IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S223 of 2011

BETWEEN:

ROSLYN EDWINA WALLER
Appellant

and

HARGRAVES SECURED INVESTMENTS LIMITED
Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES

2. The following issues arise in this appeal:

   (a) ***Number of farm debts:*** The appellant and the respondent entered into three successive loan agreements under which the appellant owed a "*farm debt*" to the respondent. Did each of the second and third agreements extinguish the "*farm debt*" created by the preceding agreement and create a new farm debt, or was there a single "*farm debt*", the terms of which of which was varied by the subsequent loan agreements?

   (b) ***Number of farm mortgages:*** If a series of "*farm debts*" was created by the three loan agreements that were entered into by the parties, did each of the successive "*farm debts*" give rise to a new "*farm mortgage*", each requiring further mediation pursuant to the *Farm Debt Mediation Act 1994* (NSW) (**Act**)?

   (c) **Certificate:** Was the certificate issued pursuant to s 11 of the Act issued *ultra vires* or in relation to the wrong "*farm mortgage*"?

   (d) ***Money judgment:*** Does the respondent's claim for a money judgment fall within the definition of "*enforcement action*" or is it otherwise prevented by the Act?

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Part III: JUDICIARY ACT 1903

3. The respondent has considered whether any notice should be given in accordance with s 78B of the *Judiciary Act 1903* (Cth) and has determined that the matter does not require that any such notice to be given.

Part IV: CONTESTED FACTS

4. The respondent contests the following facts set out in the appellant's chronology and narrative of facts:

(a) As to the appellant's chronology, the mediation between the parties took place on 5 June 2005 not 2 June 2005.

(b) As to paragraph 8 of the appellant's submissions, the respondent did not loan monies to the appellant on three occasions. The parties entered into three loan agreements, however money was only provided to the appellant's account following the entry into the first two loan agreements.

(c) In response to paragraph 10 of the appellant's submissions, it is not common ground that "*the loans to Ms Waller were "farm debts*"[1]. The respondent's loan to the appellant was a single "*farm debt*" secured by a single "*farm mortgage*". The amount under the loan agreement, dated 28 August 2004 (**First Loan Agreement**) that constituted the debt, was increased under the loan agreement, dated 28 July 2005 (**Second Loan Agreement**) following upon the mediation between the parties.[2]

(d) In response to paragraph 17 of the appellant's submissions,[3] the advance of the principal amount under the Second Loan Agreement was not treated as repaying the first loan in full.[4]

(e) As to paragraph 24 of the appellant's submissions, the certificate does not as submitted identify any particular state of indebtedness as a "*farm debt*" but particularizes the amount outstanding under the First Loan Agreement.

(f) As to paragraph 25 of the appellant's submissions, the respondent disputes the implication that the loan agreement, dated 29 August 2006 (**Third Loan Agreement**) (collectively **the Loan Agreements**) constituted the recording of an

[1] Contra Macfarlan JA, [16].
[2] Harrison J, [5], [7].
[3] Contra Macfarlan JA, [82].
[4] Affidavit of John Brian Gorman, sworn 29 April 2008, Exhibit JBG1, tab 4.

additional (further) debt. The indebtedness was increased by a further amount under the Second Loan Agreement with, under the Third Loan Agreement, only accommodation for payment terms and changes to interest.[5]

Part V: LEGISLATION

5. The respondent accepts the appellant's statement of applicable statutes and regulations save for the fact that minor amendments to the Act came into force on 6 July 2004 and 24 November 2005.

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Part VI: ARGUMENT

Summary of argument

6. The appeal must fail for the following reasons:

7. *First*, on the preferable construction of the nature of the arrangements between the parties and their common intention, there was only a single "*farm debt*" for the purposes of the Act, the terms of which were varied by the three loan agreements entered into by
20 the parties.

8. This "*farm debt*" was secured by a single "*farm mortgage*", being the legal security created following upon registration of the mortgage instrument executed by the appellant on 28 August 2003 and which is referred to in clause 6 of each of the loan agreements executed by the parties (**The Farm Mortgage**).

9. Mediation took place in relation to the Farm Mortgage in accordance with the Act, and a certificate pursuant to s 11 of the Act was properly issued. Therefore, having complied with the Act, the respondent is not barred from seeking to enforce this mortgage.

