

Rural eSpeaking

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This summer edition of *Rural eSpeaking* is our last one of the year. We hope you enjoy reading this and find the articles are both interesting and useful.

To talk further about any of the topics in this edition, please be in touch – our contact details are above

Our best wishes for a Merry Christmas, and a safe and happy New Year.



Health and Safety, and Personal Trusteeships – Not a good mix these days

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We have pointed out that the argument that liability shouldn't attach to them, as they are only there as an independent trustee, does not wash with the courts: liability under the health and safety and tax legislation, or the Resource Management Act 1991 is an issue.

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The next issue of *Rural eSpeaking* will be published in Autumn.

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Health and Safety, and Personal Trusteeships – Not a good mix these days

In the past, articles in *Rural eSpeaking* have covered the issue of personal liability for trustees, and the dangers facing independent or professional trustees who have little day-to-day involvement in the running of their trust.

We have pointed out that the argument that liability shouldn't attach to them, as they are only there as an independent trustee, does not wash with the courts: liability under the health and safety and tax legislation, or the Resource Management Act 1991 is an issue.

Increased levels of responsibility

The Health and Safety at Work Act 2015 came into force on 1 April 2016. The courts can now impose significantly increased penalties (fines and/or imprisonment) on individuals. This is something that all those in the rural sector who operate using trusts (whether they are independent trustees or not) to own part or all of their farming business need to consider.

In terms of trust law, it's generally seen as important for a trust to have an independent trustee. That role, however, comes with significant responsibilities (and therefore liability) and trustees need to look carefully at how farming operations are now structured.

This isn't to say that trustees should try to avoid responsibility. Rather, it's a practical issue that trustees who are not involved on a day-to-day basis with the farming operation will have greater difficulty in complying with their obligations under the health and safety legislation. Unless trustees can properly carry out these responsibilities, they should not be in the position of primary responsibility.

Sorting out ownership of farm assets

Sometimes the trust owns the farmland as well as the farming business. In this situation, unless an independent trustee can show a high level of personal involvement in the farming operation then they should either not be there or they should restructure the farming operations so that those who are practically able to carry out those functions are the ones that do so.

For example, a trustee who is an accountant practising 50 or 100km from the farm will have difficulty, or probably won't want to participate in monthly health and safety meetings, personally inspect farm buildings and machinery, and to monitor day-to-day activity on the farm to ensure that policies and procedures are being carried out. Certainly some of those roles can be delegated, but as an independent trustee you are not relieved from the responsibility of ensuring that the delegatee is carrying out their responsibilities properly.

A more common situation is where the trust owns the farmland and buildings, and another entity such as a company or partnership carries out the day-to-day farming, owns the stock and farm chattels and equipment. Often there's a lease between the trust farming entity and the farm owner, but in many instances (possibly on the grounds of cost) these leases tend to be pro forma affairs with little thought given to the precise terms.

Have a formal lease

In the new health and safety environment the lease needs to be a proper formal lease clearly putting responsibility of repairs and maintenance, etc on the appropriate parties. There also must be an obligation on the lessee to not only comply with health and safety legislation, but also to provide the lessor with copies of their procedures and manuals and be prepared to comply with any lessors' requirements in terms of health and safety. The 'quiet enjoyment' provision, which is usually in leases, will be some

protection for the lessor as by conferring exclusive possession on the lessee, the lessor cannot legally come onto the property on a day-to-day basis.

A better structure is to have the trust holding a shareholding in a company that then owns the land or farming business. This structure would allow the trustees greater protection: under company law the shareholders have little or no control over the day-to-day company activity. They can appoint directors, approve major transactions and so on; but the Companies Act 1993 specifically vests the day-to-day running of the company in the directors' hands. This means they are primarily responsible for the running of the company's operations and they are the ones that Worksafe will look at to ensure that the company is complying with its health and safety obligations.

The directors of the company will usually be the people personally involved in running the farm on a day-to-day basis. Therefore, in practical terms, the directors can exercise that basic obligation of the health and safety legislation which is to 'use all practical steps' to ensure that the workplace is safe.

For a number of reasons the need for an independent trustee will remain, and the trust will continue to be a useful vehicle to hold farming land and other assets. Some of the traditional structures are, however, now not suitable given the changes in health and safety law. For that reason, trustees should be consulting their advisors to put in place structures that better reflect this changed environment. We're happy to help. ■



Due Diligence – Check the primary documents

Due diligence is an important aspect of buying or selling a property, both for the purchaser and the vendor. Decisions are made based on disclosures made in due diligence, therefore it's important for both parties that the documents or information relied on are accurate and correct. Failing to undertake due diligence can have a potentially disastrous consequences, as a 2012 case¹ shows.

