HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ROSLYN EDWINA WALLER APPELLANT

AND

HARGRAVES SECURED INVESTMENTS LIMITED RESPONDENT

Waller v Hargraves Secured Investments Limited [2012] HCA 4
29 February 2012
S223/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales dated 11 November 2010 and in its place order that:*

   (a) the appeal to that Court be allowed with costs; and

   (b) the orders of the Supreme Court of New South Wales dated 12 November 2009 be set aside and in their place order that:

      (i) the proceedings be dismissed; and

      (ii) the respondent, Hargraves Secured Investments Limited, pay the costs of the appellant, Roslyn Edwina Waller, in that Court.

3. *The respondent pay the appellant's costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

D J Higgs SC with J B King for the appellant (instructed by Jackson Lalic Lawyers)

D M Loewenstein with A R A Kuklik for the respondent (instructed by Hargraves Solicitors)

CATCHWORDS

Waller v Hargraves Secured Investments Limited

Mortgages – Mortgagee's remedies – *Farm Debt Mediation Act* 1994 (NSW) ("Act") – Creditor must provide notice of intention to take "enforcement action" under "farm mortgage" ("Notice") – Notice must specify availability of mediation regarding farm debts – Creditor unable to take enforcement action until NSW Rural Assistance Authority ("Authority") issues certificate that Act does not apply because satisfactory mediation has occurred – Borrower mortgaged land to secure all monies owed under loan agreement – Borrower defaulted and lender provided Notice – Borrower requested mediation under Act – Following mediation parties executed second and third loan agreements, discharged previous debts and created new farm debts – Authority satisfied of successful mediation and issued certificate certifying that Act did not apply to farm mortgage – Borrower defaulted in making interest payments due under third loan agreement – Whether successive farm debts created new "farm mortgage" requiring satisfactory mediation before creditor could pursue enforcement action – Whether separate Notice required for enforcement action under subsequent loan agreements – Whether certificate issued by Authority void – Whether lender's entitlement to possession of secured land and outstanding monies barred.

Words and phrases – "enforcement action", "farm debt", "farm mortgage", "in respect of the farm debt involved", "in respect of the farm mortgage concerned".

Farm Debt Mediation Act 1994 (NSW), ss 3, 4(1), 5(1), 6, 8, 9, 10(1), 11(1), 14, 17.
Real Property Act 1900 (NSW), s 3(1).
Interpretation Act 1987 (NSW), s 34.

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 The *Farm Debt Mediation Act* 1994 (NSW) ("the Act") has as its object "the efficient and equitable resolution of farm debt disputes."[1] In aid of that object "[m]ediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage."[2] This appeal concerns the application of the Act to enforcement action under a farm mortgage securing advances made as part of a settlement which was reached following mediation of a farm debt dispute in accordance with the requirements of the Act.

2 The Act provides mechanisms, explained in detail in the reasons of Heydon J, which condition the enforceability of a farm mortgage upon 21 days prior written notice by the creditor, under s 8(1), in response to which the farmer may request "mediation concerning the farm debt involved."[3] The bar to enforcement is lifted if a certificate is in force under s 11 in respect of the farm mortgage concerned[4]. Section 11 provides for the issue by the New South Wales Rural Assistance Authority[5] ("the Authority") of a certificate that the Act does not apply to a farm mortgage if the farmer is in default under the farm mortgage and, relevantly, if the Authority is satisfied that satisfactory mediation has taken place in respect of the farm debt involved[6]. The Act applies to creditors "only in so far as they are creditors under a farm debt."[7] Enforcement action taken by a creditor to whom the Act applies otherwise than in compliance with the Act is void[8]. "[E]nforcement action, in relation to a farm mortgage" is defined in the Act to mean "taking possession of property under the mortgage or any other

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1 Act, s 3.

2 Act, s 3.

3 Act, s 9(1).

4 Act, s 8(3).

5 Constituted by the *Rural Assistance Act* 1989 (NSW).

6 Act, s 11(1).

7 Act, s 5.

8 Act, s 6.

action to enforce the mortgage"[9]. Three other definitions of importance in the Act are[10]:

> "**creditor** means a person to whom a farm debt is for the time being owed by a farmer.
>
> **farm debt** means a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage.
>
> **farm mortgage** includes any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor, including any interest in, or power arising from, a hire purchase agreement relating to farm machinery, but does not include … [the exclusions are not relevant for present purposes]."

3 In this case a certificate was awarded to a creditor under s 11 of the Act following a mediated settlement of a dispute arising out of the breach of a loan agreement which had given rise to a farm debt. A second loan agreement was negotiated as part of the settlement and a third loan agreement negotiated when the second loan agreement was breached. Monies advanced under each loan agreement were secured by the same "all monies" mortgage. The appellant farmer, Roslyn Waller, was the borrower and mortgagor. The respondent, Hargraves Secured Investments Limited ("HSI") was the lender and mortgagee.

4 The primary question on appeal is whether the certificate issued under s 11 lifted the bar on the enforceability of the mortgage as security for the advances made under the third loan agreement. The answer to that question is no. A second question is whether the bar on the enforceability of the mortgage precluded recovery of a money judgment framed on the basis of the covenants in the mortgage. The answer to that question is yes. For the reasons given by Heydon J and the reasons which follow, the appeal should be allowed. The factual and procedural history and the approaches taken by the primary judge in the Supreme Court of New South Wales and by the New South Wales Court of Appeal are described in Heydon J's reasons[11].

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9 Act, s 4(1) – immaterial inclusions and exclusions in the definition are omitted.

10 Act, s 4(1).

11 Reasons of Heydon J at [31]-[42].

The appeal and the contentions

5 On 1 November 2007, HSI instituted proceedings in the Common Law Division of the Supreme Court of New South Wales for possession of Ms Waller's farm. It also sought judgment against her in the sum of $754,811.38. On 12 November 2009, Harrison J gave judgment for HSI including an order for possession and a money judgment for $906,667.93. Ms Waller was ordered to pay HSI's costs. Her appeal against the judgment of Harrison J was dismissed by the Court of Appeal (Tobias and Macfarlan JJA, Sackville AJA) on 11 November 2010[12].

6 Special leave to appeal against the judgment of the Court of Appeal was granted on 10 June 2011 by Gummow and Hayne JJ.

7 Ms Waller's primary argument rested upon the proposition that the proceedings instituted against her by HSI concerned a "farm mortgage" within the meaning of the Act that was not the farm mortgage in respect of which the s 11 certificate of 20 October 2006 had been issued. Underlying that argument was the proposition that the third loan agreement gave rise to a farm debt distinct from that arising under the first loan agreement which had been the subject of mediation. On the findings of the Court of Appeal the first loan agreement had been superseded by the second loan agreement which had, in turn, been superseded by the third loan agreement. The debt arising under the third loan agreement, it was submitted, gave rise to a new and distinct "interest in, or power over" Ms Waller's farm and thereby a new and distinct "farm mortgage" in favour of HSI.

