

There are three or four things. There is no immediate threat of eviction. There was judgment on the 15th, possession and leave to issue a writ. So far as the opponent knows, the writ has not yet issued from the court and even when it does the terms of Hidden J's judgment say it was to lie in the office of the Sheriff for three weeks and even once it has lied in the office of the Sheriff for three weeks there then had to be an eviction date set, whatever that might be. There is no immediate threat or an indication that there is likely to be in the foreseeable future of February or whenever those steps would have gone through.

Secondly, our position notwithstanding the matters that your Honour raised regarding the documents, there is no reason to think that the appellant has a strong case on appeal and you are not conducting the appeal now, that is a factor. For this reason, that at its highest, the case that is now going to be run is a unilateral mistake case or a mutual mistake case.

HER HONOUR: That has not been determined, that is the problem.

GOLLEDGE: No, and even if it was successful the remedy that would be granted in the case of unilateral mistake would be rescission and putting the parties back in the position they would have been at the start, it being an equitable form of relief. The appellant here would need to do equity and there has been no offer either in the court below or in this court to do so. Notwithstanding that as recently as two months ago, from what Mr Cristian has said to your Honour, they were never under any misapprehension that they had to pay something back.

The first objection is when it came out of the loan account it was \$1000 or \$2500 extra. Mrs Cristian expected to pay \$2500 a month and they have had a windfall gain of 15 months where they have not had to do so and they made no offer here or in the court below at any stage to begin any payment.

Thirdly, if this was Mrs Cristian's domestic residence and if the Sheriff was threatening to come in over Christmas and the New Year the bank would not be heard on the stay. However, that is not the evidence. All of the affidavits have been sworn at Bowral which is also the address given by Mrs Cristian in the holding summons. The document annexed to Mr Koning's affidavit suggests that as the loan contract was signed, the investment property was available for rental use.

Fourthly, there is a negative equity problem or position attested by Ms Arigo. This is not a position where ongoing delays and stays are acting to the detriment of the defendant because it is eating away her equity. It is a thing to the detriment of the plaintiff and in that regard it is not irrelevant to note that the record in the

court below reveals that the plaintiff, the bank in the court below, had already sustained so many months of delays.

5 A motion for summary judgment was filed at the same time  
as the statement of claim in July which came before the  
court four or five times before different judicial  
officers and was adjourned 4, 5 or six times at the  
request of Mrs Cristian to allow for legal aid  
10 representatives, pro bono representatives, the delivery of  
further evidence. Hidden J heard evidence on 30 October  
and came to deliver judgment on 1 November and even then,  
in response to a request by Mrs Cristian, deferred giving  
judgment to allow a further 14 days to put on any  
15 additional material or submissions.

It was not a case where the bank and/or the court below  
were railroading the case against the defendant. Here  
again, what is sought to happen is a further delay  
20 entirely at the plaintiff or the opponent's expense as to  
the financial position with no offer at all, that in some  
way that something should be done by way of payment of an  
amount that the Cristian's appear to have accepted that,  
even on their best case, they would be indebted to the  
25 bank for the best part of \$40,000 with interest.

Confining myself to matters relevant to the stay they are  
the submissions I wish to make.

30 HER HONOUR: Do you wish to make a reply?

CRISTIAN: Yes. This whole argument goes right back to  
the fact, is there a contract that is valid or invalid and  
until that matter is resolved and determined to be valid  
35 all the argument of my learned friend is a waste of time.  
We need to, firstly, determine the validity of this  
contract because the parties joined together due to this,  
what we consider a fraudulent contract. We also have a  
situation here where the real parties to these contracts  
40 have not entered this court room at any time, we are  
dealing with third parties.

The only party to the contract outside the defendant and  
myself is, apparently, James Angus. He is the only person  
45 who states his name on the contract. We do not have  
anything, contract that says barrister Golledge is on the  
contract or solicitor, Gary Manning, or Dibbs Abbott  
Stillman, lawyers. We don't have anyone else stated on  
the contract. We are dealing with interlopers and  
50 strangers and mercenaries unrelated to this contract.

HER HONOUR: It does not help to take your argument into a  
form of invective, really. You are in a court of law and  
the arguments have to proceed in an orderly way. There is  
55 a contract on the file. I can see that you raise an issue  
with it. The loan contract has been signed by certain  
people.

