

Mercantile Credits Limited - - - - - *Appellants*

v.

John Nicholas Comblas and Another - - - *Respondents*

FROM

**THE FULL COURT OF THE SUPREME COURT
OF SOUTH AUSTRALIA**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH 1982

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD KEITH OF KINKEL
LORD SCARMAN
LORD BRANDON OF OAKBROOK

[*Delivered by* LORD DIPLOCK]

In August, 1976, Mr. Comblas and his wife, who are the plaintiffs in this action and the respondents to this appeal, were encouraged by the appellants, Mercantile Credits Ltd., to enter into a most improvident transaction in which they put at risk the family home that was their joint property. Under the terms contained in a set of documents dated 6 August, 1976, Mercantile Credits Ltd. lent to Mr. Comblas the sum of \$37,581, which they paid on his behalf directly to OGR Distributors as the purchase price of a second-hand Mack Prime Mover ("the Truck") which Mr. Comblas wanted to buy. The sum advanced together with interest at 22·30% was to be repaid by forty-eight monthly instalments of \$1,190.07 each, and on 12 August, 1976, Mr. and Mrs. Comblas executed a mortgage of the family home ("the Home Mortgage") as further security, limited to \$16,000, for the repayment by Mr. Comblas of the loan.

Mr. Comblas described himself in evidence as being at the time of the transaction an independent transport operator. He had no other occupation and the Truck was the only vehicle he possessed with which to carry on his transport business. His own driving licence did not authorise him to drive the Truck with any trailer attached to it, so its use for the transport of goods would involve his employing and paying the wages of a properly qualified driver. This hazardous enterprise with a rapidly deteriorating asset (as White J. described it in his judgment in the Full Court) was foredoomed to failure from the outset; and fail

it very quickly did. The Truck kept on breaking down. Mr. Comblas defaulted on the first three instalments towards which he paid \$214 only, and on 25 November, 1976, Mercantile Credits Ltd. gave notice to Mr. Comblas demanding delivery of possession of the Truck which was then at the premises of OGR Distributors and was from 26 November held by OGR Distributors on behalf of Mercantile Credits Ltd. until they sold it for \$20,000 on 17 August, 1977.

The litigation in which this appeal is brought seems topsy-turvy. In it Mercantile Credits Ltd. are defendants only: they make no counter-claim of any kind against Mr. and Mrs. Comblas who are the plaintiffs in the action. The action was triggered off by the service on the Comblases by Mercantile Credits Ltd. on 25 July, 1977, of a notice of intention to exercise the power of sale under the Home Mortgage—a notice which, as became common ground at an early stage of the proceedings, ironically enough was void. In the action the plaintiffs claimed relief of various kinds by way of declaration, injunction, account and damages for conversion. Wells J., who tried the action at first instance, refused Mr. and Mrs. Comblas any relief and gave judgment for Mercantile Credits Ltd. Upon appeal by the plaintiffs to the Full Court, the appeal was allowed, but the Court did not grant to Mr. and Mrs. Comblas all the relief they had sought in the action. Instead the Full Court made a limited declaration to the effect that Mercantile Credits Ltd. was not entitled to recover any moneys from Mr. and Mrs. Comblas pursuant to the express terms of the documents of 6 August, 1976, or the Home Mortgage of 12 August, 1976, and made orders for the discharge of the mortgage. In their appeal to Her Majesty in Council, Mercantile Credits Ltd. seek the reversal of the judgment of the Full Court and the restoration of the judgment of Wells J. in their favour. Mr. and Mrs. Comblas as respondents do not bring any cross-appeal for any of the relief originally sought by them in the action but not granted by the Full Court. All they seek is to sustain the judgment of the Full Court entitling them to the limited relief that was thereby granted to them.