8 HSI sought leave to file, out of time, a notice of contention that Tobias and Macfarlan JJA, in the Court of Appeal, had erred in treating the second loan agreement as discharging the obligations under the first loan agreement and the third loan agreement as discharging the obligations under the second loan agreement. For the reasons give by Heydon J leave to file that notice of contention should be refused[13].

Construction of farm mortgage

9 The term "farm mortgage" is defined in the Act broadly and non-exhaustively. It is sufficiently broadly defined to cover a mortgage at general

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12 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765.

13 Reasons of Heydon J at [43].

law which includes "a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given."[14] It encompasses a "mortgage" within the meaning of the *Conveyancing Act* 1919 (NSW) which includes "a charge on any property for securing money or money's worth"[15]. It also covers a Torrens System mortgage defined in the *Real Property Act* 1900 (NSW) ("the Real Property Act") as "[a]ny charge on land (other than a covenant charge) created merely for securing the payment of a debt."[16] The latter definition and the provisions of the Real Property Act attract to a mortgage registered under that Act the description in *English Scottish and Australian Bank Ltd v Phillips*[17]:

> "Under the system of registration … the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security."

10 The definition of "farm mortgage", however, extends beyond the general law and statutory categories mentioned above. It extends to an "interest" or a "power" over farm property securing obligations of the farmer "as a debtor". It thereby includes an interest or a power securing an obligation to repay, or pay interest on, a "farm debt". If an "interest" or "power" is granted by a farmer as security for repayment of a farm debt and the debt is thereafter repaid or extinguished, the interest or power so granted no longer secures any obligations of the farmer as a debtor. The "interest" or "power" constituting the farm mortgage then ceases to exist.

11 That is not to say that discharge of the farmer's personal obligations under a registered mortgage affects the state of the register and the legal effect of the mortgage. The personal obligations are not able to be treated in exactly the same way as the interest in land is treated by the registration system[18]. Under the Torrens System a situation can arise in which a registered mortgage does not

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14 *Santley v Wilde* [1899] 2 Ch 474 at 474 per Lindley MR, adopted in *Bevham Investments Pty Ltd v Belgot Pty Ltd* (1982) 149 CLR 494 at 499 per Gibbs CJ, Mason, Murphy and Wilson JJ; [1982] HCA 45.

15 *Conveyancing Act* 1919 (NSW), s 7(1).

16 *Real Property Act* 1900 (NSW), s 3.

17 (1937) 57 CLR 302 at 321 per Dixon, Evatt and McTiernan JJ; [1937] HCA 6.

18 *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302 at 321.

secure a debt. In *Perpetual Trustees Victoria Ltd v English*[19], Sackville AJA, delivering the judgment of the Court of Appeal, said of such a case[20]:

> "But that is the situation where a mortgagor repays the mortgage debt, yet the mortgage remains undischarged"

In the simple case of a mortgage securing a single past advance, where the advance and interest have been paid in accordance with the terms of the mortgage, the mortgagee can no longer sue for the sum secured under the mortgage even though the mortgage remains registered on the title[21]. Nor can the mortgagee exercise any of the general law or statutory rights or powers incident to the enforcement of the mortgage. In such a case there is no "interest" or "power" of the kind contemplated in the Act.

12 HSI's mortgage did not in terms secure a single past advance. It was an "all monies" mortgage. Ms Waller was obliged by the common provisions of the mortgage instrument to "carry out on time all your obligations under *every agreement covered by this mortgage* including the obligation to pay any of the *amount owing*." The term "amount owing" was defined as:

> "at any time, all money which one or more of you owe us, or will or may owe us in the future, including under this mortgage or an *agreement covered by this mortgage*." (emphasis in original)

The question in contention in this appeal was whether the extinguishment of the debts under the first and second loan agreements and the creation of new obligations under the second and third loan agreements respectively, gave rise in each case to a new "interest" or "power" over the farm property within the meaning of the definition of "farm mortgage". The answer to that question turns upon the particular language of the Act and the statutory purpose.

13 Analogous cases demonstrate the determinative significance of the specific statutory text and purpose and the particular terms of the relevant securities. One class of analogous case arose in the 1980s under s 73 of the *Property Law Act* 1974 (Q) ("the Queensland Property Law Act") which

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19 (2010) 14 BPR 27,339.

20 (2010) 14 BPR 27,339 at 27,356 [97].

21 *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705 at 714. See also Stoljar, "Mortgages, Indefeasibility and Personal Covenants to Pay", (2008) 82 *Australian Law Journal* 28 at 30.

prohibited a vendor of land under an instalment contract from mortgaging the land without the consent of the purchaser. The term "mortgage" was defined as including a charge on any property for securing money. In *Landers v Schmidt*[22] the Full Court of the Supreme Court of Queensland held that a vendor of land under an instalment contract who secured an advance of money under a pre-existing mortgage over the land had created a fresh "charge" and thereby mortgaged the land contrary to s 73[23]. The generality of the definition of mortgage extending to a "charge" underpinned that conclusion. The decision of the Full Court was approved by the Privy Council in *Coast Securities No 9 Pty Ltd v Bondoukou Pty Ltd*[24] which involved the same statutory provisions and a similar fact situation. On the other hand, this Court in *Sibbles v Highfern Pty Ltd*[25] held that the fluctuation, from credit to debit, of a current account, secured by mortgage, did not give rise to a fresh "charge" for the purposes of s 73 of the Queensland Property Law Act. This Court distinguished *Landers* and *Coast Securities No 9* on the basis that they involved variations of existing mortgages which fell within the meaning of the term "mortgage" in the Queensland Property Law Act[26]. A similar distinction was drawn recently by this Court in *Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd*[27]. The question in that case was whether a new loan agreement secured under the terms of a pre-existing charge over the assets of a corporation was a "variation in the terms of the charge" within the meaning of s 268(2) of the *Corporations Act* 2001 (Cth) ("the Corporations Act") and requiring registration under that Act. The Court answered that question in the negative.

14 The Act here in question adopts a definition of "farm mortgage" which is considerably wider than the definition of "mortgage" in the analogous cases just mentioned. The terminology of "interest" and "power" is also wider than that of "charge" in the Corporations Act.

15 It might be said that the mortgage instrument, by reason of its "all monies" provision, always secured the "prospective liability" which Ms Waller might

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22 [1983] 1 Qd R 188.

23 [1983] 1 Qd R 188 at 194-196 per Connolly J, Lucas SPJ agreeing.

24 (1986) 61 ALJR 285 at 288; 69 ALR 385 at 389.

