SUPREME COURT OF QUEENSLAND

CITATION:	*Hung & Anor v Hung & Anor* [2017] QSC 200
PARTIES:	**TIEN-CHUAN HUNG** (first plaintiff) **FENG HUA WU** (second plaintiff) **v** **TIEN TSAI HUNG** (first defendant) **SU YEN WANG** (second defendant)
FILE NO/S:	BS No 63 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2017
JUDGE:	Martin J
ORDER:	**1. The plaintiffs are required to bring in minutes of order within 10 days.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – where the first plaintiff and the first defendant were brothers – where the first plaintiff and the first defendant acquired a number properties – where the plaintiffs lent two sums of money to the defendants in the acquisition of two properties pursuant to two loan agreements – where the parties varied the loan agreements to require the plaintiffs to provide six months' notice before calling up the loans – where the plaintiffs demanded repayment of the loans – where the defendants assert that no "proper" demand has been issued – whether the demands were issued properly CONTRACTS – GENERAL CONTRACTUAL

PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – where the loan agreements provided for interest to be paid on the principle sums – where interest was to be calculated "on each anniversary" – where the plaintiffs claim compound interest – where the defendants assert that simple interest only is payable– where the defendants assert that there is a presumption in favour of simple interest – whether the loan agreements provide for simple or compound interest

INTEREST – RATE OF INTEREST AND COMPOUND INTEREST – COMPOUND INTEREST

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where the plaintiffs seek summary judgment – where the defendants assert that a trial is necessary to determine the basis for the calculation of interest – whether summary judgment ought to be granted

Uniform Civil Procedure Rules 1999 r 292

A J Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2009] VSCA 310, cited

Agricultural and Rural Finance Pty Ltd v Atkinson [2010] NSWSC 1396, cited

Australia and New Zealand Banking Group Ltd v Sammon (1984) Q ConvR 54-148, cited

Bakker v Chambri Pty Ltd (1986) 4 BPR 97,261, cited

Bernstrom v National Australia Bank Limited [2003] 1 Qd R 469, cited

Bunbury Foods Pty Ltd v National Bank of Australasia Ltd (1984) 153 CLR 491, applied

Daniell v Sinclair (1881) 6 App Cas 181, cited

Donnelly v National Australia Bank Unreported, Supreme Court of Western Australia, Full Court, 19 May 1992, distinguished

Gray v Morris [2004] 2 Qd R 118, cited

In Re Brookers (Aust) Ltd (in liq); Brooker v Pridham (1986)

41 SASR 380, cited

Morton v Elgin-Stuczynski (2008) 19 VR 294, cited

Re Colonial Finance Mortgage Investment & Guarantee Corp (1905) 6 SR (NSW) 6, cited

SB Developments Pty Ltd v HCH & K Fisheries Pty Ltd [2003] TASSC 136, cited

Stein v Torella Holdings Pty Ltd [2009] NSWSC 971, cited

Young v Queensland Trustees Ltd (1956) 99 CLR 560, cited

COUNSEL:	V D Atkinson for the applicants/plaintiffs M Steele for the respondents/defendants
SOLICITORS:	Brian McMahon & Co for the applicants/plaintiffs MHL Legal for the respondents/defendants

[1] The first plaintiff and first defendant in this matter are brothers. In 1990 they entered into an arrangement to acquire a number of properties in the Brisbane area. The second plaintiff and second defendant are their respective wives.

[2] There are five properties which are subject to the plaintiffs' claim. However, this application is only concerned with two loans made with respect to two of those properties ("the Loans").

[3] In purchasing a property on Clark Road, Park Ridge, the defendants borrowed the sum of $170,000 from the plaintiffs, being one half of the purchase price and outlays ("the Clark Road Loan"). Similarly, in purchasing a property on Green Road, Park Ridge, the defendants borrowed $260,000 from the plaintiffs, being approximately one half of the purchase price ("the Green Road Loan").

[4] The plaintiffs seek summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 and an order that the defendants pay the amounts outstanding under each Loan.

The Loans

[5] In purchasing the property at Clark Road, the plaintiffs agreed to lend the defendants the sum of $170,000 in the following terms:

> "Acknowledgment of loan …
>
> 1. Commencement of the Term of loan; 15th of December '93;
> 2. Interest payable; eleven percent per annum (11% p.a.) calculated on each anniversary of the Commencement of the Term of Loan on outstanding balance;
> 3. Term of loan; maximum of seven (7) years;
> 4. Repayments; At seven (7) years from the Commencement of the Term of Loan, or at such time or times as demanded by the Lenders;
> 5. All stamp duties payable on the Loan shall be paid by the Borrowers."

