

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

5 HIDDEN J

MONDAY 30 OCTOBER 2006

10 **2006/13403 - PERPETUAL LIMITED v FIONA CAROLINE
CRISTIAN**

Mr S Golledge for the plaintiff.
Defendant appeared in person.

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GOLLEDGE: We are seeking summary judgment.

20 HIS HONOUR: Ms Cristian, did you want to get
representation for this matter?

DEFENDANT: I have no plans to do so. I have been unable
to get pro bono assistance.

25 HIS HONOUR: Have you applied?

DEFENDANT: Yes.

30 HIS HONOUR: They said they could not help you?

DEFENDANT: They have not been able to help me.

HIS HONOUR: Have they told you they cannot help you?

35 DEFENDANT: No, I heard there was one barrister but we
weren't able to come to an agreement. They still have my
details there.

40 HIS HONOUR: What is the position? Are you happy to
proceed unrepresented or do you want to get
representation?

45 DEFENDANT: I am open to finding representation in another
barrister I am trying to contact and if I can't get one
I'll continue myself today.

50 GOLLEDGE: The plaintiff's motion was filed on 14 August
which was returnable 1 September. It was initially
adjourned on two occasions whilst Ms Cristian sought legal
aid. On 18 September the matter was referred to Justice
Latham. It was then adjourned so Ms Cristian could
investigate the possibility of legal aid. It came before
Justice Barr on 3 October and was adjourned again for the
55 same reason to enable Ms Cristian to get pro bono
assistance.

The property is an investment property. The property is
in a negative equity position. It would be my application

that we go on. There have been a number of attempts to get legal aid without assistance.

5 HIS HONOUR: Do you agree with that history, Ms Cristian?

DEFENDANT: No, I don't agree with it being an investment property or negative equity at this point. The history is correct. I seek leave to file my cross-claim and affidavit in support.

10 HIS HONOUR: I think we can proceed on the basis the matter will proceed.

15 DEFENDANT: I seek leave to join the Macquarie Bank and also the solicitors' firm Galilee & Associates. There was an error in the loan contract which is where the whole dispute arises from.

20 HIS HONOUR: I will go through the rest of the list and we will come back to you in every respect as soon as we can.

MATTER STOOD IN LIST

ON RESUMPTION

25 HIS HONOUR: Ms Cristian, are you ready to go?

DEFENDANT: Can I file my cross-claim and the affidavit?

30 GOLLEDGE: I do not object to it being filed. I have not seen it.

DEFENDANT: I have three copies and three copies of the affidavit.

35 HIS HONOUR: Give one to Mr Golledge.

DEFENDANT: Am I able to get it stamped and received in court?

40 HIS HONOUR: Yes, you can file it in court. They can be filed in court.

45 DEFENDANT: As I said before, I seek leave to join Macquarie Bank and Galilee & Associates because there was a problem with the loan contract and an error and I don't know exactly--

50 HIS HONOUR: Do you explain in the affidavit why you want them joined?

DEFENDANT: No.

HIS HONOUR: You are wanting to join Macquarie Bank?

55 DEFENDANT: Yes, and Galilee & Associates.

HIS HONOUR: I better read some material before we go much

further, Ms Cristian. Mr Golledge, I will check your position. You are moving on the motion filed 14 July 2006?

5 GOLLEDGE: Yes, and in support I would be reading the affidavit of Amanda Sherwood of 124 July 2006 and I tender the exhibits to that which have been filed, AS1 to AS6. I would seek leave to file in court a further short affidavit as to the current position under the facility.
10 That is the affidavit of Kylie Arigho sworn 27 October 2006.

HIS HONOUR: That can be filed in court. I will take a short adjournment to read this material.
15

SHORT ADJOURNMENT

HIS HONOUR: Ms Cristian, I have familiarised myself with the pleadings and the cross-claim but I have not had time to examine the affidavits and the attachments which is important to your case now. You are saying that the loan document that was signed did not represent the loan that was negotiated?
20

25 DEFENDANT: Yes.

(His Honour indicated he needed further time to look at the matter and adjourned the matter until 2pm.)
30

ON RESUMPTION

HIS HONOUR: Mr Golledge, have you had an opportunity to read this material?
35

GOLLEDGE: I have, your Honour.

HIS HONOUR: I have the affidavit of Arthur Cristian which appears to be mainly a mechanism by which documents are introduced. Do you want to cross-examine that gentleman?
40

GOLLEDGE: No, not for the purpose of this application.