25 (1987) 164 CLR 214; [1987] HCA 66.

26 (1987) 164 CLR 214 at 224.

27 (2010) 241 CLR 286 at 294 [20] fn 28; [2010] HCA 29.

incur under future advances. The registered charge in *Fortress Credit* was so characterised by this Court in determining whether or not the charge was varied by a further advance[28]. That characterisation, however, even if applicable to the instrument of mortgage in this case, does not answer the question whether by reason of the third loan agreement, read with the HSI mortgage, a new interest or power over Ms Waller's farm was created.

16 The successive discharge of the debts secured by HSI's registered mortgage under the first and second loan agreements extinguished Ms Waller's obligations arising under that mortgage by reason of those agreements. No enforcement action could thereafter be taken under the mortgage by reference to obligations arising under those agreements. The answer to the question whether the third loan agreement, read with the HSI mortgage, created a new interest or power over Ms Waller's farm, is in the affirmative. The question of construction should be answered in favour of Ms Waller. That answer cannot be met in this case by a general appeal to absurdities that might arise in particular circumstances. Absurd or unintended consequences of this broadly drawn legislation can be conjured in opposition to the competing constructions. The policy of the statute is remedial. The construction advanced by Ms Waller is within the scope of its remedial purpose.

17 The submission advanced by HSI that the Supreme Court proceedings were not barred by s 8(1) of the Act in so far as they related to recovery of a money judgment, should be rejected for the reasons give by Heydon J[29].

Conclusion

18 The appeal should be allowed with costs. We agree with the orders proposed by Heydon J.

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28 (2010) 241 CLR 286 at 294 [22].

29 Reasons of Heydon J at [64]-[68].

19 HAYNE J. The appellant ("the borrower") borrowed $450,000 from the respondent ("the lender") secured by an "all moneys" registered first mortgage over her farm. In October 2004, the lender gave the borrower notice under the *Farm Debt Mediation Act* 1994 (NSW) ("the Act") that the borrower was in default and that the lender intended to take enforcement action. The Act permitted (s 9(1)) the borrower to ask (and she did ask) for mediation "concerning the farm debt involved".

20 As a result of the mediation, the parties made a deed of settlement, in July 2005, by which the lender agreed to increase the amount of the loan to $640,000 and was directed to apply some of that extra amount lent to both past and future interest. The parties also made a new loan agreement recording and dealing in further detail with what had been agreed in the deed of settlement. The new principal of $640,000 was repayable in September 2006 along with any interest then outstanding.

21 In August 2006, the parties made a further loan agreement under which (amongst other things) the time for repayment of the principal sum of $640,000 was fixed as September 2009. From October 2006, the borrower did not make interest payments when they were due and in November 2007 the lender brought proceedings against the borrower in the Common Law Division of the Supreme Court of New South Wales seeking possession of the land and judgment for the principal and interest.

22 Section 6 of the Act provides: "Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void." Section 10(1) provides:

> "Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless a certificate is in force under section 11 in respect of the farm mortgage."

A certificate under s 11 was issued to the respondent in October 2006. It certified that the Authority (the New South Wales Rural Assistance Authority), which issued the certificate, was satisfied that the Act did not apply to a "farm mortgage" identified by reference to the borrower, her address, the registered number of the mortgage, the property over which the security was held, the "Facility" (described as "Hargraves – Account No 10294"), and the "Balance O/S as at date of issue of Section 8 notice" ("$488,250.00"). The certificate said that it "expires on 2nd Jun 2008".

23 Was the proceeding commenced by the lender in November 2007 in any or all respects a proceeding to which s 6 of the Act applied: enforcement action taken by a creditor to whom the Act applied otherwise than in compliance with the Act? The answer to that question depends on whether the proceeding fell

within the qualification to s 10(1) of the Act as "enforcement action in respect of the farm mortgage concerned [where] a certificate is in force under section 11 in respect of the farm mortgage".

24 As Heydon J explains, the "farm mortgage concerned" to which reference is made in s 10 cannot be identified without identifying the particular "farm debt" that it secures. The mediation which is the necessary precursor to the Authority issuing a certificate under s 11 is a mediation "concerning the farm debt involved" (s 9(1)) or "in respect of the farm debt involved" (s 11(1)(c)(i)). In this case "the farm debt involved" that was the subject of the mediation was the debt owing under the first loan agreement (the mediation having occurred before the second and third loan agreements were made); it was not the debt due under the third loan agreement that the lender sought to recover by the proceedings brought in the Supreme Court of New South Wales. At the time of the commencement of the proceedings there was, therefore, no certificate in force "in respect of the farm mortgage" (that is, "in respect of the farm mortgage concerned").

25 As Heydon J further explains, the expression "enforcement action" (as it is defined in s 4(1) of the Act) extends to all of the relief that was claimed by the lender in its proceedings. The lender by its pleadings asserted its "entitle[ment] to repayment, including principal and the unpaid arrears of interest" only "under the terms of the Mortgage". The width of the definition of "enforcement action", extending to "*any* other action to enforce the mortgage" (emphasis added), and the express exclusion of "the enforcement of *a judgment*" obtained before the commencement of the Act from the definition (emphasis added), point strongly to this construction. And any other construction would frustrate the evident purpose of the Act: to require mediation in respect of the farm mortgage concerned (which is defined by reference to a particular farm debt) *before* a lender can enforce – that is, bring proceedings in respect of – the farm mortgage. Whether the Act would have prevented a claim for a money judgment, brought *only* by reference to the third loan agreement, need not be decided.

26 I agree with the orders proposed by Heydon J.

27 HEYDON J. This appeal concerns the *Farm Debt Mediation Act* 1994 (NSW) ("the Act"). It is difficult legislation. Its construction has engendered differences of judicial opinion. The difficulties may spring from the origins of the Act – in a Bill which was based on legislation in Iowa and Minnesota that had attracted criticism. The Bill was introduced by an Opposition Member of the New South Wales Legislative Assembly[30]. It was introduced at a time when the enactment of legislation depended on support from independents in the absence of agreement between the major parties. Before its enactment, the Bill was amended on the suggestions of independents[31]. The Act has been amended since enactment.

28 The background to the Act lies in the notorious problems which face Australian farmers. They include harsh climatic conditions; the vulnerability of crops and animals to disease; unpredictable volatility in prices on world markets; the tendency of farmers to be asset-rich but cash-poor; their dependence on loans; the risk of speedy ejection from their land if there is entire freedom for creditors to enforce their general law rights, despite the possibility of remedying defaults if climatic and market conditions change; and the expense of and often delay in litigation as a method of keeping creditors within their rights. In contrast, some perceive in mediation a capacity to produce much cheaper and speedier outcomes.

