

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 HIDDEN J

WEDNESDAY 1 NOVEMBER 2006

13403/06 - PERPETUAL LIMITED v FIONA CAROLINE CRISTIAN

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Mr S Golledge for the Plaintiff
The Defendant appeared unrepresented

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DEFENDANT: Am I allowed to say something before you give judgment?

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HIS HONOUR: Yes, by all means.

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DEFENDANT: A couple of things. I have a notice in respect of the way in which the case has been handled, in that I have been denied the opportunity to provide all legislative authorities that support my case. I would like to present those.

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My husband is a signatory and co-borrower on the mortgage. He did put in a notice of disputed claim to the other side pursuant to the Consumer Credit Code, which they did not reply to.

I have those two to hand in, if I may.

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My husband is bankrupt and there is a provision in the Bankruptcy Act, section 301 (read).

GOLLEDGE: His being bankrupt, there is no opportunity to pursue the monetary claim against him.

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HIS HONOUR: Given that Ms Cristian is unrepresented, if there is a further submission she wishes to put, I will allow her to do so. I do not know what your commitments are this morning. I might call the rest of the list and see what is to proceed. Before I do that, I think it is appropriate that I hear what Ms Cristian would like to add. We will come back to you as soon as we can. I would like to see what is in the rest of the list this morning.

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STOOD IN LIST

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LATER

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DEFENDANT: There are two notices I wanted to give. Given the way the Court was handled, and possibly my ignorance of the legal system, I feel I have been denied the opportunity to give up everything that I needed to give up.

I was expecting yesterday, from seeing Registrar Howe the week before, that there would not be a hearing yesterday. I was expecting more of a timetable to have my affidavits in and to be given a date for the hearing. That is one matter.

The other representation is I have, on the Consumer Credit Code, section 36, which was presented to the plaintiff. My husband gave it to them last Friday, or something. A notice of claim. I believe that, under that Act, it says that there are various questions that have to be answered before a judgment can be passed.

"If a debtor by written notice to a credit provider...explaining how the liability arises."

There are some questions that were asked of the plaintiff that have not been answered.

Section 5 also says:

"The credit provider must not begin enforcement proceedings...from the time the written explanation or advice as to the agreement was given."

HIS HONOUR: Is that the notice under section 80?

GOLLEDGE: No. This is some other notice. Ms Cristian has a copy of it. I have seen it outside Court. I do not mind your Honour having a look at it.

(A copy of the Code and the letter sent to the plaintiff by the defendant's husband was handed to his Honour by the defendant.)

(A copy of section 6 of the Code was handed to his Honour by Mr Golledge, which section identified what loan contracts were and were not covered by the Code.)

GOLLEDGE: Subsection 1 of section 6 identifies those credit contracts to which the Code applies. It is a cumulative provision.

(Subparagraph b was read.)

In subsection 4 credit provided for investment purposes is specifically excluded from those purposes. Your Honour might recall that, in the affidavit of Amanda Sherwood (page 13), the purpose of the loan, as described, is "to assist you in financing an investment property and miscellaneous investment use", being the loan contract signed by Ms Cristian. So, the short answer, without going into the question of whether it is a valid notice, whether the information sought in the notice in any event has already been provided, is that section 36 does not apply to this contract.

5 HIS HONOUR: That, of course, raises the very dispute which Ms Cristian raised in the first place; that is, whether the main contract represents what was sought and what was negotiated, in the light of the correspondence.

10 GOLLEDGE: Even if, for instance, that argument had some merit, it would not turn this loan into a loan for household, domestic or personal use.

HIS HONOUR: Not on its face.

15 GOLLEDGE: Could I tender an advertising notice printed off the Internet in relation to the investment property?

HIS HONOUR: Have you seen this, Ms Cristian?

DEFENDANT: Yes. It is on my website.

20 GOLLEDGE: That is the subject property. It makes clear, even from that, that it is the conduct of a business, the operation of a guest house. So, even if the description on page 13 of the Sherwood affidavit misdescribed it, your Honour would be entitled to find, on the basis of that, 25 that the money was applied for purposes other than household, domestic or personal use. That is the argument on the section 36 notice; that it does not apply.