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10. *Secondly*, and in the alternative, if there were multiple "*farm debts*", as contended by the appellant, each of these was secured by the same legal mortgage, being The Farm Mortgage referred to above. The appellant's argument that each successive loan and debt gave rise to a new mortgage is contrary to the intention of the parties and is an unnecessary and artificial construction of the nature of the agreements, that is not in accordance with authority.

11. *Thirdly*, the reference to the "*farm debt involved*" for the purpose of determining whether there was satisfactory mediation for the purposes of s 11, is a reference to the
40 'debt in existence at the time that the s 8 notice was issued to the appellant' and

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[5] See Harrison J, [7] - [8].

therefore the certificate was not *ultra vires*. Nor was it issued in relation to the wrong "*farm mortgage*" because there was only one "*farm mortgage*".

12. *Fourthly*, even if the respondent is prevented by operation of the Act from taking possession of the appellant's property, "Merryangledre", the definition of "*enforcement action*" in s 4 of the Act does not prevent the respondent from pursuing a money judgment pursuant to the personal covenants contained in The Farm Mortgage and the three loan agreements. Nor is there any other restriction on such a claim.

10 ***Only one farm debt***

13. The Act defines "*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.*"[6]

14. There is no dispute that the appellant incurred the debt referred to in the amended statement of claim for the purposes of conducting a farming operation.[7]

15. There is also no dispute that the debt incurred by the appellant was wholly secured by a "*farm mortgage*".

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16. However, the appellant contends that the Second Loan Agreement was superseded by the agreement entered into on 29 August 2006 and that therefore the "*farm debt*" created by that agreement was discharged and replaced by a new "*farm debt.*" And similarly the appellant contends, that the Second Loan Agreement and the debt it created was discharged by the Third Loan Agreement.[8]

17. Contrary to this, Harrison J found correctly, it is submitted, that the Second and Third Loan Agreements replaced those previous to them, but that the subsequent agreements merely varied the loan.[9]

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18. In determining whether a subsequent agreement varies or replaces a previous agreement, the key consideration is the intention of the parties as disclosed by the contract.[10] That intention is to be ascertained objectively,[11] and such documents should be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction.[12]

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[6] Section 4.
[7] Section 4. No such regulations have been made to date.
[8] Appellant's submissions, [18].
[9] Harrison J, [29].
[10] *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93.
[11] *Concut Pty Ltd v Worrell* [2000] HCA 264, [54].
[12] *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking* [2000] HCA 20, [24].

19. The respondent submits that for the following reasons, the intention of the parties was that the purpose of the Second Loan Agreement was to extend the debt from $450,000 to a total of $640,000 rather than replace the existing debt, and that the purpose of the Third Loan Agreement was to provide further time for payment and an adjustment in the interest rate:

20. *First*, this common intention was reflected in the evidence of both the appellant[13] and Mr Gorman,[14] a director of the respondent, who executed the Loan Agreements on behalf of the respondent. These statements reflect a common understanding that the Second Loan Agreement was intended to extend the debt from $450,000 to a total of $640,000 rather than replace the existing debt.

21. *Secondly*, this common intention was also reflected in the Deed of Settlement, executed by the parties (**Deed**).[15] Clause 1 of the Deed states: "*HSI agrees to increase the current principal amount by $190,000, ('the further advance') making a total sum of $640,000, the principal ('the loan').*"

22. Clause 2 of the Deed goes on to say "*At the time of payment of the further advance, HSI is directed to deduct from the sum of $190,000 the following:..*"

23. These clauses clearly recognise that what was actually paid to the respondent was $190,000, not $640,000.

24. *Thirdly*, it has been recognised that a single "*farm debt*" can be variable to the extent of being paid off and subsequently re-borrowed.[16]

25. *Fourthly*, clause 35 of the Memorandum of Common Provisions 6723127Q[17] (**MCP**) contains the operative 'all monies' provision wherein it says "***amount owing means**, at any time, all money which one or more of you owe us, or will owe us in the future, including under this mortgage or an agreement covered by the is mortgage.*" The definition of "*an agreement covered by this mortgage*" is broad and includes any agreement which is acknowledged in writing to be covered by the mortgage and "*any variation of it.*" This includes all three Loan Agreements.