29 In outline the legislative scheme is that if a farmer incurs a "farm debt" that is secured by a "farm mortgage", the "creditor" is unable to take "enforcement action" under the farm mortgage until, inter alia, a certificate is issued that the Act does not apply because satisfactory mediation has taken place. The question which the appeal raises is how far that scheme works if a certificate is issued in respect of one farm debt but the creditor later wishes to take enforcement action in relation to another.

30 The transactions to which the Act is to be applied in this appeal involve borrowings by the appellant, Roslyn Edwina Waller. The lender was the respondent, Hargraves Secured Investments Ltd. The borrowings were secured by mortgage over the appellant's farm ("the farm"). The respondent, as plaintiff in the Common Law Division of the Supreme Court of New South Wales, claimed possession of the farm and judgment for the outstanding borrowings. At

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30 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 October 1994 at 4822.

31 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 30 November 1994 at 5943. See *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052 at 15,055; *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,785 [103]-[107].

first instance Harrison J granted the relief sought[32]. By majority the Court of Appeal of the Supreme Court of New South Wales (Tobias JA and Sackville AJA, Macfarlan JA dissenting in part) dismissed the appellant's appeal[33]. The appellant's appeal to this Court should be allowed for the following reasons.

The factual background

31 The appellant, on retiring from her career as a high school teacher of science and mathematics, purchased the farm in March 2002. Initially the purchase was financed by a loan on mortgage. Then refinancing with another lender took place. The original mortgage was discharged. On 28 August 2003, the respondent advanced to the appellant $450,000 on loan under a loan agreement ("the First Loan Agreement"). Interest was payable on the fifth day of every month. The interest rate was 8.5% per annum, with a default rate of 12.5%. The repayment date was 5 September 2006. The loan was secured by a registered first mortgage made on 28 August 2003 in favour of the respondent ("the Registered First Mortgage"). The farm was affected by drought. The respondent alleged that the appellant defaulted in the payment of interest in every month but four from February 2004 to July 2005.

32 Section 4(1) of the Act defines "farm debt" as meaning "a debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage." It was not in dispute that the appellant was a farmer conducting a farming operation on a "farm property", namely the farm. Section 4(1) also defines "farm mortgage" as including "any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor". It followed that the Registered First Mortgage (read with the First Loan Agreement) created a "farm mortgage" as defined in s 4(1). Section 4(1) defines "creditor" as follows:

> "**creditor** means a person to whom a farm debt is for the time being owed by a farmer".

Section 4(1) defines "enforcement action" as follows:

> "**enforcement action**, in relation to a farm mortgage, means taking possession of property under the mortgage or any other action to enforce the mortgage, including the giving of any statutory enforcement notice, or the continuation of any action to that end already commenced".

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32 *Hargraves Secured Investments Ltd v Waller* [2009] NSWSC 1210.

33 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765.

The respondent wished to take enforcement action in consequence of the appellant's alleged defaults. On 7 October 2004 the respondent gave the appellant a notice ("the Notice"). The Notice stated that it was a notice under s 8 of the Act to inform the appellant that the respondent intended to take enforcement action in relation to her default in paying interest. It advised her of her rights under s 9 of the Act.

33 Section 8 of the Act provides:

> "(1) A creditor to whom money under a farm mortgage is owed by a farmer must not take enforcement action against the farmer in respect of the farm mortgage until at least 21 days have elapsed after the creditor has given a notice to the farmer under this section.
>
> (2) Notice to the farmer is to be in writing in a form approved by the Authority (informing the farmer of the creditor's intention to take enforcement action in respect of the farm mortgage and of the availability of mediation under this Act in respect of farm debts).
>
> (3) This section does not apply if a certificate is in force under section 11 in respect of the farm mortgage concerned."

34 Section 9 of the Act provides for a farmer to whom a notice has been given under s 8 to request mediation. A mediation took place on or about 2 June 2005.

35 As a result of the mediation the appellant and the respondent entered a Deed of Settlement on or about 26 July 2005 ("the Deed of Settlement"). The Deed of Settlement contained a recital that the appellant and the respondent had agreed that "all disputes between the parties be settled on the terms and conditions in this Deed." By the Deed of Settlement, the respondent agreed to increase the advance by $190,000 so as to arrive at a new principal amount of $640,000. Of that $190,000, the appellant was to receive $17,409.53: the balance was directed to various purposes such as payment of arrears of interest and future interest. Clauses 3 and 4 contained releases and discharges in relation to defaults in payments of penalty interest from April 2004 to August 2005. On 28 July 2005, pursuant to the Deed of Settlement, the appellant and the respondent entered a further loan agreement ("the Second Loan Agreement"). The appellant acknowledged indebtedness in the principal sum of $640,000 repayable on 5 September 2006. Interest was payable on the fifth day of every month. The interest rate was 9% per annum, with a default rate of 13% per annum.

36 The provisions in the Deed of Settlement requiring prepayment of interest under the Second Loan Agreement meant that for a time no default could occur. But the appellant was suffering further difficulties from the drought, and eventually default did occur. The appellant requested "a further extension". On 29 August 2006 the appellant and the respondent executed a further loan agreement ("the Third Loan Agreement"). Under the Third Loan Agreement, the principal of $640,000 was repayable on 5 September 2009. Interest was repayable on the fifth day of every month. The interest rate was 9.25% with a default rate of 13.25%.

37 Section 11(1) of the Act provides for the issue of a certificate by the New South Wales Rural Assistance Authority ("the Authority"). The relevant part of s 11(1) is as follows:

> "The Authority must, on the application of a creditor under a farm mortgage, issue a certificate that this Act does not apply to the farm mortgage if:
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> (a) the farmer is in default under the farm mortgage, and
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> (b) no exemption certificate is in force in relation to the farm mortgage, and
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> (c) the Authority is satisfied that:
>
> (i) satisfactory mediation has taken place in respect of the farm debt involved".

The provisions in relation to exemption certificates are immaterial, since no exemption certificate was ever issued.

38 On 20 October 2006 the Authority issued to the respondent a certificate issued by the Authority under s 11 ("the Certificate"). The Certificate certified the Authority's satisfaction that the Act did not apply to a "farm mortgage", the balance outstanding being $488,250 and the facility being "Hargraves – Account No 10294". These details corresponded with those in the Notice. The Certificate was to expire on 2 June 2008, conformably with the mediation having taken place 2 June 2005: see s 11(5)(a) of the Act. It is common ground between the parties, and was assumed in the courts below, that the Certificate was issued under s 11(1)(c)(i) of the Act and that the Authority was satisfied that there had been a satisfactory mediation, namely that taking place in June 2005.

39 The appellant fell into default in payment of interest under the Third Loan Agreement. As a result the respondent commenced the Supreme Court proceedings on 1 November 2007.

