

Level 8 Angel Place 123 Pitt Street Sydney NSW 2000
GPO Box 983 Sydney NSW 2001 DX 101 Sydney
Tel 61 2 8233 9500 Fax 61 2 8233 9555
www.daslaw.com.au

12 July 2007

Mrs Fiona Cristian
11 Roycroft Street
BOWRAL NSW 2576



DIBBS ABBOTT STILLMAN | LAWYERS

Also by Facsimile and Email: (02) 4861 1113 and action@loveforlife.com.au

Dear Mrs Cristian

**PERPETUAL LIMITED –V- FIONA CRISTIAN
SUPREME COURT PROCEEDINGS COURT OF APPEAL NO 40381 OF 2007
Our Ref: JAB/GTB/3301650**

We refer to the above matter and enclose by way of service, Opponent's Response filed 12 July 2007.

Yours faithfully
Dibbs Abbott Stillman

per Gary Koning
Senior Associate
Email: gary.koning@daslaw.com.au
Direct Line: 61 2 8233 9789

Partner Responsible: Gerard Breen

839655 v1 SYDNEY 12 07 07

Melbourne
T 61 3 8080 3500
F 61 3 8080 3599

Brisbane
T 61 7 3100 5000
F 61 7 3100 5001

Canberra
T 61 2 6201 7222
F 61 2 6257 4011

Perth
T 61 8 9265 6000
F 61 8 9265 6099

The Dibbs Abbott Stillman Legal Group is a national association of independent law firms each trading as Dibbs Abbott Stillman.

12 JUL 2007

CLERK OF THE COURT

OPPONENT'S RESPONSE

COURT DETAILS

Court Supreme Court of New South Wales
Division Court of Appeal
List
Registry Sydney
Case number 40381 of 2007

TITLE OF PROCEEDINGS

Claimant Fiona Caroline Cristian
Opponent Perpetual Limited, formerly known as Perpetual Trustees Australia Limited
ACN 000 431 837
In the Court below, Supreme Court of New South Wales, Equity Division, proceedings number 3072 of 2007
Plaintiff Perpetual Limited, formerly known as Perpetual Trustees Australia Limited
ACN 000 431 837
Defendant Fiona Caroline Cristian

OPPONENT'S RESPONSE

- A. **The Opponent, Perpetual Limited, Opposes the Grant of Leave to Appeal.**
- B. **Opponent's Grounds of Argument.**
1. In the Court below, Perpetual Limited, the Plaintiff, commenced proceedings by Summons filed 7 June 2007, seeking orders for the withdrawal of a caveat placed by the Defendant over property at Currarong, New South Wales ("the Property"). The Plaintiff also sought an order restraining the Defendant from lodging any further caveat over the Property.
 2. The orders sought by the Plaintiff were based on a judgment obtained in related proceedings, numbered 13403 of 2006 in the Court below, in which Perpetual Limited was also the Plaintiff and Fiona Cristian the Defendant ("the Earlier Proceedings").
 3. In the Earlier Proceedings, on 15 November 2006, His Honour Justice Hidden gave judgment in favour of Perpetual Limited, ordering that the Defendant give the Plaintiff possession of the Property, and, inter alia, that the Plaintiff have leave to issue a Writ of Possession in respect of the Property.

4. The Defendant sought leave to appeal the decision of Justice Hidden. On 2 April 2007 this Honourable Court refused the Defendant's application for leave.
5. On 21 February 2007, the Plaintiff took possession of the Property, pursuant to a Notice to Vacate issued and executed by the Office of the Sheriff.
6. On 12 May 2007, the Property was sold at public auction by the Plaintiff as mortgagee in possession. Settlement of the sale was scheduled for 12 June 2007.
7. On or about 31 May 2007, the Defendant lodged a caveat over the Property, claiming an interest in the Property as its registered owner and noting that the Defendant has legal proceedings in relation to the Property ("the Caveat").
8. The Plaintiff wrote to the Defendant, by letter dated 4 June 2007, requesting the withdrawal of the Caveat. The Defendant did not respond to this request and accordingly, the Plaintiff approached the Duty Judge, Justice Nicholas, on 7 June 2007, with a Summons, seeking orders that the Summons be heard *instanter* and the Defendant be ordered to withdraw the Caveat.
9. At the request of the Defendant, on 7 June 2007, His Honour Justice Nicholas stood over the hearing of the Summons to 8 June 2007.
10. At the hearing of the Summons on 8 June 2007 the Plaintiff read into evidence the affidavit of Kylie Davies, sworn 6 June 2007, together with the exhibits to that affidavit.
11. On 8 June 2007, His Honour Justice Nicholas delivered an *ex tempore* judgment directing the Defendant to withdraw the Caveat and restraining the Defendant from lodging any further caveat over the Property. The Defendant seeks leave to appeal this judgment.
12. It should be noted at this point that following the judgment of Justice Nicholas the Plaintiff has completed the sale of the Property.

