

WALLER v HARGRAVES SECURED INVESTMENTS LIMITED
(S223/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 300

Date of judgment: 11 November 2010

Date of grant of special leave: 10 June 2011

This matter involves the construction of sections 8 and 11 of the *Farm Debt Mediation Act 1994* (NSW) ("the Act"). It also involves the issue of whether a series of three loan agreements (secured over the Appellant's farm) resulted in the certificate issued pursuant to section 11 of the Act being invalid and the subsequent claim for possession being void.

In 2003 the Appellant executed a mortgage in favour of the Respondent, securing all monies that she owed to the Respondent. After the Appellant defaulted on her interest payments, the Respondent gave notice under section 8 of the Act of its intention to take enforcement action.

A mediation held in 2005 led to both a settlement and further loan which paid out the first loan. In 2006 a third loan was entered into which also went into default. The Respondent then both sought and obtained a certificate under section 11 of the Act. It also commenced the present proceedings for possession and for judgment.

On 12 November 2009 Justice Harrison rejected the contention that there was no valid section 11 certificate referable to the debt upon which the Respondent relied. His Honour then granted possession and gave judgment for the amount claimed.

On 11 November 2010 the Court of Appeal (Tobias JA and Sackville AJA, Macfarlan JA dissenting) dismissed the Appellant's appeal. The majority held that sections 8 and 11 of the Act distinguished between 'farm mortgage' and 'farm debt' and that there was nothing in the definition of 'farm mortgage' which refers to any particular debt being secured. The certificate therefore complied with the Act. Justice Macfarlan however held that each separate debt was a separate mortgage and that there was no relevant section 11 certificate. His Honour also would have set aside the order for possession.

The grounds of appeal include:

- The Court of Appeal erred in failing to hold that the primary judge should have dismissed the proceeding by reason of the operation of section 6 of the Act.
- The Court of Appeal erred in failing to hold that there was no certificate in force in respect of the farm mortgage concerned within the meaning of section 8(3) of the Act.

On 17 August 2011 the Respondent filed a summons, seeking leave to file a notice of contention out of time. The grounds of that notice of contention include:

- The majority of the Court of Appeal erred in finding that the loan agreement entered into by the parties on 28 July 2005 effectively discharged the loan agreement entered into by the parties on 28 August 2003 ("First Loan Agreement") thereby extinguishing the 'farm debt' created by the First Loan Agreement.