SUPREME COURT OF QUEENSLAND

CITATION:	*Hung & Anor v Hung & Anor* [2018] QCA 87
PARTIES:	**TIEN TSAI HUNG** (first appellant) **SU YEN WANG** (second appellant) **v** **TIEN CHUAN HUNG** (first respondent) **FENG HUA WU** (second respondent)
FILE NO/S:	Appeal No 11152 of 2017 SC No 63 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 200
DELIVERED ON:	9 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2018
JUDGES:	Fraser and Morrison JJA and Bond J
ORDERS:	**1. Allow the appeal, with costs.** **2. Vary order 1 made in the Trial Division on 10 October 2017 so that the order 1, as varied, provides:** **"In relation to Paragraph N of the Amended Statement of Claim:** **a. the Defendants pay the Plaintiffs the sum of $1,403,500.00.** **b. the sum in (a) is calculated as follows:** **"Interest Calculation – Simple interest (calculated on an annual basis)** **Loan 1: 15 December 1993 – 14 December 2016 (the period the basis of which judgment sum was sought)** **Principal: $170,000** **Interest: 11% calculated on an annual basis = $430,100** **Principal + Interest = $600,100** **Loan 2: 2 December 1994 – 1 December 2016 (the period the**

basis of which judgment sum was sought)
Principal: $260,000
Interest: 9.5% calculated on an annual basis = $543,400
Principal + Interest = $803,400
Total sum: $1,403,500."

3. **Vary order 3 made in the Trial Division by adding to that order:**
"In particular, Order 1(a) does not preclude the plaintiffs from claiming, in relation to Paragraph N of the Amended Statement of Claim, that the Defendants should be ordered to pay to the Plaintiffs an additional sum representing the difference between simple interest and compound interest upon each of the principal sums of $170,000 and $260,000 mentioned in Order 1(b)."

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – where the appellant applied for summary judgment of principal plus interest on two loans of $170,000 and $260,000 that were outstanding for many years – where the appellants acknowledge they are liable for principal and simple interest – where the respondents claimed compound interest – where there was a dispute about whether the loan was made on the basis of a verbal agreement or a written loan acknowledgement – where the primary judge granted the summary judgment order for an amount incorporating compound interest – whether the primary judge erred in concluding that the appellants have no real prospect of successfully defending the respondents' claim for compound interest and that there is no need for a trial of that part of the claim

Uniform Civil Procedures Rules 1999 (Qld), r 292(2)

Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87; [1983] HCA 25, applied
Morton v Elgin-Stuczynski (2008) 19 VR 294; [2008] VSCA 25, cited
Nemeth v Bayswater Road Pty Ltd [1988] 2 Qd R 406, applied
State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170, applied

COUNSEL: C M Tam for the appellants
D L K Atkinson for the respondents

SOLICITORS: Bartley Cohen for the appellants
Brian McMahon & Co for the respondents

[1] **FRASER JA:** The appellants have appealed against an order giving the respondents summary judgment for amounts outstanding for many years upon loans of $170,000 and $260,000. The total amount of the judgment is $3,789,091.29, most of which is for compound interest. The issue in the appeal is whether, in terms of r 292(2) of the *Uniform Civil Procedure Rules* 1999 (Qld), the primary judge erred in concluding that the appellants have no real prospect of successfully defending the respondents' claim for compound interest and that there is no need for a trial of that part of the claim. The appellants acknowledge that they are liable for the outstanding principal and simple interest at agreed rates, but they contend that there is a question to be tried whether they are liable for compound interest. The parties agree that if the appellants' contention is correct the total amount of the summary judgment should be reduced to $1,403,500.

Relevant pleadings and evidence

[2] The first appellant and the first respondent are brothers and the other parties are their wives. The respondents' statement of claim alleges that the respondents and the appellants agreed in mid-1990 that they would contribute monies equally for the acquisition of real property. Their shares in the venture would be equivalent to the proportions that their contributions bore to the total money contributed. They would share capital gain, expenses, income and any other net revenue in proportion to their contributions. The appellants would hold, manage and dispose of the property on behalf of the respondents and the appellants for their benefit and in proportion to their respective interests. Pursuant to the agreement the parties subsequently invested in five properties. The loans related to two of the properties, known as the "Clark Road property" and the "Green Road property". The pleadings and evidence about the two loans, including the loan documents, are substantially the same. There are differences, such as the dates of the loan documents and the advances, the amounts of the advances, and the interest rates, but the differences are immaterial to the issue in the appeal. It is therefore sufficient to discuss only one of the loans.