30 DEFENDANT: We have always disputed that it was an investment property. The only reason I am not living there now is because I was not happy with the education system in the area. That was why I moved away. For my children's schooling.

35 I do not have a job. I look after my children. This is how I pay the mortgage. Some people have a job. I rent out my property on a short term basis.

40 In fact, the reason for the whole refinancing of this thing was so I could convert the bottom part of the house into a place in which I would be able to reside later on, when my children are a bit older, and to provide an income from the top part. It is the only property that I own or have any interest in.

45 HIS HONOUR: I understand that. There was some other material that you wanted to raise.

50 DEFENDANT: Yes. I wanted to give the notice in relation to the case and that I feel I have not been given a chance to do everything that I wanted to do.

55 HIS HONOUR: I best ask you generally what it is you want to do that you did not get to do yesterday.

DEFENDANT: I needed to present the other affidavits, which are not yet prepared. At the time you asked me were they similar, and I was a bit fluffy about that. There

are things in those affidavits that are different to the other one and that I think do bear considerable weight on the case.

5 HIS HONOUR: The matter proceeded yesterday upon the assumption that I accept all those points that you set out in the cross-claim.

10 DEFENDANT: I understand that.

HIS HONOUR: Do you say there is more than that that you would want to proffer in answer to this application for summary judgment?

15 DEFENDANT: Yes. There are points in my affidavit particularly, including legal precedents, showing that we have had fraudulent misrepresentation by the plaintiff in that we haven't been given everything. There was a copy of the loan contract in June, exactly the same as the one we mistakenly signed that we rejected. We had previously
20 sent them back to them and said no, no, that is not what we want, yet we received the same contract a couple of months later.

25 HIS HONOUR: That earlier contract is attached to your husband's affidavit. I did note that in some respects it is different.

30 DEFENDANT: It is shorter, but it is basically the same loan, the same contract, the same everything.

HIS HONOUR: Mr Golledge's arguments yesterday turned upon the proposition that the loan contract, which was the loan contract upon which the plaintiff relied, was signed by
35 you and your husband, and you signed a mortgage to secure it. He said on that basis at the very least he is entitled to an order for possession from you because clearly there is a breach of the terms of the mortgage and, by the terms of the mortgage, ejection; that the
40 plaintiff is entitled to eject you in the event of default. That was his primary argument.

45 Is there any further material you want to advance in answer to that argument that adds to the material that you presented to me yesterday?

DEFENDANT: I would like to say that it is interesting that they are saying I have not given any money to them, whereas I was expecting an interest only loan, or line of
50 credit, and they provided us with a principal and interest, standard home loan, which works very differently to a line of credit. Yet nowhere on the contract does it actually state the amount of interest that is payable. It only states a monthly payment amount. Even had I wanted
55 to pay the interest, there is nothing on there that says that this is what is the interest payment for that.

HIS HONOUR: I think it is right at the beginning. 6.69,
.01/11/06

with a margin of 1.1.

5 DEFENDANT: They got that wrong. That was not the agreed interest rate either.

HIS HONOUR: Plus an additional 2 per cent in the event of default of payment. That is set out in the schedule.

10 DEFENDANT: It gives you the amount of the monthly payments, but does not set out the amount of interest I am supposed to pay every month; the rate of interest.

HIS HONOUR: The interest rate is set out in the box above.

15 Mr Golledge, the difficulty you face is that Ms Cristian is unrepresented. She says she did not present yesterday the full case she wished to. She did foreshadow yesterday that she wished to put some affidavits on, but refrained from doing so on the basis that the matter proceeded on 20 the allegations in the cross-claim. She says now that there is more she wants to prove.

