

SUPREME COURT OF N.S.W.  
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## OPPONENT'S RESPONSE

### COURT DETAILS

Court Supreme Court of New South Wales  
Division Court of Appeal  
List  
Registry Sydney  
Case number 40839 of 2006

### TITLE OF PROCEEDINGS

Claimant Fiona 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, Common Law Division Possession List,  
proceedings number 13403 of 2006-  
Plaintiff Perpetual Limited, formerly known as Perpetual Trustees Australia Limited  
ACN 000 431 837  
Defendant Fiona Cristian

### OPPONENT'S RESPONSE

1. Attached as Annexure A.

### SIGNATURE

Signature



Name Gerard Breen

Solicitor for the Plaintiff

Date 26 March 2006

**PARTY DETAILS**

**Parties to the proceedings**

**CLAIMANT**

Fiona 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 Cristian

"A"

**PERPETUAL v CRISTIAN**

**OPPONENT'S RESPONSE**

**SUPREME COURT RULES PART 51 RULE 4C**

- A. THE OPPONENT, PERPETUAL LIMITED, OPPOSES THE GRANT OF LEAVE TO APPEAL.
- B. OPPONENT'S GROUNDS OF ARGUMENT.

**History of Proceedings.**

- i. In the Court below, Perpetual Limited, the Plaintiff, commenced proceedings by Statement of Claim seeking orders for possession of certain property at Currawong, New South Wales, together with a monetary judgment against the Defendant in the sum of \$713,862.82, plus interest and costs.
- ii. The Plaintiff's claim for possession was based upon the terms of a Registered Mortgage granted by the Defendant in favour of the Plaintiff over the Currawong land. That Mortgage was given as security for obligations owed by the Defendant pursuant to a Loan Contract between the parties dated 25 August 2005. The claim for monetary judgment was in respect of amounts said to be owing under that Loan Contract.

- iii. The allegation in the Statement of Claim was, in short, that in September 2005 the Plaintiff had advanced \$664,000.00 to the Defendant and that the Defendant had made no repayments at all in respect of that debt since the advance was settled.
- iv. At the same time as filing the Statement of Claim the Plaintiff filed a Notice of Motion for Summary Judgment pursuant to Part 13, Rule 1 of the *Uniform Civil Procedure Rules*.
- v. In her Defence, filed on 15 September 2006, that is after the Application for Summary Judgment had been filed, and apart from a general denial of the Plaintiff's entitlement to relief, the Defendant admitted that she had made no repayments at all to the Plaintiff in respect of any money that had been advanced to her or for her benefit. That position has not changed since that date.
- vi. After being before various judicial officers, the Plaintiff's Application was ultimately heard by Justice Hidden. It was first before the Judge on 30 October 2006. At the commencement of the hearing on that day the Defendant sought, and was granted leave, to file a Cross-Claim. From the bar table, during submissions, the Defendant (who was self-represented) informed the Court that she wished to Cross-Claim against Macquarie Bank and Gallilee Solicitors, the firm of solicitors who had acted for Perpetual Limited in the finance transaction, however the Cross-Claim which was lodged sought relief against the Plaintiff.
- vii. The Plaintiff proceeded with its Application and read into evidence the affidavit of Amanda Sherwood together with Exhibits to that Affidavit being, importantly, a copy of the Mortgage documents and the Loan Contract signed by the Defendant. After hearing argument in support

of, and against, the Plaintiff's Application, Justice Hidden reserved his judgment.

- viii. The matter returned to his Court on 1 November ostensibly for delivery of that judgment. Before that occurred, the Defendant was allowed to raise additional matters in support of her Defence, this being a reference to Section 36 of the Consumer Credit Code. In response to a request to be allowed further time to adduce additional material the matter was then adjourned.
- ix. On 15 November 2006 the matter came before Justice Hidden again. Further Affidavits had been filed by the Defendant. The Defendant also sought, and was granted leave, to file in Court two Notices of Motion (seeking to join Macquarie Bank and Gallilee Solicitors to the proceedings) as well as a Notice to Produce. The Defendant also foreshadowed her intention to file an additional Cross-Claim, the contents of which were not clearly identified nor the manner in which that Cross-Claim differed from the document filed in Court on October 30. The Defendant indicated that that Cross-Claim was not then "complete". The judge declined the request for further time to complete the Cross-Claim and he proceeded to deliver judgment on the Plaintiff's Application.
- x. In his judgment, the Judge upheld the Plaintiff's claim for Summary Judgment in respect of its action for possession of the security property but not in respect of the claim for a monetary judgment. That much of the proceedings were to continue and he made orders that the proceedings be listed for directions before a Registrar of the Court for the purpose of adoption of a timetable for the continued prosecution of that much of the Plaintiff's claim together with the Cross-Claim (actual and foreshadowed) of the Defendant.

