained.

30 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."

A copy of CCCM was duly annexed, and the document was properly executed.

40. It is apparent from the extracts from the pleadings set forth above that the plaintiffs have appealed to Part III and Part VIII of the Consumer Transactions Act 1972-1973 and s. 55b of the Law of Property Act 1936 (as amended) to provide the statutory material for their challenge. I must, therefore, now examine the scope and operation of the Acts, and of the specified Parts and section referred to.

The Consumer Transactions Act operates in conjunction with the more general Consumer Credit Act 1972-1973 from which it has borrowed definitions. The Consumer Credit Act superseded the Money-lenders

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Act 1940-1971 and confers widened powers of regulating and controlling providers of credit and the contracts they enter into.

According to s. 5 of the Consumer Credit Act, "credit" means -

- "(a) any advance of money or money's worth made in expectation of repayment or any forbearance to require payment of any money owing made in expectation of subsequent payment;

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and includes -

- (b) any provision of a contract or agreement for the sale of goods under which the purchaser is entitled to discharge his pecuniary obligations under the contract or agreement in three or more instalments."

"Credit charge" means -

- "(a) in relation to a credit contract (other than a sale by instalment) means any interest or other amount (however it may be described), or the value of any other benefit, in excess of the principal, that has been, or is to be, paid or given in consideration of, or otherwise in respect of, the provision of credit but does not include -

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- (i) any amount that has been, or is to be paid, on account of stamp duty, fees payable to the Registrar-General, or costs or fees payable to a legal practitioner or licensed land broker in respect of the transaction; or

30

- (ii) any other charges authorised for the purpose of this definition by regulation;

and

- (b) in relation to a sale by instalment, has the meaning assigned by section 41 of this Act:"

40

"Credit contract" means -

"a contract or agreement (whatever its terms or form may be) under which credit is provided

by a credit provider to, or for the use or benefit of, a person (other than a body corporate) and includes a sale by instalment:"

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and "credit provider" means -

"(a) a person whose business is, or includes, the provision of credit, or who holds himself out in any way as carrying on that business;

10 and includes -

(b) a person who, in the course of a business enters as vendor into a contract of sale by instalment:".

20 The Consumer Transactions Act superseded the Hire Purchase Agreements Act, 1960-1971; it provides protection for consumers in various forms of consumer transactions (consumer mortgage, consumer leases, insurance, and guarantees) and provides relief against the consequences of breaches of some agreements. In this Act, too, certain definitions in s. 5 are important for the purposes of this case:

"'consumer' means a person (other than a body corporate) -

(a) who enters into a consumer contract with a view to purchasing, or acquiring the use or benefit of, goods or services;

30 (b) who enters into a consumer credit contract with a view to obtaining credit, or the use or benefit of credit;

or

(c) who enters, as mortgagor, into a consumer mortgage,

40 and includes a person to whom the rights, interest or liability of any such person under the consumer contract, consumer credit contract, or consumer mortgage is assigned:";

"'consumer credit contract' means a credit contract -

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- (a) under which the principal does not exceed ten thousand dollars and in respect of which no security is taken over land;
- or
- (b) under which the principal does not exceed twenty thousand dollars and in respect of which security is taken over land,

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but does not include a credit contract in respect of which security is taken over land where the amount of the principal exceeds ten thousand dollars and the consumer has made a statutory declaration that he does not use, or propose to use, the land as a place of dwelling for his own personal occupation:"; 10

"'consumer mortgage' or 'mortgage' means any mortgage, charge or other security (including a bill of sale within the meaning of the Bills of Sale Act) over goods, by which the performance of any obligations by a consumer under a consumer credit contract is secured; and 'mortgagee' and 'mortgagor' have corresponding meanings:"; 20

"'guarantor' means a person who guarantees the performance by a consumer of obligations under a consumer credit contract and includes a person who undertakes to indemnify a credit provider for any loss that he might suffer in consequence of any failure to recover moneys from a consumer under a consumer credit contract or purported consumer credit contract (but does not include a person who gives any such guarantee or makes any such undertaking in the course of carrying on a business of insurance, or any other business):"; 30

and "credit", "credit charge", "credit contract" and "credit provider" have the meanings respectively assigned to those terms under the Consumer Credit Act 1972. 40

Part II of the Consumer Transactions Act contains a number of important provisions as to the contents of various consumer transactions; these are not directly relevant to this case.

Part III deals with consumer mortgages and, in particular, with the exercise of powers under such mortgages.

Section 25 confirms the obligation to construe the credit contract and the consumer mortgage components together by providing:

"25. Where the obligations whose performance is secured by a consumer mortgage are contained in a consumer credit contract that is separate from the mortgage, then, unless the contrary intention appears, a reference in this Part to a 'consumer mortgage' or 'mortgage' includes that separate consumer credit contract."

Section 26 regulates discharge of a consumer mortgage.

Sections 27 and 28 are specially concerned with a mortgagee's power to take possession of mortgaged goods. For the purposes of applying paragraphs 9 and 10 of the Statement of Claim, Mr. Angel relied heavily on these two sections; I set them out in full.

"27. (1) Subject to subsection (2) of this section, a mortgagee shall not exercise any right or power to take possession of the goods comprised in a consumer mortgage unless he has served on the consumer a notice in writing in the prescribed form, and the period fixed by the notice (being a period of not less than seven days from the service of the notice) has expired.

(2) A mortgagee shall not be required to comply with subsection (1) of this section if -

(a) there are reasonable grounds for believing that the goods comprised in the mortgage will be or have been, removed or concealed by the consumer contrary to the provisions of the mortgage, (but the onus of proving the existence of such grounds shall lie upon the mortgagee);

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or

(b) the mortgagee has been authorised by the Tribunal to take possession of the goods notwithstanding that the provisions of subsection (1) of this section have not been complied with.

(3) The mortgagee shall upon, or within twenty-one days after, taking possession of the goods in pursuance of a consumer mortgage, serve on the consumer, and every guarantor, a notice in writing, in the prescribed form setting forth the rights of the consumer, or the guarantor, as the case may be, under this Act. 10

(4) If the notice required by subsection (3) of this section is not served on the consumer, the mortgagee shall not exercise any right or power to sell, dispose of, or part with his possession of the goods otherwise than - 20

(a) with the consent in writing of the consumer;

or

(b) with the authority of the Tribunal.

(5) If the notice required by subsection (3) of this section is not served on a guarantor, the mortgagee shall not be entitled to enforce the guarantee. 30

(6) There shall be no appeal against a decision of the Tribunal to grant its authority for the purposes of subsection (2) or subsection (4) of this section."

"28. (1) Where a mortgagee has taken possession of any goods in pursuance of a consumer mortgage he shall not, without the consent in writing of the consumer or the authority of the Tribunal, sell or dispose of the goods, or part with possession of the goods - 40

(a) until after the expiration of twenty-one days from the date of

service on the consumer of notice in the prescribed form setting forth the rights of the consumer under this Act;

- (b) where the consumer has given the mortgagee a notice pursuant to the provisions of this Part requiring him to re-deliver the goods, until after the time for payment or tender pursuant to that notice has expired;

or

- (c) where the consumer has made an application for relief under Part VI of this Act until the application has been disposed of by the Commissioner, or if he has referred the application to the Tribunal, until the application has been disposed of by the Tribunal.

(2) There shall be no appeal against a decision of the Tribunal to grant its authority for the sale or disposal of goods under subsection (1) of this section.

(3) This section does not apply where the consumer has voluntarily returned goods to a mortgagee pursuant to the provisions of this Part."

It is necessary, when considering Mr. Angel's arguments under this head, to bear in mind that Clause 4 of CCCM cited above incorporates the provisions of the Bills of Sale Act 1886 (as amended) that relate, inter alia, to powers to enter and take possession of goods that are the subject of the security. It is for that reason that ss. 27 and 28 are pertinent to the plaintiffs' claim.

Paragraph 12A of the Statement of Claim invokes sub-s. (1) of s. 44 of the Consumer Transactions Act. It will be convenient at this point to set forth the entire section:

"44. (1) Where a guarantor enters into an agreement binding the guarantor -

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- (a) to pay a credit provider an aggregate sum that is larger than the balance originally payable under the consumer credit contract to which the guarantee relates;
 - (b) to perform an obligation that is not imposed upon the consumer;
 - (c) to perform any obligation that could not be enforced against the consumer; 10
 - (d) to permit a mortgagee or any person acting on behalf of the mortgagee to enter upon any premises for the purpose of taking possession of or inspecting goods subject to a mortgage;
- or
- (e) to relieve a mortgagee or any person acting on behalf of the mortgagee from liability for any such entry. 20

the agreement so entered into by the guarantor shall be void unless the agreement is executed by the guarantor in the presence of a legal practitioner instructed and employed independently of the credit provider or mortgagee and the legal practitioner certifies in writing upon the agreement -

- (f) that he is satisfied that the guarantor understands the true purport and effect of the agreement; 30

and

- (g) that the guarantor has voluntarily executed the agreement in his presence."

As sub-paragraph (5) of paragraph 17 of the defence records, it was not disputed that execution of CCCM was not effected in the manner described in s. 44. 40

Paragraph 13 of the Statement of Claim refers to s. 55b of the Law of Property Act 1936 (as amended). That section reads:

"55b. (1) Notwithstanding any covenant to the contrary, a mortgagee shall be deemed to have covenanted with the mortgagor that where the mortgagee makes demand of any amount in pursuance of the mortgage, he will at the request of the mortgagor, supply him with reasonable particulars of how the amount of the demand is arrived at.

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10 (2) Where a mortgage is entered into after the commencement of the Law of Property Act Amendment Act, 1972, and a covenant collateral to the mortgage is made between the mortgagor and mortgagee, the collateral covenant shall have no further force or effect upon extinguishment of the mortgage debt.

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20 (3) Any covenant by which a mortgagee might enforce a personal right to the repayment of a debt secured by a mortgage after and without re-opening the foreclosure of the mortgage is invalid."

Before turning to a consideration of the separate challenges to the two central documents, it is necessary to discuss a question common to all.

30 The principal relief sought by the prayer for relief cited above (heads 1, 1A, 2, 3, 4, and 5) is framed upon the basis that what the plaintiffs are challenging, ultimately, is, not CCCM, but MRP. The case advanced in support of that relief was founded upon the operation of the two documents in association.

40 Speaking generally, the plaintiff's claim, in the alternative, is that the Consumer Transactions Act applies directly to the CCCM, or that the CCCM has incorporated most of its provisions; and in consequence of the direct or indirect effect of that Act, the CCCM is either void or unenforceable. The statement of claim sets forth various contentions as to the lack of validity or enforceability of the CCCM. There would be no point in mounting such challenges if it were not to be claimed that the validity or the enforceability of the MRP is affected by the alleged flaws in the CCCM.

What then is the interdependence of the MRP and the CCCM?

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Mr. Angel (for the plaintiffs) relies upon well-settled authority to the effect that where two or more documents were executed with the intention that they should govern one transaction to which they all relate, they are to be construed, as far as is practicable, together to give effect to that intention.

There is no doubt about the principle, but the difficulty it raises in practice is in spelling out precisely what is the interrelationship between the documents, and how the legal shortcomings of one affects the other. 10

It appears to be undisputed that the MRP was entered into for the purpose of better securing the payment of moneys said to be secured by the CCCM. (To that end Mr and Mrs Comblas (as "the mortgagor") covenanted to keep, observe, and perform, the covenants contained in the CCCM; one must, it seems, qualify this covenant by some such addition as "on the part of the mortgagor to be performed etc. etc.". Mr. Lunn (for the company) would go further and would argue that covenant "1" in the MRP places Mrs. Comblas under a precuniary obligation only, and does not fix her with a duty to perform or observe the non-pecuniary obligations created by the CCCM. 20

The vital question is whether and how the MRP would be affected by a conclusion that the CCCM is void - alternatively, unenforceable.

The interdependence of the two documents may be supposed to arise as follows: 30

- (i) Covenant "1" of the MRP is expressed to be entered into "in consideration of (the plaintiffs) desire to render the land available as an additional security" to the extent of \$16,000 "for the payment of the instalments secured by and the performance of the covenants contained in" the CCCM. It was argued that the parties entered into the MRP upon the assumption that the CCCM was, and would remain, valid and enforceable. Upon that assumption, it may be contended that, if the CCCM is void, then either a condition precedent to the coming into effect of the MRP was not fulfilled, or that there was a common mistake with respect to an essential part of the subject matter of 40

the transaction, treated as a whole (that is, as comprising the CCCM and the MRP), and that the MRP in consequence was and remains void. If the CCCM is but unenforceable (or, at the worst, voidable), it may be argued that the MRP suffers accordingly - that the MRP may stand on its own to secure the credit contract portion of CCCM much as it would if the primary security failed.

- (ii) The MRP mortgagors covenanted in covenant "1" to keep, observe, and perform, each and every covenant respectively contained in the CCCM. It is argued that covenant "1" does more than just import the text of the CCCM, and that it incorporates, not only the words of the CCCM, but also their legal standing, as allegedly part of a professed CCCM which is, in law, void or unenforceable.

Of course, if a satisfactory basis for holding the MRP to be dependent in some way on the CCCM is lacking, or if there is no incorporation, then those parts of the statement of claim that rely upon Consumer Transactions Act must be rejected.

One question of interpretation hangs over the MRP, namely, what effect does the limitation of the security to \$16,000 have upon the interdependence? Counsel not surprisingly were not eager to commit themselves to an unequivocal answer. I have found it convenient to defer consideration of this question to the end, by which time it may have become unimportant.

For the purpose of examining Mr. Angel's arguments, I have assumed in his favour that the interdependence of the two principal documents, CCCM and MRP, is as he claims it to be.

The first of the substantial claims advanced by the plaintiffs is that if, for the moment, one assumes that the company took possession of the truck in consequence of the plaintiffs' default, it must have purported to act under cl. 9 of CCCM; but (so it is claimed by paragraphs 9 and 10 of the Statement of Claim) in that event it was bound by Part III of the Act, and having failed to comply

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with it, is disentitled to pursue its remedy,
or to have resort, finally, to MRP for any
purpose.

I referred earlier to an issue of fact, and
it is here that its resolution becomes relevant.
The issue is whether the company actively - suo
motu - repossessed the truck, or whether it passively
received possession of the truck which the plaintiff
voluntarily surrendered when he realized (as he did)
that he could not keep up the payments. If the
finding were to be that the taking was active, .10
the contention was that s. 27 clearly applied.
If the finding were to be that the truck was
voluntarily surrendered then s. 27 still applied,
so Mr. Angel submitted, because the expression
"to take possession" is, in the circumstances,
equivocal, and an application of the expressio unius
rule s. 27 read in contrast to sub-s. (3) of
s. 28 leads to the conclusion that s. 27 applies to
both kinds of "tak(ing) possession". 20

I have weighed the body of evidence led with
respect to this issue, and I am satisfied - and I
find - that the plaintiff voluntarily surrendered
his truck. I shall, however, consider what
would have followed if the finding had been to the
contrary.

The first and predominant question is whether
the Consumer Transactions Act has been incorporated
into CCCM, or in some way made applicable to it,
either wholly or to some determinable extent, and
whether, in particular, the provisions of Part III
are deemed to apply to CCCM, in general, and Clause
9, in particular. 30

Without attempting to catalogue the several
passages in which the Consumer Transactions Act,
or some Part or provision of it, is, ex facie,
incorporated or referred to or relied on, it is
sufficient to say that, putting aside Clause 12
for the moment, there is cogent evidence in CCCM
that the Consumer Transactions Act provisions,
so far as applicable, were intended to be .40
integrated with the Act. Mr. Angel relied, not
only on the numerous references to that Act,
but also on the submission that, if the incorporation
contended for be not accepted, Clause 9 would be so
emasculated by Clause 12 as to become meaningless.
It followed (so Mr. Angel maintained) that Clause 12
should be treated as excised on the ground that it
is wholly inconsistent with the balance of CCCM.

Mr. Lunn's answer to those contentions rested upon Clause 12 and provisions of the Consumer Transactions Act necessarily associated with it. He pointed out that a consumer mortgage, by definition, was designed to secure performance by a consumer of his obligations under a consumer credit contract, but CCCM, in the circumstances of this case, is not a consumer credit contract as defined. The definition referred to runs:

"'consumer credit contract' means a credit contract -

(a) under which the principal does not exceed ten thousand dollars and in respect of which no security is taken over land;

or

(b) under which the principal does not exceed twenty thousand dollars and in respect of which security is taken over land."

(Some further ranged out matter in this definition is immaterial).

The amount secured by CCCM plainly exceeds this statutory limit (Mr. Lunn continued) and therefore both by virtue of Clause 12 and of ordinary logic, neither the Consumer Transactions Act, nor any portion of it, can be regarded as incorporated. As to the alleged emasculation of Clause 9, Mr. Lunn would reply, I gather, that, subject to all relevant excisions, the Clause would read thus:

"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"

Mr. Lunn also opposed the argument based on the expressio unius construction, and argued that s. 27 (apart from the financial limit inherent in its operation) applied only to an active taking of possession.

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I must confess that I view clauses drafted like Clause 12 with profound distaste. Its draftsman would, I suppose, claim that it is justified on the grounds of economy both of drafting and of administration, and that it enables one document to serve both transactions that are within, and transactions that are without, the purview of the Consumer Transactions Act. It may be that it gives to its parent document the twofold operation mentioned, but in other respects the claim is ill-founded. In my experience, incorporation by general provisions usually causes serious uncertainty, and exclusion or excision by general provisions may be expected to have the same result. I repeat, with emphasis, the remarks made (*mutatis mutandis*) about such clauses in O'Neill & Clayton Pty. Ltd. v. Ellis & Clark Pty. Ltd. (No. 1246 of 1978: unreported: judgment delivered 9 November 1978). 10

Much, however, as I dislike the form and operation of the clause, I am driven to the conclusion that Mr. Lunn is right, and that I must reject Mr. Angel's argument. 20

A Court certainly has the power, in certain exceptional cases, if it finds a clause to be so defective in its language that no meaning can reasonably be wrested from it, to disregard it altogether and hence, to all intents and purposes, to excise it from the instrument in which it appears: utile per inutile non vitiatur. But the cannon of construction that agreements, being the product of an intention common to the parties, should be construed ut res magis valeat quam pereat goes a long way; wholly to eject a clause from an agreement can be justified only by grave and weighty circumstances. Although its application to individual clauses may give rise to controversy, Clause 12, to my mind, possesses a meaning that is sufficiently evident to warrant its retention. It means, in my opinion, this: that references in the document to the Consumer Transactions Act are to be given effect to only where, in the circumstances in which the transaction was concluded, the Act would ordinarily apply to it, that is, would apply to it in consequences of its natural, legal, operation. The implication is that any references in the body of the document to the Act are intended to have effect, not as words of incorporation, but at integrating the agreement with the Act when it already applies. 30 40 50

10 Mr. Angel sought to meet this answer
by the contention that, given favourable
circumstances, courts may be disposed to treat
a purported incorporation of the terms of
another instrument as amounting, not to an
attempt to incorporate, without discrimination,
all the terms of that instrument, but to an
incorporation of only so much of it as was
appropriate in the circumstances (see
Adamostos Shipping Co. Ltd. v. Anglo-Saxon
Petroleum Co. Ltd. (1958) 1 AER 725. This
(he submitted) was such a case, and the
relevant parts of the Consumer Transactions
Act should be regarded as having been
incorporated, disengaged from the upper
financial limit imposed by the definition
of "Consumer Credit Contract".

