

Fineprint

ISSUE 37 | AUTUMN 2006



Are You Selling or Buying a Farm?

Strategic advice for vendors and purchasers

A number of vendors and purchasers only consult with their lawyer after the Agreement has been signed and the deal is done and dusted. However, there is a more strategic card that can be played. This article discusses the advantages for vendors in getting your lawyer to draft the Agreement before the property is placed on the market. For purchasers, consulting with your lawyer before the Agreement is signed can bring very real advantages to the transaction.

It is not unknown for vendors of quite significant farming properties to go through the sales process without first consulting their lawyer. It can be most frustrating for the lawyer to then study the Agreement and find the vendor or purchaser could have had a more advantageous, smoother and/or lower risk transaction if only there had been some earlier consultation.

For vendors

We list below some major issues that should be dealt with and will ensure the Agreement is right the first time:

Correct names of the parties. With the proliferation of trusts it is important that the correct names of the vendors and purchasers are stated in the Agreement. For example, the full names of the trustees (not 'XYZ Trust', which is not a legal entity) should be included. If there is a professional or independent trustee, the documentation must include a limitation of that trustee's personal liability.

Legal description of the property. This needs to be correct in order to prevent the purchaser having a right to raise objections or queries later on about the title. Any encumbrances or other memorials on the title should be clearly set out. The title should be searched to satisfy this requirement.

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www.nzlaw.co.nz

ISSN: 1174-2658

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If encumbrances are not disclosed and you are unable to satisfy any requisitions or queries raised by the purchaser, the Agreement could be cancelled, even though the vendor's understanding was that the Agreement was unconditional.

Dairy company shares. The transfer of dairy company shares have high level risks and a vendor needs early professional advice as to what is included in the sale, and the repercussions of an increased or reduced supply at the end of the season.

Buildings, plant, chattels, shares, stock, etc. All these assets must be listed. In addition a valuation of these items is required to determine depreciation and GST. In consultation with the vendor's accountant, the vendor's lawyer should draft the Agreement and insert figures that are most beneficial to the vendor from a taxation perspective, then the purchaser at least knows where the taxation issues will arise and can negotiate accordingly.

Good farming clauses, etc. Well drafted clauses are needed for good farming, entry before possession, transfer of resource consents and general compliance issues. There should be consultation with your farm advisor or sharemilker about any good farming provisions that should be included in the Agreement.

GST. This is a fundamental part of a farming transaction. Often Agreements are presented incorrectly as being sold inclusive of GST. This could cost you one-ninth of the sale price. The value of the dwelling and curtilage (the area around the house and not part of the farming activity) must be identified for GST purposes. The 'going concern' criteria are also far from clear in some instances; professional advice can help avoid the pitfalls.

Vendors should check the date when their GST liability arises. If the vendors are on an 'invoice' basis the obligation to pay the GST in full could arise before they receive the GST from the farm purchase.

Subdivisions, etc. More and more farm sales involve a subdivision, the removal from or retention of a dwelling on the title, or an amalgamation of titles. Subdivision

is a lengthy process, and frequently titles will not be available by the proposed settlement date. Careful drafting of provisions in the Agreement are essential in these circumstances otherwise the vendor could be severely disadvantaged if a title is not available on the settlement date. If consent has not been granted for the subdivision the sale must be conditional on such consent being obtained on conditions acceptable to you.



“Careful drafting of provisions in the Agreement are essential in these circumstances otherwise the vendor could be severely disadvantaged if a title is not available on the settlement date.”

For purchasers

For a purchaser, the same issues for a vendor (as shown above) are relevant. In addition, a purchaser may require additional protection with regard to compliance with dairy company and local authority requirements, and warranties about those and other issues such as the condition of plant and chattels. The vendor may not voluntarily offer such warranties, but may do so on request.

There will also be discussions on the inclusion of suitable provisions for your obtaining finance, sale of an existing property and completing due diligence. There are also benefits in getting reports

such as a Land Information Memorandum (LIM) from the local authority and checking if any resource consents are needed.

Water rights. A number of farms are dependent on irrigation; it is essential that these rights are preserved for the purchaser on the transfer of the farm. There is more on water rights on Page 5.