[6] The defendants admit that the Clark Road Loan was executed in the above terms. They accept that the funds were transferred to the first defendant's bank account.

[7] In purchasing the property at Green Road, the plaintiffs agreed to lend the sum of $260,000 in the following terms:

> "Acknowledgment of loan …
>
> 1. Commencement of the Term of Loan: 2 December 1994
> 2. Interest payable: nine and one-half percent per annum (9.5%) calculated on each anniversary of the Commencement of the Term of Loan on outstanding balance;
> 3. Term of loan: Maximum of seven (7) years;
> 4. Repayments: At seven (7) years from the Commencement of the Term of Loan, or at such time or times as demanded by the Lenders;
> 5. All stamp duties payable on the Loan shall be paid by the Borrowers."

[8] The defendants also admit that the Green Road Loan was executed in the above terms and that the funds were transferred to a joint bank account held by both defendants.

[9] The parties purported to vary the loans by a document dated 12 September 1995. This document was executed in Chinese. The parties provided different translations of this document, but the gist of the variation was:

(a) The defendants acknowledge that they have received the loans from the plaintiffs;

(b) The defendants can continue to use the loan funds after the expiry of the loan agreements;

(c) Should the plaintiffs wish to recover the debts, they must provide the defendants with six months' notice;

(d) The interest rate shall remain as provided for in the loan agreements; and

(e) No security interest is created by the document.

The application before the court

[10] The plaintiffs seek summary judgment with respect to the part of their claim regarding the Loans. To succeed, the plaintiffs must demonstrate that the defendants have no real prospect of successfully defending this aspect of the plaintiffs' claim.[1]

[11] At the hearing of this application, the defendants raised two bases on which they resist the application:

(a) The plaintiffs have failed to issue a "proper" demand; and

(b) The need for determination by trial of the interpretation of the loan contracts as to whether they provide for the payment of simple or compound interest.

[12] The claim filed by the plaintiffs is defective in that it does not include the amounts sought under the loan agreements. However, these are articulated in the statement of claim and no prejudice has been suffered by the defendants by the defect in the process. Through their counsel, the defendants conceded that they could not resist an application to amend the claim. Leave should be granted to amend the claim to include these amounts.

Were the demands issued properly?

[13] The defendants contend that no obligation to repay the Loans has arisen as the plaintiffs have not made a "proper" demand for repayment.

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[1] *Uniform Civil Procedure Rules* 1999 r 292.

[14] Unless otherwise agreed, a debt is payable immediately on request without the need to issue a demand.[2] In this case, the variation of 12 September 1995 provided that the plaintiffs were required to provide the defendants with six months' notice.

[15] On 1 April 2015, solicitors for the plaintiffs issued a letter to the defendants demanding the repayment of the Loans. That letter required repayment of the Loans within fourteen days. The defendants did not respond to the letter.

[16] On 2 September 2015, the plaintiffs' solicitors sent another letter asking the defendants to engage in "meaningful negotiations" to settle the entire dispute, setting out the amounts claimed under the Loan agreements. Once again, the defendants did not respond.

[17] On 25 October 2016, the plaintiffs' solicitors issued a final demand, explaining that any continued failure on the defendants' part to settle the matter would result in a claim being lodged in this court. This included a demand that the Loans be repaid.

[18] The defendants assert that they have not refused, declined or neglected to repay any part of the Loans. In their defence, the defendants state that:

> "(a) the plaintiffs have not made a proper demand for repayment of the principal amount and interest;
>
> (b) the plaintiffs demand for payment of compound interest (rather than simple interest) is unfounded and unreasonable; [and]
>
> (c) the defendants will pay the amounts owing once a proper demand for repayment of the loan is made."

[19] In his affidavit, the first defendant explains that he did not respond to the demands for repayment of the Loans as he could not understand the reason for the plaintiffs' demand. Somewhat contrarily, he also deposes:

> "Given the plaintiffs' demand for repayment of the Clark Road Loan and the Green Road Loan, my wife [the second defendant] and I are in the process of applying for bank finance to meet the repayments."