20 In my opinion, this argument must be
rejected. If I am right about the construction
of Clause 12, the circumstances of this case
are different altogether from the sort of
circumstances in which the principles expounded
in Adamostos's Case (supra) may be applied.
Given that Clause 12 is to stay, given that it
confines the operation of the Consumer
Transactions Act to subject matter to which it
naturally, in its character as a statute, applies,
there can be no incorporation of any kind, and
there is accordingly no occasion for invoking
30 Adamostos's Case (supra).

In recognition of Mr. Angel's earnest
arguments, which were well marshalled and presented,
I propose, nevertheless, to follow his reasoning
through, on the assumption that Part III,
pro tanto, applies. The first difficulty he
encounters is the finding of fact recorded above.
Mr. Angel's submission is that, in any event,
s. 27 applies because the expression "take
possession of" applies to both kinds of taking
40 possession.

In my opinion, the language of ss. 27 and 28
does not attract the expressio unius rule. The
two sections contemplate situations that, in my
judgment, are fundamentally different from one
another. Section 27 seems to me to suppose that
the mortgagee is taking the first, positive, steps
available to him to protect his security in the
face of a default by the mortgagor that is
effected knowingly, and perhaps wilfully (see
50 sub-s. (2)). None of the procedures established
by s. 27 would be called for if a voluntary yielding
up was taking, or about to take, place. Sub-
section (1) of s. 28, however, would seem to apply

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to circumstances obtaining after the mortgagee has, in one way or another, gained possession, and liquidation of the mortgaged property is imminent. At first sight, it could well have been thought that it would be of no consequence whether possession had been gained with or without opposition. Sub-section (3), however, represents a decision by Parliament that when a mortgagor yields possession voluntarily he is taken to have released any right to restore the mortgage to its original state.

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Mr. Angel, assuming all other issues to have been decided in his favour, submitted that sub-s. (3) of s. 27 protected Mrs. Comblas against execution under MRP, because she was a "guarantor" within the meaning of that sub-section.

The word "guarantor" is defined by s. 5 of the Consumer Transactions Act as follows:

"'guarantor' means a person who guarantees the performance by a consumer of obligations under a consumer credit contract and includes a person who undertakes to indemnify a credit provider for any loss that he might suffer in consequence of any failure to recover moneys from a consumer under a consumer credit contract or purported consumer credit contract (but does not include a person who gives any such guarantee or makes any such undertaking in the course of carrying on a business of insurance, or any other business):".

20

30

Mr. Angel conceded that Mrs. Comblas might not be a guarantor, in the strict legal sense - he could not point to a principal and a secondary debtor, and that there was no consumer credit contract as defined, but contended that Mrs. Comblas was a person who, in the terms of the definition of "guarantor", had undertaken to indemnify the company for any loss that it might suffer in consequence of any failure to recover moneys from Mr. Comblas under "a purported consumer credit contract". CCCM "purported" to be such a contract, because, in effect, everything about it conformed to the legal description of a consumer credit contract except the sum of money secured. This argument fails, in my opinion, for two reasons: there was not a true contract of indemnity because Mr. and Mrs. Comblas were, at the most, simply debtors who had, together, made their land available as security; and, in my view, whatever else the word

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.50

"purported" encompasses, it cannot apply to something (in this case, a document - CCCM) which demonstrates, on the face of it (because the definition in the Consumer Transactions Act of "consumer credit contract" expressly imposes the upper financial limit) that it cannot be what it allegedly purports to be.

10. The next head of argument is derived from para. 12A of the statement of claim, together with the particulars thereto.

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The essence of Mr. Angel's argument is this. Under Clause 4 of the CCCM, the mortgagor agrees that the several covenants and powers set out in sub-sections 1 to 7 of section 11 of the Bills of Sale Act 1886 (as amended) shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the Mortgagee.

20 By virtue of s. 11 of the Bills of Sale Act, in the absence of a contrary intention - and there is no such intention here, the grantee of a bill of sale (and hence here the mortgagee in CCCM), has the power, at all reasonable times, to enter the premises where the goods are kept and to view them, and, upon default by the grantor (and hence here upon default of the mortgagor under CCCM), to enter those premises and take possession of the goods with a view to selling them. These powers were
30 accordingly imported into CCCM.

But para. (d) of sub-s. (1) of s. 44 of the Consumer Transactions Act provides that

"(1) Where a guarantor enters into an agreement binding the guarantor -

.....

(d) to permit a mortgagee or any person acting on behalf of the mortgagee to enter upon any premises for the purpose of taking possession of or inspecting goods subject to a mortgage;

40

.....
the agreement so entered into by the guarantor shall be void unless"

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certain things are done which it is common ground were not done. In Part VIII of the Act, where s. 44 appears, the word "guarantor" (Mr. Angel contends) has a circumscribed meaning according to which it applies to Mrs. Comblas. It is circumscribed to this extent that the upper limit placed on the principal secured by the CCCM does not apply.

Mr. Angel's argument in support of the circumscribed meaning runs thus. The definition of "guarantor" in s. 5 includes the indemnifier of a credit provider under a "purported consumer credit contract". CCCM, in this case, is correctly described as a purported consumer credit contract (for the same reasons as those referred to above). An indemnifier under a consumer credit contract (which this is in all but its upper limit of principal) is, therefore, a "guarantor" within the meaning of the Consumer Transactions Act, and, ex hypothesi, Part VIII should protect such a guarantor.

10

20

But if, in prescribing the extent of the protection given by Part VIII to such a "guarantor", the protection is conditioned upon the existence of a strictly legal consumer credit contract as defined (that is, one in which the principal is within the upper financial limit), the Act is giving protection with one hand and taking it away with the other.

Accordingly (so the argument concludes), there is a sufficient indication in the context of a contrary intention (as contemplated by the definition), and Mrs. Comblas is entitled, as guarantor, successfully to claim that CCCM is pro tanto void.

30

Mr. Lunn replies simply that an instrument cannot be a purported consumer credit contract where, by definition, it manifestly cannot be a consumer credit contract because the principal exceeds the express statutory maximum.

Though the authorities on the word "purported" show that it is protean in character, and may, in different contexts, carry a wide range of meanings, I am constrained to conclude that Mr. Lunn is again right and that CCCM does not, for the purposes of s.44, answer the description of a purported consumer credit contract.

40

The plaintiffs' last plea appears in para 13 of the statement of claim which rests upon s. 55b of the Law of Property Act (cited above). Mr. Angel expanded this in argument. Sub-section (3) of that section applies to this case (Mr. Angel submitted) because the section as a whole applies both to real and to personal property, and Clause 9 of the CCCM is a covenant of the kind described in sub-s. (3). It is accordingly invalid. As matters stand, the company has put it out of its power to "reopen the foreclosure" because the truck has already been sold. The company cannot, therefore (Mr. Angel concluded), proceed further to enforce its security. Mr. Lunn submits that, having regard to the history of property, real and personal, and to the language of the Law of Property Act, the section applies only to real property; the word "foreclosure" has a special and technical significance in the field of real property, and has never been used in any context in which personal property was under discussion.

It may be acknowledged that not a few provisions of the Act apply both to real and to personal property or to personal property alone, and, if a contrary intention were not to be inferred from its immediate context, there would be grounds for concluding the s. 55b applied to personal as well as to real property. But in my opinion, the contrary intention clearly appears. Not only does the whole structure and tenor of Part IV of the Act (in which s. 55b is contained) appear to me to be concerned with land, but s. 55a, which, with s. 55b, was introduced into the Act by amendment in 1972, is clearly intended to apply to land, and s. 55b appears to me to be closely associated in subject matter. Moreover, I agree with Mr. Lunn that the word "foreclosure" is a term of art whose historical and legal associations are with land and interests in land, and not with chattels personal.

Two questions debated by counsel I have not found it necessary to answer: first, the legal effect of the limit of \$16,000 placed upon the security provided by MRP; and second, the extent of the incorporation effected by the covenant entitled "(1)" in the same document. I have, in coming to my conclusions, disregarded the limit, and have construed the covenant as widely as was necessary to

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provide, pro tanto, a support for Mr. Angel's arguments. In approaching the case in this way, I have thus made two assumptions, and have not come to reasoned conclusions about either.

It follows from the above examination of the arguments advanced for the plaintiffs that they cannot be made good, and that, in general, there must be judgment for the defendant.

I shall hear counsel on the precise form of orders sought and on the question of costs.

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No. 5

No. 5
Formal
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FORMAL JUDGMENT
DATED THE 21ST DAY OF FEBRUARY
1979

BEFORE THE HONOURABLE MR. JUSTICE WELLS
WEDNESDAY THE 21ST DAY OF FEBRUARY 1979

21st
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THIS ACTION coming on for trial before the Honourable Mr. Justice Wells on the 13th and 14th days of December 1978, the 21st day of December 1978 and this day in the presence of Mr. Angel and Mr. Niarchos of counsel for the plaintiffs and Mr. R.M. Lunn of counsel for the defendant
AND the Judge having:

20

(1) found that the Notice of Intention to Exercise the Power of Sale dated the 25th day of July 1977 which was given by the defendant to the plaintiffs is void, but declined to make any declaration in respect thereof because of the defendant's acknowledgement in the pleadings that the said notice is void.

30

(2) in respect of the other relief claimed herein found that the plaintiffs are not entitled to:

(a) a declaration that Memorandum of Mortgage No. 3929270 is void by reason of the provisions of Section 44(1) of the Consumer Transactions

Act 1972-1973 not having been
complied with as to the manner
of execution and certification thereof.

(b) a declaration that the defendant
having failed to comply with the
provisions of Part III of the
Consumer Transactions Act 1972-1973
is disentitled from exercising any
rights pursuant to Memorandum of
Mortgage registered No. 3929270.

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(continued)

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(c) a declaration that in the events
that have happened the plaintiffs
are not indebted to the defendant in
any sum.

(d) an injunction restraining the
defendant whether by itself, its
servants, agents or otherwise
howsoever from selling or otherwise
howsoever dealing with the whole or
any part of or interest in the land
comprised and described in Certificate
of Title Register Book Volume 3876
Folio 17 or from occupying or using
the said land in any way so as to
interfere with the plaintiffs'
interest therein.

20

(e) an account of what moneys if any
are due from the male plaintiff to
the defendant either pursuant to
Section 55b of the Law of Property
Act 1936 as amended or otherwise.

30

(f) an account of profits received by the
defendant or its agents in the wrongful
use of the vehicle.

(g) damages for conversion.

AND having accordingly ordered that the plaintiffs'
claim do stand dismissed out of this Court and that
judgment be entered for the defendant for its cost
of action THEREFORE IT IS ADJUDGED that the plaintiffs
do recover nothing against the defendant and that the
defendant do recover against the plaintiffs its costs
of action to be taxed AND IT IS FURTHER ORDERED that the
injunction made herein on the 19th day of May 1978
restraining the defendant from selling, letting or
otherwise dealing with the whole of the land comprised

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in Certificate of Title Register Book Volume
3876 Folio 17 and situated at 36 Queen Street
Alberton in the State of South Australia or from
occupying or using the land in any way so as
to interfere with the plaintiffs' interests
therein be and is hereby discharged.

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(continued)

BY THE COURT

signed R.E. Gregor
CHIEF CLERK

THIS ORDER was lodged by Messrs. Lambert & Solomon
of 27 Gilbert Street, Adelaide, Solicitors for
the Defendant.

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No. 6

No.6
Notice of
Appeal
dated the
7th day of
March 1979

NOTICE OF APPEAL
DATED THE 7TH DAY OF MARCH 1979

7th March
1979

TAKE NOTICE that the Full Court will be moved by
way of appeal at the next sittings of the Full
Court for hearing appeals to be held at the expiration
of twenty one days from the due institution of this
appeal or so soon thereafter as counsel may be heard 20
FOR AN ORDER that the judgment of His Honour Mr.
Justice Wells made and pronounced on the 21st day
of February 1979 wherein he dismissed the Appellants'
claims for declaratory and other relief and gave
judgment for the Respondent BE SET ASIDE as being
wrong in law and in fact and that Judgment be
entered for the Plaintiffs on the claims for relief
herein set out with costs. The whole of the said
judgment is complained of. The grounds of appeal
are as follows:

30

1. The Learned Trial Judge was wrong in law in his finding that clause 12 of the "Credit Contract-Consumer Mortgage" could be so interpreted as excluding the operation of the Consumer Transactions Act 1972 (as amended) upon the legal rights and obligations of the parties to the said agreement.
2. The Learned Trial Judge ought to have found that on the proper construction of the said

"Credit Contract-Consumer Mortgage" the financial limit thereof did not go to exclude the operation of the Consumer Transactions Act 1972 (as amended) and the parties thereto had effectively attracted the operation of the said Act by express or implied agreement.

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- 10 3. In the alternative to grounds 1 and 2 hereof the Learned Trial Judge ought to have found that the said "Credit Contract-Consumer Mortgage" was void for ambiguity and unenforceable at the suit of the respondent.
- 20 4. The Learned Trial Judge ought to have found on the evidence that the delivery of the vehicle by the Appellant JOHN NICHOLAS COMBLAS to the Respondent or its agents was in response to and contemporaneous with a forced repossession by the Respondent.
5. The Learned Trial Judge ought to have found that Section 27 of the Consumer Transactions Act 1972 (as amended) applied equally to the voluntary surrender as well as the force repossession of the vehicle.
- 30 6. The Learned Trial Judge ought to have found that the Respondent having failed to comply with requirements of Section 27 of the Consumer Transactions Act 1972 (as amended) following upon the taking possession of the vehicle it was precluded from recovery of any moneys from either or both of the Appellants whether pursuant to the "Credit Contract Consumer Mortgage" or the "Mortgage Real Property".
- 40 7. In the alternative to ground 6 hereof, the Learned Trial Judge ought to have found that Section 27 of the Consumer Transactions Act 1972 (as amended) extended protection to the Appellants ARSINOI COMBLAS as a "guarantor" and the Respondent having failed to comply with requirements of Section 27 aforesaid could not recover any moneys from the said ARSINOI COMBLAS pursuant to the "Mortgage Real Property".

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8. The Learned Trial Judge ought to have found that the said ARSINOI COMBLAS was a "guarantor" within the meaning of Part VIII of the Consumer Transactions Act 1972 (as amended) and that the requirements as to the execution of the "Mortgage Real Property" set out in Section 44 of the said Act not having been complied with the Respondent was precluded from reliance upon the "Mortgage Real Property" which was thereby rendered void and unenforceable. 10
9. The Learned Trial Judge ought to have found that the Appellants had established their claims for the relief sought and set out in the prayer for relief and numbered (1A), (2), (3) and (4).

DATED the 7th day of March, 1979.

NICHOLAS NIARCHOS

Per: N. Niarchos (sgd)

27 Leigh Street, 20
ADELAIDE. S.A. 5000

Solicitor for the Appellants

To : The Master,
 Supreme Court.

And To : The abovenamed Respondent

And To : Messrs. Lambert & Solomon,
 27 Gilbert Street,
ADELAIDE. S.A. 5000
 Solicitors for the Respondent

THIS NOTICE OF APPEAL is filed by NICHOLAS NIARCHOS 30
 of 27 Leigh Street, Adelaide. Solicitor
 for the Appellants.

REASONS FOR JUDGMENT OF
THE HONOURABLE CHIEF JUSTICE
DATED THE 21ST DAY OF NOVEMBER 1979

DELIVERED 21 NOV 1979

COMBLAS AND COMBLAS v. MERCANTILE CREDITS LIMITED

No. 1611 of 1977

Dates of Hearing: 11th, 12th October 1979

IN THE FULL COURT

10 Coram: King C.J., Walters and White JJ.

J U D G M E N T of the Honourable the Chief Justice

(On appeal from judgment of the Honourable
Mr. Justice Wells)

Counsel for the Appellants:	Mr. D. Angel
Solicitor for the Appellants:	Nicholas Niarchos
Counsel for the Respondent:	Mr. R.M. Lunn
Solicitors for the Respondent:	Lambert & Solomon

COMBLAS AND COMBLAS v. MERCANTILE CREDITS LIMITED

20 Full Court

King C.J.

The facts, the material parts of, the documents and the issues in this appeal are fully set out in the judgment of White J.

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I agree with White J. that the Consumer Transactions Act 1972 as amended has no application to the transaction or the documents which implement it, but that the Consumer Credit Act 1972 as amended applies.

The male appellant and the respondent executed a document entitled "Credit Contract - Consumer Mortgage" which purports to set out the rights and obligations of the parties. The document was prepared on behalf of the respondent on the respondent's printed form and was proffered to the male appellant for signature. It contains many references to the Consumer Transactions Act. As that Act has no application the document is quite inappropriate to the transaction. The respondent attempted to meet this situation by including in its printed form Clause 12 which in effect provides that where the Act is inapplicable any reference to any provision of it "shall be disregarded in the interpretation of this agreement and treated as inapplicable". The difficulties of the case largely arise from the necessity of attempting to apply Clause 12 to provisions in which references to the Consumer Transactions Act are so interwoven with the other parts of those provisions as to render them inextricable.

In one respect, I think that the meaning of the document is quite clear. Where the mortgagee has resort to the security over the chattel by taking possession of it or the mortgagor returns it, the mortgagee's right to recover anything further from the mortgagor arises, if at all, under the provisions of Clause 9 and the mortgagee's rights, if any, arising out of that clause are to the exclusion of any other rights under the document. I set out Clause 9 with my own emphasis:

"9. Where the mortgagee has taken possession of the goods comprised in the 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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How is Clause 12 to be applied to Clause 9? It may be possible to disregard the words "pursuant to section 30 of the Consumer Transactions Act 1972", and the words "subject to the provisions of Part III of the said Act", and still leave the clause with an acceptable meaning. I fail to understand, however, how, if the reference to section 29 of the Act is disregarded as required by Clause 12, the amount recoverable by the mortgagee under Clause 9 can be ascertained. The clause as drafted provides that the mortgagee may recover an amount calculated in accordance with section 29. If the reference to section 29 is disregarded, how is the amount to be calculated? The calculation in section 29 is a sophisticated computation designed to produce a fair net balance which the mortgagee may recover. The section incorporates a concept of "statutory rebates" which is defined in the Act and which must be ignored by virtue of Clause 12. It also incorporates a particular concept of the value of the goods at the time of taking possession or return which must also be ignored. Without the aid of section 29 there is no basis for computing the net balance and the words have no relevant meaning.

I do not overlook the canon of construction embodied in the Latin maxim ut res magis valeat quam pereat. I appreciate the reluctance of courts to treat a provision as meaningless. The fact that a provision is obscure and its meaning difficult to arrive at does mean that it is so uncertain as to have no legal effect. The Court will do its best to arrive at a meaning which gives effect to the intention of the parties; it will construe the provision as best it can and the provision so construed will be given effect to. But if it is impossible to construe the language fairly so as to give a meaning to it, the Court must say so. It is not the function of the Court to impose an agreement on the parties if the document which purports to record their agreement fails to disclose its meaning.

In my opinion the excision of the reference to section 29 of the Consumer Transactions Act leaves no basis for the computation of the sum said to be recoverable by the mortgagee. To assign a meaning to the words "nett balance" would be to force on the parties a bargain which they did not make. The amount recoverable under the clause is

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therefore unascertainable. It follows that the respondent, having taken possession of the truck or had it returned, cannot recover any further amount from the male appellant.