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CRISTIAN: There is nothing on the contract that says that the plaintiff signed it. All we have is a signature of James Angers and we want to subpoena him into the contract.

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HER HONOUR: I have a contract in the file and this type of explanation into areas that are not relevant to the present issue just prolong the time and are not helpful.

10 CRISTIAN: I am sorry. The defendant said to Hidden J that he erred in his judgment. We also stated that again to Registrar Howe and we stated it affidavits. We note in the transcripts that he had seen documents but had not stated that he had read all the documents. We were  
15 concerned, was it an evidentiary hearing or not. That was a question that needs to be addressed as well. That can be backed up again by the transcripts. We also asked from the plaintiff's solicitors, which I have here or you may have on file, we requested discovery for all documentation  
20 regarding phone calls between the parties and all forms of data communication. That has never been presented to us so far.

25 HER HONOUR: That is really the material on the cross-claim and that is why I am having difficulty determining what is the appropriate thing to do. Can I just tell you my thinking at the moment. You have signed a contract over which \$4000 per month were payable and you have not paid anything. You are alleging that you thought you were  
30 entering into a different sort of contract. Let us assume that is the contract that you should have been given to sign. You were still obliged to make payments under that of something in the order of \$3000 to \$3500 per month.

35 There is evidence before me that indicates, regardless of how the transaction was done, there was a movement of indebtedness from yourself to Citibank and yourself to Perpetual. You have had the benefit of that. There is  
40 evidence before me that you have not been paying any money in respect of that indebtedness and just for the moment I am not concerned with the gold standard or anything like that, that is an argument for another day.

45 If I am going to give you any stay it will have to be on condition that you make the back payments and you start to make the payments. What I have in mind is I do that on the basis of the contract that you allege you ought to have had.

50 CRISTIAN: That also then determines that that contract being invalid means that everything that happens from that contract is invalid.

55 HER HONOUR: That may be so. That is not the argument. This is an argument about the gold standard.

CRISTIAN: I have a court precedent.

HER HONOUR: Yes, I understand that you have a court precedent from some State in America in 1968. I do not find that case very persuasive, having regard to the manner in which financial transactions are done in this country at this point of time. Therefore, if I am going to give you any relief, it is going to be on condition that you make the back payments and that you continue to make the continuing payments.

10 The real issue in this case is not the possession summons. The real issue arises on the cross-claim and they have not been determined by anybody so the Court of Appeal is not going to be able to, I do not think, to deal with your argument on the appeal because there is no primary determination in the cross-claim. Am I right in that or not? Mr Golledge, there has been no determination on the cross-claim.

CRISTIAN: It has not been addressed.

HER HONOUR: And an issue arises on the cross-claim. What I do not know is why the cross-claims were severed off from the possession application?

GOLLEDGE: I think the judge accepted the proposition because even if the loan was to be rewritten in some fashion reflective of a mistake, that there would nevertheless be a default under the rewritten loan and under the memorandum of mortgage which the defendant signed, upon any default it has the right of possession. He said if the loan is rewritten that may well go to how much is the in personam indebtedness of the defendants because there might be arguments about whether it is 6.8 or 6.2 per cent on the line of credit because that is the differential. Even if a loan is rewritten it is clearly a default and whether it is a default for \$1 or \$1,000,000 the right for possession arose.

HER HONOUR: It may not have, if they were given the right loan. I suppose the other difficulty I have at the moment is, I do not know what went on after the loan was entered into. When was the problem, if I can call it that for the moment, recognised by either side?

CRISTIAN: 1 November when the direct debit was hitting the bank account of the defendants, 1 November 2005, that is when we discovered the problems and that is when the phone calls started streaming in from the defendant and from myself.

HER HONOUR: Is there any correspondence?

CRISTIAN: 22 September I think we received a letter and they stated in that. It will be in the documents. It stated to our request: We are willing to modify the existing product to an interest only. Please sign here and life will go on. We rang and we said: No, we do not want that product, we want a line of credit. You will

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notice that in the affidavits.

5 HER HONOUR: The difficulty with that is that you can draw down a line of credit in one go and the arrangement was Citibank to be paid out so that Macquarie/Perpetual could come in and then you draw down the entire amount so you would be required to pay interest from that time.

10 CRISTIAN: The problem is the product itself comes with a line of credit, you can run it like an overdraft. Also they charged us a higher interest rate than agreed and they never gave a clarification about the interest rate after the problem was discovered. That is backed up from the affidavit of the Macquarie Bank's authorised agent.  
15 The first time we received something by official from the plaintiff's agent was that letter of 22 September, that they were willing to amend the existing product to interest only.