The proceedings: Common Law Division

40 The trial judge granted the respondent the relief sought. The appellant sought relief under the *Contracts Review Act* 1980 (NSW) ("the Contracts Review Act"). However, the trial judge denied that relief, and no challenge to this has been made since. The contention advanced by the appellant which continues to be pressed arises from the fact, as was common ground, that the claim to possession was "enforcement action" as defined in s 4(1). The appellant relied on s 6 of the Act, which provides: "Enforcement action taken by a creditor to whom this Act applies otherwise than in compliance with this Act is void." She also relied on s 10(1) which provides:

> "Once a farmer has given a creditor a notification in accordance with section 9 requesting mediation, the creditor must not take enforcement action in respect of the farm mortgage concerned unless a certificate is in force under section 11 in respect of the farm mortgage."

She contended that the Act had not been complied with because the Certificate was not relevantly a "certificate" within s 10(1). She argued that the Certificate related only to the farm debt created by the First Loan Agreement, while the proceedings constituted an enforcement action in relation to the farm debt created by the Third Loan Agreement, in relation to which no mediation had taken place and no s 11(1) certificate had ever been issued. The appellant submitted that the proceedings were debarred by s 8(1), and s 8(3) could not prevent that outcome, for no s 11 certificate had been given in relation to a farm mortgage so far as it secured the money owed under the Third Loan Agreement.

41 The trial judge rejected these contentions. He considered that they failed to distinguish between the "farm debts" which the appellant owed and the "farm mortgage" she had entered. He pointed out that the Certificate issued under s 11 was a certificate that the Act did not apply to the *farm mortgage*. He considered that s 8(3) permitted enforcement action against the respondent in respect of the *farm mortgage* to which a certificate related, irrespective of what farm debt was involved.

The proceedings: the Court of Appeal

42 Sackville AJA accepted submissions advocating lines of reasoning broadly consistent with that of the trial judge, and, with some regret, so did Tobias JA. Macfarlan JA, however, dissented in relation to the claim for possession. He and Tobias JA considered that the farm debt that arose under the First Loan Agreement was extinguished by the Second Loan Agreement, and the farm debt that arose under the Second Loan Agreement was extinguished by the Third Loan Agreement. The Certificate related to the debt arising under the First Loan Agreement, which was the subject of the respondent's Notice under s 8 of the Act and which was the focus of the farm debt mediation of June 2005.

Macfarlan JA noted that s 9(1) conferred an entitlement on a farmer to whom notice had been given under s 8 to request mediation concerning "the farm debt involved". He decided that the expression "farm debt" referred to the farm debt or debts upon which the creditor relies to found the proposed enforcement action. Similarly, he said that the expression "the farm debt involved" in s 11(1)(c)(i) must refer to the farm debt or debts upon which the creditor relies to found the proposed enforcement action, and in respect of which mediation has taken place. Macfarlan JA construed "the farm mortgage concerned" in s 8(3), in context, as referring to the power over the farm property that secures the debt which has been the subject of the mediation certified pursuant to the s 11(1) certificate. He preferred that construction on the ground that it accorded better with the object of the Act, which was stated by s 3 as follows:

> "The object of this Act is to provide for the efficient and equitable resolution of farm debt disputes. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage."

Hence he said:

> "'farm mortgage' [is] to be construed as a reference to the interest in, or power over, the farm property that secures the particular farm debt that is the subject of the creditor's intended enforcement action. … On this basis an instrument of mortgage such as that being considered here is to be regarded, for the purposes of the Act, as giving rise to as many security interests (that is, mortgages) as there are separate debts."[34]

Here the only debt secured was the debt created by the Third Loan Agreement. No s 11(1) certificate existed in relation to that debt. Hence the bar created by s 8(3) to the immunity conferred by s 8(1) did not exist. That approach caused Macfarlan JA to conclude that the respondent's claim to possession should be dismissed – but not its monetary claim. He considered that the monetary claim fell outside the definition of "enforcement action" in s 4(1).

The proposed notice of contention

43 The respondent sought leave to file out of time a notice of contention. The contention which it wished to advance was that Tobias and Macfarlan JJA had been wrong to treat the Second Loan Agreement as discharging the obligations under the First, and the Third as discharging the obligations under the Second. The appellant opposed the grant of leave on the ground that the appeal book did not contain all the materials necessary to resolve the point. Leave

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34 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,778 [65].

should be refused for that reason, and for the following other reasons. No arguable error was demonstrated, by recourse to the evidence that was in the appeal book, in the detailed reasoning of Macfarlan JA that led him to the conclusion controverted by the respondent in the draft notice of contention. It is true that the different loan agreements arose out of the changing needs of the appellant for money in running her farm, and the indebtedness under the Third Loan Agreement involved no fresh advance and can be traced back to indebtedness under the Second and before that the First. But the quantum of principal to be repaid under the First Loan Agreement was different from that to be repaid under the Second and Third, the rates of interest were different, and as between the First and the Second on the one hand, and the Third on the other hand, the dates of repayment were different. Each Loan Agreement was comprehensive and exhaustive in its terms. The releases in the Deed of Settlement were also fatal to the notice of contention point. The respondent relied on what was said to be evidence of the intention of the parties outside the Loan Agreements, but it did not support the thesis that there was only one farm debt.

44 The removal of the notice of contention from consideration casts a significant light on the respondent's argument. That argument is that once a satisfactory mediation has taken place between a farmer and a creditor of a dispute involving one debt obligation owed by the farmer to the creditor which is secured by a farm mortgage, there is no s 8(1) ban on enforcement action in relation to other debt obligations secured by that farm mortgage, even though the disputes arising from those other debt obligations might involve quite different issues from those involved in the mediation. A farmer would be entitled to one, but only one, mediation every three years.

The respondent's textual arguments

45 The arguments of the respondent in relation to the text of ss 4(1), 5, 8 and 11 fell into two groups. In the first group were arguments stressing the linguistic contrast between the words "farm mortgage" and "farm debt". They pointed out that if s 8(3) had meant to lift the s 8(1) ban on enforcement action only when the s 11 certificate related to the farm debt the subject of the enforcement action, it would have been easy to say so. In the second group were arguments criticising Macfarlan JA's view that the Act caused an instrument of mortgage to give rise to as many security interests as there were separate debts.

The text of the Act

46 Independently of the *Real Property Act* 1900 (NSW) ("the RP Act"), the "classic definition of a mortgage"[35] is "a conveyance of land … as a security for the payment of a debt or the discharge of some other obligation for which it is given."[36] Under the RP Act, a mortgage is not a conveyance of the mortgagor's estate or interest in the land, but "a charge on that estate or interest" created by statute[37]. That follows from the definition of "mortgage" in s 3(1)(a) of the RP Act as "[a]ny charge on land (other than a covenant charge) created merely for securing the payment of a debt." The charge thus created is an interest securing the payment of the debtor's obligations.