It is unnecessary to decide whether the failure of Clause 9 to provide a basis for the ascertainment of the sum said to be recoverable under it results in the "Credit Contract-Consumer Mortgage" being void for uncertainty, or whether it can survive despite the ineffectiveness of Clause 9 to provide a basis for the recovery by the respondent of any amount in addition to the proceeds of the sale of the truck, because the result for this case is the same on either view. The Real Property Act mortgage, which is the subject of the action, is by way of additional security for the payment of the instalments under the Consumer Mortgage and the performance of the covenants. If the "Credit Contract - Consumer Mortgage" is void for uncertainty, there is nothing to secure. If it survives but the respondent can recover nothing further from the male appellant, the result is the same. The respondent has received the proceeds of the sale of the truck and no further amount can be due to it. The covenants are therefore spent. The obligations secured by the Real Property Act mortgage being either void or spent, the appellants are entitled to a discharge of the mortgage.

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I add my voice to the criticisms made by Wells J. on the first appeal and White J. in this Court of the documents prepared on behalf of the respondent to implement this transaction. The respondent has brought the result of this appeal on itself by using documents which could only confuse and mislead the other party to the transaction. It is to be hoped that it will now desist from the use of the form of "Credit Contract - Consumer Mortgage" which has been the source of most of the difficulty in the case. The Real Property Act mortgage was not prepared by a solicitor but by a land broker. Land brokers are trained and are qualified within a limited field. Where a Real Property Act document must reflect the wider legal implications of a transaction of which it forms part, the need for it to be prepared by a solicitor whose legal training equips him to appreciate those legal implications, is obvious. The ineptness of the drafting of the Real Property Act mortgage

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in this case suggests a failure on the part of the land broker to understand the real bearing of the document which he was preparing on the whole transaction, or perhaps an inability to draft a legal document appropriate to the legal purpose in view.

10 Finally, like White J., I draw the legislature's attention to the need to increase greatly the present monetary limits on transactions to which the Consumer Transactions Act applies, to take into account changes in the purchasing power of money since they were enacted in 1972.

In my opinion the appeal should be allowed and this Court should grant relief to the appellants as proposed by White J.

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DATED THE 21ST DAY OF NOVEMBER 1979

DELIVERED 21st NOVEMBER 1979

COMBLAS AND COMBLAS v. MERCANTILE CREDITS LIMITED

No. 1611 of 1977

Dates of Hearing: 11th, 12th and 16th
October 1979

IN THE FULL COURT

Coram: King C.J., Walters and White JJ.

J U D G M E N T of the Honourable Mr. Justice Walters

(On appeal from the Honourable Mr. Justice Wells)

30 (Construction of agreement purporting to be credit contract-consumer mortgage: terms of document purporting to introduce provisions of Consumer Credit Act 1972 as amended and Consumer Transactions Act: incongruous

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provisions in document obscuring its true
implications: contra proferentem rule
applied)

Counsel for the appellant: Mr. D.N. Angel
Solicitors for the appellant: Mr. N. Niarchos
Counsel for the respondent: Mr. R.M. Lunn
Solicitors for the respondent: Lambert &
Solomon

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COMBLAS AND COMBLAS V. MERCANTILE CREDITS LIMITED

Full Court

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Walters J.

I have had the benefit of reading the judgment of White J., and although the case has given rise to certain misgiving on my part with respect to its ultimate result, I recognize the force of the reasoning of my learned colleague. Thus I agree with his reasons and the conclusion that he has reached.

It is not an easy task to consider the import of the credit contract-consumer mortgage, because of the presence in it of incongruous provisions. The document is one which is characteristic of a document that obscures its true implications owing to terms in which it is expressed. It may have been appropriate for other circumstances, but it was inapt for the purpose of the transaction presently under consideration. However, as it is the respondent's document, it must be construed strictly against the respondent; it was for the respondent to protect itself by introducing into, or by excluding from, the document whatever was necessary to shield its interests.

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Ordinarily, I would have been reluctant to interpret the credit contract-consumer mortgage in such a way as to release the appellant from liability under it, since the transaction entered into by him with the respondent imposed upon him an implied obligation to do all that was reasonably necessary to secure his performance of the contractual obligations that he chose voluntarily to assume. However, because the document has been

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drawn in such a way as to attract the provisions of the Consumer Credit Act 1972 as amended, for the reasons stated by White J. I think the appellant must be given the protection afforded by the relevant provisions of that Act. I agree with White J. that the appeal must succeed, and I concur with the orders proposed by him.

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DELIVERED 21st November, 1979.

COMBLAS AND COMBLAS v. MERCANTILE CREDITS LIMITED

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Dates of Hearing: 11th, 12th and
16th October, 1979.

IN THE FULL COURT

Coram: King C.J., Walters and White JJ.

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J U D G M E N T of the Honourable Mr. Justice White

(On appeal from the Honourable Mr. Justice Wells)

(Consumer Credit Act 1972-3, sections 5, 40, 43; Consumer Transactions Act 1972-3, sections 5, 44; Credit Act applicable to transaction, but not Transactions Act; effect of striking out references to Transactions Act; uncertainty as terms; severability of uncertain term.)

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Counsel for the Appellant: Mr. D.N. Angel
Solicitors for the Appellant: Mr. N. Niarchos
Counsel for the Respondent: Mr. R.M. Lunn
Solicitors for the Respondent: Lambert & Solomon

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Full Court.

White J.

In August 1976, the male appellant ("Comblas") purchased a Mack Prime Mover ("the truck") from O.G.R. Distributors for the purpose of operating his own interstate haulage business. He borrowed the full purchase price of \$37,581 from the respondent company, which required security over the truck and also over the home of Comblas and his wife, the latter security being limited to \$16,000. 10

Comblas signed an agreement on the respondent's standard form of credit contract-consumer mortgage, the terms of which are appropriate in a transaction to which both the Consumer Credit Act 1972-1973 ("C. Act") and the Consumer Transactions Act 1972-1973 ("T. Act") apply. In addition, Comblas and his wife signed a Real Property Act Mortgage ("RPM"). 20

The trial judge, Wells J., found it necessary to abbreviate terms, as repeated reference must be made to different Acts and kinds of documents. I, too, find this course convenient, and I gather the abbreviations here. 30

- C. Act 5, 40 etc. Consumer Credit Act 1972-3, Sections 5, 40 etc.
- T. Act 5, 44 etc. Consumer Transactions Act 1972-3, sections 5, 44 etc.
- RPM Real Property Act Mortgage given here.
- CC Credit contract as defined in C. Act 5.

CCC Consumer credit contract as
 defined in T. Act 5

CM Consumer mortgage as defined in
 T. Act 5

CC-CM Combined CC-CM embodied in one
 document

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10 The main issues at the trial and on the
 appeal centred around the questions whether
 T. Act applied to or was incorporated into the
 transaction, so I will deal with that question
 at the outset.

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20 The four page contract between Comblas
 and the respondent was headed "CREDIT
 CONTRACT-CONSUMER MORTGAGE". For reasons
 given later, I hold that that was an incorrect
 description of the contract. I will refer to
 the contract as "the truck agreement" in
 order to distinguish it from a credit contract-
 consumer mortgage ("CC-CM") properly so
 described. And I use a hyphen between the
 initials CC-CM in order to acknowledge the
 quite distinct character and consequences of a
 CC and a CM.

30 A central clue to the applicability of
 either Act is the amount involved. Normally,
 the limit under both Acts is \$10,000, in credit under
 C. Act, in goods under T. Act. However, that
 \$10,000 limit is lifted once security over a
 person's home is taken, as it was here. The
 limit under T. Act is then lifted to \$20,000,
 while the limit under C. Act is lifted altogether -
 that is, there is no monetary limit. Put another
 way, T. Act applies where the credit provided
 under a CCC is \$10,000 without a home as security,
 or \$20,000 with such security, (these being the
 respective limits set out in the definition of
 CCC in T. Act 5.). On the other hand, C. Act
 applies without any monetary limit in the home
 security situation (this absence of a limit
40 arising from two considerations).

 First, there is no limit in the definition
 of CC in C. Act 5. Second, the limit mentioned
 in C. Act 6 (3) has no application where security
 over a home is taken. Here, such security was
 taken. It follows that there is no monetary
 limit to the applicability of C. Act in this case.

 C. Act 6 (3) provides:-

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"(3) This Act does not apply to a credit contract -

(a) where the amount of principal exceeds ten thousand dollars

and

(b) where -

(i) the credit is not provided on the security of land;

or

(ii) the credit is provided on the security of land declared not to be the borrower's own home."

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In the present case, (3) (a) applies but not 3 (b). T. Act 6 (3) is a non-applicability provision. Either (a) and (b) (i) must co-exist or (a) and (b) (ii) must co-exist, if C. Act is not to apply. C. Act must apply, because the two elements of non-applicability do not co-exist here.

20

The taking of security over the home (RPM) resulted, therefore, in C. Act being attracted to the truck agreement even though the credit provided was \$37,581.

I turn now to consider the applicability or otherwise of T. Act. The respondent lent to Comblas a principal sum of \$37,581, which plainly exceeds the \$20,000 limit of T. Act when security over the home is taken. That fact alone is sufficient to take the truck agreement outside of T. Act.

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In case it might be thought that RPM's limit of \$16,000 (which is under the T. Act limit of \$20,000) is significant, I will deal with that point at once. Although RPM is drawn in ambiguous terms, it is clear enough that the combined effect of the truck agreement and of RPM which annexes a copy thereof is that Comblas received credit to the extent of \$37,581 on the security of his sole interest in the truck and his joint interest in the home, while Mrs. Comblas guaranteed his performance of the covenants in the

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truck agreement and secured her promise to do so by mortgaging her joint interest in the home.

The appellants' claim to relief from the prima facie obligations created by the covenants in the truck agreement and by RPM depends in the main upon the applicability of two Parts of T. Act - Part III relating to consumer rights when the credit provider takes possession upon default and Part VIII relating to a guarantor's right to independent legal advice before signing a guarantee of a CM. I will refer to these Parts of T. Act as T. Act III and T. Act VIII.

T. Act III is headed "Consumer Mortgages" and the Part obviously applies only to such documents. The question here is whether the truck agreement or RPM or the combination of them constitutes a CM.

A CM is defined in T. Act 5:-

"'consumer mortgage' or 'mortgage' means any mortgage charge or other security (including a bill of sale within the meaning of the Bills of Sale Act) over goods, by which the performance of any obligations by a consumer under a consumer credit contract is secured...."

Applying that definition to the truck agreement, it is immediately obvious that in this document Comblas gave security to the respondent over goods, a fact which qualifies it as a CM in that respect at least. However, the truck agreement is for a principal sum of \$37,581, a fact which takes the truck agreement beyond the limit of \$20,000 allowed for a CCC where security is taken over a home as one of the conditions of the loan (T. Act 5). To qualify as a CM, both aspects of its definition must be satisfied; and the truck agreement fails to qualify in the latter respect.

Applying the same definition to RPM, this document gave security over land (the home), thereby falling outside the definition of CM, which is confined to security over goods. RPM also falls outside the definition of CM for another reason; it does not secure obligations arising under a CCC, as I have just held. The

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definition of CM not applying to RPM, it is beside the point that RPM happens to be for less than \$20,000 and may in other respects qualify as a CC under C. Act. It is not a CCC under T. Act, nor is it a CM.

Finally, applying that definition to both documents read as one document, the total documentation fails to qualify as CM for the reasons given above.

The failure of the truck agreement and RPM and both documents combined to meet the definition of CM is the short answer to much argument at the trial and on the appeal, because T. Act III is applicable only to CM. There were, of course, other arguments about the possible incorporation of the provisions of T. Act III into the truck agreement as contractual terms to which I will return later.

I now turn to the different considerations affecting the possible applicability of T. Act VIII to RPM, the only document to which this Part could conceivably apply. T. Act VIII consists of two sections:-

"PART VIII

GUARANTEES

43. (Irrelevant)

44. (1) Where a guarantor enters into an agreement binding the guarantor:-

- (a) to pay a credit provider an aggregate sum that is larger than the balance originally payable under the consumer credit contract to which the guarantee relates;
- (b) to perform an obligation that is not imposed upon the consumer;
- (c) to perform any obligation that could not be enforced against the consumer;

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(d) to permit a mortgagee or any person acting on behalf of the mortgagee to enter upon any premises for the purpose of taking possession of or inspecting goods subject to a mortgage;

or

(e) to relieve a mortgagee or any person acting on behalf of the mortgagee from liability for any such entry,

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the agreement so entered into by the guarantor shall be void unless the agreement is executed by the guarantor in the presence of a legal practitioner instructed and employed independently of the credit provider or mortgagee and the legal practitioner certifies in writing upon the agreement -

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(f) that he is satisfied that the guarantor understands the true purport and effect of the agreement;

and

(g) that the guarantor has voluntarily executed the agreement in his presence."

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On behalf of Mrs. Comblas, it was contended that RPM constituted a guarantee to which T. Act 44 applied. It was common ground that she did not have the benefit of the independent legal advice contemplated by the section, when the Part does apply. Since T. Act 44 applies to both guarantees and indemnities (T. Act 5), I will use the word guarantee to describe both forms of suretyship. It is not possible for a person to be guarantor of his own obligations. Accordingly, it was not possible for Mr. Comblas, in RPM, to guarantee his own obligations arising under the truck agreement. In so far as RPM binds him, it merely creates an added security to that given in the truck agreement. Mrs. Comblas, on the other hand, was not a party to the truck agreement, so she could, in signing RPM, guarantee the performance by Mr. Comblas of his obligations under the truck agreement, at the

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same time undertaking, by virtue of the covenant in RPM, collateral obligations to observe the covenants in the truck agreement. The signing of the truck agreement had to precede the signing of RPM. The former was attached to the latter and incorporated therein not only by express cross-reference but also by physical attachment. In so far as RPM is a valid document, the intention was that she was to be the guarantor of his obligations.

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Do the provisions of T. Act 44 protecting certain guarantors apply to her guarantee of his obligations as supported by RPM? This depends upon the meaning of the words "mortgagee" and "guarantor" in T. Act 44.

"Mortgagee" has a meaning corresponding with "mortgage" in T. Act 5. CM and M are completely interchangeable terms. Wherever the word "mortgage" or "mortgagee" appears in T. Act 44 it has the same meaning as CM already discussed. T. Act 44 applies only to guarantors of CM. Neither the truck agreement nor CM is a CM. So the protection of T. Act 44 is not available.

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This conclusion is confirmed when the definition of "guarantor" in T. Act 5 is applied to T. Act 44. T. Act 5 defines "guarantor" as "a person who guarantees the performance by a consumer, Mr. Comblas, of his "obligations under a consumer credit contract". I refer later to an extension of the definition to the obligation under a "purported" CCC. The obligations arose under the truck agreement, which is not a CCC. Accordingly, the obligations here are not obligations within the definition of "guarantor". So Mrs. Comblas is not a "guarantor" within the T. Act 5 definition and she is not protected by T. Act 44.

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It was further argued that T. Act 44 applied because this was a "purported" CCC and thus within the definition of guarantor in T. Act 5. I agree with Wells J. that this is not a purported CCC. An incomplete CCC or a CCC with an infant or insane person might be a purported CCC, but not a contract to which the Act cannot apply at all. Simply calling it a CC-CM" in the heading did not elevate the document to a "purported" CCC.

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The difficulty in the present case has arisen by reason of the different limits in the two Acts. If there had been no limit in T. Act, the

truck agreement would have been a CCC and both Part III and Part VIII of T. Act would have applied. This anomaly appears to call for legislative attention.

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10 The thrust of the appellants' pleadings and arguments was towards incorporation of the provisions of T. Act into the truck agreement, by reason of its many references to T. Act. However, there are insuperable difficulties in the way of that argument, not so much for the reason that clause 12 of the truck agreement prohibits incorporation of terms in this way, but for the more fundamental reason that the T. Act references, if incorporated, would involve the Credit Tribunal itself in resolving any contractual disputes which might arise under an incorporated contractual term. In other words, jurisdiction would be conferred upon the Credit Tribunal at the whim of the contracting parties. In the alternative, incorporation would involve this Court in acting as if it were the Credit Tribunal in resolving any such disputes. The point need not only be stated to be refuted.

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The appellants also contended that the truck agreement was "void for ambiguity and unenforceable at the suit of the respondent" and that RPM falls with it. It is here, I think, that the appellants are on firmer ground.

30 The truck agreement is studded with numerous references to the relevant C. Act and the irrelevant T. Act. As will be seen, excision of the T. Act references leads to excision of a crucial clause in the truck agreement. It was the use of the standard form agreement in inappropriate circumstances that led to all of the difficulties - uncertainty amongst the respondent's staff as to notices and procedure, uncertainty in the minds of the respondent's legal advisers as to notices, and uncertainty in the minds of the appellants' advisers as to the appellants' rights - they filed five different statements of claim. Applied to the correct set of circumstances, the truck agreement is clear in its compliance with the Acts and in its intentions. Applied to the wrong set of circumstances, confusion reigns.

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50 I turn now to the truck agreements and to its references to C. Act and T. Act. Clause 3 reads:-

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".....if the mortgagor shall make default in payment of any moneys payable hereunder and such default shall continue for 7 days.....then and in....such event the whole of the moneys hereby secured...shall (subject to Section 43 of the Consumer Credit Act 1972 as amended) at the option of the Mortgagee become immediately due payable and recoverable, such option to be exercised by notice in writing signed and served in manner provided by Clause 2 hereof".

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It might be thought that this correct incorporation of the calculation in C. Act 43 provides a basis for calculating the liability of Comblas under the truck agreement, whatever the weaknesses of clause 9 referred to later. However, there are two reasons why clause 3 is irrelevant here. The first is that clause 9 is the relevant clause, as the respondent took possession of the truck (whether voluntarily or involuntarily) and sold it, so it is too late for the respondent to claim under clause 3. The second is that the respondent did not exercise the option referred to in clause 3 as can be seen from the default notice documents in evidence. They are:-

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Exhibit P4: This is T. Act Sixth Schedule Notice (T. Act 27) dated November 16 1975 - an irrelevant notice since T. Act is not incorporated. In any event, it is not a Clause 3 demand for payment of the whole sum but merely a demand for payment of 3 monthly instalments. Finally, it does not purport to exercise the option.

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Exhibit P5: This is a demand for delivery dated November 25 1976 of the goods "of which the Company is owner under a hire-purchase agreement" (sic). Again there is no claim for payment of the full amount or for any amount due under clause 3 and no reference to the exercise of the option.

Exhibit P3: This is a Notice of Intention to Exercise Power of Sale under RPM dated July 25 1977 and addressed to Mr. and Mrs. Comblas, mentioning \$40,223.89 as payable. However, this notice was not given, nor does it purport to have been given, under clause 3. It is confined to an alleged default under RPM and requires payment of \$40,223.89 "secured by such", i.e. by RPM; in default, sale of the home. In any event, para. 19 of the defence admits that this notice is void.

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Exhibit D1: This is another notice of intention to exercise power of sale under the mortgage. It is dated January 16 1978. It recites many alleged "facts", including the sale of the truck for \$20,000, the balance of \$20,223.89 as due and owing, and default in the obligation to pay under the truck agreement. However, that is no more than an allegation, as the respondent had not previously exercised the option under clause 3. This notice proceeds to require both Mr. and Mrs. Comblas to pay \$16,000 allegedly due under RPM; in default, sale of the home. But the note at the foot thereof reads:-

"Note - This Notice is issued by the mortgagee without prejudice to the rights which the mortgagee has under the contract dated the 6th day of August 1976 for recovery of moneys owing pursuant to that contract by John Nicholas Comblas."