The documents that Mercantile Credits Ltd. issued to Mr. and Mrs. Comblas in connection with the loan and mortgage contain provisions that well deserve the epithets applied to them by the various members of the Full Court, of meaningless, misleading and obscure. The principal document, which it will be convenient to refer to as "the Contract", is dated 6 August, 1976, and was executed by Mr. Comblas, described therein as "the Mortgagor" and Mercantile Credits Ltd. described as "the Mortgagee". Their Lordships will refer to the parties by these descriptions when they come to discuss the construction of the Contract, to which Mrs. Comblas was not a party. The Contract bore the heading in large type "Credit contract—Consumer Mortgage". The first part of the document so headed took the form of a Bill of Sale (under the Bills of Sale Act, 1886—1972) over the Truck as security for the repayment of the principal amount of the loan (viz. \$37,581) and the payment of the credit charges (viz. \$19,542.36) making a total sum of \$57,123.36, by forty-eight monthly instalments of \$1,190.07 each commencing on 6 September, 1976. These particulars were in typescript and contained in what was referred to as "The Schedule". All the rest of the Contract consisted of standard printed clauses. These incorporated a loan agreement between the parties the terms of which were said to be set out in fourteen numbered clauses printed below the space for the signatures of the parties and on the back of the document. To several of these clauses it will be necessary to refer in detail.

The expressions "credit contract" and "consumer mortgage" used in the heading of the Contract to describe its legal character are not ordinary terms of legal art but are statutory expressions originating and

defined in the Consumer Credit Act, 1972-1973 ("the Credit Act") and the Consumer Transactions Act, 1972-1973 ("the Transactions Act"), respectively. Their Lordships agree with Wells J., who heard the case at first instance, and with the Full Court, for the reasons that they give, that while the Contract *is* a "credit contract" it *is not* a "consumer mortgage", because the amount of the principal advanced exceeded the financial limits incorporated in the definition of "consumer mortgage" in the Transactions Act.

Whatever may be the merits or demerits of the Contract in its standard form when used for transactions to which both the Credit Act and the Transactions Act apply, to use this heading in a document relating to a transaction to which the Credit Act does and the Transactions Act does *not* apply is, in their Lordships' view, highly misleading. Its misleading character is enhanced by the fact that, as required by section 40(5) of the Credit Act, Mr. Comblas's copy of the Contract was accompanied by a notice in the form set out in the 13th Schedule to the Consumer Credit Regulations, 1973. The prescribed form refers to the protection afforded to consumers by both the Credit Act and the Transactions Act; and, in particular, paragraph 6 refers to restrictions on the right to take possession of goods and to sell them. The restrictions referred to are imposed by the Transactions Act only. They conflict with the right to take possession and sell the Truck conferred on Mercantile Credits Ltd. by the Contract, to which the Transactions Act does not apply.

It would seem that it did not occur to the draftsman of the statutory regulations that there might be credit contracts (involving goods) to which, although the Credit Act applied, the Transactions Act did *not*. In their Lordships' view an alternative form of notice needs to be prescribed for use in such a case, in order to prevent consumers being actively misled. Mercantile Credits Ltd. would have committed an offence under section 40(5) of the Credit Act if they had omitted to serve Mr. Comblas with a notice in the prescribed, though in the circumstances misleading, form; but this could only make it the more incumbent upon them to state explicitly in the body of the Contract what his rights and liabilities were in relation to taking possession and sale of the Truck, and to draw attention to this in words that he and his wife, who was to put up security for the loan, could readily understand.

In any document which purports, as the Contract does, to combine the functions and create the legal consequences of both a loan agreement and a bill of sale, there can be no more essential term than that which regulates the rights and obligations of the parties in the event of the lender taking possession of the goods and selling them as mortgagee/grantee under the bill of sale. It was this essential term that the Full Court held was missing from the Contract. With the consequences of its omission upon the outcome of the present action by Mr. and Mrs. Comblas their Lordships will deal later. They will go first to the heart of the matter, which lies in the interaction between Clause 12, which is an interpretation clause, and Clause 9, which purports to deal with the consequences of the mortgagee's taking possession of the Truck.

The very full judgment of Wells J. sets out *in extenso* many of the other terms of the Contract. Accordingly their Lordships need not repeat them here although they will find it necessary to refer to some of them that, at various stages of the argument, have been relied upon by counsel for Mercantile Credits Ltd. as enabling them to salvage from the Contract something more than the proceeds of sale of the Truck, even if Clause 9 has to be written off as a constructive total loss. Suffice it to say, at this stage, that there is also a specific reference to the

Transactions Act in Clause 4 which, while avoiding any express use of the words "taking possession" of the goods, can nevertheless be found on close examination to confer upon the mortgagee a right to take possession of the Truck upon default in punctual payment of any instalment; and there is another specific reference in Clause 6 which deals with resumption of possession by the mortgagor with the permission of the mortgagee after the latter has taken possession under Clause 4.

