

IN THE HIGH COURT OF AUSTRALIA

---

CREDIT RENOVATIONS PTY. LIMITED.....

V.

.....UNITED DOMINIONS CORPORATION.....

---

**REASONS FOR JUDGMENT**

---

*Judgment delivered at*..... SYDNEY .....

*on*..... FRIDAY, 25 June 1976 .....

553.  
CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

ORDER

Appeal allowed.

Judgment of the Supreme Court of Queensland  
varied as follows:

In lieu of the order of Lucas J., order that  
the plaintiff recover against the defendant \$71,910 and  
that the defendant do pay the plaintiff's costs of and  
incidental to the application for summary judgment to be  
taxed. Further order that the defendant be allowed to  
defend as to the residue of the plaintiff's claim, subject  
to such orders as a judge may make under O. 18 of the  
Rules of the Supreme Court of Queensland.

Remit the appellant's application for summary  
judgment to the Supreme Court for further consideration  
of the question what further orders, if any, should be  
made under O. 18.

No order as to the costs of the appeal.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

JUDGMENT

GIBBS J.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

The respondent is the plaintiff in an action commenced against the appellant in the Supreme Court of Queensland on 27th June 1975. The writ was specially endorsed with a claim for \$78,852.69, being the principal and interest due to 27th June 1975 under four bills of mortgage executed by the appellant in favour of the respondent. There was a further claim for interest from the date of the writ to judgment or earlier payment. The appellant entered an appearance and the respondent thereupon applied on summons, supported by affidavit, for summary judgment under O. 18, r. 1 of the Rules of the Supreme Court of Queensland. The appellant filed an affidavit in opposition but Lucas J., before whom the application came, gave judgment for the respondent for \$78,948.27. An appeal has been brought to this Court from that judgment. The appeal involves no question of principle, and would more appropriately have been brought to the Full Court of the Supreme Court.

The respondent's material revealed that the appellant executed in favour of the respondent four mortgages of land. The mortgages, which were executed on 7th August 1973, 27th February 1974, 29th March 1974 and 29th March 1974 respectively, contained covenants in identical terms. The principal sum secured by each mortgage, and the date on which each such principal sum became payable, were respectively as follows:

First mortgage	\$21,380	31st August 1974
Second mortgage	\$28,050	28th February 1975
Third mortgage	\$10,160	29th March 1975
Fourth mortgage	\$12,320	29th March 1975

Each mortgage provided that instalments of interest at specified rates should be paid monthly. By the eighth covenant in each mortgage it was provided (inter alia) as follows:

"AND if at any time default shall be made in due payment of the principal and/or interest on any of the days when the same respectively shall become payable or if default be otherwise made by the Mortgagor hereunder, then the whole of the principal sum and all other moneys owing hereunder shall at the option of the Mortgagee (but only at such option) immediately or at any time thereafter become due and the Mortgagor will thereafter pay the same on demand."

By the twenty-sixth covenant in each mortgage it was provided (inter alia) that the mortgage should be security for all amounts from time to time advanced by the mortgagee to the mortgagor on any account whatsoever and default by the mortgagor in payment of any moneys which might be owing to the mortgagee upon any such other account should be deemed default under the mortgage. On 4th February 1975 the respondent delivered to the appellant notices of default in respect of the first and second mortgages, claiming in each case that there had been default in payment of the monthly instalments (\$224.49 under the first mortgage and \$350.63 under the second mortgage) payable on 31st December 1974 and 31st January 1975 and requiring payment of the whole of the principal secured by the mortgage and interest calculated to the date of the notice. On 7th February 1975 the respondent delivered a notice of default in respect of each of the third and fourth mortgages, alleging default in payment of an instalment

of principal and interest (particulars of which were not given) and requiring payment of the whole of the principal and interest to the date of the notice.

In the affidavit filed on behalf of the appellant it was alleged that at the time of entering into the mortgages it was agreed between the parties that the appellant would forthwith pay to the respondent the sum of \$5,000 which the respondent would hold as security for the repayments under the bills of mortgage and so long as any amount thereof continued to be held would pay interest thereon at the rate of 6% per annum, and that pursuant to the said agreement the appellant paid to the respondent the sum of \$5,000. It was further alleged in the affidavit that the appellant paid instalments under the mortgages until about the middle of 1974 and that thereafter the respondent had recourse to the sum of \$5,000. Annexed to the affidavit was a letter from the respondent to the appellant dated 17th January 1975 in the following terms:

" Re: Loan Accounts - Brisbane & Surfers Paradise

As you are aware, we have since August last year been charging interest instalments on the four loan accounts in the name of your company against the \$5,000 security deposit lodged with us in 1972.

The whole of this deposit has now been used up in meeting outstanding interest instalments and interest on all four accounts is at present paid to 30th November, 1974.

Will you please contact us as an urgent matter to discuss arrangements for bringing these accounts up to date and then for meeting future instalments as they fall due.

For your information we set out below details of the amounts taken to pay interest as from and after 21st August, 1974:-

Date	Amount Debited and U.D.C. Branch Brisbane	Surfers Paradise	Balance \$
21.7.72			5,000.00 Cr.
21. 8.74		\$262.26	4,737.74
31. 8.74	\$575.12		4,162.62
17. 9.74		\$262.26	3,900.36
30. 9.74	\$575.12		3,325.24
17.10.74		\$262.26	3,062.98
31.10.74	\$575.12		2,487.86
14.11.74		\$262.26	2,225.60
31.11.74	\$575.12		1,650.48
12.12.74		\$262.26	1,388.22
31.12.74	\$575.12		813.10
15. 1.75		\$237.98	575.12
16. 1.75	\$575.12		NIL "

The affidavit further stated that the properties subject to three of the mortgages were vacant lands but the fourth was a house property from which the appellant had until 15th January 1975 received rentals in the sum of \$151.66 per month. It was alleged that the appellant had received no rentals after that date, and further that in or about February 1975 the appellant was advised that the respondent had taken possession of all four properties and had accepted rent in respect of the house property.