[3] Under the heading "Background", paragraph 10 of the statement of claim alleges that the Clark Road property was purchased on 15 November 1993 for $330,000.00, with transaction costs of approximately $10,000.00. The first respondent contributed $170,000.00 by paying it into the first appellant's bank account on 14 December 1993. Paragraph 10(c) alleges that the first respondent agreed to lend to the first appellant the amount of his contribution, $170,000.00, and the first respondent advanced that further sum at the first appellant's direction. That is defined as "the Clark Road loan". Paragraph 10(d) alleges that the Clark Road loan was made "on the basis of a verbal agreement that … the principal would attract interest at 11% per annum, calculated yearly", that when the Clark Road property was sold the respondents "would receive from the proceeds an amount equivalent to the principal and interest" and an amount equivalent to their contribution, and that the appellants would otherwise share equally in the balance of the proceeds.

[4] The next section of the statement of claim is headed "Causes of Action". There are two relevant bases of claim articulated under that heading. First, the statement of claim alleges that the money contributed by the first respondent and the money lent by the first respondent to the first appellant were applied to the purchase of the Clark Road property, the appellants were registered as owner of that property as joint tenants, the appellants never provided any income to the respondents in

relation to any of the properties and never repaid any part of the Clark Road loan, and the appellants held the Clark Road property in whole or as to a half share on trust for the respondents. Those allegations are reflected in the respondents' Amended Claim, which seeks a declaration that the Clark Road property is held in whole or in part on trust for the benefit of the respondents and an order that it be vested in statutory trustees for sale pursuant to s 38 of the *Property Law Act* 1974 (Qld).

[5] Secondly, paragraph 24 of the statement of claim alleges that the Clark Road loan was executed on 29 November 1993 by the appellants and the respondents, it is "in writing", it is in English, and it included terms that:

> "(i) the Plaintiffs would advance a sum of $170,000.00 to the Defendants;
>
> (ii) the Defendants would be liable for interest at the rate of 11% per annum;
>
> (iii) repayments were to be made at seven years from the commencement of the term, or at such time or times as demanded by the Plaintiffs."

[6] Paragraphs 25 to 27 allege that the respondents advanced $170,000.00 "in accordance with the Clark Road loan and immediately after entering into the same", the respondents demanded repayment on three occasions between March 2014 and 25 October 2016, and the appellants have not paid any part of the principal or interest owing for the loan. Paragraph 28 of the pleading claims the sum of $170,000.00 "plus interest" pursuant to the Clark Road loan.

[7] The application for summary judgment was supported by an affidavit of the first respondent. He deposed that the statement of claim was filed on his instructions and it set out his honest and true recollection of the history of property acquisition with his brother since they made their agreement in mid-1990. The affidavit thereafter refers in detail to the Clark Road loan and the Green Road loan. In relation to the Clark Road loan, the respondent deposed that the appellants and the respondents executed a "loan document" dated 29 November 1993, according to which the respondents would advance $170,000 to the appellants. The first appellant organised for that document to be prepared in Brisbane and sent to the first respondent in Taiwan for signing, it having already been signed by the appellants. The respondents signed and returned the document after the first appellant telephoned the first respondent and asked that the respondents do so. At the time, the first respondent and his brother were contemplating the purchase of the Clark Road property and the first appellant indicated that he intended to use the loan monies to provide his share of the purchase price. On 14 December 1993, the first respondent transferred into the first appellant's bank account the first respondent's contribution of $170,000 to the purchase, and he transferred $170,000 at the first appellant's direction to their father's account in performance of the "Loan Agreement". (That capitalised term is not defined in the affidavit.) The Clark Road property was subsequently purchased in the appellants' names. The respondents' solicitors had made written demands for repayment of the loan on many occasions and the appellants had not made any payment by way of principal, interest or otherwise in satisfaction of the Clark Road loan.

