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Rural eSpeaking

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Welcome to the Autumn issue of *Rural eSpeaking*.

We hope you find the articles of interest. If you would like to talk further about any of the items covered in this newsletter, please don't hesitate to contact us.

Inside:

The next issue of Rural eSpeaking *will be published in July 2011.*
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Personal Property Securities Act

Grappling with section 53 in a livestock purchase

It has been more than eight years since the Personal Property Securities Act 1999 (PPSA) came into force and ushered in a fundamental change to the way the law treats personal property; see our article in Rural eSpeaking/2 *in March 2010 which discussed its relevance to livestock. Since then* Re Plateau Farms Ltd[1] *has come before the High Court and tested section 53.*

The PPSA and its register

The PPSA created a public register for all personal property; it allows all purchasers of personal property, including of livestock, to search for any encumbrances on that property.

It is now possible, prior to a private livestock sale, to search under a farmer's name and see what encumbrances are on their livestock – if any. In these recessionary times, when farmers across the country are facing financial difficulties and lending institutions are seeking to extract what they can, the need to search this public register when entering into certain transactions is more important than ever.

A cautionary example

In the *Plateau Farms* case, the High Court grappled with one of the critically important provisions: section 53. That section provides that a buyer obtains goods free of security encumbrances if they were purchased in the seller's ordinary course of business. Section 53 determines whether a buyer of livestock obtains that livestock free of any prior security encumbrance.

In this case, the purchaser of the livestock – which owns and leases dairy cows – had bought 4000 heifers from the Crafar Farms group of companies. It then leased those heifers to Allan Crafar's son's company Nugen Farms (which was not part of the Crafar Farms group).

The Crafar's banks had a general security deed over all the Crafar Farms' livestock. The Crafar Farms receivers, acting on appointment by the banks, argued that the 4000 heifers were not sold in the ordinary course of the Crafar Farms' business, and so their security deed was still attached to the heifers.

The High Court found that the sale was not in the Crafar Group's ordinary course of business. Accordingly, the purchaser, which had bought the heifers at roughly market value, had paid cash to Crafar Farms, and was at all material times the owner of the heifers, nonetheless owned them subject to the prior security that the banks held over Crafar Farms' livestock.

The reasons the Court gave are:

» It was a sale of Crafar Farms' entire replacement dairy herd
» The proceeds were not used to purchase a replacement herd
» It was a unique and unprecedented transaction
» The heifers remained on the Crafar Farms' properties, and
» The proceeds from the sale were not retained by the Crafar Group but were instead used to finance the purchase of further farms by the son's company, Nugen Farms – thus taking those funds outside the Crafar Farms' banks' general security.

While the facts of this particular case were unusual, it does illustrate that buyers of large numbers of livestock must be extremely cautious. At the very least, when faced with a sale involving any out of the ordinary features, the following steps should be taken:

» Search the PPSA Register to check if any registered security interest exists over the livestock, and
» Contact any registered security holder to obtain approval for the sale or a release of the security.

In the case of any doubt, please talk with us as we are familiar with the PPSA and its Register.

1 *Re Plateau Farms Ltd, Gibson & Stiassny v StockCo Ltd* HC AK CIV 2009-404-7120 17 December 2010

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Leasing the Farm

Can be a practical solution

Leasing a farm, an orchard or cropping land is becoming more common and has attractions for both the land owner and the tenant farmer. We consider below the reasons why leasing could be a practical solution for both parties, and what should be considered in a lease.

For a land owner, leasing provides a fixed return and gives protection against the fluctuations in returns – which are inevitable in the farming sector. During the lease tenure, the capital (the farm) is protected for another day. Situations where leasing might be considered are:

- When the farm is being held for future generations who are not yet of an age to take over
- Where working capital is not available to the farmer for whatever reason, and
- Illness or other incapacity.

If the land has been farmed by the same family for some time (maybe even for several generations), the concept of parting with possession of the property and allowing someone else to farm it is not easy. It necessarily means a loss of control and sometimes that is hard to accept. The leasing of farms also has the added difference from commercial leasing in that the land owner might well still live on the property and the tenant's farming operations are conducted with the land owner watching on!