GST. Some Agreements contain a provision that a purchaser will pay all the GST on the signing of the Agreement or when the Agreement becomes unconditional rather than on the settlement date. If not budgeted for, this could be a very unpleasant surprise and give rise to payment of penalties.

Auction. For those people contemplating buying by auction, many standard auction terms and conditions contain a requirement that the purchaser pays all the GST on the fall of the hammer, not on settlement; the purchaser must be aware of this obligation.

‘Subject to lawyer’s approval’ clause. Inserting a ‘subject to lawyer’s approval’ clause into the Agreement may not be as advantageous as first thought.

First, it can put undue pressure on your professional advisers if there is a time limit which may not be easily met, particularly if there are complicated issues to be resolved.

Second, many of these clauses in the Agreement have a sunset clause which provides that if approval is not given by a certain time, the approval is deemed to be given. The purchaser bargains from a weak position as they have ostensibly agreed to the provisions subject to non-approval anyway. Matters in dispute are more readily negotiated when there is not a signed contract. And beware, not all ‘lawyer’s approval clauses’ give the purchaser a right to cancel the contract.

Talking with your lawyer at an early stage of a major property transaction would rarely cost you any more; indeed, it may well save you a great deal of money, time and worry. Make your lawyer and other professional advisers the first port of call when considering the sale or purchase of a farm property.

Employee Protection Provisions

What are they?

In the Spring 2005 issue, Post Script reported on a recent case (Crest) involving vulnerable employees. This article expands on vulnerable employee provisions. New employment legislation introduced in 1 December 2004 requires every employment agreement to include an employee protection provision. What is an employee protection provision, to whom does it apply, and what does that mean for employees and employers?



An employee protection provision protects employees where the employer's business is restructured, and the work that the employee does is contracted out to a third party, for example, a hotel that wishes to contract its in-house cleaning services to another company.

The law divides employees into two types. 'Vulnerable employees' have been identified as deserving a greater level of protection than all other employees. If an employee is 'not vulnerable' then all that is required is for the employment agreement to contain a provision that sets out what process is to apply between the employer and new employer in respect to the possible transfer of affected employees to the new employer. The parties are free to agree on what that process may be.

'Vulnerable employees'

Vulnerable employees include cleaning, food catering, caretaking or laundry services in the education, health, age-related residential care, local government and aviation sectors. Also protected are employees offering cleaning services or food catering services in any industry to any other place of work.

These employees have the right to elect to transfer to a new employer on the same terms and conditions as the employee was on immediately before transferring to the new employer. This right must be set out in the employment agreement.

Vulnerable employees can bargain for redundancy entitlements from the new employer if made redundant by the new employer for reasons related to the restructuring of the previous employer's business. This process will have to be done in good faith.

If redundancy entitlements cannot be agreed with the new employer then the Employment Relations Authority has the ability to determine redundancy entitlements.

For employers

An employer tendering for a contract in the industries affected should be made aware that they may have to hire employees on the same terms and conditions as they are currently on. Legal advice should be sought at an early stage.

The employer may have a 'technical redundancy' clause in the employment agreement, that is the right not to pay redundancy compensation if the person is

offered similar work with a new employer. If so, then any employee who elects not to transfer to the new employer may not be entitled to any redundancy compensation.

The flipside may also be true – that any vulnerable employee who elects to transfer to a new employer is not redundant as far as the original employer is concerned, and therefore may not be entitled to any redundancy entitlements from that original employer. It all depends on the wording of the employment agreement.

Employers should ensure that not only are new employee protection provisions included in employment agreements, but also any redundancy clauses are reviewed at the same time.

And back to the cleaning company

What happens if the cleaning company already has sufficient staff to perform the cleaning contract in respect of the fictitious hotel, but the vulnerable employees elect to transfer to that cleaning company?

If the cleaning company ends up with too many staff to perform the work it will have to undergo its own restructuring process and may lay off some staff. The new employer would need to undertake a fair redundancy process and would have to be particularly careful that it is objective in determining who is to be made redundant. It could determine who is to be laid off on the basis of cost of wages, length of service or performance. Some of these grounds may appear objective but be inherently unfavourable to the newly transferred employees. Much care is required.

There is currently a Bill before the Transportation and Industrial Relations Select Committee that will increase the scope of vulnerable employee provisions and which would reverse the effect of the Crest decision. We will keep you posted.

