IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2011

BETWEEN:

ROSLYN EDWINA WALLER
Appellant

and

HARGRAVES SECURED INVESTMENTS LIMITED
Respondent

APPELLANT'S REPLY

PART I

1 These submissions are in a form suitable for publication on the Internet.

PART II

Multiplicity of farm mortgages

2 It is not the appellant's submission that the respondent's statutory charge was, could, or should have been discharged.[1]

3 The appellant's position on the multiplicity of farm mortgages is set out at paragraphs [51]-[81] of her submissions. There has been no answer to those submissions.

The construction of section 11

4 The respondent submits the words "*the farm debt involved*" in s 11 refer to a farm debt 'existing at the time that notice to mediate was issued pursuant to s 8 of the Act'.[2]

5 In so far as the submission is that s 11 assumes the applicant creditor has given notice under s 8 of the Act in respect of a farm debt then in existence, it is uncontroversial.

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[1] Respondent's submissions at [38]-[56].

[2] Respondent's submissions at [78], [81]

Filed on behalf of the appellant on 9 August 2011:

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6 However, that submission says nothing about the question raised by this appeal. Only a creditor being "*a person to whom a farm debt is for the time being owed*" may apply for a certificate under s 11. For s. 11 to be enlivened, it is therefore not enough that the applicant was owed a farm debt when notice was given under s 8. The applicant must also be owed a farm debt at the time of the application. The question raised by this appeal is whether the section is enlivened where those debts are not the same.

7 The Act is concerned with the resolution of farm debt disputes.[3] The resolution of a farm debt dispute is intended to be achieved by mediation.[4] When the Act speaks of "*the farm debt involved*" (wherever occurring), it is speaking of the farm debt involved in the farm debt dispute between the farmer and the creditor which the Act intends to be resolved by mediation (if possible).

8 The statutory scheme of giving notice under s 8, requesting mediation under s 9, and seeking a certificate under s 11, assumes the continuation of the farm debt dispute. It also assumes the continuation of the farm debt which forms the subject of the dispute.

9 When the chapeau to s 11, which refers to "*a person to whom a farm debt is for the time being owed*", is construed with the words "*the farm debt involved*", it emerges that the section only applies where a person was owed a farm debt 'at the time that notice to mediate was issued pursuant to s 8 of the Act', and that farm debt continues to be owed to the person at the time of the application under s 11.

10 To hold otherwise would be to conclude that a person to whom a farm debt is owed may apply for, and be issued with, a certificate on the basis of a mediation that has taken place in respect of a farm debt that the person is no longer owed.

11 The respondent does not offer any answers to the obvious questions raised by such a conclusion, such as why the legislature would require the Authority to be satisfied that mediation had taken place in respect of a non-existent debt, or how mediation that has occurred in relation to a farm debt that is no longer owed or disputed could ever lead to the efficient and equitable resolution of a presently existing farm debt dispute by mediation.

12 The absence of express investigative powers[5] is of no consequence. It is for the Authority to determine in the first instance whether the information provided by a creditor enables the Authority to be "*satisfied*" of the matters of which it is required to be satisfied. There can be no suggestion the Authority "*would need to pursue the parties*":[6] the applicant creditor properly bears the burden of satisfying the Authority.

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[3] *Farm Debt Mediation Act 1994* (NSW) s 3.

[4] *Farm Debt Mediation Act 1994* (NSW) s 4(1A) (definition of "*satisfactory mediation*").

[5] Respondent's submissions at [84]-[85].

[6] Respondent's submissions at [84].

13 It follows that s 11 was never enlivened and the Authority had no power to issue the certificate relied upon by the respondent.

Enforcement action

14 The respondent submits the Act was not intended to prevent, and does not prevent, recovery of farm debts.[7] The unstated but necessary corollary of the respondent's submission is that a creditor, having obtained a money judgment in respect of a farm debt, remains free to enforce its farm mortgage.

15 The respondent again offers no answers to the obvious questions raised. Having obtained a money judgment on the farm debt how is the creditor to enforce its farm mortgage? If the Act applies, what is to be mediated under s 9(1)? If the Act does not apply, how did the farmer lose her right to insist on mediation under s 9(1A)?

16 The respondent is compelled to submit either that:

(a) the legislature intended farmers and creditors to mediate judgments entered in the Supreme Court of New South Wales; or

(b) creditors who obtain money judgments are no longer subject to the Act.

17 Neither conclusion has any foundation in principle or precedent. The correct position is that a farm debt cannot be extricated from the farm mortgage which secures it.