47 The respondent's construction rests on the proposition that "there is nothing in the definition of 'farm mortgage' which refers to a particular farm debt being secured"[38]. That proposition is incomplete.

48 The key provisions of the Act centre on farm debts, not farm mortgages. Part 2 of the Act deals with the duties and consequences of mediation. Mediation under Pt 2 can only take place in relation to a "farm debt". The operative provisions in Pt 2 (eg ss 9-10) do not apply to "mortgages", but creditors, and, as noted above, a "creditor" is a person "to whom a farm debt is for the time being owed by a farmer": s 4(1). Section 5(1) provides that the Act "applies in respect of creditors only in so far as they are creditors under a farm debt." Because of the definition of "farm debt", s 5(1) refers to creditors secured under a farm mortgage. As noted above, s 4(1) defines "farm mortgage" as including "any interest in, or power over, any farm property securing obligations of the farmer whether as a debtor or guarantor". Because, as also noted above, s 4(1) defines a "farm debt" as a "debt incurred by a farmer for the purposes of the conduct of a farming operation that is secured wholly or partly by a farm mortgage", "obligations of [a] farmer … as a debtor" are "farm debts". Thus a "creditor" to whom the Act applies will always be owed a "farm debt" secured by a "farm mortgage". Hence although a "farm mortgage" can secure debts other than a "farm debt", the key operative provisions require the creditor who is mortgagee

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35 *Handevel Pty Ltd v Comptroller of Stamps (Vict)* (1985) 157 CLR 177 at 192 per Mason, Wilson, Deane and Dawson JJ; [1985] HCA 73. See also *Bevham Investments Pty Ltd v Belgot Pty Ltd* (1982) 149 CLR 494 at 499; [1982] HCA 45.

36 *Santley v Wilde* [1899] 2 Ch 474 at 474 per Sir Nathaniel Lindley MR.

37 *Cambridge Credit Corporation Ltd v Lombard Australia Ltd* (1977) 136 CLR 608 at 615 per Barwick CJ, Mason and Jacobs JJ.

38 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,786-28,787 [116] per Sackville AJA; see also at 28,766 [5] and [7] per Tobias JA.

under a farm mortgage to be owed a "farm debt" secured by a "farm mortgage". Although s 8(1) read by itself prevents a creditor to whom money under a *farm mortgage* is owed by a farmer (whether or not it is a farm debt) from taking enforcement action, s 5(1) ensures that s 8(1) only applies to creditors in so far as they are creditors under a *farm debt*.

49 There is thus, for the purposes of the Act, a close connection between a farm mortgage in relation to which the creditor desires to take enforcement action and any farm debt which it secures. It is not possible to identify what a relevant "farm mortgage" is without identifying the particular "farm debt" which is secured wholly or partly by it.

50 The respondent relied on the terms of s 8(3), which deprives the farmer of the immunity from enforcement action conferred by s 8(1) if a s 11 certificate is "in force … in respect of the *farm mortgage* concerned" (emphasis added). In that respect it echoes s 11(1). The respondent's reliance on s 8(3) was misplaced.

51 To draw a dichotomy between, on the one hand, the "money under a farm mortgage … owed by a farmer" (s 8(1)), which is "the farm debt involved" (s 9(1)), and, on the other hand, the "farm mortgage" referred to in ss 8(3) and 11(1), is to draw a false distinction. Section 8(3) refers to the "*certificate* … in force under section 11 in respect of the *farm mortgage* concerned" (emphasis added). The reference to a "farm mortgage" is a reference to a farm mortgage under which money is owed by a farmer to a creditor – that is, a particular farm debt in respect of which the creditor intends to take enforcement action against the farmer. And the reference in s 8(3) to a "certificate" is a reference, relevantly, to a certificate that the Authority is satisfied that satisfactory mediation has taken place in respect of "the farm debt involved" – that is, again, the particular farm debt in respect of which the creditor intends to take enforcement action against the farmer. A s 11 certificate is "in respect of the farm mortgage concerned", but only because the "farm mortgage concerned" secures a particular "farm debt" and the Authority is satisfied that "satisfactory mediation has taken place in respect of the farm debt involved" (s 11(1)(c)(i)).

52 Section 8(1) forbids enforcement action by a creditor against a farmer "in respect of" a farm mortgage. The expression "in respect of" can encompass several farm debts secured by the farm mortgage. Similarly, "enforcement action" can encompass remedies sought by the creditor in relation to several distinct disputes about distinct farm debts. Section 8(3) only operates to permit enforcement action under s 8(1) in relation to a dispute about a farm debt if a s 11 certificate is in force in respect of the farm mortgage. But in circumstances like the present, s 11(1)(c)(i) provides that the certificate cannot be issued unless the Authority is satisfied that satisfactory mediation has taken place in respect of "the farm debt involved" in the dispute which went to mediation. The issue of the certificate does not depend on the Authority being satisfied that satisfactory mediation has taken place in respect of any aspect of the farm mortgage at large.

Thus the dispute about a farm debt – "the farm debt involved" – which was satisfactorily mediated under s 11(1)(c)(i) must be the same dispute as that which triggered the creditor's desire to take the enforcement action referred to in s 8(1).

53 The legislative purpose stated in s 3 that mediation must take place before a creditor can take enforcement action under a farm mortgage is effected by the operative provisions. The function of mediation is to explore the means for settling a dispute. The type of dispute contemplated by the mediation referred to in ss 3, 9, 9A and 11 arises where a creditor wishes to take enforcement action under a farm mortgage on the ground that a person who owes a farm debt is in default, and the debtor disputes that. Thus ss 9(1), 9(1A), 9A(1), 9B(1), 9B(2)(b) and 11(1)(c)(i) refer to mediation concerning the "*farm debt involved*" (emphasis added). Section 11(2)(b) refers to "mediation in respect of *the debt concerned*" (emphasis added). Section 11(2)(c)(iii) refers to the farmer declining "to mediate in respect of *the farm debt*" (emphasis added). It is the dispute about *the* farm debt *involved* or *concerned* which calls for mediation. The respondent's construction would have the unlikely consequence that where a farmer has incurred several farm debts from a creditor and several distinct disputes arise in relation to those farm debts, there is a requirement for that first dispute to be mediated, but not any of the others, even though the nature of each dispute may be quite different.

54 The expression "farm mortgage" in s 8(3) refers to the interests in, or powers over, farm property which have been conferred on a creditor to secure the particular farm debt of a farmer. The s 11 certificate cannot be issued unless the Authority is satisfied that satisfactory mediation has taken place in respect to the farm debt involved – that is, the farm debt secured by particular interests in or powers over farm property. There is a difference between the interests in or powers over farm land which secured the "farm debt involved" in the June 2005 mediation – a debt of $488,250 referred to in the Notice and in the Certificate – and the interests in or powers over the farm land which secure the "farm debt" which the respondent wished to enforce by starting these proceedings – a much larger debt of $754,811.38 arising under the Third Loan Agreement. The greater size of the debt meant that the respondent's interests in or powers over the appellant's farm land were greater and therefore different.