- xi. The Defendant made various applications, to Registrars, Supreme Court Judges and to the Court of Appeal, for a Stay of the Judgment. On 22 December Justice Beazley indicated that she would only grant a Stay on condition that the Defendant make a payment to the Plaintiff on account of money that would have accrued on the Loan Contract (calculated on the basis of the Defendant's version of the terms of that Agreement) and, as well, continued to make monthly payments (calculated on that same basis) pending the hearing of the Appeal. That condition was rejected by Mr Cristian, then appearing for the Defendant, and hence no Stay was granted.
- xii. The Plaintiff has subsequently executed on the Writ of Possession which issued pursuant to Justice Hidden's judgment although the property (now vacant) has not been sold. No contract for its sale has been entered.

### **Opponent's Summary of Argument**

- xiii. The Claimant requires Leave to Appeal because the Judgment was given on an Application for Summary Judgment. **Supreme Court Act** Section 101(1)(l).
- xiv. 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.

- xv. 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 Hidden which prevented her from having the Plaintiff's claim against her, or her Cross-Claims, determined on their merits **and** that that result was, in the particular circumstances of the matter, unjust.
- xvi. The Claimant's attempt to discharge that onus in Parts A and B of the Summary of Argument that has been filed is replete with scandalous, irrelevant and mainly untenable propositions. Most of the matters which appear in that Summary formed no part either of the original Defence that was filed in the Court below nor of the Cross-Claim which was filed in Court on October 30, nor of her oral submissions on the hearing of the Application. See the whole of the material in Part A of the argument, the metaphysical criticism of the banking system and the concept of "money lending" in Part B, the demand for trial by jury in pages 11 and following and the constitutional complaint as to the validity of certain vice-regal appointments which, in some undescribed way, impeach the authority of Justice Hidden. None of this material identifies any error of principle or approach on the Application for Summary Judgment.
- xvii. That the Applicant is self-represented is no ground for relaxing the requirement that the Claimant establish a substantial case for appellate review. This is particularly so where the lack of legal representation is, apparently, a conscious decision by the Claimant to prefer her, and her

husband's counsel, to that of trained lawyers, rather than a product of economic necessity.

- xviii. To the extent that the Court will, for itself, undertake a review of Justice Hidden'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.
- xix. The Opponent conceded in argument before the Trial Judge the heavy onus, particularly on issues of fact, which it faced in an Application for Summary Judgment. It was accepted in argument that insofar as the Defendant sought to raise allegations of fact concerning the pre-contract dealings between the parties that the Application should proceed on the basis of an assumption that those factual allegations would be made out. The Opponent's argument to the Judge was that even on the basis of those factual concessions, the Defendant could not identify any triable issue in respect of, at least, the claim for possession.
- xx. The critical and relevant facts established by the evidence before Justice Hidden were as follows:
  - a. The Defendant was the registered proprietor of the Currawong land. It was a property rented out for income by the defendant. That land was, prior to the transaction involving Perpetual, subject to a registered Mortgage in favour of Citibank. The purpose of the application to Perpetual Limited was to re-finance that liability;

- b. On 25 August 2005 the Defendant signed the Loan Contract and Mortgage documents. The Mortgage was subsequently registered at the Land Titles Office.
  - c. On 19 September 2005 the Plaintiff made an advance of \$664,000.00 to the Defendant. That money was used, almost entirely, to repay a debt owed by the Defendant to Citibank Limited, whose Mortgage was subsequently discharged and replaced by the registered Mortgage in favour of Perpetual Limited.
  - d. No money has ever been repaid by the Defendant to Perpetual Limited in respect of that advance.
- xxi. In accordance with the concession made as to the proper approach to be adopted in such Applications, it was to be accepted, for instance, that the Defendant did not, herself, read the terms of the Loan Contract or the Mortgage document. Nevertheless, she was bound by the terms of the documents which she signed. *L'Estrange v Graucob Limited*; *Wilton v Farnworth Limited*. Further, even accepting the allegations of fact made in the Cross-Claim, those matters did not establish any claim of *non est factum* in accordance with the principles which govern such a claim. *Petelin v Cullen*.
- xxii. The admitted, and continuing, refusal to make any payment at all to the Plaintiff constituted, at the time of the hearing, an undeniable act of default under the Mortgage. Such a default gave rise, according to the terms of the Mortgage documents, to the right of possession which was a right acquired indefeasibly upon registration of the Mortgage. *PT*

