



Supreme Court
New South Wales

Case Name: Australia and New Zealand Banking Group Limited v Evans

Medium Neutral Citation: [2023] NSWSC 1018

Hearing Date(s): 14 August 2023

Date of Orders: 24 August 2023

Decision Date: 24 August 2023

Jurisdiction: Common Law

Before: Schmidt AJ

Decision: To be found at [78]

Catchwords: MORTGAGES — where Bank seeks possession of three rural properties — breach of agreement entered after mediation under Farm Debt Mediation Act 1994 (NSW) — exemption certificate issued under Farm Debt Mediation Act in force under ss 13 and 14 — where summary judgment, leave to issue writs of possession, summary dismissal of cross-claim and other orders are sought by Bank — orders made

CIVIL PROCEDURE — Cross-claim — against Bank and “associated parties to the contract” — where claims include that the statement of claim is a “security” and a “set off” of the face value of the security and that refusal of Bank’s claims is supported by the Income Tax Assessment Act 1936 (Cth) — whether cross-claim should be summarily dismissed

CIVIL PROCEDURE — Notices of motion — where defendant seeks orders setting aside originating process and seeks protection of property from seizure — where defendant puts in issue Court’s jurisdiction to

make orders — Court has appropriate jurisdiction —
where defendant also seeks orders allowing withdrawal
of defence and cross-claim

Legislation Cited:

A New Tax System (Goods and Services Tax) Act 1999
(Cth)
Bills of Exchange Act 1909 (Cth)
Civil Procedure Act 2005 (NSW), s 56
Corporations Act 2001 (Cth)
Farm Debt Mediation Act 1994 (NSW), ss 11,14
Foreign Account Taxation Compliance Act 2014 (USA)
Income Tax Assessment Act 1936 (Cth), ss 102AAB,
102
Local Government Act 1993 (NSW)
Real Property Act 1900 (NSW), s 57
Supreme Court Act 1970 (NSW), s 22, 23
Taxation Administration Act 1953 (Cth)
Uniform Civil Procedure Rules 2005 (NSW), rr 13.4,
14.28, 12.6. 42.1
Commonwealth Constitution, s 55
Third Royal Charter of Justice
The Convention between the Government of
Commonwealth of Australia and the Government of the
United States of America for the Avoidance of Double
Taxation and the Prevention of Fiscal Evasion with
respect to Taxes on Income

Cases Cited:

Australia and New Zealand Banking Group Ltd v Evans;
Evans v Esanda Finance Corporation Ltd [2016]
NSWSC 1742
Batistatos v Roads and Traffic Authority of New South
Wales (2006) 226 CLR 256; [2006] HCA 27
Eberstaller v Poulos (2014) 87 NSWLR 394; [2014]
NSWCA 211
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 8;
[1983] HCA 25
General Steel Industries Inc v Commissioner for
Railways (NSW) (1964) 112 CLR 125 [1964] HCA 69
Grassby v The Queen (1989) 168 CLR 1; [1989] HCA
45
Keramianakis v Regional Publishers Pty Ltd (2009) 237
CLR 268; [2009] HCA 18
Snowy Valleys Council v Evans [2021] NSWSC 428

Category: Principal judgment

Parties: Australia and New Zealand Banking Group Limited
(Plaintiff)
Anthony William Evans (First Defendant)
Juana Gave Evans (Second Defendant)

Representation: Counsel:
Mr J Burnett (Plaintiff)
Mr Anthony William Evans (self-represented)
Ms Juana Gave Evans (no appearance)
Solicitors:
Dentons Australia Pty Limited (Plaintiff)

File Number(s): 2023/00075490

JUDGMENT

- 1 In March 2023 the Australia and New Zealand Banking Group Limited brought these proceedings seeking possession of three rural properties in the State, Mr and Mrs Evans being the registered proprietors who in 2014 granted the Bank mortgages over those properties, which were registered under the *Real Property Act 1900* (NSW). They have never repaid borrowings which the Bank advanced to them in 2017 after a successful mediation under the *Farm Debt Mediation Act 1994* (NSW), despite its demands.
- 2 The Bank having obtained an exemption certificate in respect of the mortgages from the Rural Assistance Authority under that Act, which continues to apply until 2025, now seeks possession of those properties, as well as orders for repayment of the outstanding borrowings.
- 3 The Bank's claims were defended. A cross-claim was also brought by Mr Evans, who there claimed relief under the *Income Tax Assessment Act 1936* (Cth). What he thereby sought included orders directing the Bank and unidentified "associated parties to the contract" to "setoff the Instrument against their Future Tax Liabilities".
- 4 By a May 2023 motion the Bank sought summary judgment, leave to issue writs of possession and an order summarily dismissing the cross-claim under r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW), or in the alternative, orders under r 14.28 striking out the cross-claim, as well as costs and interest.