Clauses 9 and 12 read as follows:—

"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.]"

"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."

Their Lordships have placed square brackets round the words in Clause 9 which refer to provisions of the Transactions Act and according to Clause 12 are to be disregarded in the interpretation of the Contract and treated as inapplicable. One is left then with a meaningless clause and no way of ascertaining from it what, if anything, is due by the mortgagor to the mortgagee in the event of the latter's taking possession of the goods and selling them—the event that happened in the instant case.

It was argued for Mercantile Credits Ltd. that Clause 12 did not require the words "nett balance due" to be disregarded; they are ordinary English words in which the inclusion of the adjective "nett" can be explained away as merely pleonastic. Even if they were left in, their meaning would be uncertain in view of Clause 3, the default clause, to which their Lordships will be referring later. In their Lordships' view, however, the words "nett balance due" are clearly an integral part of the reference in Clause 9 to section 29 of the Transactions Act which uses that identical phrase in sub-section (1) to describe the sum arrived at by carrying out the somewhat complex calculations called for by sub-section (2). Their Lordships accordingly agree with the Full Court that Clause 9 of the Contract, truncated as it is required to be by the application of Clause 12, is devoid of any meaning and so must be treated as struck out.

As will in due course appear when their Lordships come to analyse it, the Home Mortgage is so worded as to be security for the performance of Mr. Comblas's *contractual* obligations under the Contract only. It is not security for any liability of his in connection with the loan that might arise at common law or equity in consequence of the events that have occurred. This makes it vital to Mercantile Credits Ltd., if they want to enforce their security under the Home Mortgage, to be able to rely upon some provision of the Contract itself under which monies are still recoverable from Mr. Comblas notwithstanding their having obtained possession of and sold the Truck.

So the next question is whether Clause 9 is severable from the remaining clauses in the contract, in the sense that there can be found among them some other provision of the Contract which both (a) imposes upon the mortgagor a continuing obligation to make payments of an ascertainable sum of money to the mortgagee despite his having taken possession of the goods and sold them; and (b), if enforced against the mortgagor after the goods had been sold, would not have the effect, in the absence of Clause 9, of holding him to a bargain different from that which he had made.

Mercantile Credits Ltd. have sought to rely upon various provisions of the Contract which they submit provide with sufficient certainty for what the financial obligations of the mortgagor shall be after a taking possession and sale of the Truck by the mortgagee even when Clause 9 is struck out. They point first to an unnumbered clause in the first part of the Contract:

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

This clause which does not appear to have been relied on in the Full Court is, in their Lordships' view, of no avail to the mortgagee. It serves but to make confusion worse confounded. It is expressed to operate only when the contract is determined, not upon taking possession of the goods or upon their sale, neither of which events of itself necessarily determines the contract; and Mercantile Credits Ltd. themselves argue that, in the circumstances of the instant case, it did not. Furthermore, the clause does not deal with recovery of the principal, it deals with the credit charge only and refers to “the statutory rebate”. There is one definition of “statutory rebate” in the Credit Act, but three different kinds of “statutory rebate” are provided for by section 29 of the Transactions Act when the mortgagee has taken possession of the goods. Clause 12 presumably makes the Credit Act definition applicable; but that definition does not deal with and makes no allowance for the value or sale price of the goods of which possession has been taken by the mortgagee and which might exceed the amount outstanding under the Contract. It is wholly inappropriate and cannot have been intended to apply to cases of seizure and sale of goods under a bill of sale.

The next clause in order of appearance in the Contract upon which reliance was placed by Mercantile Credits Ltd. is Clause 1(a). It does not appear to have been relied upon in argument before the Full Court and even in the hearing before this Board it assumed no prominence until the appellant's Counsel's reply. It reads as follows:—

“The Mortgagor hereby covenants and agrees with the Mortgagee

...