In other words, Exhibit D1 expressly disavows any intention to be a notice under clause 3.

The importance of written notice is emphasised in clause 2 (e) which reads:-

"(e) no time or other indulgence granted to the mortgagor shall operate as a waiver of the Mortgagee's rights (save to the extent indicated by the Mortgagee in writing) in respect of any continuing recurring or subsequent breach by the Mortgagor."

As I said, if Comblas has any obligation to pay under the covenants in the truck agreement, it must arise under clause 9, now that the truck has been sold.

Returning again to the clauses of the truck agreement, clause 4 makes one reference to the T. Act which is here irrelevant, and clause 6 makes two such references.

Clause 9 reads:-

"Where the Mortgagee has taken possession of the Goods comprised in this security or where the Mortgagor has returned the Goods

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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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As I said, this is the only covenant under
which Comblas' obligations under the terms of the
truck agreement can arise in the circumstances.
At the trial, an important issue of fact was whether
the truck had been returned voluntarily or whether
the respondent took possession of it within the
meaning of T. Act 27. Wells J. resolved the
question in favour of the respondent but gave no
reasons therefor. This finding was contested on
appeal. It is not necessary to decide the question 20.
as T. Act does not apply. Suffice it to say that
it is not altogether clear that Mr. Comblas did return
the truck voluntarily. It was important for him
as a consumer to have some say, even control, in
relation to the re-sale of the truck so as to reduce
the amount of any deficiency. Clear statement of
rights in the truck agreement covering this crucial
point of their legal relations was imperative. It
was most important for the appellants that they
should know their rights and obligations upon default, 30
and in particular to know whether they had any
of the protection under T. Act. In clause 9,
the qualifying phrase "subject to the provisions
of Part III of the said Act" may on the one hand
be read "softly" so as to gloss over and
eliminate the qualification "subject etc." where
appropriate, thus leaving untouched the rest of
the passage - "the right....to recover from the
mortgagor as a debt...." On the other hand,
that same qualifying phrase can be read "firmly" 40
so as to carry the same weight as the words which
precede it and follow it, thus qualifying the
very right to recover any amount as a debt. It is
clear enough, however, that it is intended to be
read firmly as qualifying the very calculation of
the debt because of the words which follow the
word "debt". That is to say, the "debt" is said
to be "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 50
meaning of Section 29 of the said Act".

Without reference to T. Act 29, it is impossible to calculate the amount of the debt. Yet clause 12, to which I now turn, forbids reference to T. Act 29 in the circumstances of this case.

Clause 12 here:-

"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."

I have held that "solely by operation of" T. Act, T. Act does not apply to the truck agreement. Applying clause 12 to the final part of clause 9, it will be seen that clause 12 requires that all references to T. Act in clause 9 are to be ignored in the interpretation of clause 9.

When all references to T. Act are excised from clause 9, there is little (if any) meaning left. It is meaningless to say as clause 9 now says - "The Mortgagee shall have the right... to recover as a debt the amount...." And it is just as meaningless to say that "the mortgagee shall have the right to recover as a debt....". "Amount" in the first instance, and "debt" in the second instance, is necessarily followed by silence. The words "the amount" following the word "debt" belong to the passage referring to T. Act. Clause 12 requires excision of the words "the amount" and all the words that follow.

How, then is "the debt" under clause 9 to be calculated? And is there any relationship between "the debt" in clause 9 and the "whole of the moneys.....immediately due and payable" in clause 3 which might allow in the C. Act 43 calculation mentioned in clause 3 as an aid to the respondent's right to sue for a debt?

In the events which happened, there was a stage when the respondent could have exercised the clause 3 option by notice in writing and demanded the whole of the moneys, which would then have been immediately due and payable, without waiting for the sale of the truck as security. The respondent could have issued a writ immediately. The only qualification on the whole amount being due and

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payable was that the amount due was "subject to C. Act 43", which requires adjustment of the credit charges only. Unlike T. Act 29, which applies when goods are involved and which allows for adjustments of insurance and other charges on taking possession, C. Act 43 confines its adjustments to credit charges rebates. I do not pause to consider whether C. Act 43 is really appropriate in the circumstances of this case. If it is, all that it does, as an incorporated calculation into clause 3, is to permit a C. Act 43 calculation for clause 3 purposes. 10

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But clause 3 (and hence the C. Act 43 calculation) was not availed of, there being no evidence of any written notice of exercise of the option in clause 3 to demand the "whole amount...". At this point, it is important to bear in mind the distinction between, on the one hand, the "whole of the moneys" which are immediately due under clause 3 and recoverable in an action for the balance outstanding 20- irrespective of recovery of the goods or sale thereof or ascertainment of any net deficiency and, on the other, the "debt" or "amount" due and recoverable under clause 9, which is the nett amount recoverable in an action after physical recovery of the goods, sale of the recovered goods, and ascertainment of the net deficiency by deducting the sale price from the (duly rebated) amount outstanding. Having elected to proceed to take possession or accept possession under clause 9, the respondent is forced to rely upon clause 30 9 or some other contractual term or some duly incorporated method for the calculation of the debt due after possession has been taken, whether voluntarily or involuntarily. The figure is not to be plucked out of the air or invented by the court. The calculation of the "debt" being "the amount" etc. was and is a vital matter for Mr. Comblas (and for Mrs. Comblas) quite apart from the provisions of consumer protection legislation.

It is not necessary to labour the point that the 40 contra proferentem rule applies to the truck agreement; that is, ordinary principles of construction require that it must be read strictly against the respondent who proffered it to the appellants.

But when it is remembered that, in addition to the contra proferentem rule, Mr. Comblas was and is entitled to the benefit of the disclosure requirements of C. Act 40 as to the full and clear setting out of the terms and conditions upon which the credit was provided, including the terms and conditions of the security 50 taken, which includes the consequences of default, it

was imperative that the respondent should spell out clearly in the contractual document the method of calculation. Instead, it has set out a clause which, in the circumstances, becomes the meaningless clause 9. There is nothing wrong with clause 9 in itself when T. Act applies or perhaps when there are no goods involved. It only becomes meaningless through mis-use of the document in these particular circumstances.

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10 What are the consequences of the lack of calculation? I propose to look first at the common law position and then at the effect of the provisions of C. Act 40 thereon. If the debt recovery provision in clause 9 has become, by reason of common law principles of construction, unenforceable as incalculable in the events which have happened, the respondent might have some other cause of action against Mr. Comblas but that possibility would not prevent this relief being granted to Mrs. Comblas or for that matter, to Mr. Comblas.

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If there is some other cause of action against Mr. Comblas, there still remains the inescapable applicability of the C. Act to the truck agreement.

The Court does not construe the document in a vacuum, but in its factual and legal context. Part of the legal context here is that C. Act governs the contractual relationship between the respondent and Mr. Comblas under the truck agreement. C. Act 40 requires full and clear disclosure of all the terms and conditions of the loan and the security. The credit provider must "set out" in the credit contract, the terms and conditions upon which the credit is provided. I adopt without repeating here what I said as Chairman of the Credit Tribunal in General Motors Acceptance Corporation Inquiry reported in C.C.H. Australia Consumer Sales and Credit Law Reporter para. 55-003, pages 56,121 to 56,128, concerning the Act's requirement that all of the security terms and conditions must be clearly and unambiguously set out in the credit contract.

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The usual method is attachment of the security terms and conditions to the credit contract, as here. When one vital clause is struck out of the attached document, however, a real problem arises as to the effect of the striking out on the whole contract.

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One important term or condition of security to which C. Act 40 refers is the consequence of default, and if more than one consequence, the respective consequences in the respective circumstances. Here, the respondent set out to protect its rights upon default at the two main stages. It is not possible, in my view, to use the calculation applicable at one stage as an aid to calculation at another stage on the basis that near enough is good enough. The Acts themselves provide different statutory calculations (C. Act 43 & 5: T. Act 29 & 5) for the respective stages of default and the respective circumstances to which they apply. C. Act 43 and C. Act 5 definition of "statutory rebate" together contain the calculation of rebate of credit charges only which is appropriate to those circumstances where there is a loan of money without goods being involved or where the money only is to be claimed, the goods being left with the consumer. That did not happen here and is inappropriate. On the other hand, T. Act 29 and T. Act 5 definition of "statutory rebate" have a different set of calculations appropriate to the case where goods are taken back and sold, the statutory provisions gathering into the calculation a host of considerations on both sides of the ledger, some on the credit side giving to the consumer the benefit of any rebates relating not only to credit charges but also to insurance and maintenance in accordance with the more elaborate T. Act 5 definition of "statutory rebate" as well as the value (best price) of the goods (the onus being on the respondent) or the cash amount which an introduced person might have offered under T. Act 29 (1) (a) (ii), whichever is the greater; and allowing, on the debit side, a number of guarded deductions against the consumer for the costs of taking possession, storage and selling the goods.

In this case, it might be argued that there were no maintenance or insurance charges to be rebated, so that the credit-charge-only calculation in C. Act 43 is appropriate. The answer to that argument is this. After deletion of T. Act references from clause 9, there is no clause which says that, in these circumstances, there is to be any rebate of credit charges at all. That is to say, in the absence of any statutory requirement as to rebate of credit charges, why should not the respondent demand the whole of the principal and credit charges without rebate? A case might be made out for this because so much time has gone by and so much has accrued by way of credit charges. However, the overall intention of the agreement seems to be that there was to be a rebate. If so, at what rate? There are various kinds of rebates and actuarial calculations. And the subject matter of credit charges

is further complicated by the fact that the right to any credit charges may have been forfeited by reason of non-compliance with C. Act 40 (1).

Where, as here, T. Act does not apply and C. Act 43 is inappropriate, what other yardstick is there for calculation of the debt? I do not think that there is any yardstick.

There are a number of alternative possibilities, but no agreement as to which one. They include claiming all of the principal plus all of the credit charges without reduction or all the principal but none of the credit charges or all of the principal plus some of the credit charges but rebated cy-pres in accordance with C. Act 43 or T. Act 29 or some other actuarial method.

The Court is slow on the one hand to be a destroyer of bargains and on the other a creator of unagreed terms. This case is a far cry from cases like Hillas v. Arcos (1932) All ER 494 where businessmen on equal terms may have gaps in their bargains filled out by the law. This case is more like Whitlock v. Brew (1968) 116 C.L.R. 445 where the High Court considered the effect of an important term being too uncertain.

In that case, the uncertain clause provided:-

"Portion of the land sold is used for the sale of petroleum, oils and greases and petroleum products of the Shell Co. of Australia Limited. The purchaser covenants that he will immediately upon taking possession hereunder grant a lease of that portion of the land sold as is now used for the sale of the abovementioned products to the Shell Co. of Australia Limited upon terms that the said land leased as aforesaid be used by Shell or their sub-tenant or licensee for the sale of such products and upon such reasonable terms as commonly govern such a lease."

The High Court held that the clause concerning the grant of a lease was uncertain for it did not prescribe either the term of the lease or the rent. It was also held that, since the uncertain term was a material and inseverable part of the contract of sale, there was no concluded agreement between the parties.

Kitto J. said (p. 457):-

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"It is therefore clear on the face of the document that the parties had no intention of agreeing upon a sale which would entitle the purchaser to receive vacant possession without having to grant any lease to the Shell Co.; and it follows that to treat the 'contract' as binding though shorn of special condition 5 would be to turn the sale into a different sort of sale from that which the parties contemplated." 10

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Applying that reasoning to this case, I think that, if it had pointed out to the respondent just after the truck agreement was signed and just before the truck was handed over to Mr. Comblas how meaningless clause 9 was and that credit charges were in danger, the respondent would have insisted that the dealer should not hand over the truck to Mr. Comblas until the default rights were clearly stated and credit charges were secure. In a high risk business, default rights are vital, as are high credit charges. 20 In this case, no deposit was demanded of Mr. Comblas; he had no so-called "equity" in the truck. A large amount of money was involved. In lieu of a deposit, the additional security over the home was taken and liability under the guarantee and under RPM turned upon certainty of terms. I do not think that it could be disputed that the respondent would have wished to treat clause 9 as inseverable if, for example, Mr. Comblas had brought a suit for specific performance, requiring the respondent to hand over the truck in 30 the above circumstances in spite of the uncertainties arising from clause 9. If Mr. Comblas had contended in such hypothetical litigation that clause 9 was severable and that he ought to be allowed to take the truck regardless of clause 9 and liability for credit charges, I think that the respondent would have argued successfully that there was no agreement in existence without a meaningful clause 9 and that the bargain was different in kind from the bargain both parties had in mind because credit charges and clear 40 rights on taking possession were central to their respective rights and obligations, and those of the guarantor.

Kitto J. went on to say in that case (457):-

"Courts are of course anxious to hold parties to what they have agreed upon, but there can be no justification for holding them to something they have not agreed upon."

Taylor, Menzies and Owen JJ. said (p. 461):-

"It, therefore, becomes necessary to determine 50

whether the condition is severable from the rest of the provisions of the contract or whether the whole contract falls. On this point the learned judge of first instance after referring to the observations of Knox C.J. in Life Insurance Co. of Australia Ltd. v. Phillips (1925) 36 C.L.R. 60, and to Fitzgerald v. Masters (1956) 95 C.L.R. 420, held that the condition was of such a quality that it could be ignored. But those cases and Nicole Ltd. v. Simmonds (1953) 1 Q.B. 543, to which also he made a reference, are simply particular examples of conclusions reached by the application of a general principle. That general principle is stated by Knox C.J. in the first-mentioned case (1925) 36 C.L.R. at p. 72:-

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'When a contract contains a number of stipulations one of which is void for uncertainty, the question whether the whole contract is void depends on the intention of the parties to be gathered from the instrument as a whole. If the contract be divisible, the part which is void may be separated from the rest and does not affect its validity.'

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...Of course, cases may arise where a vague, uncertain or meaningless clause in a contract may simply be ignored. An elementary example of this is to be found in the last clause on p. 2 of the contract in this case. But special condition 5 does not fall into any such category; nor can it be said to be a clause inserted solely for the benefit of one of the parties and capable of being waived by him. It is, in a sense, definitive of the ultimate rights which it is contemplated the purchaser is to get under his contract."

40

In this case also, it can be said that clause 9 was definitive of the obligations of Mr. Comblas upon default and as to credit charge liability by reason of C. Act 40 (1) whether or not there was default and of Mrs. Comblas' liability as to both aspects. Without credit charges and clause 9 and a calculation on default it is quite a different bargain.

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I have looked at a number of other cases such as Fitzgerald v. Masters (1956) 95 C.L.R. 420, Brooks v. Burns Philp Trustees (1969) 121 C.L.R. 432 especially at p. 442 per Taylor J. and Laybutt v.

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Amoco Australia Pty. Ltd. (1974) 132 C.L.R. 57 especially at 81 per Gibbs J. The statement of the general principle is the same, but the application is different in each case. Perhaps I could usefully cite the following passage from Stimson v. Gray (1929) 1 Ch. 629 cited with approval but distinguished on the facts by Dixon C.J. and Fullagar J. in Fitzgerald v. Masters (supra) at 428:-

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"In that case Maughan J. said:- '..... 10
if the Court is unable to determine all the material terms of the alleged contract, either by interpretation of the language used, or by holding that the missing details are such as the law will supply, I do not think it is possible to say that there is a binding contract. In the present case, with every wish to assist the plaintiff, I cannot escape from the conclusion that the reservations, exceptions, restrictions, 20
stipulations, and conditions referred to in condition 2 are material terms of the agreement which cannot be supplied by mere interpretation' (1929) 1 Ch. at p. 644. Here there is no difficulty whatever in giving full effect to what the parties have clearly agreed upon, the 'details', which clause 8 was supposed to provide, being 'such as the law will supply'." (emphasis mine) 30

In the present case, however, the law would not, in my view, be able to supply the missing covenant and calculation because the law included C. Act 40(1), which applied to the truck agreement and which expressly required the respondent to set out in the credit contract the terms and conditions upon which the credit had been provided; this the respondent failed to do in that the default clause and calculation was omitted. In view of the fact that C. Act 40 makes it an offence to omit terms and provides that all credit charges are irrecoverable, the law, far from supplying the "missing details", penalizes such non-disclosure of terms. The law could hardly, in the same breath as it were, both make good the defect, and penalize the defect, in the contract terms. 40

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. 50

Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties': May and Butcher Ltd. v. The King (1934) 2 K.B. 17, per Lord Dunedin, at p. 21."

10 The court should seek to apply the maxim verba ita sunt intelligenda ut res magis valeat quam pereat, but that does not mean that the court is to make a contract for the parties, or go outside the words that they have used, except in so far as there are implications of law: Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503, per Lord Wright, at p. 514.

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Applying those principles, I hold that clause 9 goes to the heart of the bargain between the parties. Not being severable, the whole contract is void.

20 In the alternative, I hold that, even if the rest of the agreement may stand without clause 9, in the events which have happened there is no method of calculating "the debt" and hence no default by Mr. Comblas under any relevant covenant. That being so, no obligation has arisen under Mrs. Comblas' guarantee of those covenants secured by RPM, nor under RPM at all, as RPM stands or falls with the enforceability of the covenants in the truck agreement.

30 It is too late now for any fresh notice under clause 3 or for any further claims to be made under the express terms of either document. Whatever other cause of action may be available to the respondent, it is my opinion that the appellants are entitled to the relief claimed.

40 I cannot part from the matter without observing that this is the type of case which should never have been the subject matter of prolonged or, indeed, any litigation. That it was so is not due to the legal advisers of the litigants, but rather to a combination of avoidable factors.

Mrs. Comblas should never have been put in the position of guarantor of this onerous obligation, which was foolishly onerous from her point of view. She is a Greek lady who reads no English and understands very little English or law. She said she "felt soft" towards her husband when he

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wanted to buy an expensive prime-mover for himself without any deposit, without any prior experience, and without even a licence to drive the combined prime-mover semi-trailer which was to be used in what can only be described as a hazardous enterprise with a rapidly deteriorating asset. A guarantee creates an onerous obligation in most circumstances, and a particularly onerous one here. The intention of the legislation (T. Act 44) is that persons should have independent legal advice before entering into guarantees within the scope of T. Act. It was purely fortuitous that she was outside the protection of T. Act while he was within the protection of C. Act. If she had been advised by virtue of T. Act 44, any responsible solicitor would have advised her not to put the roof over her head in jeopardy in support of such a venture.

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The necessity for her to consult a solicitor might also have brought Mr. Comblas himself into contact with a solicitor's advice through the advice and warnings which would undoubtedly have been given to her. Solicitors should not, and I am sure do not, take lightly their obligations to make inquiries as to the nature of the risk to a potential guarantor and to warn their clients adequately. Through the advice, to her, Mr. Comblas might then have been dissuaded from persisting with what looks very much like an irresponsible extension of credit. I say this because the evidence discloses that Mr. Comblas did not even have a licence to drive the expensive prime-mover semi-trailer; he had to employ some-one else to drive it for him. Even if he had paid a deposit, the necessity to employ a driver was itself a financial drain upon the small enterprise. The prime-mover broke down repeatedly within the first few months for undisclosed reasons. It is small wonder that he was unable to pay any instalments. If he had consulted a solicitor or an accountant, he would probably have been advised not to persist with the venture, and certainly not to mortgage his home nor ask his wife to do so.