DEFENDANT: I have a few more affidavits as well but they are not finished at this time.
45

HIS HONOUR: When would they be ready?

DEFENDANT: I need another 14 days to have those ready.
50

HIS HONOUR: I thought your evidence was closed.

DEFENDANT: I'm sorry, I'm not experienced in this.

55 HIS HONOUR: So you are asking for an adjournment of two weeks to enable you to prepare those affidavits?

DEFENDANT: Yes.

HIS HONOUR: Are you able to tell me what the effect of those affidavits is?

5 DEFENDANT: Basically more or less supporting the ones my husband has done.

HIS HONOUR: Recounting the history?

10 DEFENDANT: Obviously the broker's is his account of the proceedings. That would be in line with ours.

HIS HONOUR: The purpose of those affidavits is to put on oath what you set out are the grounds of the cross-claim
15 about the history between the parties.

DEFENDANT: Yes.

GOLLEDGE: I would resist that for two reasons - one going
20 to the utility or necessity for such an adjournment. Orders were first made on this motion for delivery of the defendant's affidavits on 27 July 2006 and orders were made for the filing of any defence by 17 August 2006. The
25 matter has been before the court since then on at least four separate occasions and it is our application that ample opportunity has been allowed for putting evidence on.

In any event, I accept that the burden faced by the
30 applicant for summary judgment is to demonstrate there is no case, putting the defendant's case at its highest. To that extent your Honour would probably deal with this matter on the basis that the factual allegations in the
35 cross-claim would be made out unless they are patently fanciful. Further affidavits swearing to the matters in the cross-claim would not really change the issue before the court because the proper approach would be to accept what was said in the cross-claim would be made out.

40 HIS HONOUR: Ms Cristian, Mr Golledge says maybe there is no need to put on further evidence. He is prepared to argue the matter on the basis of the history you have set out in the cross-claim is true. He is prepared to accept
45 that for the purpose of this application upon the assumption everything you have set out here is true.

DEFENDANT: Okay.

HIS HONOUR: Is that a satisfactory approach from your
50 point of view or are there other matters you would want to establish on evidence, apart from what appears in the cross-claim?

DEFENDANT: I seek leave to join Macquarie Bank and
55 Galilee & Associates, Solicitors, to this action.

HIS HONOUR: That may depend on the outcome of this application. Mr Golledge, can you just explain to me how

the mortgage comes to be Perpetual, the loan being from Macquarie?

5 GOLLEDGE: The lender as identified in the loan contract which is annexed or exhibited to the affidavit makes it clear the lender is Perpetual Trustees Australia Limited. That is on page 5 of AS1. That is the party that advanced the funds. At page 12 the parties to the loan contract are identified.

10 HIS HONOUR: What is in fact is the relationship between Perpetual and Macquarie Mortgages?

15 GOLLEDGE: Perpetual conducts its business as a trustee of the moneys collected by Macquarie Bank, so Macquarie is the commercial entity that sources funds from the market. Perpetual is the trustee of that fund which enters into loan agreements with members of the public. There is a commercial arrangement between those two entities. The mortgage is at AS3.

20 HIS HONOUR: Ms Cristian, I take it you want to join Macquarie Mortgages and Galilee & Associates in light of the history you have set out?

25 DEFENDANT: Yes. Prior to receiving the loan contract we had no idea Perpetual were the lenders. That was never made clear in any documents. We say they made an error in the loan contract and I don't know at what point that error occurred.

30 HIS HONOUR: What I think we face is the loan contract which you attach to your husband's affidavit is in exactly the same terms--

35 DEFENDANT: Prior to receiving the loan contract there is no mention in any of the paperwork from Macquarie Bank that the actual lender is Perpetual.

40 HIS HONOUR: Let us hear what Mr Golledge says in light of your cross-claim and the affidavit material, then I will come back to you.

45 GOLLEDGE: I move on the motion of 14 July and read those two affidavits. That is the evidence of the plaintiff. This is an application pursuant to Part 13 rule 1 of the rules. The basis of the application is that the defence discloses no triable issue. There is no denial in the defence, nor indeed in any of the material handed up today, that moneys were received and not a single cent has been repaid since September 2005. That is in the defence. The defendant admits no payments have been made.