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[13] Affidavit of Roslyn Edwina Waller, sworn 2 September 2009, [13].
[14] Affidavit of John Brian Gorman, sworn 29 April 2008, [17].
[15] Affidavit of John Brian Gorman, sworn 29 April 2008, Exhibit JBG1, tab 5.
[16] *Varga v Commonwealth Bank of Australia* (1996) 7 BPR 15,052, 15,056.
[17] Affidavit of John Brian Gorman, sworn 29 April 2008, Exhibit JBG1, tab 3. **The respondent draws this Honourable Court's attention to the fact that the complete memorandum of mortgage, following upon the consent of the parties, has been inserted in to the appeal book, notwithstanding that pp 5, 7, 9, 11 and 13 were inadvertently omitted from the document in evidence before the trial judge.**

26. *Fifthly*, the commercial reality of the arrangement between the appellant and respondent supports the respondent's construction of the agreement. What in fact took place was not the repayment of $450,000 followed by the discharge of this debt and the further payment of $650,000 to the appellant, but an additional amount of $190,000 was credited to the appellant's loan, portions of which were allocated to outstanding interest and as interest in advance. The loan balance was never reduced to zero and at all times reflected that a debt was owing to the respondent.[18]

27. Further, in relation to the Third Loan Agreement, the commercial reality is that no further funds were advanced.

Definition of farm mortgage

28. The term "*farm mortgage*" is defined in s 4 of the Act. This is an inclusive definition. However, accepting the example provided, a "*farm mortgage*" essentially comprises of 3 elements:

    (a) That the there is an interest or power;
    (b) That this interest or power is over "*farm property*"; and
    (c) That the interest secures the obligations of the farmer as debtor or guarantor.

29. In relation to the *Real Property Act 1901* (NSW) (**RPA**), registration of a mortgage over land creates a statutory charge over the land, which is "*a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land which may be dealt with apart altogether from the fee simple or other estate or interest mortgaged*"[19]

30. The instrument of mortgage executed by the appellant on 28 August 2004, created a charge against the appellant's property "Merryangledre"[20] by virtue of its own provisions and of the operation of the RPA upon registration.

31. It is not in issue that the appellant's land at "Merryangledre" is for the purposes of the Act a "*farm property*".

32. It is also not in issue that The Farm Mortgage secured the obligations and debt arising out of the First Loan Agreement. As discussed above, the respondent submits that the debt created by this agreement was the only one owed by the appellant to the respondent

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[18] Affidavit of John Brian Gorman, sworn 29 April 2008, Exhibit JBG1, tab 4; Affidavit of John Brian Gorman, sworn 9 October 2009, Exhibit JBG3, tab 17.

[19] *English Scottish and Australian Bank Ltd v Phillips* (1936) 57 CLR 302, 321; *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* 196 CLR 245, [71].

[20] Being the land comprised of Folio identifiers 46/756885, 47/756885, 53/756885, 54/756885, 24/756887, 25/756887, 1/245664 and 23/601088.

and that subsequent Loan Agreements merely varied the obligations associated with this "*farm debt*". Therefore, the interest in the appellant's property created by The Farm Mortgage at all times secured the debt obligation owed to the respondent by the appellant over the farm property, and accordingly it is a "*farm mortgage*" under the Act.

33. However, the appellant appears to argue that, subsequent to the creation of The Farm Mortgage:

(a) The entry by the parties into the Second and Third Loan Agreements begat new "*farm debts*" and in the process extinguished the existing "*farm debt*"; and

(b) These new "*farm debts*" begat new "*farm mortgages*", which extinguished the interest created by the preceding "*farm mortgages*".

34. However, the respondent rejects the appellant's analysis and argues, that if there were multiple debts, there still remains only one mortgage, a "*single indivisible security interest in the farm property...*"[21], for the reasons discussed below.

Only one farm mortgage

35. The Court of Appeal held that a "*farm mortgage*" is the interest or power created by the instrument.[22] The appellant's analysis appears to suggest that Macfarlan JA was of a different view,[23] but closer examination suggests that Macfarlan JA's definition accords with that of Sackville JA.[24] Rather, it appears that their Honours' views diverged from this point on: Macfarlan JA went further to suggest that a single instrument can give rise to "*as many security interests (that is, mortgages) as there are separate debts.*"[25] This appears to be the thesis adopted by the appellant.

36. The appellant then posits that Sackville JA's interpretation is tantamount to an assertion that "*the farm mortgage is the statutory charge created by the Real Property Act.*" Perhaps the preferable characterisation is to say that, the "*farm mortgage*" is the 'interest created by the mortgage instrument and the operation of the RPA on registration of the instrument.'