It was supported by affidavits sworn by one of the Bank's managers, Mr Kostov; affidavits of service sworn by Ms Hopkins; and an affidavit sworn by Ms Rositano, the Bank's solicitor.

5 Mr Evans had also filed two motions. In the first, contradictorily, he sought an order setting aside the originating process and protecting the property the subject of the proceedings from seizure or threat of seizure, as well as orders that the Court had no jurisdiction over him or declining to exercise its jurisdiction. In the second, he sought orders allowing the defendants to withdraw all defences and cross-claims, as well as a declaration that the Court had no jurisdiction over him in respect of the subject matter of the proceedings and/or that the Court should decline to exercise its jurisdiction.

6 This judgment deals with the motions.

Mr and Mrs Evans' participation in the hearing

7 At the commencement of the hearing "Tony" announced his appearance, insisting that he not be referred to by the name Anthony Evans. He explained that Anthony Evans was an entity defined in the *Taxation Administration Act 1953* (Cth); that he was a man, not an entity; and that he controlled the trust, Anthony William Evans referred to in the various pleadings and motions, and that he did not recognise that name as referring to him.

8 If he was not Anthony William Evans, Tony, of course, had no right to appear in the proceedings, not being a party to them.

9 But it emerged that it was Tony who had used the name Anthony William Evans when he swore an affidavit in support of one of the motions filed by Anthony William Evans, before a justice of the peace. In the result I was satisfied that Tony was Anthony William Evans, the name he had used not only when he and Mrs Evans borrowed from the Bank and entered various agreements with it, but also later when filing documents in these proceedings, including the defence, cross-claim and the motions which Tony appeared to advance.

10 For her part Mrs Evans had not advised either the Court, or the Bank in their various communications, that she was content for Mr Evans or Tony to

represent her, as he announced he proposed to do. There was, however, no question that she was on notice of the proceedings, having been served not only with the Bank's pleadings, but also with documents Mr Evans had filed and still she had elected not to appear herself to resist the Bank's case, or to support that which Mr Evans pursued.

- 11 In the circumstances I was satisfied that the hearing of the three motions before the Court could justly proceed in her absence.
- 12 During the course of the hearing, after the evidence had been received, Tony demanded to know who the trustee was that day. Having explained that the Court's process did not include him interrogating me as he sought to do, there was the following exchange:

"FIRST DEFENDANT: Who is acting trustee here today?

HER HONOUR: As I've explained to you

FIRST DEFENDANT: I'm not the trustee. My estate's not the trustee. Who's the trustee? We're in a trust situation. Who's the trustee?

HER HONOUR: As I've explained to you

FIRST DEFENDANT: You will be then. I will give that job to you. Thanks for not answering. That's all I needed to know.

HER HONOUR: As I've explained to you this process doesn't include one of interrogating me.

FIRST DEFENDANT: I asked a very simple question, who was the trustee today and you've failed to answer, so I will take that as you'll accept the appointment of the job.

HER HONOUR: You shouldn't make any assumptions.

FIRST DEFENDANT: There's plenty being made towards me, so we will keep things mutual between us.

HER HONOUR: You should make no assumptions. Mr Burnett, that's the evidence, as I'm following. Now, perhaps you'd like to move to your submissions."

- 13 After the morning tea adjournment Tony abandoned the hearing after the following further exchange, as I was hearing the submissions being advanced for the Bank:

"HER HONOUR: I note for the record that Tony has left the Bar table but still remains in Court.

Tony, are you going to come back and resume your seat at the Bar table? You will see that sometimes that is convenient if something needs to be shown to you.

FIRST DEFENDANT: Yeah, I'm still struggling, Madam, with the fact that you act as the executor staying on board

HER HONOUR: I am sorry, you will need to come forward because I just can't hear you and I am sure the Court Reporter will not be able to record what you are saying and of course it is important that both happen. If you could just come forward.

FIRST DEFENDANT: I will come forward by special appearance, Madam.

HER HONOUR: If you just come forward to the Bar table where you are near the microphone and we will be able to hear you.

FIRST DEFENDANT: You are proceeding with this matter and you said that it was up to you to decide if you had subject matter jurisdiction and the actual fact that you are talking about my legal estate, Madam and you don't have my consent to do that. I've sent you an email which I think bounced back but my point of view was that you should trust me in this matter both for the benefit of my legal entities, both here and in the US.

If you wish to proceed and issue a bond in relation to this matter I will have it dealt with in the next thirty days but you are effectively proceeding with this matter to take land off our family and you have no jurisdiction to do that and you need to address that.