55 The critical date in this case is 1 November 2007 – the day when the respondent took enforcement action against the appellant by instituting the Supreme Court proceedings. The failure of the notice of contention point means that on that day the farm mortgage did not secure any obligations of the appellant under either the First or the Second Loan Agreements, only the Third. The obligations under the Third Loan Agreement were obligations of the appellant as a debtor owing a *farm debt* secured by a farm mortgage.

56 The textual considerations set out above invalidate the respondent's first group of arguments. The other group of the respondent's arguments were summarised by it thus:

> "The appellant's construction, which gives rise to a multiplicity of mortgages, does not explain by what power these further mortgages come into being. There is nothing pointed to in the dealings between the parties which suggests a contractual intention to create a multiplicity of mortgages. On the contrary, the memorandum of common provisions makes clear that there is one 'all monies' mortgage that remains in force even when the debt is paid down."

There is one instrument of mortgage – the Registered First Mortgage. Searching for a contractual intention to create a multiplicity of mortgages is an incomplete and partially misleading activity. Each of the First, Second and Third Loan Agreements, read with the Registered First Mortgage, successively created distinct interests in, and powers over, the farm property owned by the appellant securing her obligations as debtor. The Act, by virtue of the broad definition of "farm mortgage" in s 4(1), treated those distinct interests and powers as giving rise to three successive "farm mortgages". The respondent endeavoured to controvert those conclusions by relying on the continuation in force of the Registered First Mortgage even if all debts had been paid. It continued in force because of cl 1.4 (which provided that even if the amount owing were repaid, the property would remain mortgaged to the respondent until it actually released the property from the Registered First Mortgage). It also continued in force because of s 65 of the RP Act (requiring the extinguishment of a registered RP Act mortgage to be effected by execution of a discharge in the approved form, and by its registration). But the continuation in force of the Registered First Mortgage does not alter the conclusion that if all debts had been paid there would have been no "farm mortgages".

57 The respondent submitted that one consequence of the appellant's construction was so unsatisfactory as to suggest it was not correct. The consequence was that if a farmer and a creditor fall into disputation about a farm debt secured under a farm mortgage, participate in a successful mediation, agree on terms settling the dispute, and then fall into disputation about the farmer's alleged breach of the settlement terms, s 8(1) would prevent enforcement action in relation to the settlement terms even if a s 11 certificate had been issued. This submission assumes that a new farm debt would have been created. The respondent concedes that the consequence, unsatisfactory or not, could be brought about if the obligations under the settlement terms were secured by a fresh instrument of mortgage. But the unsatisfactory consequence would not follow if the settlement terms involved only adjustments to the farm debt such as extending the term to pay, reducing the principal or capitalising interest. These adjustments would leave the initial farm debt in place; to that initial farm debt the

s 11 certificate could apply; and s 8(3) would affect the s 8(1) immunity from enforcement action.

58 Sackville AJA said that this approach would cause "the rights of the parties [to] depend on nice and potentially difficult questions as to whether the farm debt in existence at the time of the mediation … is the same farm debt in existence at the time of the [post-mediation] enforcement action"[39], particularly where, by reason of ss 12 and 17, lawyers might not be involved in the mediation or in the drafting of any agreement resulting from it, and where mediations are to be conducted with informality, without technicality and with expedition (s 14(2)).

59 Macfarlan JA correctly said it would be easy for the parties to provide in the settlement terms that they did not discharge the farm debt about which the mediation took place. The respondent submitted that this is inconsistent with "the informality and lack of technicality with which the Act seeks to imbue the mediation process (ss 14 and 17)." It is true that the provisions referred to do not require that mediators be lawyers and do not give a right to legal representation during the mediation itself. But they do not prevent engaging the services of lawyers to draft the settlement terms. However, it would be unrealistic to deny that Sackville AJA was correct to suggest that in at least some circumstances difficult questions may arise. Whether the unattractiveness of those difficulties are determinative depends on a comparison with the unattractiveness of the respondent's construction. On the respondent's construction, the Act does not entitle a farmer to more than one mediation every three years. As Macfarlan JA pointed out, if a farm mortgage secures a large loan to buy a farm and a small loan to buy a tractor, on the respondent's construction any mediation by the farmer of a dispute about the small loan will debar mediation of a later unrelated dispute about the large loan. Sackville AJA suggested, in a manner which Tobias JA found "not altogether satisfactory"[40], specific circumstances in which a farmer's entitlement would not be limited to one mediation every three years. However, there are certainly some circumstances where that limitation would exist. Macfarlan JA was, with respect, correct to conclude that this result was "contrary to the manifestly remedial policy underlying the Act."[41]

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39 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,788 [128] per Sackville AJA.

40 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,766-28,767 [7].

41 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,777 [63].

60 The respondent also submitted that the appellant's construction was absurd, because it meant that "if a farmer and creditor enter into five distinct loan agreements, and secure them with a single 'all monies' farm mortgage, if the farmer fails to make his payments under the agreements, he is entitled to a mediation for each of the five debts." It might be absurd if the farmer in question was relying on the same point in the dispute which led to each mediation. It would not be absurd if the circumstances underlying each dispute were different.

Travaux préparatoires

61 The trial judge relied on a statement in the Second Reading Speech delivered in relation to the Farm Debt Mediation Amendment Bill 1996, which, when enacted, amended the Act, suggesting that once a creditor has obtained a s 11 certificate, there is no obligation to submit to any mediation in future[42]. Remarks by a Minister after legislation has been enacted, if receivable at all under s 34 of the *Interpretation Act* 1987 (NSW), must have very little weight compared with those made before the legislature enacted it. Even if they are receivable, in any event, as Macfarlan JA pointed out, there is an Explanatory Note to the Farm Debt Mediation Amendment Bill 1996 which points against the conclusion favoured by the trial judge and the majority of the Court of Appeal. The Note states[43]:

> "At present a certificate issued under section 11 of this Act is valid for an unlimited time. The certificate is issued following any instance of successful mediation between the parties or of bona fide attempted mediation by the creditor, and *effectively excludes the debt concerned from the operation of the Act* from that time onward. Schedule 1[7] amends section 11 so that the validity of the certificate is limited to the period of three years after its issue." (emphasis added)

Macfarlan JA correctly stated that this passage implies that "a s 11 certificate was intended to apply only to a farm mortgage in respect of the farm debt that was the subject of a mediation."[44]

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42 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 1996 at 5532.