37. This is because, in the case of a statutory legal mortgage created under the RPA, some rights and powers given to the mortgagee arise under the RPA,[26] and some arise

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[21] Macfarlan JA, [51]
[22] Sackville JA, [121]; Tobias JA, [13]; Macfarlan JA, [49]. Macfarlan JA went as far as to say that s 4 of the Act does not refer to the document creating the security interest, but only to the interest itself.
[23] Appellant's submissions, [111], [116].
[24] See note 25.
[25] Macfarlan JA, [65].
[26] See for example ss 57 - 62.

pursuant to the general law in relation to mortgages.[27] In relation to legal mortgages under the RPA at least, the instrument is essential, because without registration of the instrument, no legal mortgage arises.[28]

38. Moreover, the interest created by the registration of the instrument is not extinguished by the creation of a new "*farm debt*" (assuming that this occurred) for the following reasons:

39. *First*, as The Farm Mortgage was a legal mortgage pursuant to the RPA, in order for this mortgage to be extinguished, it must be formally discharged by execution and registration of the appropriate form.[29]

40. Whilst it is accepted that upon payment of the debt, a mortgagor is entitled to a discharge and may commence proceedings to have the discharge registered, without such a discharge the mortgagee still maintains an interest in the property.[30]

41. In the present proceedings, no discharge has yet been filed (and the appellant has not sought to bring proceedings to force the respondent to discharge the mortgage). Had it been the intention of the parties to create a new mortgage, they could have easily discharged the existing mortgage and registered new mortgages upon the entry into the Second and Third Loan Agreements.

42. This construction is also supported by s 94 of the *Conveyancing Act 1919* (NSW) which provides that "*where a mortgagor is entitled to redeem*" the mortgage, he/she has the power to require the mortgagee to transfer the mortgage to a third party rather than discharge it. However, if the appellant's construction of the nature of the mortgage were correct, and the mortgage became a nullity upon the payment of the debt, then there could be nothing for the mortgagee to transfer pursuant to s 94.

43. Similarly, if a third party pays out the debt secured by a mortgage, he/she becomes an equitable assignee of that mortgage, and "*he is presumed, unless the contrary intention appears, to intend that the mortgage be kept alive for his own benefit.*"[31] This is inconsistent with the appellant's thesis that the mortgage is immediately discharged upon payment of the debt.

44. *Secondly*, the terms of the documents and the context of the transactions between the appellant and respondent point to the conclusion that there was a single interest in the appellant's property which secured all debts owed to the respondent by the appellant.

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[27] *Fink v Robertson* (1907) 4 CLR 864, at 877 and 891; *Conveyancing Act 1919* (NSW), Part 7.
[28] Sections 41, 56.
[29] *Real Property Act 1901* (NSW), ss 64 and 41; *Taylor v Wolfe & Co* (1892) 18 VLR 727.
[30] *Overseas-Chinese Banking Corp Ltd v Malaysian Kuwaiti Investment Co* [2003] VSC 495, [65].
[31] *Ghana Commercial Bank v Chandiram* [1060] AC 732, 745; *Hill v ANZ Banking* (1974) 4 ALR 634, 636.

45. In analysing transactions such as those entered into by the parties, "*the Courts must enquire into the real (or true) nature of the transaction, not merely its nominal form.*"[32] This includes assessing the history and context of the transaction.[33]

46. There is nothing in the circumstances or history of the transactions which suggests that the parties intended to create further mortgages in addition to that which was already in place:

10 (a) the evidence of the appellant makes the clear that the appellant was having difficulty making repayments on her loan and wanted to suspend the need to repay whilst she obtained drought relief subsidies.[34]

(b) The terms of the Deed suggest that as a consequence of the matters in (a), the Second Loan Agreement was provided as a short term break on the appellant's increasing debt, on the basis she would within 12 months either refinance elsewhere or sub-divide and sell part of her property in order to reduce her debt to the respondent. [35]

20 47. In such circumstances, it is unlikely that the parties intended that to enter into further complex arrangements regarding the security over the respondent's property, rather than have any further loans governed by the existing mortgage.