HER HONOUR: Just one moment. I note your view. I indicate to you that I will continue to hear this matter as a Judge of this Court. I don't accept any appointment from you to any other Office.

FIRST DEFENDANT: Right. So you are saying - one moment, just to clarify your point, you are going to proceed to be a Judge of this Court without proving jurisdiction, is that what you just said? Did you just say that?

HER HONOUR: Stop raising your voice. I will repeat what I said to you; I will continue hearing this matter as a Judge of this Court. I will not accept any appointment from you otherwise. Please take a seat.

FIRST DEFENDANT: No. I am out of here. You have no jurisdiction to proceed, no consent, anyone sets foot on my land from any Department of a New South Wales corporation I will file a writ against them in the Federal Court. Goodbye. You are the trustee. You settle it.

HER HONOUR: I should indicate for the benefit of the transcript that Tony has gathered his things and

FIRST DEFENDANT: No consent.

HER HONOUR: And has left the courtroom with a bang. His final words to the Court being, 'No consent'.

Mr Burnett, let's proceed. It is a matter for Tony or Mr Evans who are plainly the same person, whether or not he appears before the Court. Please continue."

- 14 It appears that there is an error in the transcript, understandably given how Tony was interjecting. I had understood Tony to have said "my point of view was that you should act as trustee for me in this matter", rather than "my point of view was that you should trust me in this matter". That accorded with his

final observation “You are the trustee. You settle it”. Hence my response that I did not accept any appointment from him.

- 15 Tony was certainly incorrect in his view that he could appoint a judge of this Court to be his trustee.
- 16 Whatever his view about that, the proceedings had to be heard in the normal way, even though there was an issue between the parties about the Court’s jurisdiction. That was for the Court to resolve, the Bank having sought to invoke its jurisdiction. The dispute about that had to be determined by the Court, in order to determine the applicable law, having heard the parties: *Eberstaller v Poulos* (2014) 87 NSWLR 394; [2014] NSWCA 211 at [20].
- 17 It was not for the Court to establish its jurisdiction in response to Tony’s various demands. Neither those demands, nor his views about trustees, could justly deflect from the course of hearing the Bank and Tony about the matters they each sought to advance by their oral submissions.
- 18 Whether or not I misheard Tony, it was his right to depart the hearing as he did. That did not have the result that I became his trustee. What did result was that he abandoned his defence of the Bank’s motion, as well as the pursuit of his motions, when the hearing continued in his absence.
- 19 That was because the Bank’s right to have its case on the motions listed for hearing heard and determined by the Court was unaffected by Tony’s departure. That according with the requirements of s 56 of the *Civil Procedure Act 2005* (NSW) which imposes obligations on the Court and the parties, to act in accordance with the overriding purpose there specified, the just, quick and cheap resolution of the real issues in the proceedings.

The orders which the Bank seeks must be made

- 20 For the reasons which follow, having considered what the Bank advanced in light of the evidence, which included the affidavit sworn by Anthony William Evans in support of his first motion, as well as his unsworn declarations and an unsworn affidavit, which the Bank addressed in its written and oral submissions, I am satisfied that the orders which the Bank sought must be made. They were:

“1. Pursuant r 13.1 of the *Uniform Civil Procedure Rules 2005* (NSW), summary judgment in favour of the plaintiff for:

(a) Possession of the whole of the land in folio identifier x/xxxxxxx situated at and known as ‘xxx’ Wagga Road (also known as Tumbarumba Road), Tumbarumba in the state of New South Wales.

(b) Possession of the whole of the land in folio identifier [sic] x/xxxxxxx situated at and known as Part ‘Mawarra’, xx Wagga Road (also known as Mawarra Tumbarumba Road), Tumbarumba in the state of New South Wales.

(c) Possession of the whole of the land in folio identifiers x/xxxxxx and Auto Consol xxxx-xx situated at and known as ‘xxxxxxx’, xxx Mannus Glenroy Road, Mannus in the state of New South Wales.

(d) Judgment against the first defendant and second defendant in the sum of \$1,194,250.81 being the amount owing to the plaintiff as at 14 August 2023.

2. Pursuant to r 39.1 of the *Uniform Civil Procedure Rules 2005* (NSW), the plaintiff is granted leave to issue writs of possession for the properties referred to in order 1.

3. Pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW), the cross-claim filed by the first defendant on 16 April 2023 is summarily dismissed.

