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is created in the Court of Appeal--

CRISTIAN: Yes.

5 HER HONOUR: --upon which the Court of Appeal documents
are contained. At the moment that is only the notices of
possession and the affidavit, so I am just needing to work
through the file from the Court below to try and
understand what happened down there.

10 CRISTIAN: Thank you for explaining that, your Honour.

HER HONOUR: So a defence was filed on 15 September; is
that correct?

15 GOLLEDGE: That's correct. Paragraph 7 contained the
admission that there'd been no payments at all under the
loan.

20 HER HONOUR: Was there a cross-claim?

GOLLEDGE: There was no cross-claim filed though one was
mentioned from time to time and, indeed, in the final
stages before Justice Hidden there were motions produced.
25 I don't think they were ever filed.

CRISTIAN: There was a cross-claim filed.

30 GOLLEDGE: Seeking leave to join various third parties to
the proceedings, but none of that had been--

HER HONOUR: There is a first cross-claim filed on 30
October 2006. When was the matter heard by Justice
Hidden?

35 GOLLEDGE: It was before him on 30 October, 1 November and
then again on 15 November when he gave judgment.

40 HER HONOUR: What is happening with the cross-claim?

GOLLEDGE: Well, after Justine Hidden delivered the
judgment for possession, he then stood the matter over to
the registrar's list for the purpose of making directions
as to the conduct of the balance of the claim, the balance
45 being, from the plaintiff's perspective, the claim for a
monetary judgment which remained outstanding and the
claims by Mrs Cristian for her part to join various third
parties, Galilee Solicitors and what have you as their
parties to the proceedings. For what purpose we're not
50 quite clear.

CRISTIAN: Very clear.

55 HER HONOUR: What is the position in relation to the loan
because there was certainly documentation to indicate this
was supposed to have been a line of credit, but then the
loan document seems to be a home loan.

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GOLLEDGE: That's correct. Well, at least the loan signed on 25 August was for an advance of \$664,000 called a Macquarie Mortgage Saver Loan Contract. Now there seemed to be--

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CRISTIAN: I have brochures here, your Honour, that explain--

10 HER HONOUR: Just a moment. What I haven't quite picked up yet - I am looking at Mr Cristian's affidavit of 29 October and at annexure 17 which has got loan contracts, which doesn't really have a name on it except for being a loan contract, but it does indicate that there are to be scheduled monthly repayments. What I haven't picked up
15 yet is whether they're of interest or principal and interest.

20 CRISTIAN: Excuse me, your Honour, but the mortgage broker spoke to us and told us with that line of credit there is no dollar value stated on the contract because it is undetermined what the borrowings will be from any given time from one day to the next.

25 HER HONOUR: Can you just tell me, Mr Golledge, is this a principal and interest loan?

GOLLEDGE: This is a principal and interest loan, your Honour.

30 HER HONOUR: And Macquarie Bank had informed Mr Cristian and Mrs Cristian on 22 August that they would get a line of credit. I mean, were the wrong documents sent out? Is this a mistake of fact case?

35 GOLLEDGE: Earlier on in the affidavit it appears as though the defendants waxed and waned a little as to exactly what they wanted.

40 CRISTIAN: That is our prerogative, your Honour.

45 GOLLEDGE: The earlier annexures your Honour wasn't taken to. In May the various loan offers were made and then we get to AC 12, which is a note from Mr Hartley, who is the broker acting for the Christians and who swore an affidavit below who, as Mr Cristian says, asked for a line of credit loan. That is on 21 July.

50 A week later the loan approval goes out for the home loan of \$664,000.

CRISTIAN: For a line of credit.

GOLLEDGE: That is AC 13.

55 HER HONOUR: Just a moment, please. Macquarie Executive Choice Home Loan.

CRISTIAN: Again, I have the brochure that Macquarie

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Executive Choice is a line of credit and you will notice the date on that internal memo from Macquarie Bank that says clearly that a Macquarie Executive Choice is a line of credit effective of 18 July 2005.

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HER HONOUR: That is 27 January. Then the next document, that is a bit difficult to understand what that is talking about other than being an interest only for five years.

10 CRISTIAN: What is that document, your Honour, please?

HER HONOUR: That is annexure 14, 4 August 2005. Then the next document is to Mrs Cristian, 22 August, and the same letter to you saying, "Your loan application has been approved. This is a line of credit." Then the next thing that seems to happen is that a home loan document - or a principal and interest document--

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CRISTIAN: I need to clarify, your Honour, that they all came in the mail on the same day, on the 25th. Our broker arrived on our premises on the 25th and we signed the documents on the 25th.