48. The MCP is identified in the mortgage deed as being incorporated into the mortgage. It is also identified in each of the Loan Agreements as being "*collateral to*" each Loan Agreement, along with the mortgage and the respective letter of offer. Clause 35 of the MCP contains the operative 'all monies' provision wherein it says "***amount owing means**, at any time, all money which one or more of you owe us, or will owe us in the future, including under this mortgage or an agreement covered by the is mortgage.*"
30 The definition of "*an agreement covered by this mortgage*" is broad and includes any agreement which is acknowledged in writing to be covered by the mortgage and "*any variation of it.*" This includes all three Loan Agreements.

49. The preponderance of authority suggests that 'all monies clauses' are to be construed with reference to the context of the transaction and the commercial purpose which the clause is intended to serve.[36]

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[32] *Wily as Administrator of Macquarie Medical Holdings Pty Ltd v Endeavour Health Care Services* [2003] NSWCA 321, [8]
[33] Ibid, [9].
[34] Affidavit of Roslyn Edwina Waller, sworn 2 September 2009, [9].
[35] Affidavit of John Brian Gorman, sworn 29 April 2008, Exhibit JBG1, tab 5 (paragraph 5).
[36] *Overton Investments Pty Ltd v Cuzeno RVM Pty Ltd* [2003] NSWCA 27; *Fountain v Bank of America National Trust & Savings Association* (1992) 5 BPR 11,817, 11,819 – 11,820.

50. In the context of the matters discussed above, the inclusion of the 'all monies' clause is evidence that the parties intended all debts incurred by the appellant to be subject to a single mortgage rather than separate mortgages.

51. Further, the inclusion of the definition of "*agreements covered by this mortgage*" in clause 35 of the MCP also suggests that it was within the parties' intention that the Waller was to secure multiple agreements and variations, and therefore multiple debts (if such exist).

52. In addition to the 'all monies' provision, clause 1.4 of the MCP explicitly states that the property will remain mortgaged until a release or discharge is provided, "*even if the amount owing is repaid*". This clause and, to a lesser extent, clause 6.6 of the MCP, clearly evince the intention of the parties that the original mortgage is not extinguished by the payment of the debt.

53. *Thirdly*, again, even assuming the appellant's thesis that each new loan agreement paid down and extinguished the existing debt, the authorities support the argument that this does not act to extinguish the mortgage, but rather that a mortgage established by an underlying contract, but which does not at any time secure a debt, still retains a legal interest in the land, and can in due course secure further advances.[37]

54. Similarly, a charge on property, created by a mortgage, whilst not operative until a debt is secured, still exists in the absence of a debt, and when an advance is made the charge becomes operative, but a fresh charge or mortgage is not created.[38]

55. To the extent that decisions of *Coast Securities No. 9 Pty Ltd v Bondoukou Pty Ltd*[39] and *Landers v Schmidt*[40] suggest that a fresh advance pursuant to a deed of variation creates a new mortgage, they are distinguishable. In each of those cases, the advance involved was made pursuant to the execution of an instrument which constituted a *variation of the terms of the mortgage*. Here however, the instrument merely advanced further monies within the scope of an existing term of the mortgage, "*which is variable or ambulatory in its factual operation*",[41] i.e. the 'all monies' clause in the MCP. In the present case, there is no variation of the mortgage and therefore no new charge or mortgage is created by the advance of funds.

56. Other decisions which have considered the effect on the security created by 'all monies' mortgages under which a debt has been repaid, have commented that it is ultimately a

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[37] *Overseas-Chinese Banking Corp Ltd v Malaysian Kuwaiti Investment Co* [2003] VSC 495, [65]; *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214, 230 per Brennan J.
[38] *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214, 223, per Mason CJ, Dawson, Toohey and Gaudron JJ, citing *Robert v Grigg* (1932) 47 CLR 257, at 271.
[39] (1986) 69 ALR 385 (PC).
[40] [1983] 1 Qd R 188.
[41] *Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd* [2010] HCA 29.

matter of the intention of the parties as derived from the language employed in the mortgage and the surrounding circumstances.[42] In view of clause 1.4 of the MCP and the matters discussed above, this must lead to the conclusion that, even if the respondent had a right to require the discharge of the mortgage from the moment of the execution of the new loan agreement, the intention of the parties was that it remain in force until discharged.