[8] The exhibited "loan document" for the Clark Road loan is in the following form (and there was a loan document for the Green Road loan in the same terms, save for the inevitable differences in dates, amounts, and rates of interest):

> "ACKNOWLEDGMENT OF LOAN
>
> We, [the appellants] of [address in Brisbane] (hereinafter called 'the Borrowers'), hereby acknowledge receipt of the sum of… ($170,000.00)…by way of loan from [the respondents] of [address in Taiwan] (hereinafter called 'the Lenders') under the following terms and conditions:
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> 1. Commencement of the Term of Loan; 15th of December 93;
> 2. Interest Payable; eleven percent per annum (11%pa) 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.
>
> Dated this 29 day of NOV, 1993."

[9] The first respondent's affidavit also refers to an agreement dated 12 September 1995 that extended the time for repayment of the loans, which is not mentioned in the statement of claim but is referred to in the defence. The original document is in Mandarin. An exhibited translation is headed "PRIVISO". It recites that "The Borrowers acknowledge obtaining the loans from the Lenders in the past and being allowed to continue using the money borrowed after the due date. The Lenders must provide the Borrowers with a six months' notice should the Lenders require the loans to be repaid with the rate of interest remains the same as per the Loan Agreements."

[10] The appellant's defence denies that they entered into the alleged agreement with the respondents in about mid-1990. In relation to the Clark Road property, the defence admits that in about late 1993 the respondents provided a loan to the appellants in the amount of $170,000 and that the appellants have not repaid the principal or any interest. The defence alleges that the respondents did not otherwise invest in the property and have no interest in it, the appellants have no obligation to the respondents apart from the repayment of loan monies in relation to the property, and the appellants and respondents signed an Acknowledgment of Loan dated 29 November 1993 and the loan variation agreement dated 12 September 1995 in relation to all loans. Substantially the same case is pleaded in relation to the other allegations about the Clark Road property in the statement of claim. In particular, the defence denies paragraph 10(d) of the statement of claim, "because …the term of the loan was for 7 years … interest would accrue at the rate of 11% simple interest per annum, calculated on each anniversary of the loan …", and on 12 September 1995, the parties extended the time for repayment of the loan until a date six months after demand was made by the respondents for repayment.

[11] The appellants relied upon an affidavit by the first appellant. The affidavit refers to investments by the respondents commencing in late 1990. It includes the following statements which were mentioned in arguments in this appeal:

> "6 All financial arrangements between the parties to these proceedings are evidenced by written loan agreements, and there is no agreement to acquire and/or hold any of the subject properties in whole or in part on trust for the benefit of the plaintiffs.
>
> …
>
> 9 The loan document … [the "Acknowledgment of Loan" for the Clark Road loan] is a true copy of the loan agreement signed by the plaintiffs as Lenders, and my wife and me as Borrowers on 29 November 1993.
>
> 10 As stated in the loan agreement, the plaintiffs provided $170,000 as the Clark Road loan at an annual interest rate of 11%. The loan agreement did not provide for compound interest.
>
> …
>
> 17. The plaintiffs through their lawyers … purported to issue letters of demand for repayment of the Clark Road loan and interest on a compounded basis, contrary to the written agreements my wife and I had with the plaintiffs."

[12] The first appellant acknowledged in his affidavit that the amount of the Clark Road loan had been provided to the appellants on or about 14 December 1993. He denied that there was any agreement that the Clark Road Property was to be held wholly or partly on trust or for the benefit of the respondents and he denied that the respondents made the contributions to the purchase price which they alleged they had made. The first appellant deposed that he and his wife were in the process of applying for bank finance to meet the repayments. The reason why they had not responded to the respondents' lawyers' demands was that the first appellant could not understand the calculation of compound interest or the basis of the demand for it.

The primary judge's reasons

[13] The primary judge observed that the appellants conceded that the written documents contained the entirety of the terms of the loans and it was not submitted that extrinsic evidence would assist in construing the agreements. The primary judge concluded that in purchasing the Clark Road and Green Road properties the respondents agreed to lend the defendants the sums of $170,000 and $260,000 in the terms stated in the Acknowledgment of Loan in each case. The appellants admitted that the Clark Road loan and Green Road loan were executed in those terms and the funds were transferred to the respondents' bank accounts. For those reasons the primary judge considered that the question about interest involved only a simple matter of interpretation.