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CHRISTIAN: It is stated we said to them, we want a line of credit to work a product as a line of credit.

5 HER HONOUR: With that argument, if you are not paying out Citibank what you owed, and assume that you need a line of credit, you draw down your line of credit and interest is payable after.

10 CHRISTIAN: I understand that, your Honour but the plaintiff acted irresponsibly in not acting quickly to make a new contract, from September 5th. They had the opportunity from basically 1 or 2 November 2005, no, December 2005, to issue a new contract and the defendant and the husband myself, would have gone on and continued to do that but they never did that, but they continued abusing us we say by ignoring their obligations, and we suffered as can be shown later in the Court of Appeal, the issue just dragged on and we received another letter February 2006 also on the records, repeating the same story we received in December: We are willing to amend the existing product as per your request and again we said, no we did not want you to amend the existing one but to supply what you agreed to supply, and deliver.

25 They agreed to to that in September.

CHRISTIAN: It is still not a line of credit, and the February letter repeated the same story, we will amend your product to interest only but not give you a line of credit.

30 HER HONOUR: If you have a line of credit and have drawn down the money.

35 CHRISTIAN: We have been able to put more money in and.

HER HONOUR: Up to the amount you had.

40 CHRISTIAN: We can put a lot of money in, it does not matter what the amount is but we have the produc

HER HONOUR: But you have to pay interest on it.

45 CHRISTIAN: We are talking about a product, a contract supplying the product, a contract and a product. That is the dispute here, nothing else comes in until this is resolved.

50 HER HONOUR: The letter 22 December 2005, it is not available, what the interest rate is supposed to be.

DEFENDANT: And they are not willing to change the product.

55 GOLLEDGE: The only changes made, the interest rate doesn't change nor the repayments because the loan has been fully drawn down.

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HER HONOUR: The interest would change.

GOLLEDGE: The proposal to change from principal and interest to an interest only product.

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HER HONOUR: There must be a difference in repayments even if not much.

CHRISTIAN: There is nothing to document that. It continues the pattern of this bank being very irresponsible and unprofessional, a lack of duty of care.

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HER HONOUR: There is a document which is part of the assignment by a mortgage, it must be a line of credit only, 6.7 percent and that is in November 2005.

15

8 November 2005, that seems to be it.

GOLLEDGE: The interest rate arising from the loan, they got it for 6.9 so the interest rate

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HER HONOUR: Is anybody able to calculate the interest rate on the actual mortgage loan.

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GOLLEDGE: Anybody in the Court can do that.

GOLLEDGE: I have some instructions but only general. I do not think I can give you a figure.

30

CHRISTIAN: The base.

HER HONOUR: I am sorry Mr Christian.

GOLLEDGE: This is mentally, but the figure based on 6.7 percent on a line of credit fully drawn down.

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HER HONOUR: That is right.

GOLLEDGE: Yes your Honour.

40

HER HONOUR: I am not prepared to grant a stay unless the repayments of interest on that basis I calculated are ongoing payments.

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CHRISTIAN: On the basis of a contract either valid or invalid.

HER HONOUR: I am not determining that, I have made that clear.

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The second basis is, you have to work out what to do because the cross-claim has not been determined and the issue as to why the loan ought to be, if there was a mistake and they meant to enter into a loan on a line of credit basis, repayments of principal repayable in five years has never been determined so there is little point in the case going to the Court of Appeal unless it is caught up with that case.

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So I am having difficulty working out if a stay is granted, on what basis.

5 GOLLEDGE: On the point about there being no point in the possession matter, it is not inconsistent that say, everything Mr Christian asserts is right, it might still be the case that the orders for possession and relief in terms of the cross-claim are not necessarily inconsistent, because the relief of rewriting the loan would nevertheless call for recognition of an obligation to pay a very substantial amount of money where the defendant remains in default, ongoing payments.

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15 HER HONOUR: I will make that a condition of the stay, if they are not paid.

GOLLEDGE: I would have to get instructions, if that came into being, all the back interest being repaid, that might be something, I can get instructions on that, although that can affected the case going forward.

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CHRISTIAN: The affidavit stipulates that a contract without any consideration (read).

