Casenotes

PROBLEMS WITH DEEDS OF SETTLEMENTS

WARD V KEEN

In *Ward v Keen (No 2)* [2009] WASC 369, the first and second plaintiffs were sisters and executors of their late mother's estate and commenced proceedings in their capacity as the representatives of that estate. The plaintiffs alleged that the first defendant misappropriated funds from the estate and that the second defendant, a bank, permitted withdrawals to be made without the proper authorisation.

Proceedings commenced in 2006 and two mediations were held in 2007 in an effort to resolve the dispute. The plaintiffs alleged that an agreement was reached at the second mediation, a fact conceded by the second defendant and disputed by the first defendant. The issue for the Supreme Court of Western Australia was whether the parties had reached a binding agreement at the second mediation. A further issue of misrepresentation was dismissed in the same proceedings.

The agreement reached at the second mediation was pleaded in the following terms at [8]:

> 27.1 that the plaintiffs were to be paid $650,000.00 in full and final satisfaction of their claims, which sum was inclusive of costs and interest to date;
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> 27.2 as to the settlement sum the second defendant was to pay $25,000.00, the first defendant was to pay $500,000.00 and the second third party was to contribute $125,000.00 in settlement of the third party proceedings which sum was to be in turn paid on by the first defendant to the plaintiffs;
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> 27.3 $150,000.00 of the settlement sum was to be paid to the plaintiffs upon the execution of the deed referred to in paragraph 27.4 below, incorporating the terms of settlement to which the second third party was to contribute $125,000.00, by way of payment, firstly, to the first defendant and then in turn paid on by him to the plaintiffs; and the second defendant to contribute $25,000.00, by way of payment to the plaintiffs direct;
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> 27.4 a deed of settlement recording the agreement reached between the parties, by way of compromise at mediation, was to be prepared by the first defendant's solicitors and upon execution of the deed the action as between the plaintiffs and the second defendant was to be dismissed;
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> 27.5 as to the first defendant, the further sum of $500,000.00, if paid within 3 months, was to be paid without incurring interest; if paid by instalments of $125,000.00 then interest at 6% on the balance outstanding from the date of deed of settlement until each payment with the first part payment of $125,000 to be made within 3 months of the agreement and the final payment of $125,000 to be within 5 months of the date of the deed of settlement.

Clause 27.5 is material to the action before the court because the dispute that led to the commencement of these proceedings centred on whether there was any agreement as to instalments and the payment of interest over the outstanding balance of settlement moneys. Further, it was disputed as to whether the first payment of $125,000 was to be made on exchange of the deed of settlement or up to 21 days after exchange of the deeds.

Murphy J commenced his judgment by recounting and then analysing the evidence presented by the parties. As would be expected, his Honour detailed the inconsistencies in the evidence but in summary these amounted to differing views by those present at mediation as to the amount of money to be paid on agreement, when that money should be paid and whether instalments were permissible and what interest was to be paid on the balance of the money owing.

The other issue raised by the evidence was whether, pursuant to para 27.4 of the pleadings recited above, the redrafted agreement was consistent with the deed of settlement. In particular, his Honour noted evidence taken by one party that the deed of settlement (at [52]):

> does not support the existence of any concluded consensus as to the payment by instalments. It clearly states that the $500,000 will be interest-free for three months which at least indicates that if the $500,000 was paid within three months, it would not carry interest.

Murphy J provided a concise summary of the evidence worthy of accurately quoting (at [73]):

> The foregoing review of the evidence indicates the following. First, none of the solicitors kept a verbatim record of what was said at the second mediation in relation to the negotiations, or in relation

> to the concluding remarks by the Registrar. Secondly, none of the witnesses had a clear recollection of what was said and, in the case of Mr Grubb and Ms Butler, they were largely reliant on their abbreviated notes made at or shortly after the second mediation. Thirdly, Mr Grubb, Ms Butler and the first defendant, to varying degrees, attested to some discussion on the topic of a proposal that the first defendant be entitled to pay by instalments. Fourthly, it appears that the Registrar was undertaking Kissinger-style shuttle diplomacy between the parties. The Registrar also brought the parties together at the conclusion of the mediation to describe the result. Accordingly, the Registrar's notes are likely to be the best record of what ultimately transpired to be the consensus at the second mediation. Fifthly, none of the contemporaneous file notes mention the payment of interest within the first three months. Mr Grubb's file note is silent on that matter. The file notes of the second third party's solicitor, Ms Butler, and of the Registrar, positively indicate that no interest is to be payable in the first three months.