Opponent's Summary of Argument

13. The Claimant requires Leave to Appeal because the Judgment was given on an Application to the Court to remove a caveat pursuant to section 74MA of the *Real Property Act, 1900* (*Supreme Court Act, 1970*, Section 101(2)(m)).
14. The principles which govern the exercise of the power to grant leave are well established. It is not possible, or appropriate, to identify any set criteria for the grant of leave (*Adam P. Brown Male Fashions Pty Limited v Phillip Morris Inc.*). However, a requirement for leave is, clearly enough,

intended to operate as a filter to preserve the resources of the appellate court by excluding matters clearly unsuitable for review at that level.

15. It is for the Appellant to establish the existence of substantial reasons to allow the opportunity of appellate review (*Johnson Tiles Pty Limited v Esso Australia Limited*). This usually, though not compulsorily, means that the Applicant for leave must identify some error of principle at first instance and some substantial injustice thereby caused. In the context of the present matter it can readily be conceded that grant of leave would be appropriate **if** the Claimant can identify some error of approach or principle on behalf of Justice Nicholas **and** that the result was, in the particular circumstances of the matter, unjust.
16. The Claimant's attempt to discharge that onus in its White Folder is replete with scandalous, irrelevant and mainly untenable propositions. Most of the matters which appear in that folder are matters related to the Earlier Proceedings and irrelevant to the question required to be determined by Justice Nicholas, namely, was the Defendant entitled to maintain the Caveat over the Property. None of the Defendant's material identifies any error of principle or approach by Justice Nicholas.
17. That the Defendant is self-represented is no ground for relaxing the requirement that the Claimant establish a substantial case for appellate review.
18. To the extent that the Court will, for itself, undertake a review of Justice Nicholas's decision, notwithstanding the confusing and irrelevant material in the Claimant's Summary, the Opponent says that the decision appealed from was, in the circumstances of the present matter, undoubtedly correct and that no injustice in its result can be identified.

C. Reasons Why Leave Should Not Be Granted

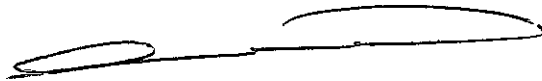
19. Claimant's Summary of Argument does not identify any error of principle or approach in the proceedings before, or judgment of, Justice Nicholas.
20. The Plaintiff cannot point to any relevant injustice in the result.
21. The judgment of Justice Hidden in the Earlier Proceedings, granting the Opponent possession of the Property, which the Claimant unsuccessfully sought leave to appeal in this Honourable Court, gave the Opponent the right, as mortgagee in possession, to sell the Property. There was no basis upon which the Caveat of the Claimant was maintainable in light of that judgment and no basis upon which Justice Nicholas could make any order other than requiring the withdrawal of the Caveat.

D. **Relevant Authorities and Legislation**

- 22. Supreme Court Act.
- 23. Real Property Act section 74MA.
- 24. Perpetual Limited v Fiona Caroline Cristian (unreported) Hidden J 15/11/2006
- 25. Fiona Caroline Cristian v Perpetual Limited (unreported) Court of Appeal, Mason P and Handley AJA 2/04/2007.

SIGNATURE

Signature



Name Gerard Breen

Solicitor for the Plaintiff *by his employed solicitor, Gary Kenny*

Date *12 July* 2007

PARTY DETAILS

Parties to the proceedings

CLAIMANT

Fiona Caroline Cristian

OPPONENT

Perpetual Limited, formerly known as Perpetual
Trustees Australia Limited

ACN 000 431 837

In the Court below-

PLAINTIFF

Perpetual Limited, formerly known as Perpetual
Trustees Australia Limited

ACN 000 431 837

DEFENDANT

Fiona Caroline Cristian