

Welcome to the Summer 2014 edition of *Rural eSpeaking*. We hope you enjoy reading this e-newsletter and find the articles both interesting and useful.

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

As this is our last newsletter for 2014, we wish you a Merry Christmas and a happy and safe New Year.

INSIDE:

Town and Country

Not always a good mix

The popularity of 'lifestyle' and 'farm park' type subdivisions is ever increasing as city dwellers look to the fresh air and open spaces of country living. There is, however, the possibility of a clash between a city dweller's desire for a peaceful quiet existence in the countryside and a farmer's need to continue to farm their property as they have always done ... [CONTINUE READING](#)

Trust Decision-Making

What are the rules?

Over the years, the trust has been one of the favourite entities for farm ownership. Historically this has been for estate duty and tax reasons. However, in more recent times, a trust has been used for its more general ability to keep the farming assets 'in the family' and free from claims from third parties ... [CONTINUE READING](#)

Over the Fence

Redundancy ... [CONTINUE READING](#)

Mid-season dairy farm settlements ... [CONTINUE READING](#)

New Zealand Dairy Industry Awards ... [CONTINUE READING](#)

Resource consents: compliance and enforcement ... [CONTINUE READING](#)

The next issue of Rural eSpeaking will be published in March 2015.

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Town and Country

Not always a good mix

The popularity of 'lifestyle' and 'farm park' type subdivisions is ever increasing as city dwellers look to the fresh air and open spaces of country living. There is, however, the possibility of a clash between a city dweller's desire for a peaceful quiet existence in the countryside and a farmer's need to continue to farm their property as they have always done.

The thought of *moving* to the country brings visions of the rural idyll. Sometimes, however, it's not until the city dweller actually *lives* in the country that they realise that it's not as peaceful as they thought and they may have to cope with:

- » Birdscarers, wind machines and low-flying helicopters at 4am
- » Stock movements at any time of the day (or night), weekends included
- » Truck movements – both stock, milk and other carting such as hay
- » Insecticide and herbicide spraying, seven days a week
- » Armies of pickers turning up, and
- » Dust.

Local authority consent notice

As a condition of a subdivision consent in rural areas for lifestyle-type developments, local authorities will often impose a requirement that a 'no objection' consent notice is registered on a title to a property. This notifies a purchaser that the property is in a rural area and the property owner will not object to normal rural activities taking place.

Where a local authority doesn't impose this consent notice (or even when they do), it's prudent for rural subdividers to register a specific covenant on the title forbidding a purchaser or future owner of the property objecting to the rural activities carried on the adjacent land. This type of covenant can have more practical force than the council consent notice as it's a direct covenant between landowners.

Testing the case

It's also important to ensure that the balance of your farm property is protected in its use of access-ways, water and other services. An example is the case¹ where a farmer subdivided off a farm cottage and sold the cottage as a 'lifestyle block', reserving to itself a right-of-way (RoW) for the main farm. The RoW was much wider than a standard RoW because it was the principal access to the farm's woolshed and cattle yards and there was room for mobs of cattle and sheep to be held and assembled and for stock trucks to turn, etc. There was a formed track going through the RoW, but the RoW itself was significantly wider and of a different shape than the track.

A subsequent purchaser of the lifestyle cottage objected to the use of the RoW by the farm and went to court for an order that the RoW, notwithstanding its legally surveyed width, should be limited to the formed track and that there should be no access to and egress from the track other than at the beginning and end of it. The stock movements across the full RoW and comings and goings of trucks were causing annoyance to the lifestyle purchaser who saw the RoW as a simple right of access only.

The court had little hesitation in finding the farmer had the absolute right to use the full surveyed width of the RoW for stock movement and assembly, and to access it where they liked.

The terms of the easement of the RoW were the usual terms applied in RoW easements under the Property Law Act. So while in this case the farmer was successful, the court did note that the lifestyle cottage purchaser simply didn't appreciate why the RoW was specifically designed and created.

The case shows that if you're thinking of subdividing and creating lifestyle blocks, you need to consider carefully about what rights your farm needs to retain. In this case it was access, but it could just as easily have been rights to water, or the right to spray, create dust, or any number of activities that might seem the norm to a lifetime farmer, but which a city dweller may never have encountered before.

Careful thought needs to be given to the wording of easements and land covenants to protect your right to farm and also alert a purchaser to what living in the country actually means. ■

¹ *Handforth v Koko Farms* (2010) 11NZCPR 171

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Keeping the farm (or farms) in the family can call for unequal or delayed distribution of trust assets. What are the rules around treating beneficiaries differently?

One of the features of the modern 'discretionary trust' is its flexibility. The settlors, appointors or trustees are usually given wide powers to:

- » Vary the terms of the trust deed
- » Appoint and remove trustees
- » Add and exclude beneficiaries
- » Allocate income or capital between beneficiaries each year, or on a permanent basis
- » Resettle the trust on other trusts for some beneficiaries to the exclusion of others
- » Bring the date of distribution of the trust forward, and
- » Distribute the trust on the date of distribution between beneficiaries, in equal or unequal shares.