57. *Finally*, irrespective of whether there is a single debt or a series of debts, The Farm Mortgage has at all times secured a "*farm debt*", because even on the appellant's construction, the extinction of one "*farm debt*" in the same moment creates another. Therefore at all times since the creation of the original "*farm debt*", The Farm Mortgage has secured obligations of the farmer as a debtor.

58. In the premises, The Farm Mortgage must be a "*farm mortgage*" for the purposes of the Act.

59. Moreover, for the reasons set out above, there was only one "*farm mortgage*" throughout the course of dealings between the parties, and this farm mortgage, must therefore necessarily be the "*farm mortgage concerned*", referred to in ss 8(3), 10 and 11.

The appellant's definition of farm mortgage

60. The appellant's approach to the definition of farm mortgage falls into error in so far as it requires that a "*farm mortgage*" must secure a "*farm debt.*" Whilst the definition of a "*farm debt*" requires that it be secured by a "*farm mortgage*", there is nothing in the definition of "*farm mortgage*" that requires it to secure a "*farm debt*".[43]

61. Further, although the appellant's thesis is that the operation of each of the Second and Third Loan Agreements extinguished the existing "*farm mortgage*" and created a new "*farm mortgage*", there is no explanation as to how this security was created. The mere creation of a new debt does not in itself create a secured interest in that debt. Furthermore, unless a debt is secured by a "*farm mortgage*", it cannot be a "*farm debt*".

62. Further, aside from the comments above, to the extent that the appellant posits that the definition of "*farm mortgage*" is to be interpreted as being constituted by the elements of "*farm*" (as defined in s 4 of the Act) and "*mortgage*" as bearing a technical and ordinary meaning, it is submitted that the result of such interpretation leads to the same conclusions as those set out above.

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[42] *Estoril Investments Pty Ltd v Westpac Banking Corp* (1993) 6 BPR 13,146, 13,152; *Re Modular Design Group Pty Ltd* (in liq) (1994) 35 NSWLR 96, 102.

[43] Sackville JA, [116]; see also Sackville JA, [110]; *Australian Cherry Imports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337, 340 - 345.

Construction of the Act

63. The appellant complains that the construction of the Act adopted by the majority of the Court of Appeal (and the respondent) does not promote "*the efficient and equitable resolution of farm debt disputes.*"[44]

64. However, if, as in the present circumstances, after a successful mediation pursuant to the Act, the farmer and the creditor enter into a new agreement, according to the appellant's argument, a new "*farm debt*" is created and therefore so is a new "farm mortgage requiring mediation. "*This gives rise to the spectre of successive mediations and successive certificates, a cycle that could be broken only by the refusal of the creditor to settle.*"[45] Such an outcome is inconsistent with the objects of the Act.

65. Macfarlan J's solution to this difficulty (that mediation agreements be carefully drafted so as to avoid the consequence that a new farm debt is created) is inconsistent with the clear purpose of s 17 of the Act,[46] which is to encourage informality by restricting representation at mediations, and s 14 of the Act, which mandates that mediation sessions "*are to be conducted with as little formality and technicality, and as much expedition as possible.*" It is also inconsistent with the purpose of s 11AA(2) of the Act, which requires that heads of agreement be executed very quickly after mediations. And in the creditor's case, a failure to accurately reflect the heads of agreement in a final mediation agreement or deed, is an offence.[47]

66. Further, the intention of Parliament in relation to the purpose of the Act included that, "*this scheme is not meant to replace the laws of banking, mortgages, debt recovery or anything else; it provides for a mechanism for mediation and mediation that is not aligned to any particular stake holder.*"[48]

67. This sentiment was echoed by the majority in the Court of Appeal: "*the objective represents a compromise between competing interests of farm debtors and credit providers*".[49]

68. Similarly, Harrison J held that the "*scheme of the legislation supports the proposition that a creditor ought to be entitled to proceed to enforce the terms of any agreement*

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[44] Appellant's submissions, [122]. See s 3 of the Act.
[45] Harrison J, at [34].
[46] See Sackville JA, [128].
[47] Section 11C
[48] NSW, Parliamentary Debates, Legislative Council, 30 November 2004, 5960 (Elisabeth Kirby). See also Sackville JA, [131].
[49] Sackville JA [131], Tobias JA [13].

reached at or following a successful mediation with the authority of a s 11 certificate and otherwise unhindered."[50]

69. Further, it is clear that Parliament intended that a farmer was not entitled to more than one mediation every three years under the Act.[51]

70. The appellant also complains that the construction of the Act by the majority in the Court of Appeal is such that if a farmer fails to request mediation after receiving a notice pursuant to s 8 of the Act he/she will never again have the opportunity to request a mediation under the Act.