Murphy J correctly identified the issue as being whether agreement was reached in the mediation or whether it was to be reached over the negotiation of the contents of the deed of settlement to be executed by the parties at the conclusion of those negotiations. His Honour cited the usual cases to ensure that the correct legal principles are adopted including (at [77]) the landmark decision of the High Court of Australia in *Masters v Cameron* (1954) 91 CLRC 353 at 360-361, where the court stated:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

The first two categories mean, in the instant case, that a binding agreement was struck at mediation and the last category means that no such agreement had been struck. His Honour also cited *Australian Broadcasting Corp v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548, which his Honour interpreted in the following way (at [76]):

> As the decision in the *Australian Broadcasting Corporation case* illustrates, the fact that parties to negotiations have agreed upon the major matter under discussion, confidently believing that the remaining matters to be decided will be sorted out later between them, or their lawyers, without any difficulty, can sometimes create a misleading appearance of consensus. Such parties may well believe that they have a "deal" or a "bargain", and speak and act accordingly, whilst at the same time knowing and intending that further and more detailed agreement is necessary.

Murphy J commenced his judgment by finding that the parties had agreed on a settlement sum of $650,000. Further, that the first defendant would have three months to pay the sum of $500,000 without interest. Finally, that the money owing could be paid via four instalments and once the deed of settlement was signed the consent orders for judgment signed by all parties would be destroyed.

His Honour found that there was no final consensus as to: when the first instalment would be paid; when the next three instalments would be paid; and how the instalment arrangement would operate in relation to whether the first defendant would incur any interest liability. On these matters Murphy J clearly stated (at [85]) "They are matters for negotiation and agreement between the parties, which cannot be remedied by the court employing techniques of contractual construction or by the court ascertaining the existence of implied terms". His Honour supported the role of mediation in settling disputes when he stated (at [86]):

> The courts will strive to uphold agreements for the settlement of litigation, particularly agreements arrived at in the forum of a formal mediation, designed specifically to facilitate settlements. However in this case, there was no consensus recorded, even in an abbreviated form, in writing and the evidence indicates that insofar as an oral consensus was reached, it was neither "unambiguous" nor "sufficiently comprehensive" (cf *Geebung Investments v Varga Group Investments* (90,313)), to constitute a binding agreement.

Murphy J found that there was no binding agreement between the parties either in the written form or by way of a parol or verbal contract. *Ward's* case is yet another example of parties not being clear on what they are agreeing to at the conclusion of mediation. The landmark decisions in *Masters v Cameron* and the more recent *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622,[1] provide four categories of agreements that are either binding or not binding, depending on the parties' intentions. Mediators, and particularly lawyers representing clients at mediation, must understand those four categories and must be able to clearly explain to the disputants exactly what they are agreeing or not agreeing to at the conclusion of a successful mediation.

Hargraves Secured Investments Ltd v Waller

In *Hargraves Secured Investments Ltd v Waller* [2009] NSWSC 1210, the defendant owned a farm and borrowed money from the plaintiff who took a first mortgage to secure the loan. The defendant defaulted on the loan and the plaintiff gave notice pursuant to s 8(1) of the *Farm Debt Mediation Act 1994* (NSW) (the Act) and a mediation took place. Settlement was reached at mediation and the parties entered into a deed of settlement and second loan agreement which increased the amount of indebtedness, raised the interest rate and changed the repayment schedule and discharged the defendant from the terms and conditions of the first loan agreement. The defendant defaulted under the second loan agreement and entered a third loan agreement once again discharging the defendant from the liabilities and rights under the second loan agreement.

The defendant defaulted under the third loan agreement and the plaintiff applied for and was granted a s 11 certificate under the Act meaning the Act no longer applied and the plaintiff could commence proceedings for possession in order to recoup the money under the loan. It is material to note that there was only ever one mortgage transaction involved in the loan arrangements made despite the breaches and new loan arrangements entered into.

The primary issue for the court to decide was whether the proceedings to recover the loan amount and for possession of the mortgaged property were void because the Act had not been complied with because there had been no further mediation dealing with the breaches of the second and third loan agreements.