Giving Evidence in Court

From a judge's perspective

Giving evidence in court can be a daunting experience, not helped with television and cinema portrayals of controversial and emotional courtroom procedure. In this feature article Judge Peter Callinicos gives some common sense guidance to those people who have to stand in the witness box in court. Judge Callinicos sits in Wanganui's Family Court.

At some time in your life you may be required to give evidence in court. This may arise because you are a party to a case, either seeking an order of some kind or defending someone's claim against you. This could happen in a commercial or civil dispute, or might be the result of a relationship break-up. You might be a witness to an event or you may be charged with a traffic or criminal matter.

This article gives some guidance as to how most judges would assess your reliability as a witness. In short, where there are different versions of an event, which witness is to be believed?

The 'truth' is a fluid concept in that two persons to a dispute may have entirely different versions of the same event, and yet both might be genuinely honest in their recollection. This is understandable as most people will, and often do, recall events with a perception most favourable to their position. The same factual event can be interpreted quite differently due to a variety of factors that influence their perception and recall.

Judges understand these dynamics as we see this as part of our daily diet of work. We do appreciate that witnesses might be anxious, fearful, partisan, driven by emotion, possessed of poor memory and, in some cases, plainly dishonest.

The Golden Rule – tell the truth

The most obvious starting point is to emphasise the need to tell the truth in terms of recounting your honest recollection of whatever event is in issue. Stand back and recall the event free of emotion or antipathy regarding the other party or witnesses.

Judges sit in the middle of whatever dispute is being decided upon. The view from that position is entirely different from that of a participant in the factual event in issue. For this reason it is very easy for judges

to recognise witnesses whose evidence may be affected by their plight as a party to the dispute or as a supporter of a party.

You do your integrity and dignity no favour if your evidence is given in an overly emotive or acrimonious manner. More importantly, you do your case no favour.

So, rule number one – try as best you can to be objective about your evidence. When I see a witness who is able to give evidence free from such negative influences then there is a high chance that I will prefer them, subject to the following important aspects.

A person who has been honest and truthful throughout is not only more likely to be believed at a hearing but they may have, by such characteristics, avoided the very need for a hearing by acknowledging responsibility at a much earlier stage or by convincing the other side to 'settle'.

Consistency

Lawyers cross-examining you and judges watching you will be assessing the consistency of your story. That consistency will be assessed by how your story is given verbally in court as against any previous written statements by you.

You would be surprised how often we see cases where a party may have sworn an affidavit shortly after an event and say that they could not recall exactly what happened. And yet at a hearing, which could be a year later, they have somehow recalled with an amazing clarity exactly what happened. You cannot have it both ways. Rarely does recall improve over time.

The longer the time that elapses from an event the more difficult it can be to lock in to the memory of the event, unaffected by the passage of time.

Remember that when swearing affidavits, making statements or signing briefs of evidence what you have said will be scrutinised very closely at a hearing.

Dignity

Don't do yourself the disservice of using evidence to 'have a go' at the other side. Don't think for a moment that you impress a judge, or indeed anyone else in the room. You are not.

The danger of trying to be clever, sarcastic or vitriolic (or all three) is that such a display might inadvertently distract from any truth in your evidence. Despite popular belief to the contrary, judges are human too and their ability to track your consistency might be diverted by puerile displays. It's just not worth it.

Have the self-control and self respect to behave as an adult, if only to ensure that you concentrate on the truth of your evidence as opposed to less noble concerns.

Be patient

Cross-examination can be stressful and exasperating especially if a lawyer is labouring a point. It may just be that the lawyer is persisting because you haven't answered the question clearly enough. You know what you mean, but others may not.

Be patient. Listen carefully to the question. If you are uncertain what the question is then ask politely for the lawyer to repeat it.

Answer carefully and as clearly as you can. If you feel the lawyer has cut across your answer then ask politely if you can continue. It is likely a judge will let you elaborate, especially if it is clear that the lawyer has cut you short in a situation where simple yes or no answers are not appropriate.

Don't lose your temper. That will not help your focus or the judge's assessment of your reliability.

These are some simple tips to help you give honest and convincing evidence in court. The better you do your job the easier it will be for a judge to make the decision on the issue at hand.