50 I accept that the burden for an applicant on an application for summary judgment is to persuade the court there can be no triable issue on the matters raised. Your Honour can be satisfied of that in this case because notwithstanding all of the material handed up before lunch

and the somewhat confusing array of correspondence back and forth between the broker and Macquarie, there are a couple of things that are clear and they are in September last year the defendant received \$664,000 from the plaintiff. She did so pursuant to the loan contract which is at AS1 and if your Honour can just go to that document. The schedule sets out the amount of the loan of \$664,000, the percentage rates, and importantly in the second box under the heading "Scheduled monthly repayments" it stipulates the monthly repayment obligation of \$4,293.67.

If your Honour would go over to page 13 of the exhibit, and just note in the paragraph numbered 4 it is clear that the purpose for the loan was to assist in re-financing an investment property. That is borne out by one of the documents annexed to Mr Cristian's affidavit, the drawdown notice. That disclosed that the settlement date was 19 September. Mr and Mrs Cristian received \$25,000 and \$625 went to Citibank. What Macquarie/Perpetual were doing is refinancing an existing indebtedness plus provided pocket money for Mr and Mrs Cristian. Page 14 section 6 stipulates the loan contract comprising this schedule and the general conditions, and if you turn over the loan contract is signed by Mr and Mrs Cristian.

If your Honour turns over again, Mr and Mrs Cristian have both opted to do without the benefit of legal advice in relation to the loan and in the circumstances in which that must have been made one accepts the allegations of fact in the cross-claim at their highest are those disclosed in paragraph 16 of the cross-claim.

On 19 September \$664,000 is advanced indisputably by way of a loan. Accepting the matters in the cross-claim, Mr and Mrs Cristian may well, or their broker, appear to have submitted a loan application and what they were asking for was a principal interest-only loan repayable for five years. We accept that was the subject of the application. What was offered to them and what they signed by way of acceptance was a principal interest loan with monthly repayments over a period of 361 months - indisputably a loan application.

The other indisputable fact is that since 19 September not one cent has been repaid and that leads inescapably to the conclusion that whatever else might be said about liability or solicitors or others, there is an event of default under the loan contract. If your Honour goes to the security document which is AS2, that is a copy of the certificate of title. AS3 is the signed mortgage and AS4 is the memorandum incorporated into the mortgage and what it does at page 22 under the heading "The debt" is confirm the obligation to repay the debt, the debt being a defined term meaning all money owing to the mortgagee.

Then importantly, section 5 defines what is an event of default, including a failure to pay the debt. Over at 5.2 the mortgage provides for rights on default, including in

sub-paragraph (b)(i) is a right of ejectment. All the mortgagee has to show to establish right to possession/ejectment is there has been a failure to repay, so it is not necessary for us to show \$776,000 currently due is the amount owing or \$1 million or any sum in particular. The right of possession and the right of ejectment arises upon an event of default. In circumstances where money was borrowed over a year ago and not a cent has been repaid in respect of a loan contract which makes clear there is a monthly repayment obligation, particularly where that fact is admitted in the defence, it cannot seriously be contested there has been a default.

We are not seeking summary dismissal of the cross-claim. What we are seeking is summary judgment on the claim and it is open to your Honour under the rules to take the view that by reason in those circumstances of the matters raised in the cross-claim, there might be some argument about the extent of the default, whether the full amount referred to in the affidavit is due because it might be liable to be reduced in some fashion if there was an interest differential but that would not detract from the right of possession which occurs upon default. Your Honour might say: by reason of those matters I won't grant summary judgment on the whole of the plaintiff's claim. There might be a triable issue, accepting what is said by the cross-claimant on that matter, but that would not detract from the existence of the default.

What the authorities say in respect of counterclaims which are raised in response to actions in possession is that unless the counterclaim affects the existence of an underlying default or debt, then the counterclaim does not detract from the right of possession. It has to impugn or defeat the allegation of default, otherwise what the counterclaim goes to is the in personam position between mortgagor and mortgagee. If Ms Cristian made an application supported by evidence for a stay of that, that would be a matter the court would deal with in due course, including whether there should be an imposition of some condition relating to interest.

Those are not matters that detract from the right of judgment today. I seek judgment for the monetary claim as well but I am acknowledging the difficulty I face with that portion of the claim in light of the array of matters contained in that large bundle of documents. Your Honour could fairly form the view there might be somewhere amongst that bundle be something that might somehow affect the precise amount due, but even accepting everything else, you come back to the proposition you cannot have money for a year, not pay back a cent and not be in default.

HIS HONOUR: These documents were prepared without legal representation, the defence and the cross-claim?