The defendant's submission for resisting an order for possession was that the breach of the first loan agreement was discharged and replaced by the deed of settlement and the second loan agreement. Subsequently all the defendant's obligations under the second agreement were discharged and replaced by the third loan agreement. The judgment records (at [18] and [20]) that the defendant submitted:

> that "[i]t is the third loan agreement that is the '*farm debt involved*' in this case": see s 11(1)(c)(i) of the Act. I observe in passing that the defendant is at pains for her purposes to emphasise the *farm debt involved* in preference to the *farm mortgage* as principally informing her argument. This is because the Authority must be satisfied (in this case) that satisfactory mediation has taken place in respect of the "farm debt involved".
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> Section 11(1)(c)(i) of the Act states:
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> (1) 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:
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> (i) satisfactory mediation has taken place in respect of the farm debt involved, or
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> (ii) the farmer has declined to mediate, or

[1] Affirmed on appeal in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631. The fourth category of negotiated agreement was stated in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622 at 628 (McLelland J): "There is in reality a fourth class of case additional to the three mentioned in *Masters v Cameron*, as recognised by Knox CJ, Rich J and Dixon J, in *Sinclair, Scott & Co v Naughton* (1929) 43 CLR 310 at 317, namely, '… one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms'."

(iii) 3 months have elapsed after a notice was given by the creditor under section 8 and the creditor has throughout that period attempted to mediate in good faith (whether or not a mediation session or satisfactory mediation took place during that period).

In other words, each new loan agreement becomes the "farm debt involved" pursuant to s 11(1)(c)(i) of the Act and the requirement to mediate according to the Act is renewed with each new agreement that supersedes the previous loan agreement. The plaintiff's view (expressed at [20]) was:

> The defendant accurately but critically observed that the plaintiff's case was based upon a construction that holds that once there has been a mediation in respect of a farm debt and a certificate has been issued by the Authority under s 11, the creditor may rely on that certificate while still current and take enforcement action based on a farmer's default "under any subsequent debt provided it is secured by the same all moneys mortgage". The defendant described this as in effect a "blanket approval" upon which the creditor can rely regardless of whether or not the enforcement action relates to a farm debt that has been mediated or that the farmer has declined to mediate.

Harrison J opined that the Act deals with farm mortgages rather than farm debts and his Honour proceeded to provide authority for this view. His Honour quoted the object of the Act (at [25]) as being:

> 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.

His Honour went on (at [26]) to express a view as to the rationale of the object of the Act:

> The enforcement action that is constrained by the Act is the taking possession of property or other enforcement action *under a farm mortgage*. The underpinning philosophy of the Act would appear to be based upon the perceived wisdom of bringing the creditor and the farmer to mediation in circumstances where there is a dispute that the creditor might otherwise seek to resolve by an action for possession of the farm. Such action is qualitatively different to an action to recover unpaid money.

Harrison J then argued that precedent clearly establishes that actions pursuant to the Act were for farm mortgages not farm debts. His Honour quoted with approval (at [27]-[28]) Priestley JA in *Australian Cherry Exports Ltd v Commonwealth Bank of Australia* (1996) 39 NSWLR 337 at 339, who stated:

> Although the farm debt is necessarily secured by mortgage, it is noticeable that s 8(1), as enacted, and more clearly I think in its rewritten form, prohibits enforcement action for the prescribed period, in respect of the farm mortgage, not the farm debt.
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> For the reasons I have already mentioned, the Act appears quite plainly to be imposing its temporary moratorium on actions to enforce farm mortgages, not farm debts. The distinction is significant. A farm debt is two things, a debt and a secured debt. It does not cease to be a debt because it is also a secured debt. Had the purpose been directed against actions to enforce farm debts both as debts and secured debts, nothing would have been easier than to say so.

Harrison J raised the issue of what would transpire should the defendant's submission be held to be the correct interpretation of the Act and opined (at [30]):

> In *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 257 Gleeson CJ commented as follows:
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> > Built into the legislation are provisions aimed at limiting the time during which one party can delay the enforcement of the other's rights. This is an obvious problem against which the legislation was intended to guard. It is not the purpose of the legislation to provide an unlimited moratorium on farm debts, or to allow debtors to keep creditors at bay for as long as they wish.

In other words, if the defendant's interpretation of the operative parts of the Act currently under discussion were adopted then no creditor could take action unless they refused to settle. Farmers could mediate, settle, breach the settlement agreement, mediate, settle, breach the settlement agreement and so on thereby frustrating the efforts of the creditor to recoup the money owed under respective loan agreements. His Honour viewed this arrangement (at [34]) as being "inimical to the purpose of the Act outlined in s 3 if the requirement or prospect of constant mediations was to be endorsed or encouraged, let alone entrenched. It would hardly promote 'the efficient and equitable resolution of farm debt disputes'".

A further piece of evidence (recited at [35]) that his Honour found persuasive was cl 35 of the mortgage document signed by the parties which stated:

> agreement covered by this mortgage means:
> - 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.
>
> *amount owing* means, 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*.