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.”

The only obligation created by these words is to make payments in accordance with the Schedule and not otherwise i.e. by forty-eight monthly instalments of \$1,190.07 starting on 6 September, 1976. The clause itself makes no provision for what is to happen in default of full and punctual payment of any instalment; that is left to be dealt with by Clause 3. As appears on the face of the Contract the sum advanced by the mortgagee was for the purchase by the mortgagor of

an income-earning asset, the Truck, over which the bill of sale was granted. It is conceded, as it must be, by Counsel for Mercantile Credits Ltd. that the obligation of the mortgagor under Clause 1(a) to comply with its express terms and to continue to pay a sum of \$1,190.07 upon the 6th of each month until forty-eight such payments totalling \$57,123.36 have been made cannot survive the exercise by the mortgagee of the power of seizure and sale conferred upon him by Clause 6, to which their Lordships will be turning shortly. So what is to happen when that power is exercised in the two consecutive stages that are involved and between which a considerable interval may elapse: the obtaining of possession by the mortgagee, which in the instant case occurred on 26 November, 1976, and the sale thereafter, which in the instant case occurred on 17 August, 1977, after eight further monthly instalments under Clause 1(a) had fallen due?

The answer, it was submitted, is to be found in Clause 1(a) as a matter of necessary implication and thus for the purposes of the Home Mortgage is to be treated as one of the terms of the Contract. But, to incorporate in a contract a contractual term by necessary implication, it is not enough to point to alternative terms either of which might not unreasonably have been incorporated in the contract to deal with an event which the parties must have contemplated might happen but have omitted to deal with expressly. Unless the precise terms of the one and only provision which the parties must have intended to be applicable can be identified, it is not possible to say that they were *ad idem* as to how the event was to be dealt with. Their Lordships, notwithstanding the able and ingenious argument of Counsel for Mercantile Credits Ltd., remain completely in the dark as to what the terms of the one and only provision to be implied would be. A whole series of questions pose themselves to which no satisfactory answer can be extracted from Clause 1(a). After possession of the Truck had been taken on 26 November, 1976, when, on the only evidence available, its value was \$30,000, what was to happen about the instalment due on 6 December, 1976? Did that instalment and the instalments, of \$1,190.07 each, falling due on the 6th of each subsequent month until the sale of the Truck for \$20,000, continue to be payable and did they also continue to be payable after that? If so, in apportioning the total amount of each such instalment between payment of interest and repayment of principal, from what date, the date of taking possession or the date of sale, was the mortgagor to be treated as having repaid part of the principal and what sum, \$30,000 or \$20,000, was to be used for calculating the amount of the repayment with which he was to be credited? Upon the answers to these questions would depend the number of months for which the mortgagor's obligation to pay instalments would continue. Whichever be the right answers to each of the questions, they would inevitably make that number shorter than the forty-eight months from 6 August, 1976, i.e. 6 August 1980, for which the Contract provided that credit would be extended by the mortgagee to the mortgagor (except as otherwise provided by the default provisions in clause 3 upon which, for reasons that will appear, the mortgagee is, in the circumstances of the instant case, unable to rely).

It was for this reason that Counsel for Mercantile Credits Ltd. eventually plumped for a provision, arising as the necessary implication from Clause 1(a), that would preserve intact the period of forty-eight months over which credit was extended. Under the implied provision contended for so much of the proceeds of sale of the Truck as could be ascribed to repayment of principal after settlement of all arrears of interest would be treated as payment in advance of monthly instalments of \$1,190.07, for a period during which no monthly instalments would be payable; such period of suspense of monthly instalments to be