4. The first defendant’s notices of motion filed 2 May 2023 and 31 May 2023 be dismissed.

5. The defendants to pay the plaintiff’s costs of claim made in the statement of claim.

6. The cross-claimant to pay the cross-defendants’ costs of the first cross-claim.”

21 The Bank also sought the opportunity, before final orders were made, to update the calculation of what was repayable as at the date of the judgment, so that this figure could be reflected in those orders. I am also satisfied that it should have that opportunity and that Mr and Mrs Evans also have the opportunity to be heard about those calculations, in the event of any disagreement.

Jurisdiction

22 As I have explained the Court must be satisfied that it has jurisdiction to make the orders which the Bank sought.

23 I am satisfied that even if Tony had remained to press his case, it could not have been accepted, given misconceptions on which it rested. For example, there can be no question about the continued existence of the State of New South Wales, despite what he appears to perceive.

- 24 This Court was first established while New South Wales was a British Colony, by the Third Royal Charter of Justice which came into effect in May 1824. The Court continues to remain in existence.
- 25 Australia later came into existence as a nation in 1901, with the enactment of the Commonwealth Constitution on which Tony relied. Thereby the Commonwealth of Australia was established and the former colony of New South Wales became one of the States of that Commonwealth. It also continues to exist.
- 26 Consistent with this factual position, Tony relied not only on the Constitution, but on various statutes enacted by the Parliaments of both the Commonwealth and this State.
- 27 I am bound by what has earlier been decided about the Court's jurisdiction, it being a superior court of record with an inherent common law jurisdiction preserved by the *Supreme Court Act 1970* (NSW): s 22. It provides that the Supreme Court is continued "as formerly established as the superior court of record in New South Wales" and thus has the general responsibility of a superior court of unlimited jurisdiction for the administration of justice: *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268; [2009] HCA 18 at 280.
- 28 The Court thus has the power to exercise "the full plenitude of judicial power" in this State: *Grassby v The Queen* (1989) 168 CLR 1; [1989] HCA 45 at 16. They include powers expressly or impliedly conferred by the legislation which governs the Court, as well as "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred": *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27 at 263.
- 29 That includes what is conferred by s 23 of the *Supreme Court Act*, namely, "all jurisdiction which may be necessary for the administration of justice in New South Wales".
- 30 In the result the conclusion that the Court does not have the jurisdiction to deal with the contractual dispute which lies between the parties to these

proceedings, or to make the orders which the Bank seeks to resolve that dispute, including orders for possession of land situated in this State, which Tony denies, is not available. I am well satisfied that it has jurisdiction to deal with all those matters.

- 31 The Court's powers must, of course, be exercised in accordance with the requirements of its rules and the applicable principles, to which I will return.
- 32 This, it should be noted, accords with the orders made by this Court in earlier proceedings which the Bank brought in relation to Mr and Mrs Evans' original borrowings, which were also secured by the same mortgages on which the Bank still relies, which had also fallen into default. In those proceedings Garling J made orders striking out their defence and cross-claim: *Australia and New Zealand Banking Group Ltd v Evans; Evans v Esanda Finance Corporation Ltd* [2016] NSWSC 1742.
- 33 Those proceedings were later settled after a 2017 mediation, the results of which were documented by the deed which the parties then executed and the further loan agreement which they then entered, which was also secured by the three registered mortgages which Mr and Mrs Evans had earlier given. The result was that this loan fell due to be paid in June 2018, but it was not.
- 34 It was this default which resulted in the mediation required by the *Farm Debt Mediation Act*, which precludes enforcement proceedings such as this unless the creditor is granted a certificate which remains in force. This resulted in another agreement between the parties, which required the loan to be repaid by 31 July 2022, but again it was not.
- 35 Mr Evans later unsuccessfully pursued an internal review of the decision to grant the certificate which the Bank then obtained under the *Farm Debt Mediation Act*. That permitting the Bank to pursue its demands for repayment of the outstanding loans and interest and when they were not met, to commence these proceedings.
- 36 In the result I am well satisfied that there is no doubt that the Court has the jurisdiction to hear and determine the motions, despite Tony's departure from the hearing, before its conclusion.