18 It follows that the commencement of proceedings to recover a farm debt must be regarded as enforcement action "*in respect of*"[8] a farm mortgage and is prohibited.

19 Upon the true construction of the Act, a creditor who seeks to obtain a money judgment is faced with an election: the creditor must mediate the farm debt in accordance with the Act or abandon any right to enforce the farm mortgage.

20 If the money judgment stands, the respondent's farm mortgage cannot be enforced.

Discharge of farm debts

21 The respondent submits that "*the subsequent agreements merely varied the loan*".[9]

22 Macfarlan JA held that each of the first and second loan agreements was superseded and replaced by the second and third loan agreements respectively,[10] with the consequence that the farm debts owed under the earlier agreements were discharged.[11]

23 Tobias JA agreed with Macfarlan JA.[12] Sackville AJA found it unnecessary to decide.[13]

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[7] Respondent's submissions at [91].

[8] *Farm Debt Mediation Act 1994* (NSW) s 8(1).

[9] Respondent's submissions at [17].

[10] Macfarlan JA at [78]-[79], [82]-[83].

[11] Macfarlan JA at [78]-[79].

24 Insofar as the respondent contends that the Court of Appeal erroneously decided some matter of fact or law, that contention ought not to be entertained without notice.[14] The respondent's contention faces insuperable difficulties in any event.

25 No error of law has been alleged or demonstrated in the reasoning of Macfarlan JA. His Honour's judgment involved the orthodox application of decisions of this Court.[15] Indeed, the respondent cites the same decisions in support of the same principles.[16]

26 None of the matters raised by the respondent support the conclusion that the parties intended their relationship at the time of the second and third loan agreements to continue to be governed by the terms of the first loan agreement.

27 Whether the parties intended to "*extend the debt*",[17] or intended that a different amount would be "*actually paid*",[18] and submissions about the "*commercial reality*"[19] of the arrangement, are not to the point. Those matters provide no assistance in determining whether the parties intended the terms of the second and third loan agreements respectively to govern exhaustively their relationship.

28 The respondent attempts to draw support from findings made by the primary judge,[20] but the only relevant findings were in the following terms:

(a) "*The terms of the Deed of Settlement were to take account of the defendant's breaches*" under the first loan agreement, "*to replace that agreement with the second loan agreement and in effect thereafter to waive, or to exonerate the [appellant] from, any breach of the first loan agreement*".[21]

(b) "*[I]n the present case, the loan secured by the mortgage [was] varied or the respective obligations of the parties to the loan transaction change[d]*".[22]

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[12] Tobias JA at [10].

[13] Sackville AJA at [125].

[14] *High Court Rules 2004* (Cth) r 42.08.5; see also respondent's submissions at [95].

[15] *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533-534 [22]-[24] per Gleeson CJ, Gaudron, McHugh and Hayne JJ, 545-546 [81] per Callinan J, approving *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 143-144 per Taylor J.

[16] Respondent's submissions at [18].

[17] Respondent's submissions at [19]-[20].

[18] Respondent's submissions at [23]. See also *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 487 [47]-[48] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ (the expression "*real money*" suggests that the point sought to be made concerns the economic rather than the legal effect of the transaction).

[19] Respondent's submissions at [26].

[20] Respondent's submissions at [17].

[21] Harrison J at [33].

[22] Harrison J at [29].

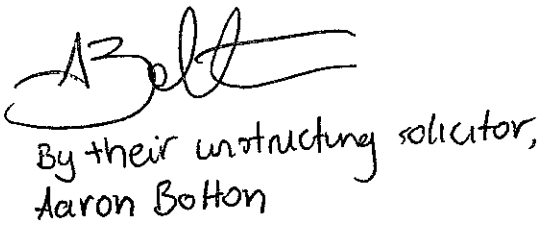
29 The second finding is equivocal and the first finding is consistent only with the conclusion reached by Macfarlan and Tobias JJA. Neither supports the contention sought to be advanced by the respondent.

30 Finally, the respondent's submissions are also inconsistent with the terms and effect of the deed of settlement. The deed released the parties' obligations by accord and satisfaction.[23] The first loan agreement had no relevance once the dispute was settled.

31 The appeal must be allowed.

Dated: 9 August 2011

10 **Counsel for the appellant**



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[23] A comprehensive collection of the leading authorities appears in *Scaffidi v Perpetual Trustees Victoria Ltd* [2011] WASCA 159 at [14]-[33] per Newnes and Murphy JJA and Mazza J.