

Bee-lieve it or Not!

Sweet justice as Farm Debt Mediation Act found to apply to micro-scale and unprofitable migratory bee operation

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Summary

The Supreme Court of New South Wales delivered judgment on 6 April 2016 in *Secure Funding Pty Ltd v Bee* [2016] NSWSC 521. This case raises important considerations for lending institutions when dealing with farm debt and security because:

1. it highlights again that a lender must genuinely know its customer, their business and the purpose for which the funds to be lent will be used; and
2. of the ramification in seeking enforcement without first participating in mediation pursuant to the *Farm Debt Mediation Act 1994* (the Act).

Brief Facts

Secure Funding Pty Ltd ("Secure Funding") commenced proceedings against Mr Bee for an outstanding amount owed by him which was secured by a mortgage over land. Mr Bee agreed that he had fallen into arrears on the loan.

Mr Bee defended the proceedings on the basis that:

- a. the mortgage granted to Secure Funding was a "farm mortgage" subject to the Act;
- b. he was a farmer within the definitions of the Act; and

- c. Secure Funding did not take the steps required of it under the Act before commencing its proceedings for recovery of the debt and under its mortgage.

Issues

Distilled, the issues were simply whether:

1. the loan to Mr Bee was a farm debt; and
2. the mortgage given by Mr Bee was a farm mortgage over farm property.

If the answers to those questions were in the affirmative, Mr Bee would succeed because Secure Funding had not performed the tasks required of it under the Act.

Proceedings

Secure Funding issued several Notices to Produce seeking material such as rates notices, tax returns, supplier invoices, records about movement of hives and so on. Very little material was produced in answer to the Notices to Produce.

Mr Bee was required for cross-examination and he gave oral evidence that, amongst other things:

- he is an apiarist and has been a registered beekeeper since 1986;
- his business is to label and sell honey collected from his hives;
- he is a migratory beekeeper and so he has to move his hives around because his property alone cannot support the number he keeps on a full time basis;

- his business was profitable in the 1980s but was not so now; and
- the loan from Secure Funding refinanced an earlier facility which, although refinanced itself, ultimately was used to purchase a honey extractor and some stocked hives.

In the end, Secure Funding's case amounted to little more than an invitation to the Court to find Mr Bee had not proved he was a farmer who borrowed money (a farm debt) and conducted a farm business on the secured property. Secured Funding contended:

- a. the absence of supportive documentation produced by Mr Bee meant that he had not discharged the onus on him to prove he is a farmer; and
- b. if Mr Bee truly was a farmer, he would have tendered the requested documents to the Court as proof of his occupation.

Further and in the alternative to the primary attack, Secured Funding submitted that if the Court accepted that Mr Bee was a migratory beekeeper, the secured property could not then be a farm property on which a farming business was being conducted because the hives were not permanently maintained on it.

Decision

Justice Wilson found no reason to disbelieve Mr Bee's evidence that he was a farmer within the definition of the Act and dismissed Secure Funding's proceedings because it had not complied with the Act.

Secured Funding produced no evidence at all to contradict Mr Bee's evidence that he was and is an apiarist who conducted a beekeeping business on the security property and applied the loan funds to the conduct of that business.

In coming to this decision, her Honour found that Secured Funding did not specifically dispute the defendant was a farmer, but rather asserted that it could not be satisfied whether he was or was not based on the documentation provided to them.

Her Honour held that Mr Bee's business is peripatetic, conducted on a very modest scale, and not profitable, [however] none of that takes his farming business outside the operation of the Act. The Act does not require any

particular level of economic activity, or profitability of a farming activity before it is a farming operation within the meaning of the legislation. Nor does it require that all aspects of the farming operation must be conducted exclusively on the farm property.

Conclusion

Prudent business lenders must take all reasonable steps to ensure they know the purpose of the loan and their customer's business in order to minimise the risk of becoming embroiled in a sticky situation.

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