The case advanced by Tony

- 37 Despite his abandonment of the hearing , the case which Tony advanced in the various documents in evidence and his oral submissions have to be considered. They were somewhat difficult to follow, resting as they did on notions such as the location of Norfolk Island, out of which he claimed the Court operates, because “You people moved off shore in 1973”.
- 38 The result was claimed to be that it has no jurisdiction to take the land which he claims has been in his family since 1875. At one point he said that it was located in a colony of New South Wales. Later, however, he submitted that it was not in New South Wales, which was a corporate state, which had nothing to do with the land he lived on.
- 39 Tony also claimed at the hearing that the matter was a tax matter only, given s 55 of the Constitution; that a tax treaty was the highest law that governed him; that I was “an international servant in the international monetary fund”; and that all the other “nonsense” on which the Bank relied was null and void.
- 40 In the documents Tony also sought to resist the Bank’s case by reliance on claims that he had arranged his affairs in such a way that he no longer owes it anything. Alternatively, he claimed that once his tax returns are finalised, he will be in a position to repay what is claimed, in any event.
- 41 The Bank challenged the relevance of the arguments advanced, so far as they can be understood, also contending that they had no factual foundation. It certainly must be accepted that what Tony did not attempt to do was to establish the facts on which his claims must necessarily rest.
- 42 Subrule 12.6(1) of the Uniform Civil Procedure Rules permits “a party raising any matter in a defence or subsequent pleading” to withdraw the matter at any time. That is a right which may be exercised by filing a notice of withdrawal stating the extent of the withdrawal. Such a notice has not been filed. Further, what requires the other party’s consent, is “withdrawal of any admission, or any other matter that operates for the benefit of another party”: subr 12.6(2).
- 43 The Bank gave no consent and opposed the leave sought being granted, its case being that the cross-claim had to be dismissed.

- 44 In his 30 June 2021 affidavit in the form of an unsworn declaration, “The Office Holder of ‘ANTHONY WILLIAM EVANS’ & equitable title holder of ‘Glenevan’ & other land”, said at para 67 that “I hereby withdraw the defence of the first named and second named defendant filed with the Supreme Court of New South Wales pertaining to this matter”. But at para 68 he also said that he would attend the Court “by way of special appearance” to see that the motions filed on behalf of Anthony William Evans and Juana Gare Evans are fulfilled.
- 45 In May 2023 a document entitled “Notice of Withdrawal of Defence and Cross Claim” was sent to the attention of the Court’s “Executive Director & Principal Registrar” and Justice Campbell, who was then case managing this matter, and the Bank’s solicitors, by “the officeholder”. There it was said that the officeholder of Mr Evans withdrew the whole of his defence and cross-claim, together with any supporting affidavits and also rescinded any and all signatures written on them.
- 46 There was also an outline of events given in this document, which referred to the mediation; the agreement then reached; what was claimed had been done afterwards, including by communicating with Mr Kostov and demanding proof by the Bank of its claims; explained why it was considered that an offer of settlement had been made and accepted; the letter of demand which had subsequently been received from the Bank; default notices later served upon it; and expressed views about a security interest claimed to have been placed over a bank account.
- 47 This explains why the Bank did not accept that a notice of withdrawal of the defence or cross-claim had ever been filed. Their intended withdrawal, not finally pressed, supports the making of the orders which it seeks.

The Bank has established its case

- 48 I am well satisfied that the evidence establishes that the Bank advanced the loan monies on which it relies to Mr and Mrs Evans; that these borrowings were secured by the registered mortgages on which it relies; that the funds advanced and the interest which they attracted were not repaid when they fell due and remain outstanding; that the result is that Mr and Mrs Evans are in default; and that in all the circumstances the Bank is entitled to the orders

which it seeks, the applicable requirements of the *Farm Debt Mediation Act* also having been satisfied.

- 49 Mr Kostov's opinion, that Mr and Mrs Evans in truth have no defence to the matters which the Bank has pleaded, must thus be accepted as having a foundation in the evidence. That accords with the interest in the properties which the Bank was granted by Mr and Mrs Evans when they agreed to the mortgages over the three properties which were later registered; the agreements by which the parties are still bound; and the failure of Mr and Mrs Evans to repay their borrowings, in the circumstances in which that was demanded, they having fallen into default and still not repaying what they owed, despite the Bank's demands, made in accordance with the parties' agreement and the terms of the mortgages.

The applicable principles

- 50 Rule 13.1 of the Uniform Civil Procedure Rules empowers the Court to give summary judgment in favour of a plaintiff when:

(a) there is evidence of the facts on which the claim or part of the claim is based, and

(b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed.

- 51 But the power to give summary judgment must be exercised with care and only where there is no serious question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 8; [1983] HCA 25 at 99.

- 52 A party will not be denied a contested hearing on the merits unless the absence of a cause of action or defence is clearly demonstrated: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69 at 129. There must thus be a real basis for satisfaction that the case is so untenable, that it cannot possibly succeed.

- 53 As I will explain, given the evidence on which the Bank relies and what it establishes, as well as the case which Tony advanced and his failure to establish any evidentiary or legal basis for what he claimed, I am satisfied that the Bank has established that this is such a case, notwithstanding the filed

defence and cross-claim. In any event, given what is advanced in the motions Tony no longer wishes to rely on either.