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[2] *Young v Queensland Trustees Ltd* (1956) 99 CLR 560; *In Re Brookers (Aust) Ltd (in liq); Brooker v Pridham* (1986) 41 SASR 380.

[20] In their defence, the defendants' contend that the plaintiffs have failed to issue a "proper" demand. The demands are said to be defective because they claim compound interest. The defendants assert that a demand for compound interest is inconsistent with the loan agreements, which they submit provide for interest to be paid on a simple basis. Additionally, they say that the plaintiffs have failed to properly identify the amounts owing and argue that without doing so, no proper demand will have been made.

[21] A demand need not be in a particular form. What identifies a demand, distinguishing it from a negotiating position, is that it contains an unequivocal command for payment.[3] The terms of the letters issued by the plaintiffs' solicitors on 1 April 2015 and 25 October 2016 are clear – repayment of the Clark Road and Green Road Loans was required.

[22] A debtor is not entitled to ignore a demand simply because it fails to state or incorrectly asserts the amount in which the debtor is owing. As the High Court explained in *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd*:[4]

> "It is of some materiality to note that **it is not essential to the validity of a notice calling up a debt that it correctly states the amount of the debt** …
>
> The foregoing examination supports the view that the interests of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than by the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. In determining whether the debtor has had such an opportunity it will be relevant to take account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor." (emphasis added)

[23] Regardless of whether the demands incorrectly claimed compound interest or failed to identify the amount outstanding, that would not have entitled the defendants to ignore

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[3] *Re Colonial Finance Mortgage Investment & Guarantee Corp* (1905) 6 SR (NSW) 6 at 9; *Australia and New Zealand Banking Group Ltd v Sammon* (1984) Q ConvR 54-148 at 54-149; *A J Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2009] VSCA 310 at [179].

[4] (1984) 153 CLR 491 at 503-4.

the demands for payment issued by the plaintiffs. A dispute as to the basis for calculating interest was no justification for ignoring the demands.

[24] The plaintiffs also referred to the case of *Donnelly v National Australia Bank*,[5] which they submit that this court should not follow. That case concerned an action brought by the National Australia Bank, the creditor, against two guarantors. The guarantors were directors of the corporate debtor. The bank demanded repayment of an array of fees and charges, including "discounts, postages, commissions … according to the usage and course of business of the Bank from time to time". The bank, however, did not detail the amounts demanded for these items. The majority in that case found that the guarantors had no means of identifying these amounts or how those amounts were arrived at, and accordingly denied the application for summary judgment.

[25] The decision in *Donnelly* can be distinguished from the circumstances in this case. The defendants in this matter had all the necessary information by which they could have determined the extent of their liability to the plaintiffs. They were by no means in the same position as the guarantors in *Donnelly*. Moreover, the plaintiffs' demands set out the amounts they claimed were owing and the method by which those figures were reached. There could be no doubt as to the amounts being claimed.

[26] The demands were issued properly.

Simple or compound interest?

[27] The defendants contend that, contrary to the plaintiffs' construction, the plaintiffs are entitled to simple interest only under the Loans. In their defence, the defendants contend that the plaintiffs' demand for compounded interest is "unfounded and unreasonable".

[28] The defendants submit that the loan agreements and the variation make no reference to compound interest. They rely on the authority of *Stein v Torella Holdings Pty Ltd*,[6] in which it was said, "It is settled law that compound interest is payable either by

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5 Unreported, Supreme Court of Western Australia, Full Court, 19 May 1992.

6 [2009] NSWSC 971 at [25].

agreement or by custom, but not otherwise". Accordingly, they say that the provisions should be interpreted as providing for simple interest.

[29] The defendants contend that this is a matter that ought to be determined by way of a trial. However, it was conceded at the hearing of this application that the written documents contained the entirety of the terms of the Loans. It was not submitted that extrinsic evidence would assist in the construction of the agreements. This is a simple matter of interpretation.