25 DEFENDANT: My affidavits were not ready by Monday.

GOLLEDGE: It is still not clear what more there is. The cross-claim has been accepted, setting out in some considerable detail, including in an historical narrative way, the matters. The application on Monday proceeded 30 with all of that accepted. It is hard to see, beyond corroborating matters which are accepted as to the truth for the purpose of this application, what the matters would go to.

35 Could I hand a copy of a letter sent to Ms Cristian by my instructing solicitor after the appearance before Registrar Howe, which made clear, so far as the plaintiff was concerned, that we were going to ask for the matter to be dealt with before the Duty Judge.

40 DEFENDANT: I have had that every time I come to Court.

45 GOLLEDGE: Every time we come to Court we have been trying to get a hearing date. Since 4 August we have been unable to do so, because of repeated non-compliance with directions and repeated requests for adjournments and extensions to put on evidence. There comes a time when the dispensation allowed a litigant in person must give way finally to the Court hearing the case.

50 Directions were made as early as 27 July for all the defendant's affidavits in response to the motion to be filed.

55 The matter has been back before the Court on 1 September, 8 September, 18 September, 3 October, 17 October and then when it came before your Honour.

5 We got the affidavit on the morning of the hearing. There is no explanation as to why the affidavits are coming from a broker and the husband, who presumably the defendant has been in contact with since July, when those directions were repeatedly made. No explanation as to why something has not emerged, an affidavit, from Ms Cristian.

10 There is an explanation as to why the motion has been before the Court on numerous occasions. She has been aware every time we come to Court that we urge the Court to hear our motion. There must come a time, particularly if nothing is written, which is said to be brand new evidence to change the flavour of the arguments that will be put, which is essentially the same as put on Monday, 15 namely that there is some sort of misrepresentation that excuses non-payment of any money off the loan. I am happy to deal with the new point that has been raised. I am happy to deal with the section 301 point, if there is one raised, under the Bankruptcy Act. Beyond those, I would 20 urge your Honour to deliver judgment.

HIS HONOUR: We did proceed on Monday upon the basis that I would assume all the matters alleged in the cross-claim and have regard to the documents, your husbands' affidavit 25 and the documents annexed to it. It is not apparent to me what you could add to that material in answer to this application for summary judgment. I understood you to say on Monday that the only affidavit you would produce would be evidence of the matters set out in the cross-claim. 30 Mr Golledge said that he was prepared to accept those matters for the purpose of this application. Do you understand?

DEFENDANT: I do, I think. As I say, I also have more 35 evidence in regard to legal precedents that have been set before and more evidence regarding what we consider fraudulent misrepresentation by the plaintiff, not limited to just documents, which my husband's affidavit swears was mostly presentation of the documents. 40

HIS HONOUR: You have not pleaded, in a defence or cross-claim, any misrepresentation.

DEFENDANT: Well, you have to put that down to my 45 ignorance of the legal system. Mr Golledge keeps bringing up the 27 July thing. If I knew then what I know now, I would never have signed anything agreeing to affidavits in three weeks. I have learned considerably more since then.

50 It does take me a long time. My primary duty is looking after my children. That has to fit around them. I cannot put them in a cupboard while I prepare my legal case.

HIS HONOUR: I appreciate what you say in that regard. 55 The proceedings have been protracted. There needs to be finality of this application one way or another.

DEFENDANT: As I stated in this notice, if I am allowed to

5 present it, this issue could have been resolved easily at the end of November 2005, had they been willing to do something about the situation, rather than ignoring the situation and making half-hearted efforts.

10 At one time, I agreed to meet with Macquarie Bank, to see if we could organise something. It was refused. They didn't want to talk to me. They didn't want to see me. That is what I feel is unfair. They have one little point of law; that I have not given them any money; therefore, they have a right to my property. Everything they have done to me from their errors is not important.

15 HIS HONOUR: You said something about precedents. Do you have cases you want to refer me to?

DEFENDANT: Yes, but I do not have them here. I am piecing it together bit by bit.

20 HIS HONOUR: How long do you need?

25 DEFENDANT: I have various people giving me guidance and helping me along. I have been told 14 days to get the affidavits done.