- 54 On all that is before the Court, that there is in reality no conceivable defence to what the Bank has established, or any basis for the cross-claim, must be accepted.
- 55 Under r 13.4 the Court also has the power to dismiss the proceedings or any claim for relief in them, if it concludes that they are frivolous or vexatious, disclose no reasonable cause of action, or are an abuse of the process of the Court.
- 56 I am also satisfied that the evidence establishes that the cross-claim and the two motions Tony initially appeared to pursue falls into these categories. His departure, abandoning the defence of the Bank's claims, his opposition to the orders which the Bank sought and the pursuit of his motions, leaves no other conclusion sensibly available.
- 57 What the defendants were entitled to and did receive, was a fair opportunity to advance their case. That they were given. But the Court cannot ensure that they take best advantage of that opportunity.
- 58 The reasons for Tony's abandonment of the pursuit of their case are not readily apparent. But given what was advanced in writing and orally, that they were misconceived must be accepted. That cannot result in the orders which the evidence establishes the Bank is entitled to have made, being refused.

Tony's contentions

- 59 What Tony sought to put in issue by the matters which he advanced in the various documents in evidence, establish that there is in truth not available defence to the Bank's claims and that there is no basis for the cross-claim. They include, in summary, matters such as that:
- (1) Mr Evans is the office holder of the legal entity and first named defendant Anthony Williams Evans;
 - (2) The Supreme Court has an Australian Business Number;
 - (3) Mr Evans is a trust estate within the meaning of s 102AAB of the *Income Tax Assessment Act*;

- (4) Mr Evans is a Part X resident of Australia for the purpose of that Act;
- (5) Mr Evans is an exempt beneficial owner, as defined by United States Tax laws under which he has lodged tax returns;
- (6) Mr Evans is an investment entity for the *Foreign Account Taxation Compliance Act 2014* (USA);
- (7) The Bank has issued qualified securities otherwise defined as debentures to Mr Evans;
- (8) Mr Evans has an equity interest in various Australian companies, including the Bank;
- (9) Verifiable evidence is freely available to the Court;
- (10) The land the subject of the proceedings is an offshore property of an offshore banking unit and subsequently outside Australia;
- (11) Neither the Constitution nor any statute or code empower this Court to intervene in the private and confidential affairs of an offshore person;
- (12) What the Bank was pursuing involved offences under US laws;
- (13) Mr Evans is an offshore person and has redeemed securities the Bank has issued by filing a return with the US Internal Revenue Service;
- (14) Such securities are trading stock under the *Income Tax Assessment Act* and also specified foreign financial assets within the meaning of certain US regulations;
- (15) Mr Evans also relied on The Convention between the Government of Commonwealth of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income;
- (16) Mr Evans also relied on an offer which he made to the Bank in December 2022, which he claims was not responded to and so had been accepted, with the result that it bound the Bank, which it denies;
- (17) Mr Evans also claimed to be an eligible investment business under s 102 of the *Income Tax Assessment Act*;
- (18) Mr Evans also contended that the legal holder of the properties is not their equitable owner;
- (19) Mr Evans also claimed that he is an absolutely entitled beneficiary of a CGT asset, exempt from any CGT liability;
- (20) Mr Evans also claimed that the Court has no jurisdiction under common law to intervene in the affairs of an offshore person and relied on various aspects of US law to explain his concern that if the Bank were able to take possession of the properties, he would be stripped of everything and removed from his home and land at gunpoint;
- (21) Mr Evans also relied on the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) definition of “acquisition” and the definition of “associates” in the *Income Tax Assessment*;

- (22) He also relied on what was said to be “a true copy of an application for a transmitter control code as verification of the existence of the associate entity”;
- (23) Mr Evans also claimed that he was an unincorporated association or body of persons involved in the business of banking, as defined in the *Bills of Exchange Act 1909* (Cth) and also a person trading under a business number and employer identification number, the main business activity of which was said to be financial supplies;
- (24) He also claimed to be pursuing the Australian Taxation Office to backdate the accrual method of accounting for earlier reported GST amounts;
- (25) He further claimed that he had acquired all financial supplies, including the interest on the borrowings, from the Bank; and
- (26) Further, that he had debentures to which the *Corporations Act 2001* (Cth) applied.

60 Exhibited were documents such as Mr Evans’ birth certificate; extracts from various Australian tax and other statutes; it appears, extracts from various US codes and regulations; international tax treaties and conventions; documents Mr Evans has created; bank statements; postal records; the mediation agreement; and correspondence with the Rural Assistance Authority, the Bank and its solicitors.