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When T. Act was drafted in 1971 and passed in 1972, the limit of \$20,000 was probably high enough to cover the amount of any loans likely to be advanced upon the security of the homes of the vast majority of the population. The small percentage of persons likely to seek larger loans may have been presumed to be wise enough and to have sufficient money to consult a solicitor. Whatever the reason for the \$20,000 limit, most homes

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would have been covered by the \$20,000 limit having regard to money values in 1971-2. The eroding effect of inflation has halved the protection envisaged by T. Act 44. It seems to me that the aim of T. Act 44 would best be achieved if the limit were to be raised to \$40,000 and thereafter were to keep pace annually with inflation, or if the limit were to be removed altogether.

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10 Returning to this case, a land-broker
drafted RPM on instructions from the respondent.
Any solicitor instructed to draw up RPM would
be likely to perceive the dual nature of the
document and the direct conflict of interest
between Mr. and Mrs. Comblas. In this case,
such solicitor would not have been under any
duty to Mrs Comblas to see that she received
independent legal advice (being solicitor for
the respondent) but he would probably have
20 perceived the difficulties inherent in the
truck agreement for his own client. In any event
he would hardly have drafted RPM in its present
form, which failed to distinguish between the
respective legal positions of Mr. and Mrs.
Comblas, which assumed that Mr. Comblas could
legally guarantee his own obligations, which
showed no consideration moving from Mrs. Comblas,
and which annexed only about nine-tenths of
the truck agreement to RPM in possible breach of
30 C. Act 40 (1).

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 Wells J. said that he viewed with
"profound distaste" the practice of using a clause
like clause 12 in such circumstances. I agree
that clause 12 is an undesirable solution to the
difficulty created by the applicability of C. Act
and the non-applicability of T. Act, especially
in view of the fact that the purpose of C. Act is
full and clear disclosure to consumers of their
liabilities (the "truth-in-lending" objective). The
40 difficulties in this case did not so much arise
from the document itself, as from the inappropriate
use of the document in the circumstances of the
transaction. Nevertheless, there was potential
for confusion from clause 12 in a case such as
this. This kind of confusion could have been
avoided by adopting the practice of using different
types of document for the different types of
transaction, even coloured differently to assist
staff, certainly headed differently to avoid mis-
50 statement of the nature of the contract. I say
this because the heading across the top of the

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truck agreement is inappropriate and misleading; it proclaims in bold print the message that it is a "CREDIT CONTRACT - CONSUMER MORTGAGE". It is true to say that it is a credit contract; it is not true to say that it is a consumer mortgage. It may have been fair practice at one time to describe documents by any name, however incorrect. However, C. Act and T. Act are inextricably related truth-in-lending and truth-in-selling measures, and they cover much of the same field as Part V of the Trade Practices Act 1974 (Cth). Not only do T. Act and C. Act cross-refer in their definitions, but they are bound inevitably together, like Siamese twins. Since C. Act applies to this transaction, a consumer entitled to the protection of C. Act could be excused for assuming, on receiving a document headed "CREDIT CONTRACT - CONSUMER MORTGAGE", that this was both a credit contract and a consumer mortgage and that the protection of both Acts applied to it. His advisers might also be excused for assuming this. The later references to T. Act in the body of the agreement would only tend to confirm the impression given by the hearing while actual delivery of the T. Act Sixth Schedule would tend to imbed that impression even further. Against that background, clause 12 near the bottom of the back surface of page 1 of the truck agreement purports to put a consumer, entitled to the C. Act's disclosure protection, on notice that, in the interpretation of the document, all references to T. Act will be ignored if he can work out the fact that T. Act does not apply by force of its provisions. Whether use of such a document in these circumstances is conduct likely to mislead or deceive within the meaning of section 52 of the Trade Practices Act, a matter raised during the course of argument, does not fall for decision, because the obligations arising under the terms of the truck agreement are unenforceable for other reasons.

I would allow the appeal and declare, pursuant to clause 4 of the prayer for relief, that the respondent is not entitled to recover any moneys from the appellants or either of them pursuant to the express terms of the agreement between the male appellant and the respondent dated August 6 1976 or pursuant to Memorandum of Mortgage Registered No. 3929270 dated August 12 1976, and that the respondent should deliver to the appellants a discharge of the said Mortgage in registrable form together with Certificate of Title Register Book Volume 3876 Folio 17,

Until that is done, I would, pursuant to clause 2 of the prayer for relief, restrain the respondent, its servants and agents from selling or otherwise disposing of or dealing with the land described in the said Certificate of Title.

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No. 10

FORMAL JUDGMENT OF THE FULL COURT
ALLOWING THE APPEAL
DATED THE 21ST DAY OF NOVEMBER 1979

No. 10
Formal Judgment of the Full Court allowing the Appeal dated the 21st day of November 1979

BEFORE THE HONOURABLE THE CHIEF JUSTICE
(MR. JUSTICE KING)
THE HONOURABLE MR. JUSTICE WHITE AND THE
HONOURABLE MR. JUSTICE WALTERS
WEDNESDAY THE 21ST DAY OF NOVEMBER 1979

21st November
1979

THIS APPEAL by the abovenamed plaintiffs from the judgment of the Honourable Mr. Justice Wells given and pronounced on the 21st day of February 1979 coming on for hearing on the 11th, 12th and 16th days of October 1979 UPON READING the Notice of Appeal herein dated the 7th day of March 1979 AND UPON HEARING Mr. Angel of counsel for the plaintiffs and Mr. R.M. Lunn of counsel for the defendant THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day THIS COURT DOTH ORDER that the said appeal be allowed and that the said judgment of the Honourable Mr. Justice Wells be set aside AND THIS COURT DOTH DECLARE that the defendant is not entitled to recover any moneys from the plaintiffs or either of them pursuant to the express terms of the agreement between the male plaintiff and the defendant dated the 6th day of August 1976 or pursuant to Memorandum of Mortgage registered number 3929270 dated the 12th day of August 1976

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AND DOTH ORDER the same accordingly AND IT IS
FURTHER ORDERED:

1. That the defendant deliver to the plaintiffs a discharge of the said mortgage in registerable form and take all steps necessary to enable the discharge to be effected.
2. That until the discharge of the said mortgage is effected the defendant be restrained and an injunction is hereby granted restraining it whether by itself its servants or agents from selling or otherwise disposing of or dealing with the land comprised and described in Certificate of Title register book volume 3876 folio 17.
3. That the defendant pay to the plaintiffs their costs of action including the costs of this appeal to be taxed.

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BY THE COURT

G.E. Gregor (sgd)

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CHIEF CLERK

THIS JUDGMENT is filed by NICHOLAS NIARCHOS of 27 Leigh Street, Adelaide. Solicitor for the Appellants.

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Order of the
Full Court
Granting
Final Leave
to Appeal to
Her Majesty
in Council
dated the
15th day of
February
1980

15th February
1980

ORDER OF THE FULL COURT
GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

BEFORE THE HONOURABLE THE CHIEF JUSTICE
(MR. JUSTICE KING)

THE HONOURABLE MR. JUSTICE WELLS AND
THE HONOURABLE MR. JUSTICE SANGSTER
FRIDAY THE 15TH DAY OF FEBRUARY 1980

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UPON MOTION made unto this Court this day on behalf

of the abovenamed plaintiff for final leave to appeal to Her Majesty in Council from the judgment herein of the Full Court dated the 21st day of November 1979 pursuant to Notice of Motion dated the 12th day of December 1979 AND UPON HEARING Mr. Williams Q.C. and Mr. R.M. Lunn of Counsel for the defendant and Mr. Angel of Counsel for the plaintiffs AND this Court being satisfied that the condition upon which conditional leave to appeal was granted by Order dated the 14th day of February 1980 has been complied with THIS COURT DOTH ORDER:

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1. That the defendant be and is hereby granted final leave to appeal to Her Majesty in Council.

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2. That the execution and carrying into effect of the Orders of the Full Court made herein on the 21st day of November 1979 be and the same are hereby suspended pending the final determination of the defendant's appeal to Her Majesty in Council.

BY THE COURT

R.E. Gregor (sgd)

CHIEF CLERK

No. 11
Order of the
Full Court
Granting
Final Leave
to Appeal to
Her Majesty
in Council
dated the 15th
day of February
1980

15th February
1980.
(continued)

THIS ORDER was filed by LAMBERT & SOLOMON of 27
Gilbert Street, Adelaide, S.A. 5000 Solicitors
for the Defendant.

Exhibit "P1"
(Respondents)
Copy of
Document
Entitled
"Credit
Contract-
Consumer
Mortgage"
dated the
6th day of
August 1976

6th August
1976

EXHIBIT "P1" (RESPONDENTS)

COPY OF DOCUMENT ENTITLED

"CREDIT CONTRACT-CONSUMER MORTGAGE"

DATED THE 6TH DAY OF AUGUST 1976

Exhibit "P1"
(Respondents)
Copy of Document
Entitled
"Credit
Contract-
Consumer
Mortgage"
dated the
6th day of
August 1976

6th August
1976
(continued)

Item	-001- 50C 19283-6		The Schedule		ORIGINAL		
A.	NAME, ADDRESS AND OCCUPATION OF MORTGAGOR(S)						
	(1)	COMBLAS	JOHN NICHOLAS.				
(2)		Block Letters	Surname	Christian Names			
	(1)	35 QUEENS STREET,	ALBERTON	S.A.	5014.		
(2)		Residential Address	Post Code	Occupation			
B.	Credit Provider — Mortgagee	MERCANTILE CREDITS LIMITED, INCORPORATED IN NEW SOUTH WALES					
	Authorized Address	1st Floor, Mercantile Credits Building, 366 King William Street, Adelaide.					
C.	THE GOODS	New - Used:	ONE ONLY 1971 MACK PRIME MOVER.				
	Model:		ENGINE NUMBER:	T673C4X0463.	REG. NUMBER:	RIH-446.	
				Serial or Engine No.			
D.	PURCHASE DETAILS — Purchased from (Vendor) O.G.R. Distributors, on / /						
	Cash Price (inc. I.T.A.S.)	\$ 37,581.00					
	Add Registration (inc. 3rd Party Ins.)	\$ -					
	Delivery Charge	\$ -					
	Other	\$ -					
	Less Cash Deposit	\$ -					
	Trade-in (Value)	\$ -					
			Balance	\$ 37,581.00			
E.	Goods Insurance (comprehensive)	\$ -					
F.	ITEMIZED STATEMENT						
	Mortgage Stamp Duty	\$ -					
	Title Insurance Charge	\$ -					
				\$ -	Total E. & F.		
				\$ 37,581.00	Principal		
				\$ 19,542.36	Add Credit Charge		
				\$ 57,123.36	Total Payable		
G.	Amount of Principal	\$ 37,581.00	Item H.	Total Credit Charge	\$ 19,542.36	Item I.	Credit Charge Rate 22.30 % P.A.
J.	INSTALMENTS 48 Instalments of \$ 190.07 each, the first of which is payable on 6 / 9 / 1976 and then at monthly (or) intervals thereafter and by Instalments of \$ - each, the first of which is payable on - / - / - and then at monthly (or) intervals thereafter, or by one instalment of \$ - on - / - / - one instalment of \$ - on - / - / - one instalment of \$ - on - / - / -						
K.	Name of Payee(s)	1. (Supplier) O.G.R. DISTRIBUTORS.				\$ 13,000.00	
	of Principal and	2. MERCANTILE CREDITS LIMITED - 50C 18965/2.				\$ 24,581.00	
	Amount	3.				\$ -	
L.	Situation of Goods	35 Queens Street, Alberton, S.A. 5014				Total	\$ 37,581.00
M.	STATEMENT OF PERSONAL PARTICULARS BY THE MORTGAGOR(S)						
	My Full Name and Address are correctly stated above.						
	Date of Birth is	/ /	and I am Married/Single/Divorced/Separated.		Drivers Licence No.	Expiring on / /	
	I Own/am Buying my Home/Farm - value \$		Mortgaged with		for \$		
	I am Renting my Home/Boarding - Name and Address of Landlord						
	I have lived at current address for		months/years.	Telephone No. - Private	Bus.		
	My previous address was				for	months/years	
	I am employed by		of			for	months/years
	I was previously employed by		of			for	months/years
	My net 4 weekly/monthly "take home" pay is \$		I have		dependants.		
	My wife's/husband's name is				Occupation		
	She/he is employed by				for	months/years	
	My cheque/savings account is with				Branch		
	Business reference		of			Phone No.	
	Private reference		of			Phone No.	
	Nearest relative not living with me				Phone No.		
	Current/previous finance with (I)		of				
	(II)		of				
	I would wish to pay in cash/by bank order through				Branch		

APPROVED VENDOR: DUTY PAYABLE ON MONTHLY RETURN

Dated this 6th day of AUGUST 1976.
 Witness W.G. LANG (Sgd.) J.N. COMBLAS (Sgd.)
 Address 366 King William St. Adelaide. Mortgageor(s)
 Signed for and on behalf of the Mortgagee IAN H. GLOVER (Sgd.)
 PLEASE SEE OVER FOR IMPORTANT NOTICE

THIRTEENTH SCHEDULE

*Consumer Credit Act, 1972-1973 — Section 40 (5)*CREDIT CONTRACT (NOT BEING A SALE BY INSTALMENT) —
NOTICE TO CONSUMERTHE CONSUMER CREDIT ACT, 1972-1973 AND THE CONSUMER
TRANSACTIONS ACT, 1972-1973 AFFORD PROTECTION TO
CONSUMERS IN A NUMBER OF WAYS

10 1. THE DOCUMENTS:— You are entitled to receive this notice, a copy of your credit contract and notice of any variations thereof within 14 days of such contract or variations.

The credit contract itself must be printed in the prescribed printing size and signed by you. It must contain clear information about your financial obligations including (a) the amount of principal borrowed; (b) where and to whom you make repayments; (c) the number of instalments (if any) and the amount of each; (d) when instalments are payable; (e) the total amount of the credit charge to be paid; (f) details of other charges, like title insurance fee (if chattels), valuation fee (if real estate), permissible stamp duty, registration fees, legal costs and broker's charges; (g) the important matter of the rate at which the credit charge accrues upon the principal, that is to say, what interest you are paying.

20 2. WHERE THE SALE OF GOODS IS INVOLVED, IT IS POSSIBLE TO RESCIND (that is, cancel) your goods contract with your goods supplier within seven days of delivery of the goods (and - if the credit provider is linked with the supplier — your credit contract with your credit provider within the same time), if the goods do not comply with various compulsorily implied conditions required of the supplier as to (1) goods title (2) description and sample (3) merchantable quality and (4) fitness for the particular purpose made known to the supplier. "Goods" include new motor vehicles, but not second-hand ones, which are covered by the Second-hand Motor Vehicles Act, 1971.

30 3. DAMAGES may be obtained against both the supplier of goods or services and any linked credit provider for misrepresentation or breach of warranty.

4. TEMPORARY INABILITY TO MEET PAYMENTS and other obligations can be excused in genuine cases where something unexpected has happened. You should first see the credit provider about this but, if unsuccessful, the Department of Public and Consumer Affairs will assist in negotiations in proper cases. Requests for assistance should be made at the Consumer Services Branch of the Department of Public and Consumer Affairs, 21st Floor, Grenfell Centre, 25 Grenfell Street, Adelaide, telephone 217-0431 or at Regional Offices of the Department.

Where you are in default, your contract can be reinstated if you make good the default even after goods are repossessed.

40 5. INFORMATION ABOUT YOUR PAYMENTS and a copy of any documents signed by you must be given to you upon written request to the credit provider and payment of small fees. You can also direct that any payment made by you be credited to the account of your choice.

50 6. REPOSSESSION OF THE GOODS cannot be effected, generally speaking, even if you are in arrears, unless the credit provider gives you seven days notice of intention to repossess. Sale cannot be effected thereafter without a further written notice.

7. COMPOUND INTEREST is prohibited; simple interest may be charged on amounts in default.

8. HARSH TERMS AND EXCESSIVE INTEREST, although rarely encountered in responsible business dealings, may be avoided on application to the Courts or the Credit Tribunal. You should first consult the Department at the above address.

9. PROCUREMENT CHARGES are prohibited for arranging your credit with a licensed credit provider or any recognized lending institution.

60 10. WHERE THE CREDIT CONTRACT COMES TO AN END EARLIER THAN ORIGINALLY INTENDED (whether by agreement or by breach), the total credit charge must be reduced by rebating as set out in section 43 of The Consumer Credit Act.

11. INSURANCE. You are not obliged to insure with any particular company, agree to any unreasonable terms or premiums, nor submit to arbitration.

Exhibit "P1"
(Respondents)
Copy of
Document
Entitled
"Credit
Contract-
Consumer
Mortgage"
dated the
6th day of
August 1976

6th August
1976
(continued)

Supreme Court of S.A. Civil Jurisdiction Comblas v Mercantile Credits Exhibit P1 Return to Mr. Angel

Exhibit "P1"
(Respondents)

Credit Contract – Consumer Mortgage

Copy of Document Entitled "Credit Contract-Consumer Mortgage dated the 6th day of August 1976

6th August 1976
(continued)

The party named and described in Item A of the Schedule hereto (hereinafter if a natural person with his executors administrators and assigns and if a corporation with its successors and assigns called "the Mortgagor") IN CONSIDERATION of the loan of the amount of the principal set out in Item G of the Schedule as "Amount of Principal" (hereinafter called "the principal sum") 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 named and described in Item B of the Schedule (hereinafter with its successors and assigns called "the Mortgagee") HEREBY TRANSFERS ASSIGNS AND SETS OVER unto the Mortgagee all and singular the personal chattels described in Item C of the Schedule which personal chattels are now situated at and usually kept at the premises described in Item L of the Schedule (hereinafter called "the said premises") 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 or personal chattels acquired in substitution for or replacement of the said personal chattels and all the right title interest claim and demand of the Mortgagor to the same to have hold take and receive the same and the additions substitutions and replacements hereby assigned (all of which are hereinafter comprised in and referred to under the designation "the Goods") 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 set out in Item H of the Schedule by the instalments and at the times and in the manner set out in Item J of the Schedule and shall duly pay all other moneys becoming payable to the Mortgagee hereunder then these presents shall become void.

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IT IS HEREBY EXPRESSLY PROVIDED AND PARTICULAR ATTENTION IS DRAWN TO THE FACT THAT THE MORTGAGOR UNDERTAKES A 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.

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An itemized statement pursuant to Section 40 (1) (b) (v) of the Consumer Credit Act 1972 as amended of any amounts paid or payable by the Mortgagor is set out in Item F of the Schedule.

For the purposes of Section 40 (1) of the Consumer Credit Act 1972 as amended the rate at which the credit charge accrues upon the principal sum is set out in Item I of the Schedule.

The Mortgagor authorizes and directs the Mortgagee to pay the principal sum to the payee(s) set out in Item K of the Schedule and to the person(s) entitled to payment of the amount(s) set out in Item F of the Schedule and the receipt of such payee(s) or person(s) entitled to payment for such payment shall for all purposes be evidence of such payment.

The Mortgagor warrants the correctness and truth of the particulars contained in Items D and M of the Schedule.

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 Mortgagee simple interest on that sum from the date of default until the sum is paid at the rate of interest set out in Item I of the Schedule.