It was submitted on behalf of the appellant that the respondent's material did not make out with sufficient particularity the default which made immediately payable the whole of the amounts claimed, and that there was at least a triable issue as to whether the respondent had wrongly given the notices of default and taken possession. It was said that the first two notices, alleging default in payment of the instalments of \$224.49 and \$350.63 respectively on 31st December 1974 and 31st January 1975, conflicted with the respondent's own letter which showed payments of \$575.12 (obviously the total of the two amounts) on 31st December 1974 and 16th January 1975 respectively, and further that the statement in the letter that

the interest was paid up to 30th November 1974 conflicted with the particulars which showed payments on 12th December 1974, 31st December 1974, 15th January 1975 and 16th January 1975. Moreover, it was submitted that if interest on the \$5,000 at 6% were brought into the calculation the amount to the credit of the appellant would have been more than sufficient to pay the amounts of interest due up to the dates of the respective notices of default. In these circumstances it was submitted that it was reasonable that the appellant should have leave to defend the action.

The case put by the appellant, that there was a triable issue as to whether there had been a default in the payment of interest at the dates of the respective notices, proceeds upon a misconception. It overlooks the fact that under the terms of each mortgage the principal sum had become due before the date on which the action was commenced. It is quite immaterial for the purposes of the respondent's claim whether the appellant was in default when the notices were given and whether those notices were correct or valid. The respondent was entitled to sue for the principal and interest due at the date of the commencement of the action without giving any notice of default. Of course the notices may have been given to enable the respondent to exercise other rights under the mortgages but we are concerned only with the right to payment. Whether or not there had been default in the payment of the interest the principal sum became due on the specified dates, all of which were before the commencement of the action. If the respondent had prematurely and wrongly taken possession of the properties subject to the mortgages that would not in

itself have been a defence to the respondent's action, although it might have given grounds for a counterclaim. There was no material to suggest what amount the appellant might recover if it succeeded in establishing a cause of action against the respondent based on the alleged wrongful taking of possession, but in the circumstances it was not likely to exceed the instalments of interest due to the respondent, which considerably exceeded the amount of rental derived from the properties. Moreover, the principal sum had become due under the first mortgage before the notices of default were given and it would seem that in consequence, because of the combined effect of the eighth and twenty-sixth clauses of the mortgages, the respondent had at the dates of the notices the right to demand payment of the principal sum under all the mortgages even if no interest was in default. It would not be right to express any concluded opinion on this aspect of the matter since the appellant may yet litigate this question, but in all these circumstances it would not be reasonable to give the appellant leave to defend the action in so far as it claims the principal sums due under the mortgages, nor would it be right to order a stay of execution on a judgment in favour of the appellant pending a counterclaim.

For these reasons it is in my opinion quite clear that the appellant was entitled to judgment for the principal sum due under the mortgage in each case. The appellant was of course also entitled to judgment for such interest as was due and unpaid at the date of the writ but on the present material I find it impossible to be satisfied as to the amount of interest due. The respondent's claim is verified by affidavit but the particulars do not reveal how interest was calculated.

That is not said by way of criticism, for the particulars were in a usual form and no further particulars were asked for. However, the appellant's affidavit raises an issue as to whether interest on the sum of \$5,000 should have been credited against interest due under the mortgages and the letter suggests that it was not in fact credited. The discrepancy between the statements in the letter that interest was paid up to 30th November 1974 and that payments were debited against the sum of \$5,000 in December 1974 and January 1975 would be explained if the dates shown were the dates on which the debits were made but not the dates on which the amounts became payable, but there is no evidence to that effect. Further, if the respondent received rents from the mortgaged properties it was bound to bring those rents into account. For these reasons I consider that on the present material the appellant has shown that there is a substantial question to be tried as to the amount of interest due. In these circumstances the proper course is to allow the respondent to have judgment forthwith for the whole of its claim to the principal sums payable under the mortgages and to allow the appellant leave to defend as to the amount of interest payable (including the interest payable from the date of the writ).

On the hearing of an application for summary judgment, the judge may order any officer of a defendant corporation to be examined on oath (O. 18, r. 3) and he may, with the consent of all parties, dispose of the action in a summary manner (O. 18, r. 7). When leave is given to defend the judge has power to give directions as to the future conduct of the action (O. 18, r. 8). It seems to me that, so far as the claim for interest is concerned, the proper course is to remit the matter to the

Supreme Court for further consideration. It may be that it will be found that the question of the amount of interest due may be disposed of shortly and without the necessity for a full-scale trial, or that it would be appropriate to exercise one or other of the powers under these rules.

I would allow the appeal and vary the order of the Supreme Court by ordering that the respondent recover against the appellant the sum of \$71,910 with costs and by ordering that the appellant be allowed to defend as to the residue of the respondent's claim, subject to such orders as a judge may make under O. 18. I would remit the matter to the Supreme Court for further consideration of the lastmentioned matter. I would make no order as to the costs of the appeal.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

JUDGMENT

MASON J.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

I have read the reasons for judgment prepared in this appeal by Gibbs J. I agree with those reasons and would therefore allow the appeal and make the orders which his Honour proposes.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

JUDGMENT

JACOBS J.

CREDIT RENOVATIONS PTY. LIMITED

v.

UNITED DOMINIONS CORPORATION LIMITED

I agree.