61 It should be observed that apart from the documents which were already in evidence, on their face these other documents are of limited relevance in resolving what arises for determination. What they and the case advanced in reliance on them simply did not engage with, included what the parties’ agreements and the registered mortgages permitted the Bank to do, in the event of Mr and Mrs Evans’ default, when they failed to pay the interest due to the Bank on their borrowings and to repay the loan when it fell due, despite the demands for repayment which the Bank was entitled to make and pursued.

62 This was all relevant to the motions Mr Evans had filed, as well as to what was sought in the Bank’s motion, but was not addressed in the documents on which Tony had relied, before his departure.

63 Nor did he remain to explain what conceivable relevance his views about Australian and US tax laws and their impact on his affairs could have to the resolution of his contractual dispute with the Bank. Instead, Tony simply abandoned his resistance of its case.

Documents Mr Evans created

- 64 It should also be noted that what Tony relied on included documents which he appears to have created, that according with his approach in other proceedings to which he has been a party: *Snowy Valleys Council v Evans* [2021] NSWSC 428.
- 65 There Slattery J took the view, in relation to certain rates payable to the Council, that Mr Evans had unilaterally brought into existence documents that reflected an artificial arrangement which he claimed created an obligation in the Council to him, which matched his overdue rates, by “misusing two forms published by the Internal Revenue Service (‘IRS’) of the United States of America”: at [18].
- 66 His Honour concluded that thereby Mr Evans appeared to be constructing wholly artificial arrangements, which did not reflect reality; did not represent his real relationship with Council; was all his own work; and could not cancel or modify his actual existing statutory obligations to pay rates to the Council under the *Local Government Act 1993* (NSW). Nor did it possess the indicia of a real transaction or one to which the Council had ever consented: at [21]-[22].
- 67 Tony appears to have pursued a similar course in relation to the Bank, having created other documents in respect of his dealings with the Bank, without seeking its consent. The result also appears to be that they can have no capacity to affect his contractual relationship with it. He certainly has no right unilaterally to alter the contract which he and Mrs Evans entered with the Bank, as the result of the agreement which the parties reached in their mediation.
- 68 But as Tony did not finally press his case, it is unnecessary to consider this any further.

The Bank’s evidence establishes its case

- 69 What the Bank’s evidence establishes includes that:
- (1) In 2014 Mr and Mrs Evans gave the Bank individual guarantees as well as the three mortgages over the properties on which it relies when they first borrowed from it. The mortgages were later registered, have never been discharged and still remain on title.

- (2) Those mortgages contain covenants in the form of a memorandum of common provisions, by which Mr and Mrs Evans agreed to repay the secured money they had borrowed to the Bank on time and in the event of their default, that the Bank could take possession of the properties.
- (3) Those borrowings were not repaid, with the result the Bank's pursuit of the proceedings dealt with by Garling J.
- (4) The settlement which the parties entered after their first mediation, reflected in a deed, had the result that Mr and Mrs Evans' debt, then of some \$1.575 million, was settled by payment of \$900,000, which the Bank agreed to finance by a further loan. Their foreshadowed appeal against the judgement of Garling J was not pursued, the Bank also having provided them legal advice funding.
- (5) This further loan was repayable on 30 June 2018, but again was not repaid.
- (6) The parties' second mediation, their February 2022 Farm Debt mediation, resulted in a further agreement which is pursued in these proceedings. It was entered while the parties were bound by their 2017 agreement, as well as by the three registered mortgages. Its terms included that the Bank would forbear from enforcing its rights under the 2017 agreement until 31 July 2022, subject to there being no event of default. It was also agreed that Mr Evans had to repay their debt in full before that date.
- (7) The debt was not repaid, with the result that the Bank applied for and obtained the exemption certificate under the *Farm Debt Mediation Act*, as the mediation agreement expressly permitted. Its effective date is 10 February 2022 to 10 February 2025. While it remains in force no prohibition certificate, which may be granted to a farmer in default who may request a creditor to mediate in respect of a farm debt, may be granted to Mr or Mrs Evans: s 11.
- (8) Mr Evans' application for internal review of the decision to grant that certificate failed, the reasons for decision given indicating that both he and Mrs Evans had been given an opportunity to show cause why the Bank should not be granted the exemption certificate, but they had not responded. Further, that on his review application, Mr Evans had relied on matters falling outside the matters which the Authority was entitled to consider when determining whether to issue such a certificate.
- (9) Some further interest was later paid, the last in October 2022, but the debt was not repaid.
- (10) In January 2023 the Bank served letters of demand on Mr and Mrs Evans for repayment of what was then owing, some \$1,110,437.03 principal and interest and in March it served default notices, as well as notices required by subs 57(2)(b) of the *Real Property Act* in respect of some \$1,122,257.16 owing to the Bank as at 7 March 2023.
- (11) There was no response and these proceedings were then commenced. The statement of claim was served on both defendants and notices in

accordance with the requirements of r 6.8 of the Uniform Civil Procedure Rules were also served on the occupiers of the two properties which had occupiers, the third at Tumberumba being vacant land.

