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Personal Property Securities Register

Be careful when selling stock

Recently in this newsletter, we have looked at the implications of the Personal Properties Securities Act 1999. Another recent case¹, between the Bank of New Zealand and Waewaepa Station 2002 Limited, highlights the ability of a creditor, who in this case is the Bank of New Zealand, to recover from the purchaser of stock where the seller of stock had given a charge in favour of the creditor.

In the Waewaepa case, Te Rimu Station Limited sold stock to Waewaepa because, according to Te Rimu, they had little food cover and could not feed their stock. This occurred at the beginning of the drought over the summer of 2012/2013, which was a contributing factor. Te Rimu then transported the stock to Waewaepa who 'purchased' the stock by way of setting off its value from amounts that Waewaepa owed Te Rimu. Te Rimu and Waewaepa were 'related'. Waewaepa owned 50% of Te Rimu.

The BNZ had a general security agreement (GSA) over Te Rimu's 'all present and after acquired property' which included the stock. The sheep in question were delivered to Waewaepa on 21 November 2012, and the book transaction for the purchase of the sheep was dated 9 November 2012. At that point, Te Rimu was not in default under its loan facilities and the BNZ had not made demand under its securities.

Te Rimu subsequently did default and the BNZ made demand on Te Rimu in December 2012 and then successfully sued Waewaepa for conversion in the amount of the value of the sheep that had been sold to Waewaepa and transported off Te Rimu.

Ordinarily, under the Act, a security interest continues whether or not there is a sale. There is an exception to that in s53 which says that "a buyer of goods sold in the ordinary course of business of the seller ... takes the goods [the sheep] free of a security interest given by the seller ... unless the buyer ... knows that the sale ... constitutes a breach of the security agreement under which the security interest was created."

This exception is necessary for any business to trade, so one of the issues in the Waewaepa case was – what is the ordinary course of Te Rimu's business?

The court referred to earlier decisions where the following factors were important:

1. Where the agreement was made?
2. Parties to the agreement
3. Quantity of goods
4. Price charged
5. The nature and significance of the transaction
6. The reason for the transaction
7. Frequency of the transaction, and
8. The 'arm's length' nature of the transaction.

One of the arguments raised in relation to the 'ordinary course of business' of Te Rimu was that dry stock farming is a seasonal business. Changes to the normal pattern of business may arise because of unseasonal changes such as adverse weather conditions. In a drought situation, a farm may be required to destock its farm of capital stock simply because it cannot feed them. This argument was raised in the Waewaepa case.

The court held that the sale of the sheep was not in the ordinary course of Te Rimu's business. The main factor in the court's decision was the fact that the two parties were related in that they had similar ownership and the same person, as a director of both companies, implemented the transaction. In addition, there didn't appear to be any GST invoices for the sale, something which the court believed was certainly outside the ordinary course of business.

However, the case does have a warning signs. What if Te Rimu and Waewaepa were not related parties? A purchaser in that situation should do a PPSR search (www.ppsr.govt.nz) . If there is a GSA registered (which there invariably is), then written confirmation from the bank that the stock being sold has been released from the security interest should be obtained.

In the case of the selling farmer, if you are in the position of having to destock capital stock (for any reason) and you do have a GSA in favour of the bank, then you should obtain consent of the bank as you could be in default under your GSA. ■

¹ Bank of New Zealand v Waewaepa Station 2002 Limited [2013] NZHC3321

Animal Welfare Amendment Bill

Better enforcement, clarity and transparency

The Animal Welfare Amendment Bill is currently at the select committee stage, with the committee due to report back to Parliament at the end of March. This article looks at what changes the new legislation will make for animals and their owners.

The Animal Welfare Act 1999 provides the framework for regulating the welfare of animals and preventing their ill treatment. The amendment bill sets out to rectify some of the problems that have been identified with the current legislation. In particular, there are proposed changes relating to enforcement, clarity and transparency.

Enforcement

Part of the Act's framework is that it provides for 'codes of welfare' to be prescribed, which sets out minimum standards for the care of animals. Currently, those codes aren't directly enforceable so the new Amendment Bill gives Parliament the ability to regulate and specify mandatory and enforceable animal welfare standards.

An example could be the recent controversy relating to the use of blunt force to euthanise bobby calves on farms. Nathan Guy, the Minister of Primary Industries, announced on 27 February this year that he has asked the National Animal Advisory Committee (NAWAC) to consider an amendment to the Animal Welfare (Dairy Cattle) Code of Welfare 2010. He stated that, "The Animal Welfare Amendment Bill is currently before the Select Committee ... It allows for the creation of enforceable regulations that will complement the minimum standards contained within New Zealand's 16 codes of welfare."

