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We hope you enjoy reading this Summer edition of *Rural eSpeaking*. With the Christmas holidays only weeks away, we hope you have a good break.

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

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

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Be Careful with Long-term Contracts

Forgetting the details can have significant consequences

Many contractual relationships last for years and, over time, the parties may forget, or change, their understanding of what was originally agreed.

A recent case, *Savvy Vineyards 3784 Limited v The Arck Limited*[1], highlights two particular issues:

- » The danger of not complying with strict contractual terms particularly with regard to timeframes, and
- » The readiness of the court to use email correspondence as evidence of the intention to create contractual relations.

The case was about a number of matters in dispute. The critical issue, however, was whether or not Savvy had exercised an option to purchase grapes from Arck. Savvy and Arck had an agreement which, amongst other things, contained a right of first refusal for Savvy to purchase the entire or any part of the entire crop of grapes from Arck for the next three years. In order to exercise this right of first refusal, notice had to be given by Savvy to Arck by a particular date. It was accepted in evidence that whilst Savvy had prepared its notices to exercise its option there was no record of those notices ever having been sent. Accordingly, when a dispute arose between the parties, Arck tried to rely on the non-service of the notices to avoid any obligation to supply grapes to Savvy.

While it was clear that the right of first refusal to purchase the grapes had not been exercised strictly in terms of the contract, subsequent email correspondence was such that the court found a contract for Arck to supply the grapes to Savvy had been concluded, so the question of whether or not the option was correctly exercised ultimately wasn't critical. Arck had not realised that Savvy, by not serving its notices, had potentially missed out on its right to purchase the grapes. If Arck had realised this at the time, it may have behaved quite differently in its subsequent email negotiations with Savvy.

Problems can arise with long-term contracts

The case does show, however, the problems that can arise in long-term agreements. The agreement in question had an initial term of 10 years and had two rights to extend the agreement for two further terms of 20 years each, giving a contract term of up to 50 years. Over that period of time, personnel and/or landowners would almost certainly change and, at the very least, the specifics of contracts entered into years ago can start to fade in the memory.

All terms of a contract will become important at some time or another, but missing deadlines for notices can have a potentially devastating impact. Some contracts will have a *'time is of the essence'* phrase in a clause requiring a party to do something by a particular time, which makes it clear that if the timeframe is not met then they may not have a second chance. Examples of critical options or time periods that should be remembered are:

- » Notices to exercise options to purchase
- » The ability to terminate, or end, a contract early or to prevent it rolling over
- » Rent reviews, and
- » Renewals of leases, or supply or purchase agreements.

These days most people will have electronic calendars that they may or may not use. If you are entering into any contracts with lengthy terms and critical time periods, then it's most important to not only note the date by which the notice needs to be sent, but also make a reminder some weeks before that a critical date is coming up.

Emails can be used as evidence

The other interesting point about the Savvy case is the issue of the email correspondence between the parties being used to determine that a concluded contract had been made. Emailed communication tends to be conversational and often conducted with less thought than would go into formal written communication.

When you're dealing with contractual issues by email you must be aware that any emails you send can be saved and used as evidence in any subsequent dispute. These days it's easier for parties either to inadvertently give up legal rights or be held to have concluded a contract when perhaps they had not intended to do. The motto here is *think before you email.* ■

1 *Savvy Vineyards 3784 Limited v The Arck Limited* [2015] NZCA 534

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Company or Trust?

Which is the better option in a farming situation?

The two most common farm-owning entities are either a company or a trust. Often, a farming operation is carried out with a mix of trust ownership (typically owning the land) and a company (owning the rest). Both structures have their pros and cons; in this article we compare these two ownership models.

Liability

The major feature of the company structure is the limitation of liability for the company owners. The company acts as a 'shield' to protect its shareholders from personal liability from that company's obligations (other than for the amount of uncalled or unpaid capital). This limitation has been eroded over the years, partly by the use of personal guarantees, but also by various statutes that seek to impose liability on officers of a company, such as health and safety legislation.

By contrast, trustees are personally liable for a trust's obligations and this liability is 'joint and several', which means that any or all of the trustees can be called upon to meet a liability. This liability can be limited in two main ways:

» Contractually by way of a 'limitation of liability' clause, and

» By an indemnity in the trust document that provides that the trustees must be indemnified, out of trust assets, against any claims against them.

Both the limitations of trustee's liability are problematic. It's not possible to contract out of all liability and an indemnity out of trust assets is not of much use if those assets have been exhausted.

For the liability reason alone, the company structure has significant advantages over the trust.

Ownership

One of the reasons that the trust has been such a useful tool over the years is its ability to 'blur' ownership. The trustees are the legal owners of the trust property. It is, however, a restricted form of ownership in that the trustees must use and deal with the trust property only for the benefit of the beneficiaries of the trust. The traditional 'discretionary' family trust gives the trustees discretions as to how the capital and income of the trust can be applied; it's not until the trustees make a decision in favour of a beneficiary that ownership passes to that beneficiary.