- (12) At the time of the hearing neither the principal nor any further interest has been paid.
- (13) Mr and Mrs Evans' business loan account statements show some \$900,026.09 borrowings in June 2018, with monthly interest payments required to be made and an expiry date of 18 June 2018. As at 18 May 2023 a total of some \$1,140,945.52 remained unpaid.
- (14) The terms of the agreements and the mortgages by which the parties remain bound entitle the Bank to seek the repayment of what it has established Mr and Mrs Evans still owe it, by its pursuit of these proceedings.
- (15) Section 14 of the *Farm Debt Mediation Act* permitted the Authority to issue the Bank an exemption certificate in circumstances which included satisfaction that Mr and Mrs Evans were in default under their farm mortgage, after a satisfactory mediation in respect of the farm debt they owed the Bank.

70 It follows that mediation having taken place and the exemption certificate issued in favour of the Bank by the Authority under the *Farm Debt Mediation Act* remaining in force until 2025, there is no just basis on which the Court can now refuse to exercise its power to make the orders which the Bank seeks, the moneys it loaned Mr and Mrs Evans and the interest payable on those borrowings, still not having been repaid.

71 Nothing in evidence establishes that either Mr or Mrs Evans have any defence to the Bank's claim for repayment of their borrowings, the interest they owe, or the orders for possession which it seeks, no matter what the position might be in relation to his capacity to repay, if Mr Evans succeeds in negotiations he claims to be having with the ATO.

72 The regrettable result may be, as Mr Evans contended, the loss of property long held by his family. Sadly that has been the result for others who have not had the means to repay borrowings which they obtained from a bank and promised, but failed to repay, having provided their land as security for their borrowings. It is circumstances such as that which the *Farm Debt Mediation Act* seeks, justly, to address. Mr and Mrs Evans have had the benefit of that scheme and are bound by the results of their mediation under that scheme and

the agreement which they entered as a result, as the certificate issued to the Bank under that Act reflects.

- 73 Given the terms of the agreement which Mr and Mrs Evans last reached with the Bank, which continues to bind the parties and their failure, or inability to comply with what they agreed then and earlier under the mortgages, which remain registered, I am satisfied that justice now requires that the orders sought by the Bank be made.

Costs

- 74 The usual order under the Uniform Civil Procedure Rules is that costs follow the event: r 42.1.
- 75 In this case that is an order in favour of the Bank, as it sought and as I am satisfied should be made, Mr and Mrs Evans finally not resisting the orders it seeks.

Orders

- 76 As I earlier explained, the Bank needs still to calculate the final money sum which it is owed at the date of this judgment, which the defendants must be ordered to pay it. That figure should be filed and served within seven days, together with an affidavit explaining its calculation.
- 77 In the event of any disagreement about that calculation, Mr and Mrs Evans should file and serve a short written submission, confined to the dispute about that calculation, within a further seven days. In the event that the Bank wishes to reply, it should file and serve its submission within a further seven days.
- 78 For the reasons given I now order:
- (1) Pursuant r 13.1 of the *Uniform Civil Procedure Rules 2005* (NSW), summary judgment in favour of the plaintiff for:
 - (a) Possession of the whole of the land in folio identifier x/xxxxxxx situated at and known as 'xxxxx' Wagga Road (also known as Tumbarumba Road), Tumbarumba in the state of New South Wales.
 - (b) Possession of the whole of the land in folio identifier [sic] x/xxxxxxx situated at and known as Part 'xxxxxxx', xxx Wagga Road (also known as xxxxxxxx xxxxxxxxxx Road), Tumbarumba in the state of New South Wales.

- (c) Possession of the whole of the land in folio identifiers x/xxxxxx and Auto Consol xxxx-xx situated at and known as 'xxxxxxx', xxx Mannus Glenroy Road, Mannus in the state of New South Wales.
- (2) Pursuant to r 39.1 of the *Uniform Civil Procedure Rules 2005* (NSW), the plaintiff is granted leave to issue writs of possession for the properties referred to in order 1.
- (3) Pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW), the cross-claim filed by the first defendant on 16 April 2023 is summarily dismissed.
- (4) The first defendant's notices of motion filed 2 May 2023 and 31 May 2023 be dismissed.
- (5) The defendants to pay the plaintiff's costs of claim made in the statement of claim.
- (6) The cross-claimant to pay the cross-defendants' costs of the first cross-claim.

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