ascertained by calculating when, on the assumption that each such instalment had been paid upon its due date, it would be necessary to resume payments of monthly instalments of \$1,190.07 in order to complete the repayment of \$57,123.36 on 6 August, 1980. This calculation of the period of suspense of monthly instalments cannot be undertaken without first knowing the answer to the same two questions as were involved in ascertaining the number of months for which instalments of \$1,190.07 would continue to be payable upon the hypothesis that the mortgagor's obligation to pay instalments was not suspended by the taking possession or sale of the Truck, viz. (1) Is the date of taking possession of the Truck on 26 November, 1976, or the date of sale on 17 August, 1977, to be taken as the date of payment in advance? And (2) whichever is the answer to (1), is the estimated value of the Truck on 26 November, 1976, at \$30,000 or its proceeds of sale on 17 August, 1977, of \$20,000 to be taken as the amount paid in advance? The answers to these questions would have a significant influence on the result. Their Lordships accept that if there were only one possible answer to each of them the calculation of the period of suspense, although extremely complicated, would be mathematically possible although, even then, it would inevitably result in requiring the payment of one instalment of a smaller amount than \$1,190.07—but whether this is to be at the beginning of the resumption of payments of instalments or as the last instalment is a further matter of uncertainty.

Their Lordships would not have spent so much time in analysing the multiple uncertainties which make it impossible to extract from Clause 1(a) by necessary implication any implied obligation upon the mortgagor to make to the mortgagee any further payment after possession had been taken of the Truck, were it not for the fact that Counsel for Mercantile Credits Ltd. was able to point to a provision in Clause 1(f) under which the mortgagee is entitled to elect to receive any insurance moneys paid in respect of damage to or loss of the goods and appropriate them towards payment of the moneys secured by the Contract. This, as Counsel pointed out, would raise analogous problems as to the mortgagor's obligations in respect of future instalments, although without the doubts as to dates and amounts, to which their Lordships have drawn attention above. It may be that the exercise of the authority to appropriate insurance moneys in cases in which Clause 1(f) was applicable would land the mortgagee in difficulties in recovering any further instalments from the mortgagor, but that is not a problem with which their Lordships need deal in the instant appeal. The fact that there may be a problem cannot cure the multiple uncertainties which make it quite impossible to extract from Clause 1(a) any implied obligation on the part of the mortgagor to continue to make payments to the mortgagee in the events that have happened in the instant case.

Their Lordships accordingly turn next to the default clause (Clause 3) which, so far as is relevant, reads as follows:—

“ . . . if (a) The Mortgagor shall make default in payment of any moneys payable hereunder and such default shall continue for 7 days . . . 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.”

If Clause 9 is omitted, this is the only clause in the Contract under which repayments of principal can become due and payable otherwise than by the forty-eight monthly instalments for which the Contract provides. The reference to section 43 of the Credit Act provides for

what rebate of the credit charge is to be made in that event. In the instant case however Mercantile Credits Ltd. chose not to exercise the option. No notice in writing of its exercise was ever given by them to the mortgagor either before or after the taking possession of the Truck or its sale. So Clause 3 is of no assistance to them in filling the lacuna created by the nullity of Clause 9.

Clause 4 is the only clause in the Contract which grants to Mercantile Credits Ltd. any right to take possession of the Truck. It reads :

“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.”

In consequence of Clause 12 the words round which their Lordships have placed square brackets have to be disregarded. The mortgagee's power to take possession of the goods and to sell them is derived from the incorporation in the clause of sub-section (6) of section 11 of the Bills of Sale Act, 1886-1972. This gives a right to take possession upon default by the mortgagor/grantor but only for the purposes of sale. There is however significantly excluded from incorporation sub-section (8) of section 11, the only sub-section which deals with the disposition, as between grantor and grantee of a bill of sale, of the proceeds of sale where the grantee exercises his power of sale under sub-section (6). The exclusion of sub-section (8) was no doubt deliberate, since it provides for an entirely different method of accounting, as between mortgagor and mortgagee when possession of goods is taken by the mortgagee and they are sold, from the method of accounting that is required by section 29 of the Transactions Act; but the exclusion leaves Clause 4 of the Contract without any provision as to what effect the taking possession and sale of the goods is to have upon the rights and liabilities of the parties in cases where the Transactions Act does not apply.

(Their Lordships would add that it is in their view highly undesirable and contrary to the spirit of section 40 of the Credit Act that, even in a contract to which the Transactions Act did apply, a liability of such importance to the borrower as that of having his goods seized and sold by the lender should not be stated expressly and in plain language, rather than incorporated in it in so devious a way.)

