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August 2011 Newsletter

>> FARM DEBT MEDIATION ACT

The High Court to look at the Farm Debt Mediation Act and what is a farm mortgage...

On 20 June 2011, the High Court decided that special leave should be granted to Ms Waller for her to argue before a full bench of the Court, her appeal against earlier decisions of the New South Wales Supreme Court and the New South Wales Court of Appeal relating to whether or not she should be entitled to the protections granted under the Farm Debt Mediation Act 1994 and whether a judgement entered against her should be dismissed.

Ms Waller is a farmer who owns property at Hargraves near Mudgee, New South Wales. On three occasions, Hargraves Secured Investments Limited loaned money to her to assist in running her farm. The loans were secured by a registered mortgage over the farm. Ms Waller defaulted under the third loan agreement and Hargraves commenced proceedings for possession and recovery of the amount owing.

Ms Waller was unsuccessful before the first Judge who heard the case and in the Court of Appeal, two Judges to one.

Hargraves first advanced monies to Ms Waller in 2003. She defaulted on that loan in 2004. The mortgage included the usual all monies clause, extending to all monies owing at any time.

On 7 October 2004, Hargraves sent Ms Waller a Section 8 notice, under the Farm Debt Mediation Act, inviting her to participate in a mediation. The mediation occurred on 5 June 2005. A settlement was reached and a second loan agreement was signed. Hargraves agreed to advance the principle amount of the first loan as well as a further advance.

The Court of Appeal held that the second loan agreement superseded the first loan agreement, discharging all debts under the agreement and created a new farm debt. The first Judge who heard the matter said that the parties had intended to replace the first loan agreement with the second loan agreement, and held that the second loan agreement merely varied the amount of the debt.

On 29 August 2006, Hargraves and Ms Waller entered into a third loan agreement.

The Court of Appeal held that the third loan agreement superseded the second loan agreement, discharged all debts under it and created a new farm debt.

Ms Waller defaulted under the third loan agreement on 5 October 2006. There was no further mediation and Hargraves did not send a new Section 8 Notice inviting Ms Waller to participate in a mediation.

Hargraves applied to the New South Wales Rural Assistance Authority for a certificate under Section 11 (1) of the Farm Debt Mediation Act, stating that the Act did not apply to its mortgage and the authority issued the certificate on 29 October 2006.

The certificate stated that the amount of the debt owing as of the date of the issue of the Section 8 notice (7 October 2004) was \$488,250.00 being the amount of Ms Waller's indebtedness under the first loan agreement prior to the mediation in June 2005. By contract, the balance outstanding two years later as at 5 October 2006 was \$644,933.33.

On 29 October 2007, Hargraves commenced proceedings claiming possession of the farm property and damages for breaches of the three loan agreements.



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>> FARM DEBT MEDIATION ACT cont.

On 29 October 2007, Hargraves commenced proceedings claiming possession of the farm property and damages for breaches of the three loan agreements.

On 12 November 2009, the court ordered Ms Waller to give possession of her farm to Hargraves and entered a monetary judgment in favour of Hargraves.

Ms Waller's appeal was dismissed by a majority on 11 November 2010.

The important legal question for the High Court to deal with is whether or not the Judges were in error in failing to distinguish between the farm mortgage that existed prior to the second loan agreement in respect of which a certificate had been issued, and the farm mortgage that existed after the second loan agreement in respect of which there was not a certificate in force.

Ms Waller argued that Hargraves sought to take enforcement action in circumstances where no mediation had occurred.

Against Ms Waller, it was argued that there was no new farm mortgage. The dissenting Judge in the Court of Appeal, Judge Macfarlan, said that every pairing of a mortgage with a farm debt is a separate farm mortgage. There were three secured loan agreements, and thus three farm mortgages. There was only a certificate issued in respect of one of these debts.

It is argued for Ms Waller, that any enforcement proceedings in breach of the Farm Debt Mediation Act is void and the judgment should be set aside, and she should be permitted to have the mediation that the Act allows to members of the farming community.

>> LEGAL TERMS EXPLAINED

Deed Of Company Arrangement

A Deed of Company Arrangement is an agreement between an insolvent company and its creditors in relation to how the company's affairs will be handled following the period of voluntary administration. The agreement should aim to maximise the chances of the company, or as much as possible of its business, continuing, or to provide a better return for creditors than the immediate winding up of the company.

>> OTHER NEWS

David Lalic provides advice on the Transport Industry...

David Lalic is a regular contributor to the **Owner/Driver** Magazine. He has written articles on many topics relevant to the Transport Industry and to businesses in general.

Recent topics have included: **Employers Obligations to Safety**, **Lodging an Unfair Dismissal Claim** and **Driving whilst affected by Drugs**.

Contact David Lalic on **02 9262 1770** or dlalic@jacksonlalic.com.au



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