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GOLLEDGE: A document that is at A 17, the one that - whatever it be called and, indeed, whatever you call a line of credit, there is an interest obligation--

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HER HONOUR: There might be an interest obligation, but it is not a principal and interest, is it?

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GOLLEDGE: Whatever it is, if there is an interest obligation it hasn't been met and that, in short, was the case that led to the application for summary judgment that is.

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CRISTIAN: Again, your Honour, there are two brochures here clearly defining a distinction between the two products; they are clearly two products.

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GOLLEDGE: The case before Justice Hidden was put on the basis, your Honour, that, in light of the admission that the defendant had--

HER HONOUR: Yes, but what should have been paid by way of interest? If you were making a claim for \$4,000-odd a month and you say that wasn't paid, but if there was an error, a mistake of fact in the documentation that was signed, then there may be a question as to what the Cristians' contractual obligation was. That is not to say that there wasn't and may not have been a contractual obligation. That is why I indicated to Mr Cristian before this is not just saying, you know, this is a fraud, everything else, we're going to establish this can't be paid; that is one thing, but if, whoever the lender is - it seems to be Perpetual.

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GOLLEDGE: Perpetual.

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HER HONOUR: Perpetual was the actual lender. Was this one of these syndicate type things?

5 GOLLEDGE: Yes, it manages funds obtained from the market by the bank and perpetual is the trustee of that fund and is the lender of the money.

10 HER HONOUR: Well, it just seems to me that there is a number of questions. If, having approved one type of loan, if one type of loan was applied for, allowing for the fact that there seems to be some change in the instructions as to the type of loan and then the loan was eventually asked to be a line of credit and then that was approved, that is what the parties thought they were getting and they are faced with a bundle of documents and then they signed the document, there may be an arguable case for mistake of fact, I don't know; that hasn't been tried. I wonder whether that case ought not to be tried before there is execution, subject to - what I don't know is whether any of these moneys has been drawn down?

20 GOLLEDGE: It has all been drawn down. On settlement \$664,000 refinanced the existing borrowing of Mrs Cristian.

25 HER HONOUR: This is the Citibank loan?

30 GOLLEDGE: Yes, the whole thing was drawn down in August or September of last year.

35 HER HONOUR: And so if it is correct that this was to be a line of credit, it's all been drawn down, there seems to be some other suggestion that this was to be an interest only for five years, presumably with the line of credit, the principal having to be paid at the end of the five years with interest in the meantime, what would the interest obligation be?

40 GOLLEDGE: Well--

HER HONOUR: It would not be the \$4,000 per month as specified in the--

45 CRISTIAN: And there were no documents to validate any of that as to exactly what it was either.

50 HER HONOUR: That may be so, but the other side of the coin is you don't use money or a line of credit without paying for it. I am just working this through in my own mind at the moment because you are asking for some sort of urgent relief and I am to see whether there is any basis upon which you are to get it.

55 What seems to be suggested, I think, in these documents is that there was a mistake of fact by the Cristians as to the documentation that they were signing; that they believed they were signing for a loan which was different from that which was actually contained in the

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documentation and there is material that makes that case at least arguable. I don't know what sort of strength it has, but at least arguable on the face of the document which is before me. That case hasn't been determined.
5 However, I don't know whether there is evidence before the trial judge that the entirety of the money was drawn down?

GOLLEDGE: Yes.

10 HER HONOUR: If you want to tell me that that's so, I will just accept that for the moment for the purposes of the argument. I suppose there is a question of what interest only loan for that amount of money meant by way of monthly repayments.

15 GOLLEDGE: That wasn't the subject of evidence, your Honour, but if you look at AS 17 and you will see a percentage rate of 6.69 per cent on \$664,000 which produces annual interest payments of about 36, \$38,000.
20 My instructions are the monthly payments are about \$200 or \$300 difference, but putting that aside it's something in excess of \$3,000 a month at 6 per cent on 664.

25 HER HONOUR: And the loan is about 12 months old.

GOLLEDGE: And the evidence was that it was settled in about September of last year.

30 HER HONOUR: In very rough terms there's 45,000, \$50,000 if that, if anything.

GOLLEDGE: Even if the case that your Honour has identified was the one that he made and there was some evidence about the signing of the mortgage and Mr Hartley, the broker, swore an affidavit that he came in and read them in front of Mr and Mrs Cristian - was asked to come down. There is a suggestion he was acting for the bank, but there is no evidence of that. He's the defendant's broker. He came, they sat around a table and he explained to them the contents of the document and they were all content to sign it and signed it. But even in the face of that evidence there can still be a case for a type of mistake, a unilateral mistake, but there is no evidence it was a mutual mistake. If it was a case for a unilateral mistake, the relief you would get would be subject to conditions. It would not excuse or would not produce the result at the end of any case that the defendants were never under any obligation to pay any money and are entitled to have the \$713 interest free.