[14] The primary judge referred to cases in which it had been held that there is a presumption of simple interest rather than compound interest,[1] or that interest is taken to be simple interest "unless there is a clear agreement to pay compound interest".[2] After referring to differing opinions as to whether any presumption remains part of the law,[3] the primary judge referred to *Morton v Elgin-Stuczynski*,[4] in which Neave JA (Kellam JA and Cavanough AJA agreeing) held that the law did not presume that interest payable on a loan made by a private lender was to be calculated as either simple or compound interest; the basis upon which interest was to be calculated "depends on the true construction of the contract, read in the light of surrounding circumstances." Whether or not there was a presumption in favour of simple interest, the question remained one of construction and any such presumption could only apply if there were ambiguity in the agreement. The primary judge concluded that there was no such ambiguity: the provision in the "Loan Agreements" that interest is "calculated on each anniversary" was consistent with a requirement that interest is compound; calculation of interest on each anniversary would be unnecessary if the parties intended to charge only simple interest; the use of rests also demonstrated an intention to calculate interest on a compound basis; and the reference to "outstanding balance" comprehended the imposition of compound interest.

Summary of the arguments

[15] The appellants argued that they did not make a concession in the terms articulated by the primary judge. They argued that the primary judge erred in concluding that the summary judgment application involved only an exercise in construction of loan agreements. The appellants developed that argument by advancing three propositions: the respondents' own pleaded case was contrary to the view that what was involved was only an exercise of construction; the affidavit evidence was contrary to that conclusion; and for those reasons the natural meaning of the acknowledgments could not be discerned with precision merely by an exercise of construction. It followed, so the appellants submitted, that the interest issue was not apt for summary determination. The appellants also advanced the following arguments challenging the primary judge's construction of each Acknowledgement of Loan. The task of construction should have been approached bearing in mind what was said to be uncontested evidence that simple interest was to apply to the loans and that the respondents' own pleadings did not assert that compound interest was applicable. The terms in the acknowledgements "anniversary" and "outstanding balance" are undefined and their meanings cannot be gleaned from the documents. The relevant "anniversary" was end of the term of the loan, rather than one calendar year. This construction was supported by the broader commercial arrangements alleged in the statement of claim and in the subsequent variation. It was inappropriate summarily to conclude that the word "calculated" connoted, not merely a computation of interest, but also the capitalisation of interest at the time of

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1 *TSB 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].

2 *Bakker v Chambri Pty Ltd* (1986) 4 BPR 9234 at 9236.

3 *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].

4 (2008) 19 VR 294 at 300.

the calculation. The acknowledgements do not in terms require the "calculated" interest to be paid at the time of the calculation and the broader commercial arrangements alleged by the respondents indicate that no demand would be made until the properties were sold. The view was open that the interest compounded with the loans would not become "outstanding" until demand was made pursuant to the variation.

[16] The appellants also argued that the result of the construction that compound interest was payable upon loans which, as a result of the variation, were to endure for an indefinite period, did not make commercial sense in the context of an intra-family loan under an arrangement under which the value to the respondents was to lie in the capital appreciation of the properties. The combined principal and interest eventually would exceed the sale proceeds of the properties, the variation implicitly acknowledged that the appellants might lack sufficient funds to meet any demand under the loans before the sale of the properties, and where the respondents claimed the entirety of the proprietary interest in both properties.

[17] The respondents submitted that the order granting summary judgment was correct for the reasons given by the primary judge. The sections of the statement of claim specifically concerning the Clark Road loan and the Green Road loan pleaded written agreements for loan which contained the material terms of the agreements, including as to the appellants' liability for interest as claimed by the respondents. In each case that written agreement was adduced in evidence in the summary judgment application. (The respondents here referred to each Acknowledgement of Loan.) The claim for compound interest was sufficiently pleaded in the statement of claim. Although the claim did not make a claim for the repayment of the loans, with or without interest, the respondents subsequently filed an amended claim by leave which did make the necessary claims. The affidavit of the first respondent verified the material elements of the claim, including the claims for compound interest. The affidavit of the first appellant did not challenge any relevant part of the first respondent's affidavit. By the time of the summary judgment hearing it was not contentious that the Clark Road loan and the Green Road loan were governed by written agreements. That was clear from the affidavits. To the extent that there was any inconsistency between that view and paragraphs 10 and 11 of the statement of claim the inconsistency should be ignored. The application for summary judgment was concerned only with paragraphs 24 to 33 of the statement of claim. In any event the earlier paragraphs were not inconsistent with the later paragraphs. The affidavit of the first appellant implicitly conceded that the written agreements, signed by him and his wife, regulated the loan. Assertions by the first appellant that the loans did not provide for compound interest were not relevant in the exercise of construing the loan documents. At the summary judgment hearing the appellants did not identify any evidence which might assist in the construction of the agreements and the first respondents' affidavit appeared positively to assert that all of the financial arrangements were set out in the written agreements. The concessions identified by the primary judge were made by the appellants' counsel. Application of the parol evidence rule, and the principle that there is no presumption upon the question whether interest is to be simple interest or compound interest, required the dispute to be resolved by the process of contractual interpretation adopted by the primary judge. There is no ambiguity in the meaning of the written agreements as the primary judge concluded.