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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. Signed by the Mortgagor(s) in the presence of:—

(Witness) W.G. LANG (Sgd.) J.N. COMBLAS (Sgd.)
(Mortgagor's signature)

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(Address) 366 King William Street, Adelaide.
(Mortgagor's signature)

Signed for and on behalf of the Mortgagee IAN H. GLOVER (Sgd.)

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 at the authorised address of the Mortgagee set out in Item B of the Schedule or at such other address in South Australia as the Mortgagee may from time to time stipulate in writing to the Mortgagor. (b) to keep the Goods in good order and repair PROVIDED THAT the Mortgagor shall have no right to create any lien over the Goods or to pledge the credit of the Mortgagee and the Mortgagor shall give notice of this provision to any workman before such workman does any work upon the Goods. (c) to insure the Goods and at all times during this Mortgage to keep them insured with an insurer approved by the Mortgagee under an enforceable policy not subject to being defeated or avoided by reason of any non-disclosure misrepresentation or breach of warranty in the name of the Mortgagee as mortgagee and in the name of the Mortgagor as mortgagor for an amount equal to the full insurable value against fire accident and theft and such other risks as the Mortgagee may require, such policy to be subject to such other terms and conditions and exceptions as the Mortgagee would require if the Mortgagee were arranging such insurance, and to pay all premiums payable and to produce proof of payment to the Mortgagee on or before the due date PROVIDED THAT the Mortgagee may pay to the Insurer on the Mortgagor's behalf any amount shown as "goods insurance" in Item E of the Schedule. (d) to prevent the Goods being at any time used kept or otherwise situated or dealt with in any manner which would if the Goods became stolen or damaged by fire or accident permit the Insurer to decline a claim whether under any condition or exclusion contained in the Policy or otherwise. (e) that the Mortgagee shall be entitled to receive all moneys payable to the Mortgagor under the relevant policy or by any other person in respect of damage to or loss of the Goods and the Mortgagor appoints the Mortgagee his attorney to recover and/or compromise in the Mortgagor's name any claim for loss or damage under the policy or otherwise and to give effectual releases and receipts for the same. (f) that the Mortgagee is authorized to appropriate any insurance or other moneys received by the Mortgagee in respect of loss or damage to the Goods towards payment of the moneys hereby secured. (g) to notify the Mortgagee in writing immediately following the loss of or damage to the Goods howsoever caused. (h) to comply with all requirements of the law relating to the Goods or their possession or use. (i) not to conceal the Goods nor to refuse to disclose their whereabouts nor to part with personal possession or control of the same without the consent in writing of the Mortgagee nor to alter them or any identifying number or mark. (j) not without the consent in writing of the Mortgagee to remove the Goods from the State of South Australia nor to authorize or instruct such removal. (k) to produce the Goods for inspection or test on request by the Mortgagee. (l) to indemnify the Mortgagee against all claims and costs whatsoever arising out of the use operation or keeping of the Goods or in any manner relating thereto.

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2. The Mortgagor further COVENANTS AND AGREES with the Mortgagee as follows: (a) prior to any change of address to notify the Mortgagee in writing of the Mortgagor's proposed new address. (b) that any notice or demand to be served on the Mortgagor hereunder may be signed by any manager or other person authorized by the Mortgagee and be served by delivering the same to the Mortgagor personally or by leaving the same at or posting the same in a pre-paid letter addressed to the Mortgagor at the Mortgagor's address stated in the Schedule or at the Mortgagor's address last known to the Mortgagee. Any such notice or demand posted as aforesaid shall be deemed to be served on the Mortgagor on the day following the day of such postage. In the case of there being more than one Mortgagor a notice or demand served upon one only shall be deemed served on both or all. (c) to repay to the Mortgagee on demand any moneys which the Mortgagee may see fit to pay to make good any failure by the Mortgagor to comply with any obligation of the Mortgagor hereunder and any other expense the Mortgagee may incur in consequence or arising out of default by the Mortgagor including any expense incurred by the Mortgagee in the exercise of its rights consequent on default. (d) the Mortgagee is hereby irrevocably authorized to use the Mortgagor's name and act on the Mortgagor's behalf in exercising any rights or instituting or carrying on or enforcing any legal proceeding which the Mortgagee may think desirable to protect its rights in the Goods. (e) no time or other indulgence granted to the Mortgagor shall operate as a waiver of the Mortgagee's rights (save to the extent indicated by the Mortgagee in writing) in respect of any continuing recurring or subsequent breach by the Mortgagor.

3. If the Mortgagor shall have made a false statement in a material particular in or in connection with this Credit Contract Consumer Mortgage or if (a) The Mortgagor shall make default in payment of any moneys payable hereunder and such default shall continue for 7 days; or (b) the Mortgagor shall commit any breach of the provisions of this Mortgage and shall not remedy such breach within 7 days of its commission; or (c) execution or distress is issued against the Mortgagor or the Mortgagor's goods; then and in any such event the whole of the moneys hereby secured or so much thereof as shall then remain unpaid shall (subject to Section 43 of the Consumer Credit Act 1972 as amended) at the option of the Mortgagee become immediately due payable and recoverable such option to be exercised by notice in writing signed and served in manner provided by Clause 2 hereof.

4. The Mortgagor agrees that the several covenants and powers set out in sub sections 1 to 7 (inclusive) of Section 11 of the Bills of Sale Act 1886 as amended shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the Mortgagee.

5. All future acquired property expressed to be assigned shall be included in this security and shall be subject to the powers, licences and covenants herein expressed or implied although the same may not be capable of passing at law by the assignment herebefore contained.

6. The Mortgagee may after exercising its powers of seizing the Goods in its discretion permit the Mortgagor (notwithstanding that the Mortgagor may not have complied with the provisions of Section 29 of the Consumer Transactions Act 1972 as amended entitling him to a return of the goods) to resume possession thereof and in that event the Mortgagor shall hold the Goods as a Mortgagor on and subject to the provisions of this mortgage as if seizure had not taken place but except in so far as the Mortgagee may expressly agree in writing or the Consumer Transactions Act 1972 as amended may otherwise provide the Mortgagee shall not by permitting the Mortgagor to resume possession be deemed to have waived any default by the Mortgagor or any other such event as is referred to in Clause 3 hereof.

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.

8. Any promissory note, negotiable instrument or bank order taken by the Mortgagee for any moneys secured hereby shall be regarded as collateral only and notwithstanding discount or negotiation shall not be deemed payment until met nor shall the Mortgagee's rights and powers be affected by any such receipt.

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.

10. (a) The Laws of the State of South Australia shall apply to this instrument. (b) Any proceedings in respect of any cause of action arising hereunder shall at the option of the Mortgagee be instituted heard and determined in a court of competent jurisdiction in Adelaide and such court shall possess territorial jurisdiction to hear and determine such proceedings. (c) Where there are two or more Mortgagors they shall be bound hereunder jointly and severally. The Mortgagee's rights may be exercised by its nominees or assigns. (d) For the purposes of the Bills of Sale Act 1886 as amended the Mortgagee and the Mortgagor shall be and shall be deemed to be the "grantee" and the "grantor" respectively.

11. For the consideration aforesaid the Mortgagor hereby appoints the Mortgagee and the Secretary of the Mortgagee and the Manager for the time being at Adelaide of the Mortgagee jointly and each of them severally (with power from time to time to appoint or remove a substitute or substitutes) as the Mortgagor's attorneys for the doing of all acts the execution of any further assurance or assurances in respect of the Goods and the taking of legal proceedings which the Mortgagee shall in its discretion require for perfecting its title to the Goods or further assuring them to the Mortgagee or for or in connection with the enforcement of any of the Mortgagee's rights or powers hereunder.

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.

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.

14. In this agreement any reference to the Consumer Credit Act 1972 as amended or the Consumer Transactions Act 1972 as amended shall include a reference to those Acts as amended from time to time.

Exhibit
"P1"
(Respondents)
Copy of
Document
Entitled
"Credit
Contract
Consumer
Mortgage
dated
the 6th
day of
August
1976

6th
August
1976
(continued)

Exhibit "D2"
(Appellant)
The Schedule
(green
sheet)
dated the
6th day of
August 1976

6th August
1976

EXHIBIT "D2" (APPELLANT)

THE SCHEDULE (GREEN SHEET)

DATED THE 6TH DAY OF AUGUST 1976

Exhibit
 "D2"
 (Appellant)
 The Schedule
 (green sheet)
 dated
 the 6th
 day of
 August
 1976
 6th
 August
 1976
 (continued)

Item	The Schedule				DEALERS COPY	
A.	NAME, ADDRESS AND OCCUPATION OF MORTGAGOR(S) (1) COMBLAS JOHN NICHOLAS. (2) _____ (1) Block Letters Surname Christian Names 35 QUEENS STREET ALBERTON. S.A. 5014. (2) _____ Residential Address Post Code Occupation					
B.	Credit Provider — Mortgagee MERCANTILE CREDITS LIMITED, INCORPORATED IN NEW SOUTH WALES Authorised Address 1st Floor, Mercantile Credits Building, 366 King William Street, Adelaide.					
C.	THE GOODS New - Used: ONE ONLY 1971 MACK PRIME MOVER. ENGINE NUMBER: T673C4X0463. REG. NUMBER: RIH-446. Model: _____ Serial or Engine No. _____					
D.	PURCHASE DETAILS — Purchased from (Vendor) O.G.R. Distributors. on ____ / ____ / ____ Cash Price (inc. Extras) \$ 37,581.00 Add Registration (inc. 3rd Party Ins.) \$ _____ Delivery Charge \$ _____ Other \$ _____ Less Cash Deposit \$ _____ Trade-in (Value) \$ _____ Balance \$ 37,581.00					
E.	Goods Insurance (comprehensive) \$ _____					
F.	ITEMIZED STATEMENT Mortgage Stamp Duty \$ _____ Title Insurance Charge \$ _____ \$ _____ Total E. & F. \$ 37,581.00 Principal \$ 19,542.36 Add Credit Charge \$ 57,123.36 Total Payable					
G.	Amount of Principal \$ 37,581.00		Item H. Total Credit Charge \$ 19,542.36		Item I. Credit Charge Rate 22.30 % P.A.	
J.	INSTALMENTS 48 Instalments of \$ 190.07 each, the first of which is payable on 6 / 9 / 1976 and then at monthly (or) _____ intervals thereafter and by _____ Instalments of \$ _____ each, the first of which is payable on ____ / ____ / ____ and then at monthly (or) _____ intervals thereafter, or by _____ one instalment of \$ _____ on ____ / ____ / ____ one instalment of \$ _____ on ____ / ____ / ____ one instalment of \$ _____ on ____ / ____ / ____					
K.	Name of Payee(s) 1. (Supplier) O.G.R. DISTRIBUTORS. \$ 13,000.00 of Principal and 2. MERCANTILE CREDITS LIMITED - 50C 18965/2. \$ 24,581.00 Amount 3. _____ \$ _____					
L.	Situation of Goods 35 Queens Street, Alberton. S.A. 5014					Total \$ 37,581.00
M.	STATEMENT OF PERSONAL PARTICULARS BY THE MORTGAGOR(S) My Full Name and Address are correctly stated above. Date of Birth is ____ / ____ / ____ and I am Married/Single/Divorced/Separated. Drivers Licence No. _____ Expiring on ____ / ____ / ____ I Own/am Buying my Home/Farm - value \$ _____ Mortgaged with _____ for \$ _____ I am Renting my Home/Boarding - Name and Address of Landlord _____ I have lived at current address for _____ months/years. Telephone No. - Private _____ Bus. _____ My previous address was _____ for _____ months/years I am employed by _____ of _____ for _____ months/years I was previously employed by _____ of _____ for _____ months/years My net 4 weekly/monthly "take home" pay is \$ _____ I have _____ dependants. My wife's/husband's name is _____ Occupation _____ She/he is employed by _____ for _____ months/years My cheque/savings account is with _____ Branch _____ Business reference _____ of _____ Phone No. _____ Private reference _____ of _____ Phone No. _____ Nearest relative not living with me _____ of _____ Phone No. _____ Current/previous finance with (I) _____ of _____ (II) _____ of _____ I would wish to pay in cash/by bank order through _____ Branch _____					

Dated this 6th day of AUGUST 1976.
 Witness W.G. LANG (Sgd.) J.N. COMBLAS (Sgd.)
 Address 366 King William St. Adelaide. Mortgageor(s)
 Signed for and on behalf of the Mortgagee IAN H. GLOVER (Sgd.)
 PLEASE SEE OVER FOR IMPORTANT NOTICE

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Exhibit "P2"
(Respondents)
Memorandum
of Mortgage
dated the
12th day of
August 1976

12th August
1976

EXHIBIT "P2" (RESPONDENTS)

MEMORANDUM OF MORTGAGE

DATED THE 12TH DAY OF AUGUST 1976

Item	- 001 - 50C19283-6		The Schedule		DUPLICATE
A.	NAME, ADDRESS AND OCCUPATION OF MORTGAGOR(S) P2 (1) <u>COMBLAS</u> JOHN NICHOLAS. (2) Block Letters Surname Christian Names (1) 35 QUEENS STREET, ALBERTON. S.A. 5014. (2) Residential Address Post Code Occupation				
B.	Credit Provider — Mortgagee MERCANTILE CREDITS LIMITED, (INCORPORATED IN NEW SOUTH WALES) Authorised Address 1st Floor, Mercantile Credits Building, 366 King William Street, Adelaide.				
C.	THE GOODS New - Used: ONE ONLY 1971 MACK PRIME MOVER. ENGINE NUMBER: T673C4X0463. REG. NUMBER: RIH-446. Model: Serial or Engine No.				
D.	PURCHASE DETAILS — Purchased from (Vendor) O.G.R. Distributors on / / Cash Price (inc. Extras) \$ 37,581.00 Add Registration (inc. 3rd Party Ins.) \$ Delivery Charge \$ Other \$ Less Cash Deposit \$ Trade-in (Value) \$ Balance \$ 37,581.00				
E.	Goods Insurance (comprehensive) \$				
F.	ITEMIZED STATEMENT Mortgage Stamp Duty \$ Title Insurance Charge \$ \$ Total E. & F. \$ 37,581.00 Principal \$ 19,542.36 Add Credit Charge \$ 57,123.36 Total Payable				
G.	Amount of Principal	\$ 37,581.00	Item H.	Total Credit Charge	\$ 19,542.36
			I.	Credit Charge Rate	22.30 % P.A.
J.	INSTALMENTS 48 Instalments of \$ 190.07 each, the first of which is payable on 6 / 9 / 1976 and then at monthly (or) intervals thereafter and by Instalments of \$ each, the first of which is payable on / / and then at monthly (or) intervals thereafter, or by one instalment of \$ on / / one instalment of \$ on / / one instalment of \$ on / /				
K.	Name of Payee(s) 1. (Supplier) O.G.R. DISTRIBUTORS \$ 13,000.00 of Principal and 2. MERCANTILE CREDITS LIMITED - 50C 18965/2. \$ 24,581.00 Amount 3. \$				
L.	Situation of Goods 35 Queens Street, Alberton. S.A. 5014				Total \$ 37,581.00
M.	STATEMENT OF PERSONAL PARTICULARS BY THE MORTGAGOR(S) My Full Name and Address are correctly stated above. Date of Birth is / / and I am Married/Single/Divorced/Separated Drivers Licence No. Expiring on / / for \$ I Own/am Buying my Home/Farm - value \$ Mortgaged with I am Renting my Home/Boarding - Name and Address of Landlord I have lived at current address for months/years. Telephone No. - Private Bus. My previous address was for months/years I am employed by of for months/years I was previously employed by of for months/years My net 4 weekly/monthly "take home" pay is \$ I have dependants. My wife's/husband's name is Occupation for months/years She/he is employed by Branch My cheque/savings account is with Branch Business reference of Phone No. Private reference of Phone No. Nearest relative not living with me of Phone No. Current/previous finance with (I) of (II) of I would wish to pay in cash/by bank order through Branch				

Exhibit "p2" (Respondents) Memorandum of Mortgage dated the 12th day of August 1976

12th August 1976 (continued)

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Dated this 6th day of AUGUST 19 76.
 Witness W.G. LANG (Sgd.) J.N. COMBLAS (Sgd.)
 Address 366 King William St. Adelaide. Mortgageor(s)
 Signed for and on behalf of the Mortgagee IAN H. GLOVER (Sgd.)
 PLEASE SEE OVER FOR IMPORTANT NOTICE

Exhibit "P2"
(Respondents)
Memorandum
of
Mortgage
dated the
12th day
of August
1976

12th
August
1976
(continued)

THIRTEENTH SCHEDULE
Consumer Credit Act, 1972-1973 — Section 40 (5)
CREDIT CONTRACT (NOT BEING A SALE BY INSTALMENT) —
NOTICE TO CONSUMER

THE CONSUMER CREDIT ACT, 1972-1973 AND THE CONSUMER
TRANSACTIONS ACT, 1972-1973 AFFORD PROTECTION TO
CONSUMERS IN A NUMBER OF WAYS

1. THE DOCUMENTS:— You are entitled to receive this notice, a
copy of your credit contract and notice of any variations thereof within 14
days of such contract or variations. 10

The credit contract itself must be printed in the prescribed printing size
and signed by you. It must contain clear information about your financial
obligations including (a) the amount of principal borrowed; (b) where and to
whom you make repayments; (c) the number of instalments (if any) and the
amount of each; (d) when instalments are payable; (e) the total amount of
the credit charge to be paid; (f) details of other charges, like title insurance
fee (if chattels), valuation fee (if real estate), permissible stamp duty, regis-
tration fees, legal costs and broker's charges; (g) the important matter of the
rate at which the credit charge accrues upon the principal, that is to say,
what interest you are paying. 20

2. WHERE THE SALE OF GOODS IS INVOLVED, IT IS POSSIBLE
TO RESCIND (that is, cancel) your goods contract with your goods supplier
within seven days of delivery of the goods (and — if the credit provider is
linked with the supplier — your credit contract with your credit provider within
the same time), if the goods do not comply with various compulsorily implied
conditions required of the supplier as to (1) goods title (2) description and
sample (3) merchantable quality and (4) fitness for the particular purpose
made known to the supplier. "Goods" include new motor vehicles, but not
second-hand ones, which are covered by the Second-hand Motor Vehicles
Act, 1971. 30

3. DAMAGES may be obtained against both the supplier of goods
or services and any linked credit provider for misrepresentation or breach
of warranty.

4. TEMPORARY INABILITY TO MEET PAYMENTS and other
obligations can be excused in genuine cases where something unexpected has
happened. You should first see the credit provider about this but, if
unsuccessful, the Department of Public and Consumer Affairs will assist in
negotiations in proper cases. Requests for assistance should be made at the
Consumer Services Branch of the Department of Public and Consumer
Affairs, 21st Floor, Grenfell Centre, 25 Grenfell Street, Adelaide, telephone
217-0431 or at Regional Offices of the Department. 40

Where you are in default, your contract can be reinstated if you make
good the default even after goods are repossessed.

5. INFORMATION ABOUT YOUR PAYMENTS and a copy of any
documents signed by you must be given to you upon written request to the
credit provider and payment of small fees. You can also direct that any
payment made by you be credited to the account of your choice.