GOLLEDGE: Yes.

5 HIS HONOUR: It seems to me in a sense the cross-claim may be a non est factum defence. Ms Cristian is raising an issue akin to non est factum. She seems to be saying it is not open to the plaintiff to pursue enforcement of this agreement because what we signed is not what we negotiated, or we understand we negotiated. That seems to be the way it is heading.

10 GOLLEDGE: Even a non est factum defence, which might go to the enforceability of the loan contract, would not defeat (1) the mortgage and the non est factum defence would not impeach the title, the defendant still being in possession of \$664,000, and any way you do the review or
15 interpret the events that have occurred, the matter of the statutory provision is imposed and some of that money ought already to have been repaid.

20 HIS HONOUR: Ms Cristian, what would you like to say?

DEFENDANT: I have not paid them any money but I would like to point out I have made offers along the way where they could have had their money by now and they refused those offers. When they took possession of my house in
25 May they didn't serve the section 52(b) notice and we repossessed the house ourselves. In July we offered to pay all the interest and had this available. I could have certified that. We wanted them to let us take possession of the house to sell it and they refused that offer. It is not entirely my fault they didn't take the money for so
30 long.

Since November we realised the wrong contract had been issued to us and we were immediately in contact with
35 Macquarie Bank trying to get them to come up with a solution to the problem, so that we could begin paying on the document. On the document we requested they would have had their money. They wasted months and months not getting the document to us. There was a mistake and every
40 time we rung up they wouldn't get back to us with a solution. Again, it's not entirely my fault they don't have their money. They resisted our attempts to solve the situation.

45 At one point when we still had possession of the house they did make us an offer to send a new contract within two days but we never ever got that.

50 HIS HONOUR: Is that the letter of 18 May 2006?

DEFENDANT: Yes, it's in there somewhere.

55 GOLLEDGE: I remain seated notwithstanding an awful lot of what she has been saying is inadmissible but I am not taking the point.

DEFENDANT: We never received a copy of the new contract.

5 HIS HONOUR: Mr Golledge's position is what ever might have been negotiated before or since, what in fact happened, you signed a loan agreement and a mortgage over your property to secure advances over which you undoubtedly received moneys and no repayments have been made by the terms of the mortgage and he is entitled to possession of the land.

10 Mr Golledge says that is the simple situation. Even if the question of what is owing is left for another day, you could not resist their taking possession of the land. That is the central issue you have to face.

15 DEFENDANT: You have not paid, therefore we have a right to the land. They had plenty of chances for us to repay the money but they refused, so it's not entirely my fault that they haven't received any moneys off us.

20 HIS HONOUR: That is a matter for negotiation, it is not a matter for me. Attempts to come to an arrangement with Perpetual are strictly not matters I have to consider. What is said here is there is an entitlement to possession of the land and you have no basis for resisting it. For that reason, they should have judgment for possession of the land, if not the precise amount claimed, and if there are to be negotiations after that, that might proceed on another day.

30 What Mr Golledge is saying is the matters you have raised do not in law amount to any defence or entitlement to resist possession of the land. That is what is put against you. Is there anything you would like to say in answer to that?

35 DEFENDANT: All I can say is what I have said before. We tried to make arrangements. I do not feel it is just in any way and the proceedings should have settled a week or two after the mistake was discovered and that should have been taken into consideration.

40 HIS HONOUR: I would like to look at the matter more closely and reflect on the matter. You said before you were about an hour and a half away.

45 DEFENDANT: I live in Bowral.

HIS HONOUR: I will give judgment this week but not today. Is Wednesday morning convenient with you?

50 GOLLEDGE: Yes, your Honour.

55 HIS HONOUR: I will look at the matter somewhat more closely before I make a decision about this application. I should also ask you for completeness on what basis you can ask that these other parties be joined.

DEFENDANT: On what basis?

5 HIS HONOUR: Yes. I think I will determine the summary judgment application first. Any application to join other parties would require further argument and would require a motion filed by you so maybe we can take this a step at a time.

10 GOLLEDGE: Yes, and we could potentially come back to the Registrar. In paragraph 1 of the cross-claim it appears to refer to section 52(b) notice. Even accepting what is said in the cross-claim that the section 52(b) notice was deficient, that would not affect the right of possession. It goes to the mortgage and exercise of the power of sale in respect of section 58.

15 HEARING ADJOURNED TO WEDNESDAY 1 NOVEMBER 2006 AT 10AM.

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