Consideration

[18] The first respondent verified the respondents' statement of claim by the statement in his affidavit that it was filed on his instructions and set out his honest and true recollection of the history of property acquisition with his brother since they made their agreement in mid-1990. The allegation in paragraph 10 of the statement of claim that the loan was made on the basis of a verbal agreement which included a term that interest attracted to the principal describes an obligation by the appellants to pay only simple interest. The terms of the alleged verbal agreement do not express an obligation to pay the interest on the principal at any time before the sale of the property, out of which the principal and interest was intended be recouped, much less an obligation to pay interest upon any interest that remained unpaid after it was due for payment. In that context, the alleged term providing for interest to be "calculated annually" conveys no more than it says. There is also no allegation in the later section of the pleading, including paragraph 24, that an obligation to pay interest on interest is implicit in the express terms or implied in the contract. In short, the statement of claim alleges that the loans were made on the basis of a verbal agreement under which the appellants are obliged to pay simple interest rather than compound interest.

[19] The allegation of the verbal agreement and its verification in the first respondent's affidavit cannot be disregarded merely because subsequent paragraphs of the pleading specifically concerning the "Clark Road loan" and the "Green Road loan" allege that each loan is in writing. The quoted terms are themselves defined in the earlier section of the pleading alleging the verbal agreement as meaning that the first respondent "agreed to loan [the principal sum] to the First [appellant] and advanced the said sum at the First [appellant's] direction". The intended effect of that definition is not clear but the allegation that the loans were in writing was evidently not intended to contradict the allegation that those loans were made under the verbal agreement. Furthermore, that the Acknowledgment of Loan does not include all of the terms of the parties' alleged bargain is suggested by the absence from it of the term alleged in paragraph 24 of the statement of claim that the respondents would advance the principal to the respondents.

[20] Curiously, it is the first appellant's affidavit which supplies most support for the respondents' argument that the Acknowledgment of Loan contains all of the terms of the parties' bargain. But the first appellant's statement that the financial arrangements were evidenced by written loan agreements does not necessarily mean that those agreements record all of the terms, and his characterisation of the Acknowledgment of Loan as "the loan agreement" is not determinative of the correct characterisation. In any event, the first appellant's affidavit does not justify disregard of the evidence to the contrary in the respondents' statement of claim and its verification in the affidavit of the first respondent. A trial judge would be required to take into account all of the evidence adduced at trial of the terms of the parties' contract, regardless of whether or not evidence given by one party did or did not favour that party.

[21] The alleged verbal agreement was irrelevant upon the premise that the issue turned merely upon the proper construction of the Acknowledgment of Loan. That reflects a traditional application of the parol evidence rule that evidence is not admissible to contradict or vary the terms of a written agreement, as explained by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.[5] But that

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5 (1982) 149 CLR 337 at 347.

rule does not operate until it is first concluded that the terms of the contract are wholly contained in writing, and the existence of writing which appears to represent a written contract between the parties is no more than an evidentiary foundation for such a conclusion: see *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*[6] and *Nemeth v Bayswater Road Pty Ltd*.[7] In this case, the evidence leaves open the answer to the question whether the Acknowledgment of Loan contains all of the terms of the parties' loan contract. If that document is or records only one part of a contract which includes a verbal agreement for simple interest, the interpretation of the document would have to be approached from a very different perspective to that adopted by the primary judge. The language of the Acknowledgment of Loan is sparse. It does not express an obligation to pay compound interest. Whether or not the parties' contract imposes such an obligation cannot be reliably determined in the absence of evidence of what was said and done by the parties in concluding their contract.