50 CRISTIAN: There is no money. Money does not exist. The goal stand was removed.

55 HER HONOUR: I am not interested in that argument. I have got an urgent application as to whether you should have a stay. That is an esoteric argument that is not going to be resolved today.

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GOLLEDGE: Whilst I am on my feet, I have short evidence on the stay aspect. I don't know if Mr Cristian is finished with his evidence--

5 HER HONOUR: I think he was wanting to tender some documents, so I perhaps should finish with that tender. Do you object to me looking at the material?

10 GOLLEDGE: Until I have seen it. I am not sure if I have seen it.

CRISTIAN: You have a copy of that. This was for the Common Law Court.

15 GOLLEDGE: I don't object to that one.

(Handed up.)

20 CRISTIAN: This shows the case there referred to and, amongst other matters, the difference between credit and money. The way I understand the law, which I would like to present in the Court of Appeal, is that if anyone says they owe money isn't guilty of fraud.

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HER HONOUR: I am not going to give you any advice at all. If I can indicate at first blush that argument would look to have very little prospects.

5 CRISTIAN: We would ask the plaintiff to present us their books, their journal entries and let us see they had those funds in place to lend at the time the loan was lent. Let us see if there was a debit on the books of the ledgers of this company and we will decide, both in electronic,
10 physically, all forms. Let the plaintiff prove to us that they have made a loss if they are so concerned, that they are so concerned there is a loss, let them prove that. They are arguing over a contract. They believe the contract entitles them to certain remedies. We are saying
15 the contract is void and until that matter is determined, then we can conduct the other matters. That has been our argument.

20 HER HONOUR: Just let me look at this material. Is there any other material?

CRISTIAN: Just some points, not so much the material.

25 HER HONOUR: If it is just the points I will hear the argument, I will take the evidence first. There is material you want?

30 CRISTIAN: You have the whole common law including one, two and three affidavits.

HER HONOUR: I think I have not read those.

GOLLEDGE: I tender AC24 from Mr Cristian's affidavit.

35 HER HONOUR: Are you familiar with that?

40 CRISTIAN: Yes, it says "requiring executive choice". So it is the application of funds on settlement including the payment to Citibank and \$25,000 to Mr and Mrs Cristian. I seek to read two of the affidavits: Kylie Arigo of 4 December 2006 and one of Gary Koning of 22 December 2006.

HER HONOUR: Do you have any objection?

45 CRISTIAN: No.

HER HONOUR: This is the subject property?

50 GOLLEDGE: Yes.

HER HONOUR: The purpose of my knowing about that?

55 GOLLEDGE: Is that it would go to the exercise of your discretion to know that this is not, the security property is not a domestic residence where the defendant and the family are going to be in effect put out into the street over the Christmas vacation. This is a beach house which is earning income and has been so, apparently, since the

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loan was settled and not one cent of which has been offered or paid to the bank.

5 CRISTIAN: It has not been rented, it has been sitting vacant and empty.

GOLLEDGE: That is a matter that would go to the discretion.

10 CRISTIAN: That is the prerogative of the defendant. It is her home and she is allowed to service her liabilities wherever they may be. There are many people renting rooms in their family homes to another to service a liability and generating income as a home owner. I consider is not
15 relevant to this matter because we all have jobs. Some work in a full-time career to generate an income to service the liability. Others will rent rooms. In this case the defendant has moved from her family home and I consider cleverly rented the home to cover her obligations
20 by not living in the home. She has another home at Bowral where the Steiner School is for her children but she had lived in that home for two years.

25 No capital gains tax liability, she does not pay land tax, she owns no other commercial or private properties or any interest whatsoever. This is her family home and how she conducts her family home is her business and not the business of the plaintiff or anyone else. Otherwise I
30 consider that as an intrusion or imposition into privacy.

GOLLEDGE: That is our evidence on the stay application.

CRISTIAN: Am I allowed to mention something else?

35 HER HONOUR: Yes.

CRISTIAN: When the contract was signed we were given the settlement date towards the end of August 2005, I could
40 not find those notes, they will be noted in the early affidavits.

HER HONOUR: Would you just say that again?