71. However this perceived evil has little to do with the interpretation put on the Act by the Court of Appeal: it is true of all loans secured by a Farm Mortgage.

72. The simple cure for farmers who wish to separate their debts is to secure the successive debts with new legal mortgages. Such would be the likely outcome if the loans were from different lenders.

73. As set out at paragraph 60 above, there is nothing in the inclusive definition of *"farm mortgage"* that requires it to secure *"a farm debt"*. Debts that are not farm debts may also be secured by a farm mortgage. If there be a default in respect of a debt that is not a *"farm debt"*, section 5(1) of the Act clearly does operate to exclude its operation in respect of that debt. Contrary to the submissions of the appellant at paragraph 127, there is nothing in the contents of the majority's decision that conflict with that proposition.

74. In light of what is set out above, the appellant's construction is not to be preferred.

Section 11 certificate

75. The appellant's argument in relation to the validity of the s 11 certificate is premised on the argument that there was more than one "*farm debt*" in existence between the parties. If the respondent's argument that there was only one farm debt is accepted, the issue regarding the validity of the s 11 certificate does not arise.

76. For the purposes of issuing a certificate exempting a farm mortgage from the operation of the Act, among other things, s 11 requires that the NSW Rural Assistance Authority (**NSWRAA**) must be satisfied that one of three things has occurred. Relevant to these proceedings, s 11(1)(c)(i) says that it must be satisfied that "*satisfactory mediation has taken place in respect of the farm debt involved.*"

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[50] Harrison J

[51] NSW, Parliamentary Debates, Legislative Assembly, 30 October 1996, 5960 (Amery); Harrison J, [38]; Sackville JA [125].

77. Accepting the appellant's premise, the appellant has argued[52] that "*the farm debt involved*" is a reference to the farm debt in existence at the time that the application is made for a certificate pursuant to s 11 of the Act. None of the decisions below make a finding on this point.[53]

78. The appellant's interpretation is incorrect. The correct meaning of "*farm debt involved*" is the "*farm debt*" 'existing at the time that notice to mediate was issued pursuant to s 8 of the Act.' This is necessarily so for the following reasons:

79. *First*, the term "*farm debt involved*" is referred to in several places in the Act:

(a) Section 9(1), which refers to the farmer having 21 days from the date of receiving a notice under s 8 to request mediation concerning "*the farm debt involved.*"

(b) Section 9(1A), which refers to a farmer being able to request (without a notice) that mediation take place concerning the "*farm debt involved.*"

(c) Section 9A, which allows a creditor to give notice that he/she refuses to mediate in respect to the "*farm debt involved*" after receiving a request pursuant to 9(1A).

(d) Section 9B (1) and (2) allow a farmer who has requested mediation in respect of the "*farm debt involved*" to apply for an exemption certificate.

(e) Section 11(1)(c)(i).

80. In each of (a) to (d), it is clear that the reference to a "*farm debt involved*" is a reference to the farm debt existing at the time that the instrument requesting mediation is created:

(a) In relation to s 9(1), it is plainly a reference to the farm debt existing at the time that the s 8 notice was issued. This is consistent with the fact that:

(i) The s 8 notice is the touchstone and starting point from which creditor-requested mediation process develops.

(ii) Section 9(1) could not refer to a later debt, as at the time of the issue of the s 8 notice, there would not have been any other debt in the contemplation of the parties at the time; and

(iii) The s 8 notice itself specifically refers to the debt owed at the time of issue.

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[52] Appellant's submissions, [92].
[53] Macfarlan JA, [61]. Sackville JA leaves this issue open at [113], [122].

(b) Similarly, in relation to s 9(1A), the request for mediation forms the starting point for this form of mediation process, and the debt at the time of the request must be the "*debt concerned*". The references in ss 9A and 9B both necessarily refer back to this debt.

81. Therefore, the reference to "*farm debt involved*" in s 11 must also be a reference to the farm debt in existence when the mediation process is commenced, i.e. at the time of the issue of the notice. To interpret this phrase otherwise requires that it be given different meanings or be ambulatory in nature. Such an interpretation would be inconsistent with its use elsewhere in the Act.