*Limited v Maradona; Liberty Funding Pty Limited v Starscape Holdings Pty Limited.*

- xxiii. Counter-claims of the type asserted by the Defendant did not give rise to a triable issue, as to the mortgagee's right to possession of the security property as opposed to its claim for a monetary judgment, because the Cross-Claim did not, in any rational way, impeach the mortgagee's title. *Keller (Samuel) Limited v Martins Bank Limited; CBFC Limited v Evans*. As such, a mortgagor cannot rely on those matters in answer to a claim for possession unless they bring into Court the amount of the Mortgage debt. *CBA Limited v Inglis*.
- xxiv. The trial judge, correctly it is submitted, upheld this reasoning and found the right to possession was established. However, again correctly it is submitted, he also found that the matters raised in the Cross-Claim raised at least a triable issue as to the precise amount due from the Defendant to the Plaintiff, on the basis that claims about divergent interest rates might be productive of some dispute as to the calculation of that debt and thus he exercised the undeniable power under the Rules to grant Summary Judgment in respect of part only of the Plaintiff's claim. The Opponent says that no error of approach or principle is demonstrated by that approach

#### C. REASONS WHY LEAVE SHOULD NOT BE GRANTED

- i. The Claimant's Summary of Argument does not identify any error of principle or approach in the proceedings before, or judgment of, Justice Hidden.
- ii. The Plaintiff cannot point to any relevant injustice in the result. It is inevitable that even if the matters sought to be raised in the Cross-

Claim were heard and determined by Justice Hidden, and a finding was made in favour of the Defendant on her claim that the parties had agreed, in advance of the documentation being signed, on a different Loan Contract as between them with a marginally different interest rate, that nevertheless, the non-payment by the Defendant of any amount in the ensuing period would produce the result that the Defendant was, as at the date of the hearing of the Application for Summary Judgment, in default under the mortgage. The inevitable result of such a finding is that the Plaintiff would have established an entitlement to immediate possession of the security property even on the defendant's own case, such entitlement having arisen at or shortly after the time of the original advance over twelve months previously. The only relevant "injustice" that is attracted by the present circumstances arises from the Defendant's continued and determined refusal to make any repayment to the Plaintiff notwithstanding her admission that substantial funds had been advanced to her and paid away to her benefit in September 2005 on the basis of a mutual understanding that such was by way of a commercial loan requiring some level of monthly repayments. To grant leave to appeal that decision, particularly in light of the Claimant's continuing refusal to contemplate making any payments to the Plaintiff in the meantime, would be to continue that injustice.

- iii. If leave to appeal is granted then it should be on condition similar to those proposed by Justice Beazley so as to minimise that ongoing injustice, particularly in circumstances where the evidence on the Stay Applications, in the Court below, established that, even at those previous times, the subject property was in a "negative equity" position and the Defendant is, again on the evidence tendered during the course of those Applications, a person unlikely to be able to discharge any substantial in personam judgment.

D. RELEVANT AUTHORITIES AND LEGISLATION

Supreme Court Act

Uniform Civil Procedure Rules Part 13 r 1

Real Property Act s 42, 60.

Adam P Brown Male Fashions Pty Ltd v Phillip Morris (1981) 148 CLR 170

Johnson Tiles Pty Limited v Esso Australia Limited (2000) FCR 564

L'estrage v Graucob [1934] KB 395

Wilton v Farnworth (1948) 76 CLR 649

PT Limited v Maradona 25 NSWLR 643 at 681

CBFC Limited v Evans (unreported) Badgery-Parker J 9/01/91 BC 9102420

Inglis v Commonwealth Trading Bank(1972) 126 CLR 161

Keller (Samuel) Limited Martins Bank Limited (1970) 3 All ER 952

Dated: 26 March 2007

Steven Golledge

Counsel for the Opponent.