HIS HONOUR: You say you would need 14 days.

30 DEFENDANT: Comfortably, to make sure it is all straight, correct, get it delivered and served, and all that sort of stuff.

35 HIS HONOUR: Mr Golledge, I understand what you are saying. I am troubled by this. What I am minded to do is to consider myself part heard and give Ms Cristian time to gather such additional evidence as she requires. Does that relieve your position, to some extent? I am loathe to just put it back in the list and let some other Judge start it again.

40 DEFENDANT: Me to. It is not that I do not want the matter resolved. I do. I want my best shot at getting justice as well.

45 GOLLEDGE: I am obviously in your Honour's hands. Would your Honour bear in mind, in terms of any further dispensation, that, on the plaintiff's case - I can tender an affidavit on this if Ms Cristian disputes it - the mortgage debt is currently in excess of the value of the mortgage property. The plaintiff is in a negative equity position. Every day, indeed since July, that has got worse and worse.

55 I hear what your Honour says. I know it is a difficult position with an unrepresented litigant. If your Honour is minded to adopt the course you propose, I am in your Honour's hands. I urge that it be a short period of time, and that there be no uncertainty by Ms Cristian that, on the next occasion, we will get resolution, at least of

this part of the application.

5 DEFENDANT: I offered them money and they refused it. I offered them all that interest and they refused it.

Could I say something as well?

HIS HONOUR: Yes.

10 DEFENDANT: In regard to the non-payment, one of the main reasons is, like, the house does make money and does make money sufficient to cover the mortgage payments. The reason we didn't pay is because we felt we would be validating a contract that was not the correct contract.

15 HIS HONOUR: I understand that position. I have understood that from the outset. Your position is that the loan that you unfortunately signed is not the one you negotiated.

20 DEFENDANT: I am saying that the fact we have not paid is not because we could not pay it but because we wanted to pay the correct thing.

25 HIS HONOUR: Just looking at my commitments, next week is a problem. Wednesday, the 15th, I could do it.

GOLLEDGE: We will take whatever date is available.

30 DEFENDANT: That's okay for me.

HIS HONOUR: That is the best I can do.

35 Can I just say this to you: First of all, you have already heard what Mr Golledge has said about the interest still accruing and the debt increasing.

40 The other thing is - I am sure you are aware of this - if, ultimately, Mr Golledge's application succeeds, it is likely that costs orders will be made against you. The more appearances, the greater the costs.

45 Even if he does not succeed, there may be an argument for costs, arising out of adjourning the matter, rather than dealing with it. Costs are likely to build up against you, whatever the outcome. Do you understand that?

DEFENDANT: I do.

50 HIS HONOUR: The other matter is - I ask you to focus on this, Ms Cristian - you do not need evidence of the matters set out in the cross-claim. Mr Golledge has approached the case on the basis that he is prepared to accept, for the purposes of the argument, all of those matters. So, there is no point in delaying the outcome of this matter simply so you can get evidence of things that are, for present purposes, not in dispute. Do you understand that?

DEFENDANT: Okay. Yes.

5 GOLLEDGE: If we are back on the 15th, could I have a direction that any evidential matters to be relied upon be served on us by the day before, or the Monday before; the close of business on the Monday?

10 HIS HONOUR: I think that is reasonable.

Any further affidavits will need to be filed and served by 4pm on Monday, 13 November 2006.

15 DEFENDANT: Okay.

20 Can I hand up my notice regarding what I talked about and the fact that I haven't had - there is a few things on there. Basically, how I felt about the case and that I hadn't been given the chance to properly present my case?

25 HIS HONOUR: I am now giving you that chance by 15 November. If there is any further material you want to raise, subject to that direction about filing further evidence, we will deal with it on Monday.

30 (The copy of the Consumer Credit Code and the copy of section 36 which were handed to his Honour by the defendant were returned to the defendant.)

The material handed up by Mr Golledge was returned to Mr Golledge.)

35 ADJOURNED PART HEARD TO WEDNESDAY 15 NOVEMBER 2006

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