82. In this regard, there is a presumption that "*any document should be construed as far as possible so as to give the same meaning to the same words where ever those words occur in that document, and that applies especially to an act of Parliament.*"[54] And there is little in the text or context or size of the Act to suggest in that this presumption does not apply.

83. *Secondly*, to interpret "*farm debt involved*" as meaning a debt in existence after the mediation process took place, or as an ambulatory term which could have such meaning, would in effect require the NSWRAA to make enquires and conduct an investigation of the financial circumstances of the parties beyond the mediation process.

84. In order for it to be "*satisfied*" that the mediation took place in respect of the 'correct' "*farm debt*", or that the "*farm debt*" has not changed since the mediation, the NSWRAA would need to pursue the parties regarding their current financial position and examine their contractual relations before issuing the s 11 certificate.

85. The fact that the legislature did not intend for this kind of investigative process is highlighted by the lack of any such powers given to the NSWRAA in the Act or the *Rural Assistance Act 1989* (NSW).

86. If this is correct, then the appellant's argument that the certificate was issued *ultra vires* fails because:

(a) The certificate has issued in relation to the "*farm debt involved*", being the debt in existence at the time of the issue of the s 8 notice, and is prima facie evidence of the NSWRAA's satisfaction that satisfactory mediation has taken place in relation to that farm debt; and

(b) There is no evidence that the NSWRAA was not satisfied that satisfactory mediation has taken place in relation to that debt.

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[54] *Craig, Willamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452.

87. Once it is established that the NSWRAA is satisfied, the s 11 certificate operates to lift the restriction in s 8(3), which prevents enforcement action in relation to the "*farm mortgage concerned.*" Which in turn is "*the farm mortgage that the creditor seeks to enforce.*"[55] As discussed above, in these circumstances, there is only one farm mortgage, The Farm Mortgage, and therefore it must necessarily be the "*farm mortgage concerned*".

88. The appellant's alternative argument,[56] that the certificate was issued in respect of a "*previous farm mortgage*" and not the "*farm mortgage*" which the respondent intended to enforce, also fails, because, as discussed above, there was only one "*farm mortgage*" at all relevant times.

Money judgment

89. The objects of the Act set out that the prescription for mediation under the Act pertains to enforcement action under a "*farm mortgage.*"[57]

90. As argued by the appellant, the "*farm mortgage*" is not the instrument but the security interest in or power over a farm property created by the instrument,[58] which the appellant contends inures pending discharge.

91. Therefore the "*enforcement action*" in relation to a "*farm mortgage*" is the enforcement action in relation to the interest or power over the property and not an enforcement action to recover a personal debt.[59] If the Act was intended to prevent the enforcement of "*farm debts*" rather than "*farm mortgages*", s 8 would have been expressed this way.[60]

92. True it is, that the evidence to prove the claim for possession, including the mortgage instrument,[61] also constituted the evidence to prove the mortgagee's claim for a monetary judgment.[62] However, under the Act there is no impediment to recover for money claims arising from covenants under an instrument of mortgage and an ancillary loan agreement. Essentially they are two causes of action arising out of the same facts and evidence, the pursuit of one does not preclude the other and pursuit of both does not undermine either.

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[55] Tobias JA, [7], Sackville JA, [121], [125], [126].
[56] Appellant's submissions, [104] – [110].
[57] Section 3.
[58] (Per Macfarlan JA at [65] and [88] and s4) (per Sackville at 121
[59] (Macfarlan J at 88)
[60] *Australian cherry Exports Ltd v Commonwealth Bank of Australia* (1995) 39 NSWLR 337, 340, 343; Harrison J, [26], [29].
[61] (appellant's submissions at 149)
[62] judgment (appellant's submissions at 142)

93. True it is also, that no new proceedings can be commenced for recovery, for example, for the same debt following upon judgment.[63] However judgment on the debt in the present circumstances, does not preclude the maintenance of a judgment for possession, as long as the judgment on the former is not executed. Further, the respondent remains a creditor until the debt has been discharged.

94. No issue estoppel arises on this appeal simply because there has been a judgment rendered in which the subject of this appeal.[64]

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Part VII:

95. There is no notice of contention or cross-appeal.

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[63] Which appears to be the import of the reference to the decisions of this Court made by the appellant at 144(a) of her submissions.
[64] Contra para 144(b) of the appellant's submissions.