Their Lordships thus conclude, in agreement with the Full Court, that, Clause 9 being meaningless, there is no term in the Contract either express or to be treated as incorporated therein by necessary implication that imposes upon Mr. Comblas a liability to make any further payment under the Contract to Mercantile Credits Ltd. once they had obtained possession of the Truck.

The taking possession and sale of goods by the grantee of a bill of sale is a regrettably common event in the carrying out of transactions of the kind for which the Contract provided, and the possibility of its occurrence must have been within the contemplation of both parties to it, however optimistic and unsophisticated Mr. Comblas may have been. Provision as to what were to be the mutual rights and obligations of the parties if such an event should occur was, as their Lordships have already said, an essential term of the Contract and the presence of Clause 9 indicates that the parties did not intend to enter into a contract which contained no such term. To treat the remaining provisions of the Contract as enforceable after elimination of Clause 9 might, as White J. pointed out, have the result of holding the parties to a bargain which they had never intended to make; and this the court will not do.

One way of expressing this as a matter of legal analysis is to say that the whole contract is void for uncertainty as to an essential term. This was the analysis adopted by White J. with the concurrence of Walters J. in the Full Court. He cited a number of well-known Australian and English authorities on the severability from other clauses in the same contract of contractual clauses that are held to be void for uncertainty. In their Lordships' view, although it is not easy to find among the decided cases any which presents a close analogy to the instant case, particularly when regard is had to the right of the borrower under a credit contract to be properly and clearly informed of the terms and conditions of his contract for which section 40 of the Credit Act provides, there is considerable force in this analysis; but, in company with King C.J. in the Full Court, their Lordships do not find it necessary in the events that have happened to express a concluded opinion as to whether as a matter of legal theory it is correct. If clause 9 itself is void for uncertainty, there is no other provision in the Contract which entitles Mercantile Credits Ltd., after they had taken possession of the Truck on 26 November, 1976, to recover from Mr. Comblas any sum additional to the proceeds of sale which they retained.

Their Lordships accordingly turn next to the Home Mortgage. This is the security which this action is really about. The prospects of Mercantile Credits Ltd. recovering any more money from Mr. Comblas personally would not appear ever to have been bright; their only chance of recouping a further \$16,000 of their losses incurred as a result of encouraging him to enter into his improvident venture is if they are entitled to foreclose the Home Mortgage and sell the family home.

The Home Mortgage is in typescript. Whether it follows a standard form used by Mercantile Credits Ltd. does not appear, but it was prepared by a land broker on their instructions, although at one stage they were claiming to recover his fees from Mr. Comblas. Having regard to the purpose that it was presumably intended to serve and the desirability of its being capable of being understood by Mrs. Comblas in particular, it was drafted with deplorable ineptitude. In it Mr. and Mrs. Comblas are referred to together as "the Mortgagor" in the singular. Its terms apart from the description of the parties and the mortgaged land are set out in full in the judgment of Wells J. Their Lordships need not repeat them here. After a recital which is introduced by the words "in consideration of" but which merely refers to their "desire to render the land available as additional security, but only to the extent of \$16,000," for the payment of the instalments secured by and the covenants contained in the Contract (which is described as a "Consumer Mortgage" and a copy of it is annexed) the Home Mortgage continues:

"... the Mortgagor (sc. Mr. and Mrs. Comblas) hereby covenants with the Mortgagee (sc. Mercantile Credits Ltd.) (1) That the Mortgagor will at all times keep, observe and perform each and every covenant respectively contained in the said Consumer Mortgage."

There follow some further provisions that are not relevant to any issue in this appeal and the document ends with the other operative provision

"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."