[22] That conclusion is consistent with the submissions made by the appellant's counsel in the Trial Division. He did initially concede that there was no dispute about the first respondent's evidence that the Acknowledgement of Loan was a copy of the loan agreement and that it reflected the terms of the loan, but he qualified those concessions by referring to the respondents' pleaded allegations that the loan was made on the basis of a verbal agreement under which the principal attracted interest. He submitted that the respondents' own pleading of a verbal agreement made it necessary to hear evidence from the parties about the terms of the contract.

Disposition and orders

[23] Applying the guidance in *Fancourt v Mercantile Credits Ltd* that "[t]he 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,"[8] I conclude that the requirements of r 292(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) are not fulfilled in this case in relation to the respondents' claim for compound interest. It follows that the order for summary judgment should be varied by reducing the judgment sum to the amount that represents the principal together with simple interest at the agreed rates. The parties have agreed upon that amount and the manner of its calculation.

[24] The respondents argued that if the appeal were allowed upon the basis that simple interest should be allowed instead of compound interest, the appropriate costs order should recognise that each party had some degree of success. In my view the appellants should be given their costs of the appeal. Although their concession that the judgment should be set aside only to the extent that it awarded compound rather than simple interest came late in the appeal, the result of the appeal favours the appellants and it does so to a very substantial extent. In these circumstances costs should not be apportioned according to the results upon different issues.

[25] The primary judge ordered the defendants to pay the plaintiffs' costs of the application for summary judgment on the standard basis, to be assessed if not agreed. The effect of the orders which I propose is that the application for summary judgment succeeds only to the extent that judgment is given for the principal

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6 (1986) 7 NSWLR 170 at 191 – 192 (McHugh JA).
7 [1988] 2 Qd R 406 at 413 – 414 (McPherson J).
8 (1983) 154 CLR 87 at 99 (Mason, Murphy, Wilson, Deane and Dawson JJ).

amounts of each loan together with simple interest, rather than the compound interest claimed. Nevertheless, I would not vary the costs order made in the Trial Division. The application for summary judgment was manifestly appropriate in circumstances in which, notwithstanding demands for payment and admissions of liability for the principal and simple interest by the appellants, the appellants did not consent to any judgment and made no payment of principal or interest. Furthermore, although the issue about interest was very significant, it was not the only issue agitated in the Trial Division by the appellants. They also argued, unsuccessfully, that the variation of 12 September 1995 required the plaintiffs to make a demand on six months' notice and that such demands as were made were not sufficient. Again, costs should not be apportioned according to the result of different issues.

[26] I should mention that the absence of any claim for the principal and interest in the original Claim created a jurisdictional obstacle to giving summary judgment.[9] The Amended Claim filed by the respondents with the leave of the primary judge added a claim for the principal and interest, but with reference to allegations in the statement of claim which did not plead a basis for compound interest. At the hearing of the appeal the respondents sought to cure that difficulty by applying for leave to amend the Amended Claim to add a claim for compound interest. That was not opposed by the appellants, who acknowledged that it would not create any prejudice. However the precise amendment was not formulated and, upon my view that the appeal should be allowed, any application to amend should be made in the Trial Division.

[27] I consider that the following orders are appropriate:

(1) Allow the appeal, with costs.

(2) Vary order 1 made in the Trial Division on 10 October 2017 so that the order 1, as varied, provides:

"In relation to Paragraph N of the Amended Statement of Claim:

(a) the Defendants pay the Plaintiffs the sum of $1,403,500.00.

(b) the sum in (a) is calculated as follows:

"Interest Calculation – Simple interest (calculated on an annual basis)

Loan 1: 15 December 1993 – 14 December 2016 (the period the basis of which judgment sum was sought)

Principal: $170,000

Interest: 11% calculated on an annual basis = $430,100

Principal + Interest = $600,100

Loan 2: 2 December 1994 – 1 December 2016 (the period the basis of which judgment sum was sought)

Principal: $260,000

Interest: 9.5% calculated on an annual basis = $543,400

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9 See *Equititrust Ltd v Gamp Developments Pty Ltd* [2009] QSC 115.

Principal + Interest = $803,400

Total sum: $1,403,500."

(3) Vary order 3 made in the Trial Division by adding to that order:

"In particular, Order 1(a) does not preclude the plaintiffs from claiming, in relation to Paragraph N of the Amended Statement of Claim, that the Defendants should be ordered to pay to the Plaintiffs an additional sum representing the difference between simple interest and compound interest upon each of the principal sums of $170,000 and $260,000 mentioned in Order 1(b)."

[28] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[29] **BOND J:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.