For a tenant, leasing provides the ability to:

- Use the land for a fixed rate but without having to supply the capital that might not be available
- Increase economies of scale without increasing the fixed capital that might ordinarily be required, and to
- Add flexibility which enables the size, type or location of the land to be varied for a fixed term prior to making more permanent decisions.

The lease

The relationship between the land owner and the farmer tenant is governed by the lease. While there may be 'standard' clauses that lawyers use in preparing leases, there is no such thing as a 'standard' lease. There are, however, some specifics that any lease must have. These are:

- Correct names of the parties
- Area of land to be leased
- Term
- Rent, and the
- The lease must be in writing.

Other matters that will need to be addressed include:

- The type of farming activity to be carried on. The land owner might wish to restrict the use to which the land can be put. For example, 'sheep and cattle farming' is a very wide term – a land owner might not want the land to be used for bull farming and, if so, a restriction such as this should be included
- Fertiliser/spraying requirements or obligations
- Repairs and maintenance. This can be a difficult issue. The distinction between what is a repair and what is a replacement (a capital item) is important. For longer term leases, capital expenditure may be agreed as part of the leasing proposal. If so, that agreement should state who pays for the capital item and what effect that capital expenditure will have on the rent
- Ownership of improvements. If the tenant is making capital improvements to the farm, for example, constructing new yards or in the case of an orchard planting trees, who owns those improvements and is the tenant compensated at the end of the lease?
- Rent review. What matters are taken into account at the rent review? If a tenant is making improvements to the farm by way of farm management, additional fertiliser or improving capital items, should their rent be based on the improved farm or on the farm in the condition that it was when they took over?

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Over the Fence

New minimum wage rates

Minimum wage rates are again to rise on 1 April 2011. The adult minimum wage will increase from $12.75 to $13.00/hour.

The trainee and new entrants' minimum wages will increase from $10.20 to $10.40/hour also from 1 April 2011.

It is important for farmers to be mindful of the minimum wage rate when settling annual salaries, particularly when long hours of work on the farm are expected. If you have an employee working on average 60 hours per week and their salary is $37,000, it is quite likely their remuneration would fall below the adult minimum wage rate.

Sharemilking Arrangements: 2011/2012 season

Many dairy farmers are at this time of the year planning their sharemilking and employment arrangements for the upcoming 2011/2012 season. This is an important time to be sitting down with existing or new sharemilkers/farm owners to reach agreement on the final terms of arrangements.

Federated Farmers has recently released its updated Herd Owning Sharemilking Agreement (also known as the 50:50 Sharemilking Agreement) which includes updated clauses to deal with payments to sharemilkers for milk supplied. Amendments have been made to accommodate the manner in which Fonterra now pays its shareholders.

The Federated Farmers Variable Order Sharemilking Agreement has also been updated, however this is currently still under review. It is anticipated this updated agreement will be available from Federated Farmers in late March 2011.

We recommend you speak with us regarding your contractual arrangements for next season if your existing sharemilking arrangements are continuing or changing.

Public Holidays: Easter 2011

This year ANZAC Day (25 April) falls on Easter Monday and both days will be observed simultaneously.

This means the only public holidays in 2011 at Easter weekend will be Good Friday and Monday, 25 April, with Easter Monday and ANZAC Day being recognised as one public holiday.

Employees who normally work Mondays and Fridays will be entitled to those days off on full pay. If, however, these employees work on either of the two public holidays they are entitled to be paid at the rate of time and a half and a day off in lieu for each public holiday worked.

GST zero-rating land transactions

From 1 April 2011 the sale of land (used for the production for taxable supplies) by one GST-registered party to another GST-registered party will be GST zero-rated. This will simplify the timing of settlements which previously meant GST return dates had to be considered.

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- Reservation of some rights to the land owner. Leases give 'exclusive possession' to the tenant. It may be, however, that the land owner wants to reserve some access rights, such as the right to hunt or duck shoot or a 'right to roam', and
- Mortgagee's consent. If a mortgagee has not consented to a lease, then it is not binding on them. This puts the tenant's investment at risk in the event the land owner defaults on loan obligations.

Handled properly leasing can benefit both parties, but it is critical to think carefully through the arrangements and to ensure they are documented properly.

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