In addition, the Amendment Bill introduces 'compliance orders' that will require a person to stop or start doing something. Currently, an animal welfare inspector needs to believe an animal is suffering, or likely to suffer, before steps can be taken.

Inspectors are likely to be given clearer powers to gather evidence by taking photos and video recordings, as well as taking samples from living and dead animals.

Clarity

Under the current Act, there are no mandatory standards for live animal exports. The Amendment Bill provides for new regulations which will contain these mandatory standards with offences and penalties for non-compliance.

There are also likely to be new regulations relating to surgical and painful procedures which could:

- » Prohibit specific surgical or painful procedures
- » Provide mandatory standards for any surgical or painful procedure, and
- » Declare certain surgical procedures to be not subject to the legislation.

Transparency

Under the transparency aspect of the Bill, currently the NAWAC doesn't have express power to consider 'practicality' and 'economic impact' when developing minimum standards and codes of welfare. The Bill makes it explicit that those are matters that can be considered, although they cannot override animal welfare considerations.

Conclusion

In recent years there have been an increased number of prosecutions under the current animal welfare legislation as a result of ill-treatment of animals. Should the Bill be passed into law, inspectors will have greater powers to control behaviour and to gather evidence. Also, there will be more specific and obligatory standards of animal welfare that can be enforced by a greater range of fines.

The probable changes to the implementation of rules relating to live animal exports and surgical and painful procedures means that some practices currently carried out may need to be modified. It is interesting to note, however, that 'practicality' and 'economic impact' are now factors in developing minimum standards which will give some reassurance to those at the coal face. ■

Over the Fence

Public holidays: Waitangi Day and ANZAC Day

Special public holiday arrangements are now going to apply for Waitangi Day and ANZAC Day. From 1 January 2014, ANZAC Day and Waitangi Day are now 'Mondayised'.

This means if the holiday falls on a Saturday or Sunday, the holiday will be transferred to the following Monday, meaning your employee still gets a paid day off if they would usually work on those days. If the holiday falls on a Saturday or Sunday and that day would otherwise be a working day for the employee, the holiday remains at the traditional day and your employee is entitled to a paid day off.

This year Waitangi Day fell on a Thursday and ANZAC Day falls on Friday, 25 April so there's no 'Mondayising' of those public holidays. You will, however, need to keep the new law in mind in future years.

Minimum wage review 2014

The government reviews the minimum wage each year. It has recently been announced that the adult minimum wage is to rise from \$13.75 per hour to \$14.25 per hour, coming into effect on 1 April 2014. The starting out and training minimum wages will increase from \$11.00 to \$11.40 per hour.

We recommend you review all wage and salary structures to ensure your employees are paid at least the minimum wage at all times for hours worked.

Please also remember that an employer's KiwiSaver obligations are in addition to minimum wage entitlements.

Sharemilking arrangements

With about three months remaining of the dairy farming season for 2013–2014, we suggest you review your sharemilking agreements, if you haven't already done so. This will ensure things are on track for a smooth ending to any sharemilking arrangements and/or transition. You will need to be mindful of such things as pasture cover obligations, supplements to be left on the farm, cow conditions, accommodation and farm maintenance provisions.

Similarly, if you are entering into new sharemilking agreements for next season, we suggest you take the time to ensure contractual arrangements are correctly completed to reflect the agreements reached.

Contractual considerations when entering into Agreement for Sale & Purchase of Farms – 'Proper Farming'

If you are entering into contractual arrangements for the purchase of a farm, there are some important considerations you need to keep in mind.

A purchaser will always expect a vendor to continue to properly farm the property from the date of signing the agreement until the date of settlement. A proper farming clause should always be inserted into an agreement. Any agreement should set out provisions for the following:

1. Is fertiliser to be applied by the vendor? If so, how much is applied, when and what type?
2. Is the vendor to provide autumn-saved pasture based on areas being closed up? Is this defined by round or by kilograms of dry matter?
3. Should supplements remain at the property on the settlement date?
4. How are summer or autumn crops to be dealt with, and is any regrassing required?
5. Is there a weed problem that requires attention prior to the settlement date?

If these provisions are set out in the agreement, this should ensure a smooth transition over the period of the sale. ■