Water Rights on Rural Land

An integral element in the sale process

Without water New Zealand's agricultural, horticulture and viticulture industries would economically wilt. This article alerts both vendors and purchasers of the need to ensure that water rights are included during a rural land sale transaction.

Demand and competition for water on rural land is challenging the capacity to supply. It goes without saying that the provision of water 'rights' in the form of water permits must be taken into account when a rural property is changing hands.

To 'use' or abstract water (whether surface and/or underground) other than for domestic purposes requires a permit, the transfer of which is governed by s136 of the Resource Management Act 1991 (RMA).

Transfer water rights

The standard Agreement for Sale & Purchase does not, as yet, include a standard clause dealing with water rights. As a result, it is not uncommon for water rights to be forgotten until after the settlement.

When a rural property is sold, the transfer of the water permit from the vendor to the purchaser should be an integral element in the transaction process. It is vital that the permit which allows the right to take and apply water is properly preserved and documented on transfer. Such is the demand for water rights, if the rights are inadvertently omitted from the sale transaction then the situation is very difficult to remedy.

Land value is directly related to the associated water entitlements. When water rights are omitted from the transfer of land, then the value of that land can substantially alter because there is no means to irrigate. In addition, claims of contractual misrepresentation or negligence may arise as the thirsty purchaser looks for a solution which may include the vendor and their lawyers.

Water quantities

Not only do instances exist of water permits not being transferred to the purchaser, but also it is not unknown for the incorrect quantities to be involved – a situation that is difficult, if not impossible, to remedy.

Litigation has occurred where the quantity of water available has been wrongly recorded in local authority records. The new owners later find that the required quantity of water is unavailable. If this occurs, the return on the investment quickly evaporates and losses can arise.

Local authorities are not liable if their recorded water permits and quantities are inaccurate. Nor are they legally required to confirm the water permit owner's names when 'processing' transfers. In a recent case (*The Favourite Limited v Vavasour*) the local authority was held to be merely a 'post box' and a repository of records, and without liability for accuracy. Thorough investigations should be made prior to the sale transaction taking place.



“Such is the demand for water rights, if the rights are inadvertently omitted from the sale transaction then the situation is very difficult to remedy.”

Conclusion

Vigilance is needed to ensure your property has water and sufficient quantities in order for you to carry on business. Finding out there are inaccuracies or mistakes could cost you more than just a glass of water.

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Postscript

Rare Opportunity to invest in ING's Diversified Yield Fund

After some outstanding success since its launch in mid-2003, ING has decided to close the ING Diversified Yield Fund (DYF). The DYF is one of the largest and fastest growing funds in the country with over \$500 million in funds under management and is currently yielding a stunning one-year return of around 9.5% pa* (net of fees).

Despite the fund's closure there is a rare window of opportunity for investors to gain access to the fund. *The fund will be open to new investors for a limited offer period from 20 March-30 April 2006.* After 30 April 2006 only existing investors in the fund can continue to add lump sum investments or regular savings.

This is a fantastic opportunity. We would encourage you to speak to us and we can put you in touch with a TPG financial planner who can provide you with more information and advice.

* The earning rates shown in this document are before tax and are an annualised return, NZ dollar adjusted. The earning rates are not guaranteed and are subject to change without notice, nor is the repayment of capital guaranteed.

Source: *Strategi Limited*

Penalties ease for tax errors

Legislation was introduced into the House in late March that will allow the Inland Revenue Department (IRD) to have greater flexibility in imposing shortfall penalties when people make inadvertent errors in their tax returns.

This will give comfort to those people who make a clear mistake or genuine oversight in their tax returns, and then contact the department to rectify the error. The tax relief will not be available if the IRD spots the error first.

This provision is part of the taxation legislation now before Parliament. Once enacted it is envisaged it will apply for returns filed from 1 April 2003, provided taxpayers apply before 1 October this year.

New bill will give employees a probation period

Employers will welcome Wayne Mapp's private member's bill, Employment Relations (Probationary Employment) Amendment Bill, which passed its first reading in mid-March.

The bill contains provisions for employers to hire new staff on a 90-day trial basis. This would mean that if a new employee does not work out, an employer would not be subject to a personal grievance claim brought by the employee.

Overseas, probation or trial periods are part of normal business practice, and usually last for more than the New Zealand-proposed 90 days.