In their Lordships' view it is greatly to be deprecated that a credit provider such as Mercantile Credits Ltd., whose business is or includes the provision of credit to people such as Mr. and Mrs. Comblas should

permit, let alone encourage, Mrs. Comblas (a new Australian whose native tongue was Greek and whose knowledge of written and spoken English limited) to become a party to a document in these terms without the benefit of any independent legal advice. It refers to the Contract of 6 August, 1976, as a "Consumer Mortgage". This was a false description and the more misleading because the Home Mortgage on its face limited the liability under it to \$16,000, a figure within the limit which would have attracted the protection afforded to guarantors and mortgagors by the Transactions Act. The fact that the total liability for which it was a security exceeded that limit of \$20,000 was only ascertainable by examining the annexed copy of the Contract. Furthermore, since Mrs. Comblas was not a party to the Contract, the covenant in the Home Mortgage which their Lordships have cited having regard to the definition of "Mortgagor" would make her a guarantor of the performance by Mr. Comblas of his obligations under the Contract. From her personal liability for principal or interest due from Mr. Comblas under the Contract, Mrs. Comblas would be saved by section 44 of the Credit Act, but not it would seem from personal liability for damages recoverable by Mercantile Credits Ltd. from Mr. Comblas for any breach by him of any of the covenants in the Contract apart from those for payment of principal and interest; as, for instance, for failure to maintain in good repair or to insure. It is by no means certain that to a claim for damages, should it arise, the limit of \$16,000, to which the security was subject, would apply to her personal liability and, even if it did, she would be subject to a personal liability for the amount by which the proceeds of sale of the land to which Mercantile Credits Ltd. were entitled as mortgagees, under what was only a second mortgage, fell short of \$16,000. If the Contract, which was annexed to the Home Mortgage, had satisfied the description "Consumer Mortgage", which was applied to it in the body of the Home Mortgage, Mrs. Comblas would have been entitled *inter alia* to the protection of section 44 of the Transactions Act which provides that any guarantee of obligations of this kind under a consumer credit contract shall be void unless it is executed in the presence of a legal practitioner instructed and employed independently of the credit provider or mortgagee. If she had obtained and followed competent independent advice she would never have entered into the guarantee.

In the instant case, Mrs. Comblas was probably relieved from any personal liability as guarantor by Mercantile Credits Ltd. agreeing with Mr. Comblas to give him time to pay the first three instalments: but any personal liability on her part is of little practical importance. What is important is that the Home Mortgage was not expressed to be security for any general indebtedness or liability of Mr. Comblas to Mercantile Credits Ltd.; it was limited specifically to his liability under the Contract to pay instalments and to perform the covenants contained in it; and no breach of covenant, other than non-payment by him of instalments, is alleged.

For reasons that their Lordships have already indicated, Mr. Comblas's continuing liability under the Contract to pay monthly instalments cannot survive the taking of possession of the Truck by Mercantile Credits Ltd. on 26 November, 1976, with a view to its sale, and with the elimination of Clause 9 as void for uncertainty (whether this makes the whole Contract void for uncertainty or not) there is no other covenant in the Contract which imposes upon Mr. Comblas liability to pay any sum to Mercantile Credits Ltd. once they had obtained possession of the Truck and either still retained possession of it or had sold it, as in fact they did on 17 August, 1977, for an amount in excess of the instalments already due but unpaid on 25 November, 1976, when they took possession of it.

The Home Mortgage is accordingly spent; the only liabilities of Mr. Comblas for which it was expressed to be security, viz. those imposed upon him by the covenants in the Contract, have all been discharged, and Mr. and Mrs. Comblas are entitled to cancellation of the Home Mortgage.

As previously mentioned, the Full Court limited the declaration that it made to Mercantile Credits Ltd.'s lack of entitlement to recover any moneys from Mr. and Mrs. Comblas "pursuant to the express terms of" (the Contract and the Home Mortgage). None of the members of the Full Court found it necessary to consider whether, if the whole of the Contract were void for uncertainty, Mr. Comblas, in the events that happened, would have been under any personal liability to repay to Mercantile Credits Ltd. any and, if so, how much of the principal moneys that they had lent to him. In the absence of any counter-claim by Mercantile Credits Ltd. the question of possible common law liabilities does not arise, and their Lordships must also follow, which they do without reluctance, the same abnegative course as the Full Court.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed and the order of the Full Court affirmed. The appellants must pay to the respondents the costs of this appeal.

In the Privy Council

MERCANTILE CREDITS LIMITED

v.

**JOHN NICHOLAS COMBLAS
AND ANOTHER**

DELIVERED BY
LORD DIPLOCK