In this particular case water rights were the issue. Altimarloch Joint Venture Limited contracted to buy 145.5 hectares of rural land, part of which they intended to plant in grapevines. Under the contract the water rights held by the vendors would be transferred to the purchaser. Those water rights were represented to allow 1,500m³ of water per day to be taken from a stream for irrigation purposes. The reality was that the property held resource consents to take only 750m³ a day from the stream.

The error came from a LIM Report issued by Marlborough District Council that was relied on by the vendor's real estate agents when they were marketing the property for sale and also by vendor's lawyers when preparing the agreement for sale and purchase. The

¹ *Marlborough District Council v Altimarloch Joint Venture Limited and Ors* [2012] NZSC11

vendors themselves were aware of the correct water-take figure but didn't spot the error when signing the contract, relying as they were on their professional advisors.

If the vendor's agent or lawyer had checked with the vendor themselves as to what consents they had or had obtained a copy of the resource consent from the District Council, which is easy enough to do, the error would have almost certainly been picked up.

Always check primary sources

The lesson learnt is not to rely on secondary sources, particularly when making specific contractual warranties about matters. Instead, do check the actual source documents that give the rights or govern the obligations.

In this instance the purchaser successfully claimed damages of \$1,055,907.16 as a result of this misrepresentation, even though the difference in value of the land with the represented amount of water rights as opposed to the water rights it actually had was only \$125,000.

The reason for this is that the court assessed the damages as the amount it would take the purchaser to put themselves in the position as if they did get what they contracted to purchase. The reason the damages were so high was because no further water rights were available from the stream; in order for the purchaser to obtain the increased water-take they had

to construct a dam to store the sufficient water to take up the shortfall.

By using primary source documents mistakes like this can be avoided. Where agreements, easements or resource consents are referred to in other documents such as valuations, LIM Reports (as in this case) or property information packs compiled by real estate agents, it's incumbent on both the purchaser and the vendor to check the source documents of the information.

In this case, because there was a specific contractual provision about the volume of water rights being transferred, the vendor (or in reality their professional advisors) were found liable to pay very significant damages when the correct information was readily available and could have been checked very easily.

Always thoroughly check documentation

The same applies to easements, leases, crops supply agreements or other sorts of resource consents. None of these documents should be viewed as 'standard' and the original documents should be read by a vendor to ensure that what they are representing is what is actually in the document. A purchaser must also check documentation to ensure that what they are contracting to buy is what can actually be acquired. ●



Over the Fence

Post-earthquake property settlement considerations

The recent earthquakes have created additional issues if you're buying and/or selling property.

Insurance

Some insurance companies have placed embargoes on new insurance policies from Canterbury to the Bay of Plenty. If you are looking to buy property within these

areas we suggest you check on your ability to insure the property before signing the agreement. Alternatively, you could ensure the agreement is conditional on you being able to arrange satisfactory insurance.

Banking – drawdown of lending facilities

Some banks have introduced additional requirements for borrowers as a pre-requisite for drawdown of funds in various specified areas around New Zealand. This can

include a requirement for a pre-purchase inspection and/or full structural report.

Settlement

If you have already signed an agreement for the sale or purchase of property (whether it be conditional or unconditional) in areas affected by the earthquakes, please be in touch with us as soon as possible to discuss the possible implications for you with settlement.

Employment obligations in times of natural disasters

Many business have been, and will continue for some time to be, affected by the recent earthquakes. This causes complications for both employers and employees. It's important to remember that the notion of good faith underpins all employment relations; many employers and employees will be under significant stress and pressure.

Please check the terms of your employment agreement for provisions relating to

extraordinary events. If there are any areas of concern or if you want any clarification, please be in touch with us straight away.

Review of Property (Relationships) Act 1976

The Property (Relationships) Act 1976 regulates the arrangements of couples (married, de facto and same sex) and property owned by them. The Law Commission has announced a review of this legislation that will start shortly and

go into next year. One of the issues to be reviewed are concerns about property that is held in trust. We will keep you informed of any developments.

Dairy Industry Awards

Entries to the Dairy Industry Awards for the 2017 competition have now closed. Best wishes if you've have entered, and to your staff and/or contract/sharemilkers.

If we can help with your preparation for judging, please be in touch. ●