25 HER HONOUR: I have read that Mr Christian.

If you want relief now on the stay, I can indicate to you the only basis upon which I would consider that is, it ought to be done in the exercise of my discretion, which is what I am doing, and it would be on the basis that you pay the back interest, and that it be an ongoing payment of interest.

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35 The question is, pending that, the determination of the cross claim.

CHRISTIAN: You are then asserting the claim.

40 The cross-claim is valid.

HER HONOUR: Do not keep interrupting. I understand the point you make. This is not the occasion to determine that matter.

45  
50 You are seeking a specific form of relief in Court and I am indicating the basis I am prepared to grant that relief and I would do it without determining whether or not there is any basis in your argument.

CHRISTIAN: The damages and all the things suffered to the family and all the frustration, the many things detailed there, an unjust situation and the inequity and injustice of the matter, with that kind of judgment your Honour would be benefiting a multi-national corporation and putting a suburban housewife .

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HER HONOUR: I am not making any determination as to the

correctness or otherwise of those allegations. I am not entitled in the exercise of my discretion to grant you a stay under those conditions, which is a very well-known aspect of the jurisdiction.

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CHRISTIAN: We are also establishing a precedent in the case, to say this contract is valid and moneys are to be paid, but that has an inducement, and I consider that an unfair order from the Court of Appeal to amicably resolve this matter.

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It is not a situation where the defendant has been forced to be induced to accept a contract and payments when even the plaintiff has not proven to us they have made a loss, no records from them to show they have made a loss.

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If you say there is a loss incurred and the plaintiff must pay, can that be an argument in court with subpoenas and documents for discovery and, if that is the case, we will concede, but you are suggesting it is an inducement and will establish a precedent and I object; I think that is unfair.

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HER HONOUR: I understand that.

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Perhaps if I indicate to you that I remain of the view that, if a stay is granted, then it will be on the terms that I have indicated; and if you reject that as being an unfair basis, then that part of your application will be dismissed.

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CHRISTIAN: Then, we go to the High Court.

HER HONOUR: You could seek special relief from the High Court.

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I will give you five minutes to consider your position.

CHRISTIAN: My understanding of the precedents of the Court of Appeal in the past and what has been told to me is, we have every right to a stay on that order and until that matter has been determined in court there should not be any other conditions applied.

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I consider that a benefit to the protection of a multinational banking corporation at the sufferance of a suburban housewife. I still consider that an inducement that is subtle but still a benefit to the plaintiff, and it does not benefit the defendant at all.

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I suggest to you, based on that determination, who does benefit; the multinational corporation or a suburban housewife; and this is not equity or justice and I will pursue this in the High Court based on that if that is your determination.

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HER HONOUR: I think I have made the position clear. The matter that I am not clear about at the moment in terms of

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having the matter go forward is, what the amount of monthly payments would be and what the back pay would be, the payment up to date is.

5 CHRISTIAN: I understand that.

10 HER HONOUR: The other thing, a matter of concern to me, is that discretely this matter isn't right to go to the Court of Appeal at this stage because the cross claim has not been determined and it may be I am exercising the discretion of the High Court rather than that of the Court of Appeal.

15 GOLLEDGE: I was not in this matter at the end but the only cross-claims we were aware of were those filed in, I think this Court late in the day, not against the plaintiff but apparently against a third party, Gallilee solicitors.

20 HER HONOUR: Yes, I have a document, a cross summons.

CHRISTIAN: Yes that has been filed and a second one is not yet filed.

25 The defence was filed at the same time as the cross claim or cross summons.

30 HER HONOUR: You are named as cross defendant. This is a separate document and I have not studied this in a great deal of detail.

I am trying to pick up the relief sought, it is not clear.

35 CHRISTIAN: I would be happy to have the matter stayed if we can get Hidden J's judgment.

HER HONOUR: I hand that document down to you.

40 The front page has the orders and it includes for example, that the contract be quashed and the like.

GOLLEDGE: My instructions are, my solicitor had not seen this and I certainly had not.

45 HER HONOUR: It seems they have been filed in Court.

GOLLEDGE: It is marked by the associate, on the 30th.

50 HER HONOUR: One of the dates I think you mentioned.

GOLLEDGE: When the summary judgment was heard, it is possible it was among the material then.

55 CHRISTIAN: I believe she gave to Hidden J in court both the defence and cross-claim.

GOLLEDGE: I do not wish to disagree with any of that but make the observations a copy wasn't given to myself or my