[30] A presumption of simple interest, rather than compound interest, is referred to in a number of cases.[7] In *Daniell v Sinclair*,[8] it was held that "without such an agreement simple interest only can be charged on a mortgage account". Similarly, in *Bakker v Chambri Pty Ltd*,[9] Young J explained:

> "I believe a court approaches this type of question of construction on the basis that unless there is a clear agreement to pay compound interest, interest is taken to be simple interest. The proposition is put slightly differently in the authorities, but I believe it amounts to this." (citations omitted)

[31] There are differing opinions as to whether such a presumption remains.[10] Neave JA (Kellam JA and Cavanough AJA agreeing) in *Morton v Elgin-Stuczynski*[11] said:

> "Whether interest is to be calculated on a simple or compound basis depends on the true construction of the contract, read in the light of surrounding circumstances.
>
> Whatever may have been the case historically, today there is no presumption that interest payable on a loan made by a private lender is to

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7 See, e.g., *SB Developments Pty Ltd v HCH & K Fisheries Pty Ltd* [2003] TASSC 136 at [24]; *Stein v Torella Holdings Pty Ltd* [2009] NSWSC 971 at [25]; *Agricultural and Rural Finance Pty Ltd v Atkinson* [2010] NSWSC 1396 at [129]-[137].

8 (1881) 6 App Cas 181 at 189.

9 (1986) 4 BPR 97,261 at 9236.

10 Cf with the abovementioned authorities: *Shepparton Projects Pty Ltd v Cave Investments Pty Ltd (No 2)* [2011] VSC 384 at [18], upheld on appeal in *Shepparton Projects Pty Ltd v Cave Investments Pty Ltd* [2013] VSCA 152; *Limin James Chen v Kevin McNamara & Son Pty Ltd* [2013] VSC 539 at [146]; *Volanne Pty Ltd v International Consulting and Business Management (ICBM) Pty Ltd* [2016] ACTCA 49 at [100]-[101].

11 (2008) 19 VR 294 at 300.

be calculated as either simple or compound interest. In *Alington Group Architects Ltd v Attorney-General the New Zealand Court of Appeal* said that:

> 'The question whether the interest payable … is to be simple or compound interest is to be approached without reference to any predisposition the Courts may have demonstrated in favour of simple interest as against compound interest. It is purely one of contractual interpretation. The agreement is to be interpreted so as to give effect to the meaning intended by the parties.
>
> Hence, any … 'presumption' in favour of simple interest is out of place in determining the meaning of the words in issue." (citations omitted)

[32] Regardless of whether or not there is a presumption in favour of simple interest, it is clear that the question is one of construction. If such a presumption does apply, it only applies where there is ambiguity in the agreement.

[33] The loan agreements provide that interest is "calculated on each anniversary". That the interest must be calculated on a recurring basis is consistent with a requirement that interest is compound. It would be unnecessary to calculate interest on "each anniversary" if the parties intended to charge simple interest. The use of rests also demonstrates an intention to calculate interest on a compound basis. Similarly, the reference to the "outstanding balance" comprehends the imposition of compound interest. There is no ambiguity.

[34] The contract should be construed as providing for compound interest.

Whether judgment ought to be given summarily

[35] Rule 292 provides that the defendants must have no real prospect of successfully defending this part of the claim against them. Summary judgment should not be ordered where there is a realistic, as opposed to a fanciful, prospect of success.[12]

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[12] *Bernstrom v National Australia Bank Limited* [2003] 1 Qd R 469.

[36] In *Gray v Morris*,[13] McMurdo J (McPherson JA agreeing) explained:

> "[I]n the application of the plain words of rr. 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial. In my view it surely remains the case, as Mason, Murphy, Wilson, Deane and Dawson JJ said in *Fancourt* at 99, that 'The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried'. That remains a forceful and authoritative guidance and is in no way in tension with the application of these rules according to their own terms."

[37] There was little dispute as to the facts of these matters. As explained above, the defendants admit that they borrowed the funds on the terms alleged by the plaintiffs, that the entire amounts under the Loans remain outstanding and that they are obliged to repay the Loans. A trial would cast no further light on the issues the subject of this application.

[38] The only defences to an order for summary judgment raised were whether the defendants have been served with a valid demand and the construction of the interest provision. The evidence establishes that valid demands were served and there was no submission made by the defendants that further evidence would assist the court in determining this issue. As to the matter of interest, that is merely an exercise in construction of the loan agreements.

[39] There is no need to delay the relief the plaintiffs are clearly entitled to. Summary judgment ought to be granted.

Orders

[40] I will give judgment, including costs, for the plaintiffs. They are required to bring in minutes of order within 10 days.

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[13] [2004] 2 Qd R 118 at 133.