6. REPOSSESSION OF THE GOODS cannot be effected, generally
speaking, even if you are in arrears, unless the credit provider gives you
seven days notice of intention to repossess. Sale cannot be effected thereafter
without a further written notice. 50

7. COMPOUND INTEREST is prohibited; simple interest may be
charged on amounts in default.

8. HARSH TERMS AND EXCESSIVE INTEREST, although rarely
encountered in responsible business dealings, may be avoided on applica-
tion to the Courts or the Credit Tribunal. You should first consult the
Department at the above address.

9. PROCUREMENT CHARGES are prohibited for arranging your
credit with a licensed credit provider or any recognized lending institution.

10. WHERE THE CREDIT CONTRACT COMES TO AN END
EARLIER THAN ORIGINALLY INTENDED (whether by agreement or
by breach), the total credit charge must be reduced by rebating as set out in
section 43 of The Consumer Credit Act. 60

11. INSURANCE. You are not obliged to insure with any particular
company, agree to any unreasonable terms or premiums, nor submit to
arbitration.

Credit Contract – Consumer Mortgage

The party named and described in Item A of the Schedule hereto (hereinafter if a natural person with his executors administrators and assigns and if a corporation with its successors and assigns called "the Mortgagor") IN CONSIDERATION of the loan of the amount of the principal set out in Item G of the Schedule as "Amount of Principal" (hereinafter called "the principal sum") 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 named and described in Item B of the Schedule (hereinafter with its successors and assigns called "the Mortgagee") HEREBY TRANSFERS ASSIGNS AND SETS OVER unto the Mortgagee all and singular the personal chattels described in Item C of the Schedule which personal chattels are now situated at and usually kept at the premises described in Item L of the Schedule (hereinafter called "the said premises") 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 or personal chattels acquired in substitution for or replacement of the said personal chattels and all the right title interest claim and demand of the Mortgagor to the same to have hold take and receive the same and the additions substitutions and replacements hereby assigned (all of which are hereinafter comprised in and referred to under the designation "the Goods") 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 set out in Item H of the Schedule by the instalments and at the times and in the manner set out in Item J of 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 A 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.

An itemized statement pursuant to Section 40 (1) (b) (v) of the Consumer Credit Act 1972 as amended of any amounts paid or payable by the Mortgagor is set out in Item F of the Schedule.

For the purposes of Section 40 (1) of the Consumer Credit Act 1972 as amended the rate at which the credit charge accrues upon the principal sum is set out in Item I of the Schedule.

The Mortgagor authorizes and directs the Mortgagee to pay the principal sum to the payee(s) set out in Item K of the Schedule and to the person(s) entitled to payment of the amount(s) set out in Item F of the Schedule and the receipt of such payee(s) or person(s) entitled to payment for such payment shall for all purposes be evidence of such payment.

The Mortgagor warrants the correctness and truth of the particulars contained in Items D and M of the Schedule.

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 Mortgagee simple interest on that sum from the date of default until the sum is paid at the rate of interest set out in Item I of the Schedule.

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. Signed by the Mortgagor(s) in the presence of:—

(Witness) W.G. LANG (Sgd.)

J.N. COMBLAS (Sgd.)
(Mortgagor's signature)

(Address) 366 King William Street, Adelaide.

(Mortgagor's signature)

Signed for and on behalf of the Mortgagee IAN H. GLOVER (Sgd.)

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 at the authorised address of the Mortgagee set out in Item B of the Schedule or at such other address in South Australia as the Mortgagee may from time to time stipulate in writing to the Mortgagor. (b) to keep the Goods in good order and repair PROVIDED THAT the Mortgagor shall have no right to create any lien over the Goods or to pledge the credit of the Mortgagee and the Mortgagor shall give notice of this provision to any workman before such workman does any work upon the Goods. (c) to insure the Goods and at all times during this Mortgage to keep them insured with an insurer approved by the Mortgagee under an enforceable policy not subject to being defeated or avoided by reason of any non-disclosure misrepresentation or breach of warranty in the name of the Mortgagee as mortgagee and in the name of the Mortgagor as mortgagor for an amount equal to the full insurable value against fire accident and theft and such other risks as the Mortgagee may require, such policy to be subject to such other terms and conditions and exceptions as the Mortgagee would require if the Mortgagee were arranging such insurance, and to pay all premiums payable and to produce proof of payment to the Mortgagee on or before the due date PROVIDED THAT the Mortgagee may pay to the Insurer on the Mortgagor's behalf any amount shown as "goods insurance" in Item E of the Schedule. (d) to prevent the Goods being at any time used kept or otherwise situated or dealt with in any manner which would if the Goods became stolen or damaged by fire or accident permit the Insurer to decline a claim whether under any condition or exclusion contained in the Policy or otherwise. (e) that the Mortgagee shall be entitled to receive all moneys payable to the Mortgagor under the relevant policy or by any other person in respect of damage to or loss of the Goods and the Mortgagor appoints the Mortgagee his attorney to recover and/or compromise in the Mortgagor's name any claim for loss or damage under the policy or otherwise and to give effectual releases and receipts for the same. (f) that the Mortgagee is authorized to appropriate any insurance or other moneys received by the Mortgagee in respect of loss or damage to the Goods towards payment of the moneys hereby secured. (g) to notify the Mortgagee in writing immediately following the loss of or damage to the Goods howsoever caused. (h) to comply with all requirements of the law relating to the Goods or their possession or use. (i) not to conceal the Goods nor to refuse to disclose their whereabouts nor to part with personal possession or control of the same without the consent in writing of the Mortgagee nor to alter them or any identifying number or mark. (j) not without the consent in writing of the Mortgagee to remove the Goods from the State of South Australia nor to authorize or instruct such removal. (k) to produce the Goods for inspection or test on request by the Mortgagee. (l) to indemnify the Mortgagee against all claims and costs whatsoever arising out of the use operation or keeping of the Goods or in any manner relating thereto.

Exhibit "P2"
(Respondents)
Memorandum
of
Mortgage
dated the
12th day
of August
1976

12th August
1976
(continued)

Exhibit
"P2"
(Respondents)
Memorandum of
Mortgage dated
the 12th day of
August 1976

12th
August
1976
{continued)

2. The Mortgagor further COVENANTS AND AGREES with the Mortgagee as follows: (a) prior to any change of address to notify the Mortgagee in writing of the Mortgagor's proposed new address. (b) that any notice or demand to be served on the Mortgagor hereunder may be signed by any manager or other person authorized by the Mortgagee and be served by delivering the same to the Mortgagor personally or by leaving the same at or posting the same in a pre-paid letter addressed to the Mortgagor at the Mortgagor's address stated in the Schedule or at the Mortgagor's address last known to the Mortgagee. Any such notice or demand posted as aforesaid shall be deemed to be served on the Mortgagor on the day following the day of such postage. In the case of there being more than one Mortgagor a notice or demand served upon one only shall be deemed served on both or all. (c) to repay to the Mortgagee on demand any moneys which the Mortgagee may see fit to pay to make good any failure by the Mortgagor to comply with any obligation of the Mortgagor hereunder and any other expense the Mortgagee may incur in consequence or arising out of default by the Mortgagor including any expense incurred by the Mortgagee in the exercise of its rights consequent on default. (d) the Mortgagee is hereby irrevocably authorized to use the Mortgagor's name and act on the Mortgagor's behalf in exercising any rights or instituting or carrying on or enforcing any legal proceeding which the Mortgagee may think desirable to protect its rights in the Goods. (e) no time or other indulgence granted to the Mortgagor shall operate as a waiver of the Mortgagee's rights (save to the extent indicated by the Mortgagee in writing) in respect of any continuing recurring or subsequent breach by the Mortgagor.
3. If the Mortgagor shall have made a false statement in a material particular in or in connection with this Credit Contract Consumer Mortgage or if (a) The Mortgagor shall make default in payment of any moneys payable hereunder and such default shall continue for 7 days; or (b) the Mortgagor shall commit any breach of the provisions of this Mortgage and shall not remedy such breach within 7 days of its commission; or (c) execution or distress is issued against the Mortgagor or the Mortgagor's goods; then and in any such event the whole of the moneys hereby secured or so much thereof as shall then remain unpaid shall (subject to Section 43 of the Consumer Credit Act 1972 as amended) at the option of the Mortgagee become immediately due payable and recoverable such option to be exercised by notice in writing signed and served in manner provided by Clause 2 hereof.
4. The Mortgagor agrees that the several covenants and powers set out in sub sections 1 to 7 (inclusive) of Section 11 of the Bills of Sale Act 1886 as amended shall (subject to the express provisions hereof and to the Consumer Transactions Act 1972 as amended) be implied herein in favour of the Mortgagee.
5. All future acquired property expressed to be assigned shall be included in this security and shall be subject to the powers, licenses and covenants herein expressed or implied although the same may not be capable of passing at law by the assignment herebefore contained.
6. The Mortgagee may after exercising its powers of seizing the Goods in its discretion permit the Mortgagor (notwithstanding that the Mortgagor may not have complied with the provisions of Section 29 of the Consumer Transactions Act 1972 as amended entitling him to a return of the goods) to resume possession thereof and in that event the Mortgagor shall hold the Goods as a Mortgagor on and subject to the provisions of this mortgage as if seizure had not taken place but except in so far as the Mortgagee may expressly agree in writing or the Consumer Transactions Act 1972 as amended may otherwise provide the Mortgagee shall not by permitting the Mortgagor to resume possession be deemed to have waived any default by the Mortgagor or any other such event as is referred to in Clause 3 hereof.
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.
8. Any promissory note, negotiable instrument or bank order taken by the Mortgagee for any moneys secured hereby shall be regarded as collateral only and notwithstanding discount or negotiation shall not be deemed payment until met nor shall the Mortgagee's rights and powers be affected by any such receipt.
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.
10. (a) The Laws of the State of South Australia shall apply to this instrument. (b) Any proceedings in respect of any cause of action arising hereunder shall at the option of the Mortgagee be instituted heard and determined in a court of competent jurisdiction in Adelaide and such court shall possess territorial jurisdiction to hear and determine such proceedings. (c) Where there are two or more Mortgagors they shall be bound hereunder jointly and severally. The Mortgagee's rights may be exercised by its nominees or assigns. (d) For the purposes of the Bills of Sale Act 1886 as amended the Mortgagee and the Mortgagor shall be and shall be deemed to be the "grantee" and the "grantor" respectively.
11. For the consideration aforesaid the Mortgagor hereby appoints the Mortgagee and the Secretary of the Mortgagee and the Manager for the time being at Adelaide of the Mortgagee jointly and each of them severally (with power from time to time to appoint or remove a substitute or substitutes) as the Mortgagor's attorneys for the doing of all acts the execution of any further assurance or assurances in respect of the Goods and the taking of legal proceedings which the Mortgagee shall in its discretion require for perfecting its title to the Goods or further assuring them to the Mortgagee or for or in connection with the enforcement of any of the Mortgagee's rights or powers hereunder.
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.
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.
14. In this agreement any reference to the Consumer Credit Act 1972 as amended or the Consumer Transactions Act 1972 as amended shall include a reference to those Acts as amended from time to time.

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Supreme Court of S.A.
Civil Jurisdiction
Comblas v Mercantile
Credits
Exhibit P2
Return to Mr. Angell

P2

SOUTH AUSTRALIA

MEMORANDUM OF MORTGAGE

Duty Stamp

Exhibit "P2"
(Respondents)
Memorandum
of Mortgage
dated the
12th day of
August 1976

12th August
1976
(continued)

We JOHN NICHOLAS COMBLAS of 35 Queen Street Alberton 5014 Truck Driver
formerly of 15 Victoria Street Albert Park 5014 Plant Operator and ARSINOI
COMBLAS his wife (hereinafter with their heirs executors administrators and
permitted assigns referred to as "the Mortgagor") being registered or
entitled to be registered as the proprietors of an estate in fee simple
subject however to such encumbrances liens and interests as are notified by
memorandum underwritten or endorsed hereon in the whole of the land comprised
in Certificate of Title Register book

VOLUME 3876 FOLIO 17

SUBJECT to Mortgage No. 3815718

In consideration of their desire to render the said land available as
additional security but only to the extent of SIXTEEN THOUSAND DOLLARS
(\$16,000.00) to Mercantile Credits Limited of 360 King William Street
Adelaide 5000 (hereinafter referred to as "the Mortgagee") which expression
when hereinafter used shall include its successors and assigns wherever the
context shall so require or admit for the payment of the instalments secured
by and the performance of the covenants contained in a certain Consumer Mort-
gage 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:-

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

PROVIDED always and it is hereby expressly agreed and declared that the
covenants provisos powers rights privileges and authorities conferred by
"The Real Property Act 1886 - as amended" and implied in Mortgages in favour
of Mortgagees and Mortgagors respectively shall be deemed to be embodied
herein except in so far as the same may be inconsistent with or are express-
ly or by necessary implication modified by the covenants provisos condi-
tions declarations and agreements herein expressed and contained.

AND for the better securing to the Mortgagee the repayments in manner afore-
said 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.

DATED the 12th day of August 1976

SIGNED by the said JOHN NICHOLAS)
COMBLAS and ARSINOI COMBLAS in)
the presence of:)
John Kelley J.P. (sgd))
A Justice of the Peace in and
for the State of South Australia

J.A. Comblas (sgd)

A. Comblas (sgd)

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No. 3929270

N.E. DUNCAN
Correct for the purposes of "The Real Property Act 1886-1969".

R.D. BAKER (Sgd.)
LICENSED LAND BROKER

Exhibit "P2"
(Respondents)
Memorandum of Mortgage dated the 12th day of August 1976
12th August 1976
(continued)

MEMORANDUM OF MORTGAGE of the land within described

JOHN NICHOLAS COMBLAS & Mortgagor
ARSINOI COMBLAS
MERCANTILE CREDITS LIMITED Mortgagee
Memorandum - A Memorial of the within Instrument
No. was entered in the Register Book,
Vol. 3876 Folio 17 the day of 17.8.1976
at 11 o'clock L.S.
D.G. Thamm (Sgd.) Pro. Registrar-General

Certificate of Registrar-General, Justice of the Peace, &c., before whom instrument may have been executed by the parties thereto.

Appeared before me at ADELAIDE the sixth day of August one thousand nine hundred and seventy six JOHN NICHOLAS COMBLAS & ARSINOI COMBLAS

the parties within described executing the within instrument, being persons well known to me, and did freely and voluntarily sign the same.

Signed...John Kelly...(Sgd.)...J.P...
A Justice of the Peace in and for the State of South Australia

Certificate of Registrar-General, Justice of the Peace, &c., before whom instrument may have been executed by the parties thereto.

Appeared before me at the day of one thousand nine hundred and seventy

the part within described executing the within instrument, being person well known to me, and did freely and voluntarily sign the same.

Signed.....

Certificate of Registrar-General, Justice of the Peace, &c., taking declaration of attesting witness.

Appeared before me at the day of one thousand nine hundred and seventy

(hereinafter called "the witness") a person known to me and of good repute, attesting witness of this instrument, and acknowledged his signature to the same, and did further declare that

within described (hereinafter called "the signatory") the party executing the same is personally known to him the witness and that

FEES PAID	
..... TIME	
L.T.O FEES	
.....	
NOTING	
ADVERTISING	

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the signature to the said instrument is in the handwriting of the signatory and the signatory did freely and voluntarily sign the same in the presence of the witness and was at that time of sound mind.

Signed.....

N.E. DUNCAN
Licensed Land Broker
2515 Franklin Street
Adelaide
MC/16417/B

EXHIBIT "P4" (RESPONDENTS)
COPY NOTICE OF INTENTION TO
TAKE POSSESSION OF GOODS
DATED THE 16TH DAY OF NOVEMBER 1976

42



(INCORPORATED IN N.S.W.)

Exhibit "P4"
(Respondents)
Copy Notice
of Intention
to Take
Possession
of Goods
dated the
16th day of
November
1976

Supreme Court of S.A.
Civil Jurisdiction
Comblax & Mercantile
Exhibits Ltd.
Exhibit *MEI P 4*
Return to *Mr. Angeli*

SIXTH SCHEDULE

Consumer Transactions Act, 1972 - Section 27 (1)

NOTICE TO CONSUMER OF INTENTION TO TAKE POSSESSION OF MORTGAGED GOODS

16th
November
1976

FROMMERCANTILE CREDITS LIMITED.....
(Full name of mortgagee)

of 366 KING WILLIAM STREET, ADELAIDE, S.A. 5000....., THE MORTGAGEE
(Full address of mortgagee)

TO ..JOHN NICHOLAS COMBLAS.....
(Full name of consumer-mortgagor)

of ...35 QUEEN STREET, ALBERTON, S.A. 5014....., THE CONSUMER-MORTGAGOR
(Full address of consumer-mortgagor)

TAKE NOTICE that, 7 days after service upon you of this notice, the abovenamed mortgagee INTENDS TO TAKE POSSESSION of the mortgaged goods hereunder described for your failure to carry out your obligations as set out below:-

1. Description of goods to be taken:- ..1 x 1972 Mack Prime Mover.....
.....Eng. No. T673CAX0463.....
(Full description)

2. Arrears of mortgage payments: \$ 3,356.21.....
Other arrears: \$ 113.00.....
TOTAL AMOUNT OF ARREARS: \$ 3,469.21.....
Number of mortgage payments in arrears: 3.....
Period to which such arrears relate: ..SEPTEMBER, OCTOBER & NOVEMBER 1976...

YOU MAY, IF YOU WISH, AVOID LOSING POSSESSION ON THIS GROUND BY PAYING, WITHIN 7 DAYS, THE TOTAL ARREARS OF \$..3,469.21.....
ATAS ABOVE.....

3. Breach of other provisions:-
.....
(Here set out clearly any other breach alleged)

YOU MAY, IF YOU WISH, AVOID LOSING POSSESSION ON THIS GROUND BY REMEDYING THE ABOVE BREACH(ES) WITHIN 7 DAYS BY:-
.....
.....
(Here set out clearly what is required of the consumer-mortgagor)

DATED the 16th day of NOVEMBER, 1976 .

Signed by: 

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Exhibit "P4A"
(Respondents)
Copy
Notice of
Intention
to Take
Possession
of Goods
dated the
16th day
of
November
1976

P4A

EXHIBIT "P4A" (RESPONDENTS)
COPY NOTICE OF INTENTION TO
TAKE POSSESSION OF GOODS
DATED THE 16TH DAY OF NOVEMBER 1976

MERCANTILE CREDITS LIMITED
(INCORPORATED IN N.S.W.)

SIXTH SCHEDULE

Consumer Transactions Act, 1972 - Section 27 (1)

NOTICE TO CONSUMER OF INTENTION TO TAKE POSSESSION OF MORTGAGED GOODS

16th
November
1976

FROM MERCANTILE CREDITS LIMITED
(Full name of mortgagee)
of 366 KING WILLIAM STREET, ADELAIDE, S.A. 5000, THE MORTGAGEE
(Full address of mortgagee)
TO JOHN NICHOLAS COMBLAS
(Full name of consumer-mortgagor)
of 35 QUEEN STREET, ALBERTON, S.A. 5014, THE CONSUMER-MORTGAGOR
(Full address of consumer-mortgagor)

10

TAKE NOTICE that, 7 days after service upon you of this notice, the abovenamed mortgagee INTENDS TO TAKE POSSESSION of the mortgaged goods hereunder described for your failure to carry out your obligations as set out below:-

- Description of goods to be taken:- 1 x 1972 Mack Prime Motor
Eng. No. T673CAX9463
(Full description)
- Arrears of mortgage payments: \$ 3,356.21
Other arrears: \$ 113.00
TOTAL AMOUNT OF ARREARS: \$ 3,469.21
Number of mortgage payments in arrears: 3
Period to which such arrears relate: SEPTEMBER, OCTOBER & NOVEMBER 1976

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YOU MAY, IF YOU WISH, AVOID LOSING POSSESSION ON THIS GROUND BY PAYING, WITHIN 7 DAYS, THE TOTAL ARREARS OF \$ 3,469.21 AT AS ABOVE.