45 CRISTIAN: When the contract was signed we were given a date for settlement by the plaintiff or by the plaintiff's acting agent, Macquarie Mortgages, towards the mid/late end of August. On the day of that settlement date they cancelled the settlement date without notice to the
50 defendant. The broker rang up wondering what was going on. The staff within the firm of the broker pointed out we had a small window of nearly 7 weeks to renovate the downstairs of the home and we had to vacate by the end of 20 October 2005. So we had from about the middle to end of August to October 2005 when the approval documents came
55 through and confirmation, which they gave us the settlement date. The defendant went ahead and organised tradespeople and other associates to be on-the-job. The first settlement date was cancelled on the day of

settlement.

5 We then, through the broker, rang to try and find out what
was going on. The broker contacted the agent of the
plaintiff who was told that for whatever reason, he was
not given a reason and he stated that in his affidavit, I
believe, and was given a second settlement date. Upon the
10 second settlement date it also was cancelled on the day of
that settlement date. They told us at that point that the
application for the loan that came with a valuation on
that home had expired by a day or so and they could not
settle and required another valuation on the property.
Here we are talking about a multi-million dollar banking
15 corporation with vast staff resources who cannot get their
heads together to look after a simple home loan
application.

20 HER HONOUR: What has that to do with it. That has
nothing to do with the stay application, has it?

CRISTIAN: It impacted on the fact that when the third
settlement date finally came through the defendant and
myself were at the property and we were working to deal
with the renovation of that property and it had to be
25 vacated. Out of all that we did not know that there was a
change in the contract or project, we had no idea
whatsoever. We were just completely are oblivious to what
the plaintiff had done. When we finally came back to
where the mail was being sent, they tried to direct debit
30 the defendant's bank account for funds far beyond anything
we imagined. I think it was nearly \$2000 more than what
we expected.

35 This is when we discovered: You are all on a principal and
interest product and these are the payments. We said:
Excuse me, we have a line of credit and we only have to
pay interest on that principal amount at that time. They
said: No, No. We said: You better investigate, we have a
40 problem here and until this matter is resolved from 1
November right through to almost May of the following year
we kept saying: We will not pay one cent to validate a
fraudulent contract, give us the new contract at that time
and we will own that debt and continue business from that
45 time onwards. This is going back then.

We got notification from members of the plaintiff's agent
saying: Yes, they made a mistake and they acknowledged it.
That is stated in the affidavit of the broker as well.
50 Numerous phone calls were done by the defendant and by the
plaintiff: What is happening with the new contract -- over
the phone. Every month another statement would arrive in
the mail and we would ring them up again and say: When are
you providing us with this new contract. We refuse to pay
one cent to validate a fraudulent contract and when you
55 give us the new contract we will then go into an actual
agreement. That is how we understood it to be and how the
broker understood it should be and that is what we thought
was happening.

5 In the May, not the fault of the defendant, the issue
dragged out. The way the plaintiff conducts business and
the way they treat their clients, they just send out of
nowhere, they went down to the defendant's property and
changed the locks on the property and booted out the
tenant who was staying at the time on short-term rental.
We then discovered what happened and we contacted them and
were given a phone number of the contracted agent on
10 behalf of the plaintiff's agent who told us he was
directed by the agent to go down and organise a locksmith
to change the locks on this property without even telling
us.

15 Out of that came a whole lot of scenarios. This could
have been resolved by the plaintiff a long time ago if the
plaintiff chose to do so before we discovered all these
other problems about the monetary system. It would have
never come to this if the plaintiff had decided to do the
20 right thing when they knew they had done something wrong,
or cleaned it up and they never bothered to clean it up.

Now we have come to a court case and now they are trying
to take the defendant's family home from her out of the
25 madness and the stupidity of the plaintiff who cannot get
their heads together to conduct business in a proper
manner. We find this case very offensive and very
upsetting that it has come to this.

30 GOLLEDGE: The plaintiff's position is we oppose both the
extension of time and any stay, although I did not rise to
my feet during much of what came from Mr Cristian at
various stages.

35 HER HONOUR: And nor should you.

GOLLEDGE: For the record, the opponent's position is that
much of what was said is not supported by evidence either
before and your Honour and was not the subject of any
40 evidence before Hidden J and other parts of it were
inconsistent with the record of the proceedings or in the
Lower Court both before they got to Hidden J and
afterwards.

45 If I confine what I wanted to say to the question of the
stay, can I just say one thing and I am not sure if your
Honour would have noted but when you were looking through
the loan contract that was signed and I just pointed out
because of what my friend seems to be disputing or
50 repeating, or denying, the character or status of the
property. The purpose of the loan is described at page 9
of the loan, to assist in the refinancing of an investment
property. All of the evidence, there is no evidence in
the court below that this property was anything other than
55 that and AC24 is evidence that the refinance actually
occurred in the sense that Citibank received a very large
payment from the draw down.