On the face of most trusts, these discretions or powers are given in very broad terms, often with little or no limit on the exercise of those powers by the settlor, appointor or trustees. Are those discretions or powers as wide as they seem, or are there limits or rules that must be followed in exercising them? There are rules which are very technical in nature and have been built up by case law over hundreds of years.

Beneficiaries

One of the powers mentioned above is the ability to add or exclude beneficiaries. In a recent case², the trustees had the power to declare in writing that any person or persons could be excluded as beneficiaries of the trust, for such period as the trustees determined.

In this case, the trustees (who were the settlor and a law firm's trustee company) excluded one of the settlor's children (and her deceased brother) as beneficiaries of the trust, leaving her other three children as sole beneficiaries of the trust. When the trust was to be wound up, the excluded daughter didn't even have a right to be considered as a beneficiary and had no prospect of receiving any of the trust property. Also, on the same day as the Deed of Variation excluding the daughter was signed, her mother made a Will transferring her entire estate to the trust, which effectively meant the excluded daughter would receive no inheritance at all.

The daughter challenged the trustees' decision on the basis that excluding her as a beneficiary was in breach of the trustee's duty to act in good faith, not act capriciously, not act irrationally and to act even-handedly between beneficiaries. The reason she was excluded was her mother's personal dislike of her – for no apparent reason. The court held that the trustees were able to make the decision that they did.

The very traditional view around a trust still stands – that a settlor creates a trust, puts their assets in the hands of a set of trustees, gives them a set of rules (a trust deed), and then it is up to the trustees to carry out those rules as they see fit as long as they act honestly, not in bad faith and not for their own personal benefit.

This decision, and cases like it, will give comfort to those farming families often in difficult situations wanting to apportion assets in sometimes unequal ways between siblings, for a variety of reasons. In this case, the trustees' decision was one of excluding a beneficiary, but the same rules would apply if the trustees exercised their discretions on the trust distributions and, for example, they were following a settlor's Memorandum of Wishes which might call for an unequal distribution.

As always in dealing with trust matters, caution in decision-making is important as is getting proper professional advice as to what limits a court might impose on decision-making powers. ■

² *Penson v Forbes* [2014] NZHC 2160

Over the Fence

Redundancy

If you're considering making redundancies in your business you need to be mindful of the business case that you must develop for consultation with your employees before you start the redundancy process.

You need to thoroughly prepare and examine your business case for implementing a redundancy before you consult with your employees. It's absolutely vital that the information in the business case is accurate. If it's not accurate and it's relied upon to make any of your employees redundant, there's a real risk that your redundancy decision may be found to have been unjustified – if it's challenged.

As an employer you need to be proactive in disclosing to any of your affected employees information that's relevant to the continuation of their employment at the time that you advise your employees of your redundancy proposal. It may also be useful for you to consider what questions any of your employees are likely to ask and what information they may request. You may want to volunteer some of that information, rather than wait for them to ask.

Not only do you need to be careful with the preparation of your business case and information that you give to these employees, but you also need to be very careful of the process followed in implementing these decisions.

The rural financial climate continues to display extreme volatility and many employers are regularly reviewing their costs and staffing decisions. If you're thinking about redundancies in your business please be in touch with us before you embark on this process.

Mid-season dairy farm settlements

It's now not uncommon for dairy farm settlements to occur mid-season. If you're negotiating to buy or sell a dairy farm mid-season it's important that consideration is given to the dividend entitlement. There are three options to consider:

1. The dividend is included in the purchase price and is the purchaser's entitlement
2. The dividend is apportioned based on the contribution to production for the season, or
3. The dividend is apportioned between the vendor and purchaser based on the number of days each party owns the property for the season.

Please keep these considerations in mind.

New Zealand Dairy Industry Awards

If you have entered the New Zealand Dairy Industry Awards and as part of the preparation for judging, you may like to consider getting a 'legal audit' or a review to ensure your business is legally compliant. Past participants speak highly of the value that entering the competition provides to their business.

Our best wishes to those of you who have entered the Awards.

Resource consents: compliance and enforcement

The Resource Management Act 1991 contains significant financial penalties (fines) and an ability to impose a term of imprisonment.

There's strict liability for offences and action can be taken against companies for the acts of their employees or agents – including sharemilkers.

It's important that all landowners, their staff and any sharemilkers have a thorough understanding of any resource consents associated with their rural business as penalties may be severe.

In response to inadequate effluent management, a recent enforcement decision³ of the Environment Court saw the court issue an enforcement order which prohibited restocking of the farm for the current dairy season until an approved effluent management system was installed. ■

³ *Marlborough District Council v Awarua Farm Marlborough Limited* (2014) NZEnvC89