A trust has had significant advantages (particularly in the tax field) over the years. It does mean, however, that in family situations there's often uncertainty over the ultimate ownership of the assets. Also, it's becoming more common to challenge the trustees' decisions if a beneficiary regards themselves as being hard done by. Accordingly, it's not always possible for the trustees to carry out the wishes of the person who established the trust.

By contrast, company ownership is fixed by the number of shares that are owned and/or the rights that attach to those shares. It's a simple exercise to change the share ownership in a company; therefore it's a useful vehicle where ownership is to be transferred in stages.

Longevity

Under the Perpetuities Act 1964, the private family trust has a maximum life span of 80 years. This may well change in the future as a result of the Law Commission's recent report on trusts; but it's likely that there will still be a limit on the length of a trust – possibly 150 years.

A company has no expiry date and therefore is an infinite form of ownership. While the 80-year timeframe does seem long, it has been proved that it's often not long enough and issues have arisen where properties have been put in trust, the trust nears the end of its life and there's no ability to extend the term.

As you can see there are a number of advantages and disadvantages of each ownership method. If you're contemplating farm ownership, do talk with us early on so we can discuss the ownership model/s best suited for your particular circumstances. ■

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Over the Fence

Health and safety legislation: update

The Health and Safety at Work Act was passed on 27 August 2015 and will come into force on 4 April 2016. The Act is designed to provide a balanced framework to secure the health and safety in New Zealand workplaces. Key aspects of this new legislation include:

- Every Person Conducting a Business or Undertaking (PCBU) has a duty to do what they/it can within its influence and control to ensure the health and safety of staff and people affected by its work
- A new due diligence duty is created for officers to take reasonable steps to ensure that the PCBU is meeting its health and safety obligations
- Obligations are also on staff to take reasonable care and follow reasonable instruction, and
- Every PCBU is to have effective staff participation practices and to engage with its staff.

The Ministry of Business, Innovation and Employment and WorkSafe NZ are currently developing regulations and guidance material to help PCBUs meet their duties under the new law.

We shall have more comprehensive guidelines in the Autumn 2016 edition of *Rural eSpeaking.*

Employee dismissed for cruelty to animals: the importance of getting the process right

Employers may find some comfort in a recent decision of the Employment Court[2] where an employee was denied financial remedies from his employer because his cruelty to animals resulted in an unjustified dismissal.

Whilst the outcome was favourable to the employer, the case highlights the cost of defending a personal grievance claim and the importance of getting the process right when dismissing an employee.

A brief history of the case is:

- The incident which gave rise to the personal grievance occurred in October 2013
- The case came before the Employment Relations Authority (ERA) in August 2014
- The ERA awarded the employee $7,825. This comprised three months' wages plus $5,000 compensation for humiliation, loss of dignity and injury to feelings, reduced by 50% because of the employee's contributory conduct
- The ERA ordered the employer to pay $2,750 to the employee as a contribution towards his costs along with the $71.56 lodgement fee (although the employee's legal costs exceeded $3,500)
- The decision was appealed to the Employment Court and the court released its decision on the appeal in August 2015
- The court held that the employee was not entitled to an award for lost remuneration as the decision to dismiss was substantively justified, nor an award for compensation as the employee contributed 100% to his own dismissal, and
- The court set aside the ERA's order that the employer pay the employee's costs and, instead, ordered the employee to pay $1,750 to the employer for its costs in the ERA.

Some two years after the employer dismissed the employee for cruelty to animals the employer ended up with an award of $1,750, a large legal bill and an invaluable lesson on the importance of getting the process right when dismissing an employee.

What went wrong? The ERA and the court held that the employer was justified in dismissing the employee for animal cruelty. However, the critical factor was the employer's failure to provide the employee with witness statements during the disciplinary process.

If witness statements had been provided to the employee, the employee may have been persuaded not to deny the allegations of animal cruelty. This was critical as the major factor in the decision to dismiss was that the employee failed to admit what he had done. The court agreed with the ERA but found that, even if the statements were provided, the employee would have been dismissed anyway.

Fonterra – an interest-free loan to shareholders

Fonterra's offering of an interest-free loan to its shareholder suppliers may be welcome relief for some. If you are considering sharing this loan with contract or sharemilkers, we suggest you obtain advice on possible consequences. There may be tax issues particularly where companies are involved and money is lent without interest to a third party. This may be further complicated if the third party is associated, or related, for tax purposes.

Dairy Industry Awards

Entries to the Dairy Industry Awards for the 2016 competition have now closed. Best wishes to those who have entered, their staff and/or contract/sharemilkers. If we can assist with your preparation for judging please be in touch.

2 *Waterford Holdings Limited v Nathan Morunga NZEmpC Christchurch* [2015] NZEmpC 132 [3 August 2015]

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