- Breach of other provisions:-
.....
.....
(Here set out clearly any other breach alleged)

YOU MAY, IF YOU WISH, AVOID LOSING POSSESSION ON THIS GROUND BY REMEDYING THE ABOVE BREACH(ES) WITHIN 7 DAYS BY:-
.....
.....
(Here set out clearly what is required of the consumer-mortgagor)

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DATED the 16th day of NOVEMBER, 19 76

Signed by: [Signature]

Supreme Court of S.A.
Civil Jurisdiction
Comblas Mercantile Credits Ltd.
Exhibit P4A
Return to Mr. Engel

EXHIBIT "P5" (RESPONDENTS)
COPY DEMAND FOR DELIVERY UP OF GOODS
DATED THE 25TH DAY OF NOVEMBER 1976

MERCANTILE CREDITS LIMITED

(INCORPORATED IN N.S.W.)

1st FLOOR, MERCANTILE CREDITS BUILDING, 366 KING WILLIAM STREET, ADELAIDE, SOUTH AUSTRALIA.
TELEGRAMS & CABLES: MERCREDITS. G.P.O. BOX 1292, ADELAIDE, SOUTH AUSTRALIA, 5001.
TELEPHONE: 87-5641

DEMAND FOR DELIVERY UP OF GOODS

To JOHN NICHOLAS COMBLAS
of 35 QUEEN STREET, ALBERTON, S.A. 5014

TAKE NOTICE that MERCANTILE CREDITS LIMITED (hereinafter called "The Company")
demands that immediately upon service of this NOTICE upon you you deliver up to the bearer (who is
authorised to receive them on behalf of the Company) the following goods:—

1 x 1971 BLACK PRIME MOVING ENGINE NO: T67134X0463

of which the Company as owner under a hire-purchase agreement dated the 6th day
of AUGUST 1967 with you is entitled to take possession. Should you
refuse or fail to comply with this NOTICE legal proceedings will be taken against you without further notice
or warning for an order for delivery of the said goods.

DATED at ADELAIDE this 25th day of NOVEMBER 1976

For MERCANTILE CREDITS LIMITED



FORM NO. A272

Supreme Court of S.A.
Civil Jurisdiction
Comblas v Mercantile Credits
Exhibit <u>MEP P5</u>
Return to <u>Mr Angel</u>

43

Exhibit
"p5"
(Respondents)
Copy
Demand
for
Delivery
Up of
Goods
dated the
25th day
of
November
1976

25th
November
1976

10

EXHIBIT "P6" (RESPONDENTS)
COPY LETTER FROM MERCANTILE CREDITS
LIMITED TO DAVID STEVENS & ASSOCIATES
PTY. LTD.
DATED THE 3RD DAY OF JUNE 1977

Exhibit "P6"
(Respondents)
Copy letter
from Mercan-
tile Credits
Limited to
David Stevens
& Associates
Pty. Ltd.
dated the
3rd day of
June 1977

3rd June
1977

3rd June, 1977

The Manager,
David Stevens * Associates Pty. Ltd.,
366 King William Street,
ADELAIDE, S.A. 5000

Dear Sir,

Re: JOHN NICHOLAS COMBLAS
A/c 50C.001.19283.6
1971 MACK R600 PRIME MOVER

We advise that the above vehicle was
repossessed on 25th November, 1976 and apologise
for our failure to notify your company that
insurance cover was not required from that date.

Therefore we would appreciate it if you
would refund the appropriate portion of the
premium due to us.

Yours faithfully,
MERCANTILE CREDITS LIMITED

R. Daff (sgd)

R. DAFF
Collection Department

Supreme Court of S.A.
Civil Jurisdiction
Comblas v Mercantile
Credits Ltd
Exhibit P6
Return to Mr. Angel

EXHIBIT "P3" (RESPONDENTS)
NOTICE OF INTENTION TO
EXERCISE POWER OF SALE
DATED THE 25TH DAY OF JULY 1977

NOTICE OF INTENTION TO EXERCISE
POWER OF SALE

P3

Exhibit "P3"
(Respondents)
Notice of
Intention to
Exercise
Power of Sale
dated the
25th day of
July 1977

TO: John Nicholas Comblas & Arsinoi Comblas,
35 Queen Street,
ALBERTON. S.A. 5014

DEFAULT having been made in payment of monies due under MEMORANDUM
of Mortgage REGISTERED NO. 3929270 over the whole of the land comprised
in Certificate of Title Register Book VOLUME: 3876 FOLIO: 17

25th July
1977

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Notice is hereby given that you are required to pay to MERCANTILE CREDITS
LIMITED of 366 King William Street, Adelaide, all principal, interest,
and other monies secured by such of \$40,223.89 at 6th July, 1977
plus all accruing Interest and other charges as from this date and
further that if default shall be made in the payment of such monies and
such default shall continue for the space of TWENTY EIGHT DAYS from
the posting of this Notice the said Society will proceed to sell the
land hereditaments comprised in the said Mortgage by virtue of the
powers concurred on it by the said Mortgage and by the Real Property
Act 1886 - as amended and all other powers it thereunto enabling

Dated this 25th day of July 1977.

20

MERCANTILE CREDITS LIMITED

[Signature]
MORTGAGEE.

Supreme Court of S.A.
Civil Jurisdiction
Comblas v. Mercantile
Credits Ltd
Exhibit *P3*
Return to *Mr. Angel...*

EXHIBIT "P7" (RESPONDENTS)
REPOSSESSION ADVICE
DATED THE 8TH DAY OF AUGUST 1977

MERCANTILE CREDITS LIMITED

(P7)

Exhibit "P7"
 (Respondents)
 Repossession
 Advice
 dated the
 8th day of
 August
 1977

Date: 8th August, 1977 Branch: Adelaide
 From: Collection Department - Adelaide
 To: Branch Inspector

REPOSSESSION ADVICE

Account No.: 50C.001.19283.6	Cash Price: \$ 37,581.00
Name: J.N. Comblas	Deposit or Lease Residual \$ _____
Address: 35 Queen Street, Alberton. S.A.	Residue or Lease Depreciation \$ <u>37,581.00</u>
Date of Agreement: 6.8.76	
Date of Repossession: 25.11.76	

10

8th
 August
 1977

Description of Goods: 1 x 1971 Mack Prime Mover
 Location: O.G.R. Distributors
 Dealer: O.G.R. Distributors
 Date of Repossession Statement: 26.11.76
 (where applicable)

Balance (including Residual on Lease and Repossession Costs)	56,260.25 \$ 52,260.25
Rebate Charges Ins. ()	16,036.36
	<u>\$ 40,223.89</u>

20

Expected to Realise: \$30,000	Rental
Arrears at Repo.: \$3,469.21	Monthly or Instalment \$1,190.07
Guarantors: N/A	
Estimated Cost of Selling: \$200,00	

Inspected by: J.L. Kelley Inspection Date: November 1976

For Vehicles Only

Condition of Vehicle: Fair	Reg. Expiry Date: Unregistered
Exterior: Fair Interior: Fair Mech.: Fair	Tyres: Good

30

COMMENTS:

Collateral Second Mortgage held for \$16,000 and Power of Sale has been issued on 25th July, 1977.

Supreme Court of S.A.
 Civil Jurisdiction
 Comblas v. Mercantile
 Credit Ltd.

Exhibit "P7"
(Respondents)
Repossession
Advice dated
the 8th day
of August
1977

8th August
1977
(continued)

MERCANTILE CREDITS LIMITED

P7

DATE: 18/11/77

BRANCH: Adelaide

FROM: Collection Department

ACCOUNT NUMBER: 500.001.19283.6

TO: Branch Inspector

~~REDEMPTION~~
OR
~~DISPOSAL~~ } ADVICE

CLIENT'S NAME: J.N. Comblas

GOODS: 1971 Mack Prime Mover

a) REDEMPTION: Date Redeemed:
Amount Paid by Client:
Currency of Insurance Cover:

b) DISPOSAL: Date of Disposal: 17.11.77
Sold to: K.L. Stewart
Purchaser's Address: Malliala Road, Two Wells. S.A.
Sale Price: \$20,000

~~Surplus on Sale~~
OR
Loss Incurred: } \$20,223.89

Collateral Mortgage of \$16,000
held. Power of Sale issued.

Exhibit "D5"
(Appellant)
Letter of
Valuation
from O.G.R.
Distributors
dated the
12th day of
August 1977

12th
August
1977

EXHIBIT "D5" (APPELLANT)

LETTER OF VALUATION

FROM O.G.R. DISTRIBUTORS

DATED THE 12TH DAY OF AUGUST 1977



D5

1459 Main North Road
Parafield, S.A. 5107
Phone 258 6044
Postal Address
P.O. Box 185
Salisbury, S.A. 5108

A Division of O. G. Roberts & Co.
Telex Code: GOROB
Number AA 82464

Your Ref.

Our Ref. DBD:TMC

Date 12th August, 1977

Exhibit "D5"
(Appellant)
Letter of
Valuation
from O.G.R.
Distributors
dated the
12th day of
August 1977

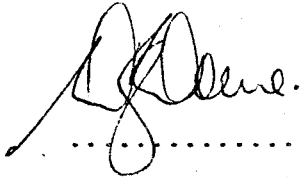
10

We have this day inspected Mack Prime Mover,
Reg. No. RIH 446 and we consider the current market value
of this unit would be approximately \$15,000.

12th August
1977
(continued)

This is a valuation only and is not an offer to
purchase.

Yours faithfully,
OGR DISTRIBUTORS,


.....
Dennis B. Dobie,
SALES MANAGER.

Supreme Court of S.A.
Civil Jurisdiction
Combak v. Merchants
Case No. 276
Exhibit ... *D5*
Return to *M. L. ...*



TRUCKS and FARM EQUIPMENT
STATE DISTRIBUTORS



Exhibit "D3"
(Appellant)
Letter from
Lambert &
Solomon
to John
Nicholas
Comblas
dated the
23rd day of
December
1977

23rd
December
1977

EXHIBIT "D3" (APPELLANT)

LETTER FROM LAMBERT & SOLOMON

TO JOHN NICHOLAS COMBLAS

DATED THE 23RD DAY OF DECEMBER 1977

LAMBERT & SOLOMON
BARRISTERS & SOLICITORS

HARRY FRANKLIN LAMBERT, LL.B.
RICHARD GEORGE HERBERT SOLOMON, LL.B.
PHILIP JOHN DORMAN, LL.B.

TELEPHONE: ADELAIDE 223 4888

Please address all
correspondence to
Box 1013, G.P.O., Adelaide 5001

PLEASE QUOTE: PJD:JM
Our Ref.....
Your Ref.....

120 WAKEFIELD STREET,
ADELAIDE, S.A. 5000
Also visiting
MARION SHOPPING CENTRE
TUESDAY AND THURSDAY
And
PORT PIRIE—MONTHLY
A.D.E. 335

Exhibit
"D3"
(Appell-
ant
Letter
from
Lambert &
Solomon
to John
Nicholas
Comblas
dated
the 23rd
day of
December
1977

23rd December, 1977.

Mr. J. N. Comblas,
35 Queens Street,
ALBERTON, S.A. 5014.

Dear Sir,

10 Re: 1971 Mack Prime Mover Registration No. RAH 446

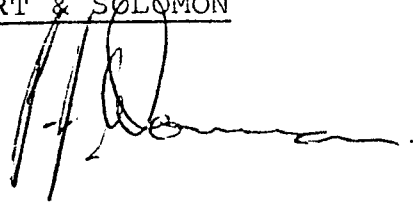
As you are aware we act for Mercantile Credits Limited of 366 King William Street Adelaide and we are authorised to give this notice to you on their behalf.

20 After the voluntary return of the prime mover to our clients the sum of \$40,223.89 remained owing pursuant to the contract dated 6th August, 1976. We wish to advise that the prime mover has now been sold for \$20,000.00 and we hereby make demand on behalf of our clients, pursuant to the provisions of the contract dated 6th August, 1976 and in particular pursuant to clauses 9 and 3 of that contract, for the payment of \$20,223.89 being the balance owing under the contract.

We further advise that if such payment is not made within seven days herein we are instructed to proceed to exercise our client's rights pursuant to memorandum of mortgage no. 3929270 for the recovery of the above sum.

Yours faithfully,
LAMBERT & SOLOMON

Per:



30 P. J. Dorman.

c.c. Nicholas Niarchos.

23rd
December
1977
(continu-
ed)

Supreme Court of S.A.
Civil Jurisdiction
Comblas, Mercantile
Credits Ltd
Exhibit D3
Return to Mr. Niarchos

EXHIBIT "D1" (APPELLANT)
COPY NOTICE OF INTENTION TO EXERCISE
POWER OF SALE UNDER MEMORANDUM OF
MORTGAGE NO. 3929270
DATED THE 16TH DAY OF JANUARY 1978

Exhibit "D1"
(Appellant)
Copy Notice of
Intention to
Exercise
Power of Sale
Under
Memorandum
of Mortgage
No. 3929270
dated the
16th day of
January
1978

16th
January
1978

NOTICE OF INTENTION TO EXERCISE POWER OF SALE
UNDER MEMORANDUM OF MORTGAGE NO. 3929270

To: JOHN NICHOLAS COMBLAS and ARSINOI COMBLAS
35 Queen Street, Alberton, S.A. 5014.

WHEREAS JOHN NICHOLAS COMBLAS of 35 Queen Street Adelaide
5014 Truck Driver and ARSINOI COMBLAS his wife (hereinafter
called "the mortgagor") is the registered mortgagor under
Memorandum of Mortgage dated the 12th day of August 1976
over the whole of the land comprised in Certificate of Title
Register Book Volume 3876 Folio 17

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AND WHEREAS MERCANTILE CREDITS LIMITED of 366 King William
Street Adelaide 5000 (hereinafter called "the mortgagee")
is the mortgagee under the said mortgage

AND WHEREAS the said JOHN NICHOLAS COMBLAS (hereinafter
called "the debtor") entered into a contract for the loan
of moneys from the mortgagee on the 6th day of August 1976
wherein a 1971 Mack prime mover registered number RAH 446
was security for repayment of the said loan moneys
(hereinafter called "the contract")

AND WHEREAS the said 1971 Mack prime mover was voluntarily
surrendered to the mortgagee by the debtor on the 25th day
of November 1976

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AND WHEREAS at the time of the surrender of the said 1971
Mack prime mover the sum of \$40,223.89 remained owing by the
debtor to the mortgagee pursuant to the terms of the contract

AND WHEREAS the said 1971 Mack prime mover has been sold by
the mortgagee for \$20,000.00 leaving a balance owing by the
debtor to the mortgagee of \$20,223.89 pursuant to the contract

AND WHEREAS by Notice delivered to the debtor on the 23rd
day of December 1977 the mortgagee requested payment of the
said \$20,223.89 within seven days of delivery of the said

30

Notice

-2-

AND WHEREAS payment of the said \$20,223.89 has not been made to the mortgagee in accordance with Clauses 1, 3 and 9 of the contract and default has continued up to and including the date of this Notice

AND WHEREAS the land comprised in Certificate of Title Register Book Volume 3876 Folio 17 is available to the mortgagee as security for the performance of the contract to the extent of \$16,000.00

AND WHEREAS the mortgagor has covenanted with the mortgagee as follows:

"That the mortgagor will at all times keep observe and perform each and every covenant respectively contained in the said consumer mortgage" (referred to in this Notice as "the contract").

AND WHEREAS the mortgagor has breached the said covenant in that payment of the said \$20,223.89 has not been made in accordance with Clauses 1, 3 and 9 of the contract
NOW the mortgagee HEREBY GIVES NOTICE to you JOHN NICHOLAS COMBLAS and ARSINOI COMBLAS to pay the moneys now due and owing to the mortgagee under the said mortgage namely \$16,000.00 and the mortgagee FURTHER GIVES NOTICE that if payment of the said \$16,000.00 is not made to the mortgagee within the space of one calendar month after the date of service of this Notice on you the mortgagee shall exercise power of sale as empowered by Section 133 of the Real Property Act 1886 as amended and by any other power granted to the mortgagee in the recited circumstances in the said Act or by the said Memorandum of Mortgage and will claim possession of the said land described in the said Mortgage.

YOU ARE ALSO GIVEN NOTICE THAT TIME IS OF THE ESSENCE

Exhibit "D1"
(Appellant)
Copy Notice of
Intention to
Exercise
Power of Sale
Under
Memorandum of
Mortgage No.
3929270
dated the
16th day of
January 1978

16th January
1978
(continued)

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Exhibit "D1"
(Appellant)
Copy of Notice
of Intention
to Exercise
Power of Sale
under
Memorandum of
Mortgage No.
3929270
dated the
16th day of
January
1978

16th
January
1978
(continued)

UNDER THIS NOTICE AND THAT NO EXTENSION WILL BE GIVEN

DATED this 16th day of January 1978

THIS NOTICE is given by Messrs. LAMBERT & SOLOMON of
120 Wakefield Street Adelaide in the State of South
Australia as solicitors and agents for the said
MERCANTILE CREDITS LIMITED.

LAMBERT & SOLOMON

Per: 

120 Wakefield Street,
ADELAIDE, S.A. 5000.

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NOTE: THIS NOTICE is issued by the mortgagee without
prejudice to the rights which the mortgagee has under
the contract dated the 6th day of August 1976 for
recovery of moneys owing pursuant to that contract by
JOHN NICHOLAS COMBLAS.

EXHIBIT "D4" (APPELLANT)
CALCULATIONS MADE FROM RECORDS OF
MERCANTILE CREDITS LIMITED

JOHN NICHOLAS COMBLAS
35 QUEEN STREET, ALBERTON, SOUTH AUSTRALIA

ACCOUNTING OF ACCOUNT NUMBER 50C 001.19283.6

1971 MACK PRIME MOVER - REGISTRATION RIH 446

Exhibit "D4"
(Appellant)
Calculations
Made from
Records of
Mercantile
Credits
Limited
Undated

1976		DEBIT	CREDIT	BALANCE
August 6	Advance for Truck	\$37,581-00		\$37,581-00
August 6	Interest Charges.	19,542-36		57,123-36
August 29	N.E. Duncan - Preparation of Mortgage	113-00		57,236-36
October 29	Cash Received		\$ 214-00	57,022-36
December 8	Rebate of Interest Charges		16,036-36	40,986-00
1977				
January 28	O.G.R. Distributors - Five Retread Tyres and One Truck Rim	544-50		41,530-50
March 22	O.G.R. Distributors - Replace Left and Right Hand Window Glass, Touch Up Paint Work, Clean and Polish Truck	283-56		41,814-06
May 11	O.G.R. Distributors - Advertising Costs - "Centralian Advocate" 17.3.1977	12-90		41,826-96
June 20	Refund of Insurance		1,603-07	40,223-89
November 17	Sale of Truck		20,000-00	20,223-89

MERCANTILE CREDITS LIMITED

per 

(D4)