Harrison J viewed this clause of the mortgage document as an "all monies mortgage clause" that would allow all moneys borrowed under different arrangements but secured by the same mortgage to be recoverable. This means that despite the loan agreements securing different amounts, interest rates and repayment schedules, they were all secured by the same mortgage and therefore all recoverable under the same mortgage. His Honour finished this section of his judgment with a very important explanation (at [36]) of the dichotomies of triggers that arise under the Act:

> If the defendant committed an act of default under the mortgage, the plaintiff would be entitled to take steps to enforce the security given by the farm mortgage if mediation had taken place and a certificate under s 11 was in force. I reiterate that farm debt disputes are mediated but that s 11 certificates issue with respect to farm mortgages.

Finally, his Honour quoted (at [38]) from the Second Reading Speech:

> which introduced amendments to s 11, where reference was made to the way in which s 11 was understood to operate. This included the following:
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> > This amendment will give comfort to a farmer who has been to mediation, restructured, traded out of trouble, and experiences further problems at a later date. *Under existing legislation, once the creditor has obtained a section 11 certificate, there is no obligation to submit to further mediation at any stage in the future*. The bill proposes that after a period of three years the provisions of the Act should once again come into force for that particular farm mortgage.[2]

Harrison J ordered that the defendant give possession of the property to the plaintiff, to grant leave to the plaintiff to forthwith apply for the issue of writ of possession and to enter judgment for the plaintiff in the amount of $906,667.93.

Hargraves' case is an important decision because it clarifies the application of the Act when there has been a succession of failed agreements flowing from mediation. It puts farmers on notice that mediation under the Act will generally cover the requirements of a breach of a loan agreement secured by a mortgage and that the opportunity to achieve a lasting settlement may only present itself once during the life of a defaulted loan agreement.

MEDIATION MEDIA WATCH

ANSETT ESTATE FINALLY SETTLED

The airline might be dead but the fight over Sir Reginald Ansett's estate has only just reached finality.

According to *The Australian's* Cameron Stewart, in an article dated 8 March 2010, "The revolt of the Ansett children against the last wishes of their father, aviation tycoon Reginald Ansett, has succeeded with three winning more than $1 million each from his estate".

Stewart reported that the five Ansett children launched legal challenges to the will of Sir Reginald claiming that the provisions of the will were grossly unfair. Stewart reported that "[t]he Ansett Australia founder, who died of cancer in 1981, aged 72, left a will that gave most of his fortune to race clubs, schools and charities, leaving only a fraction to his children in the belief that they should make their own way in life as he did".

[2] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), "Farm Debt Mediation Amendment Bill 1996", Second Reading Speech (30 October 1996) p 5532 (emphasis added).

The article states that "[w]hen Sir Reginald died, his estate in Mount Eliza on Melbourne's Mornington Peninsula was worth $8.2 million but he left only $50,000 to each of his children. The estate is now believed to be worth more than $50 million".

The dispute was mediated with a settlement being reached last year with an undisclosed settlement of more than $1 million each. It was reported that the most famous sibling, Bob Ansett (of Hertz rent-a-car fame), withdrew from the legal bid before mediation and did not receive a payout.

LITIGATION OVER THE USE OF THE TERM "MUMMY"

According to *The Australian's* Caroline Overington, "A mother has gone to court to prevent her daughter from referring to her ex-husband's new wife as 'Mum' or 'Mummy' or 'my other Mummy'. The woman, who cannot be named, argued that her ex-husband was deliberately undermining her role as their child's mother, by encouraging his new wife to answer to the terms 'Mum' and 'Mummy' and 'Mummy-D' (D being the first letter of the stepmother's first name)."

In an article of the 8 March 2010, Overington stated, "[t]he battle has been going on for almost as long as the child has been able to speak. Her parents separated when she was four months old".

Interestingly, "[a]ll other matters, including where the child should live and go to school, and how much child support should be paid, had been settled in pre-court mediation, after more than six years of litigation".

The judge, Dawe J, made the following comment: "However it is encouraging that the parties have been able to come to a conclusion by consent. Hopefully that will indicate that in future, the parties will be able to resolve matters without resort to further proceedings in this Court."[3]

So while the real issues that go to the child's welfare were settled years ago in mediation the parties were still in court over what name the child may utter to her stepmother. Another case for compulsory mediation of certain issues before the court!

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[3] *Klement and Glynn (No 2)* [2010] FamCA 97 at [7].