43 New South Wales, Farm Debt Mediation Amendment Bill 1996, Explanatory Note at 3.

44 *Waller v Hargraves Secured Investments Ltd* (2010) 15 BPR 28,765 at 28,776 [58].

Other arguments by the appellant

62 The appellant contended that the issue of the Certificate was void because by the time it was issued the "farm debt involved" in the mediation which had been certified had ceased to exist. In view of her success on other arguments, it is not necessary to decide this point.

63 That is also so for another argument advanced by the appellant – that the Certificate related to only one farm mortgage, comprising the farm debt owed under the First Loan Agreement and the Registered First Mortgage, and did not relate to the distinct farm mortgage which the respondent wished to enforce, comprising the farm debt owed under the Third Loan Agreement and the Registered First Mortgage.

The money judgment

64 The respondent submitted that even if ss 6 and 8(1) barred its claim to possession, the dissenting reasons for judgment of Macfarlan JA in the Court of Appeal had been correct to hold that its claim to a money judgment was not barred. As Macfarlan JA pointed out, the judgment of the trial judge does not suggest that the point was argued before him. Macfarlan JA also said that before the Court of Appeal the point was dealt with only in a limited way in oral argument and not at all in writing. Because Tobias JA and Sackville AJA adopted different reasoning from that of Macfarlan JA, it was not relevant for them to consider the money judgment.

65 The respondent's submission on the money judgment must be rejected. Clause 1.1 of the Registered First Mortgage provided:

> "By signing this mortgage you undertake certain obligations as mortgagor. You also give us rights concerning you and the property – for example, if you do not comply with your obligations, we may take possession of the property, sell it and sue you for any remaining money you owe us."

Clause 1.3 provided:

> "You must ensure that you are not in default under this mortgage. You must also carry out on time all your obligations under *every agreement covered by this mortgage* including the obligation to pay any of the *amount owing*." (emphasis in original)

The expression "*agreement covered by this mortgage*" was defined in cl 35 of the Registered First Mortgage thus:

> "• an agreement or other arrangement (including a deed) under which one or more of you incurs or owes obligations to us or under which

> we have rights against you, including any such agreement or arrangement which all of you acknowledge in writing to be an agreement covered by this mortgage; and
>
> • each variation of it."

The expression "*amount owing*" was defined in cl 35 of the Registered First Mortgage as meaning:

> "at any time, all money which one or more of you owe us, or will or may owe us in the future, including under this mortgage or an *agreement covered by this mortgage*." (emphasis in original)

Clause 18(a) provided that the appellant would be in default if she did not pay the "amount owing" on time. After referring to a period of grace given by cl 19.1, cl 19.3 of the Registered First Mortgage provided:

> "If you do not correct that default within that period or if there is a default that cannot be corrected, then, to the extent it is not already due for payment, the *amount owing* becomes immediately due for payment at the end of the grace period without further notice. In addition, we may then do one or more of the following as well as anything else the law allows us to do as mortgagee:
>
> (a) sue you for the *amount owing*". (emphasis in original)

These provisions thus made a failure to pay interest on time an event of default entitling the respondent to sue for it and take possession.

66 The expression "enforcement action" is defined in s 4(1) of the Act as meaning not only taking possession of the property, but "any other action to enforce the mortgage". In the Amended Statement of Claim the respondent pleaded that it was a term of the Registered First Mortgage that interest be paid monthly in accordance with, inter alia, the Third Loan Agreement. In the Amended Statement of Claim the respondent also pleaded that the appellant was obliged, under the Registered First Mortgage, to pay the principal sum ($640,000) with interest owing. The respondent contended that a claim for a debt is not "enforcement action" because it does not involve the enforcement of security over the farm property. The better view, with respect, is that the definition of "enforcement action" is wide enough to extend beyond enforcement of the security by taking possession to include reliance on any of the rights in the farm mortgage. And since the claim to the order for possession was solely based on the breach of the money obligations arising under the Registered First Mortgage and the Third Loan Agreement, it was inextricably interlinked with the claim for a money judgment. The definition of "enforcement order" in s 4(1) provides that it does not include "the enforcement of a judgment that was obtained before the commencement of this Act". The word "judgment" is not

limited to judgments other than money judgments. Had that type of enforcement action not been excluded, it would have fallen within the definition of "enforcement action". The exclusion leaves the enforcement of judgments (including money judgments) open if they were obtained after the commencement of the Act. It follows that action to obtain a money judgment after the commencement of the Act is "enforcement action" so long as it is action to enforce the mortgage. The structure of the Amended Statement of Claim, and the manner in which the proceedings were conducted, justify the characterisation of the respondent's conduct as action to enforce the mortgage, and hence as "enforcement action".

67 Hence the attempt in the Supreme Court proceedings to obtain a money judgment was an action barred by s 8(1) as much as the seeking of possession.

68 The contrary construction would have consequences pointing against its correctness. One of those consequences is that if the effect of the definition of "enforcement order" read with s 8(1) was to debar the claim for possession but not the money claim, the appellant's victory would be a hollow one. The respondent could simply obtain the money judgment, use it to bankrupt the appellant, and then take whatever its share of her bankrupt estate was. Depending on the extent of claims by other secured creditors and by unsecured creditors, this might be, for the respondent, an inferior result to that obtainable by enforcement of the respondent's security interest in priority to the general creditors. But it would be just as damaging to the appellant, for she would have lost her farm despite s 8(1).

The parties' authorities

69 Among the authorities to which the parties referred were various authorities on the Act[45]. These authorities were not directly on point on the issues debated. It is therefore not necessary to discuss them.

Orders

70 There is a potential question about the costs of the proceedings in the Common Law Division of the Supreme Court of New South Wales. The appellant contended in that Division that the proceedings should be dismissed on either of two bases – s 6 of the Act, or the Contracts Review Act. The trial judge rejected both bases. He erred in rejecting the former basis, and his rejection of the latter basis has not been challenged. In the Court of Appeal, Macfarlan JA,

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45 *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052; *Commonwealth Bank of Australia v Trellis Holdings Ltd* (1996) 19 ACSR 319; *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337.

who considered that his rejection of the former basis was partly erroneous, would have invited written submissions on the question of costs before the trial judge. No application to this Court to make a special costs order in relation to the proceedings in the Common Law Division has been made, and hence the potential question does not arise.

71 In those circumstances the following orders should be made.

72 The appeal should be allowed with costs. The orders made by the Court of Appeal of the Supreme Court of New South Wales should be set aside. In their place, it should be ordered that the appeal to the Court of Appeal be allowed with costs, and that the orders made by Harrison J be set aside. In place of the latter orders, it should be ordered that the proceedings be dismissed, and that the respondent/plaintiff pay the costs of the appellant/defendant in the Common Law Division of the Supreme Court.