

Rural eSpeaking

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L A W Y E R S

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Welcome to the Summer edition of *Rural eSpeaking*. We hope you enjoy reading the articles, and find them interesting and useful.

If you'd like to talk further about any of the topics in this edition, please contact us – our details are above.



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A new (uncertain) dawn for farmers

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Read the fine print, there could be some surprises

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The natural assumption of most borrowers is that provided they meet their repayments, then the bank will be happy; the terms and conditions are just 'fine print' ... This isn't the case. It's essential that you know exactly the bank's requirements of your farming operation.

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New government-endorsed health and safety toolkit now available

SafePlus, a new government-developed and endorsed health and safety toolkit, is now available to all New Zealand businesses, including those in the rural sector.

Casual or fixed-term employment? Be careful

The summer holidays often see a mix of casual and fixed-term employees working on the farm. You must have a written employment agreement in place from the outset for both types of employees. The consequences of getting it wrong can be expensive.

Hefty penalties in first decision of new health and safety regime

The first sentencing under the Health and Safety at Work Act 2015 has been released. The decision in *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* saw the court impose hefty penalties for breaches of the new legislation.

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Farm Management Plans

A new (uncertain) dawn for farmers

One of the hot issues in the recent election campaign was raising the water standards in our rivers and lakes. Regional authorities are the bodies that are charged with implementing the government's water standards policy.

All regional authorities have implemented, or are in the process of implementing, plan changes that are designed to enable them to achieve the minimum water standards set by government.

Reduce leaching into waterway

One of the aims of these plan changes is to reduce the amount of nitrogen and/or phosphorous leaching from farms into waterways.

The main tool to achieve this is the 'farm management plan' which is, generally speaking, a plan for each individual farm as to how that farm can be operated so that its nutrient leaching is kept at a particular rate.

A typical farm management plan will have several elements but will almost certainly involve a 'nutrient budget' which will look at the nutrients that are introduced to the farm, either naturally or by intervention. It will also examine how those nutrients then either leave the farm by way of a finished product, such as a crop, or as milk, or as a cattle beast, or whether they leave by way

of leaching through the soil into rivers and lakes.

In essence, a farm management plan summarises environmental risks that have been identified on a property and how those risks will be managed in order to comply with the legal requirements of each regional plan.

You will either be already actively engaged in this process or, where plan changes haven't yet been finalised, you will at least be aware of what is happening in your region.

By necessity, the plans are regional as there are a number of factors that will be different in each region and which will impact upon the environmental risks that farming might give rise to. Obvious regional differences are the type of soils, the climate, the intensity of farming and so on.

Plans should now form part of the due diligence process

One of the interesting by-products of this process is that farm management plans will now become a very important part of the due diligence process when buying a farm. Historically, farm due diligence was based around past production and the methods applied to that particular farm. Probably little due diligence was carried out (or needed) in relation to the regional plan as it related to the area in which the farm was situated.

From now on, if you're considering buying a farm, it will be critical to understand not only the regional plan's rules, but also to obtain

a copy and understand the particular farm management plan in relation to that farm.

Historic farming and production information will still be vital. Equally as important, however, will be for you to have an understanding of the use to which your farm might be put in the future and what restrictions might be in place, or changes to farming practices, that might need to happen. Some of those restrictions or requirements of a particular farm management plan may well not only impact upon the cost to the farming operation, but also on the intensity of the farming that could be carried out. Both of these would affect the farm's bottom line.

Imperative to understand your regional rules

The other matter to take into account is that the farm management plan system, and the rules that each regional authority have either adopted or will be adopting, are all relatively new. No one knows the extent to which they will work. Science and farming methods are continually evolving. What isn't likely to change, however, is the prominence of the environment as one of the major political issues of our time.

For that reason, it's imperative that you properly understand your regional authority's rules around the environment and the particular farm management plans relating to your area or an area in which you propose to purchase. ●



Loan Documents: Read the fine print, there could be some surprises

Whether you like it or not, you will probably need to fund your farming operations with borrowing from one of New Zealand's main trading banks.

The main terms that borrowers look at when signing loan facility documentation relate to the cost of the borrowing: interest rate, the amount of the repayment sums and the term of the lending. The security required is usually a mortgage over the farm land and, more often than not, a general security agreement which is effectively a mortgage over all of the farming entity's assets that are not land such as stock, crops, machinery, receivables and so on.

The 'standard' conditions

Most banks have standard terms and conditions applying to their mortgages and/

or their general security agreements. These days, the loan facility agreement tends to be a relatively short document setting out the main loan terms, with the bank's standard terms and conditions usually in a separate document. However the loan facility agreement and the master terms and conditions, together with the mortgage and general security agreement terms, form the contract between the bank as lender and the farming entity (or entities) as the borrower.

Generally, most loan terms and conditions cover the following matters:

- » The obligation to repay any monies borrowed
- » Representations made by the borrower; for example, that the borrower must have the necessary Resource Management Act 1991 or Building Act 2004 consents for its farming operation and that it hasn't breached the terms of any such consent

- » Covenants by the borrower to do, or not to do, certain things such as sell any of the borrower's property without the bank's consent – other than in the ordinary course of business
- » 'Events of default' which are a list of matters that enable the bank to take action under the security if those events occur, such as if there is a change in control of the borrower with, say, a new shareholder being introduced, and
- » Specific provisions regarding how the bank enforces its security.

Read that fine print

The natural assumption of most borrowers is that provided they meet their repayments, then the bank will be happy and therefore the terms and conditions, often running to 20–30 pages or more, are just 'fine print' and a working knowledge of what they say is not required. This isn't the case. It's essential

that you know the representations and covenants.

While many of the terms and conditions tend to be general in scope, some can be quite specific. For example, in relation the farming sector, common representations could be that:

- » All, or substantially all, the livestock are in prime health and condition
- » The borrower will replace any livestock that die or are lost or destroyed with livestock of a like nature
- » Livestock must be tended and cared for in accordance with accepted methods of animal husbandry
- » That crops are in prime health and condition
- » The proceeds of the sale of the crops or livestock will be paid or delivered where the bank directs, and

Over the Fence

New government-endorsed health and safety toolkit now available

SafePlus, a new government-developed and endorsed health and safety toolkit, is now available to all New Zealand businesses, including those in the rural sector.

SafePlus currently consists of three products:

1. Resources and guidance
2. Independent onsite assessment and advisory service, and
3. Online self-assessment tool (available mid-2018).

The launch of the independent onsite assessment and advisory service includes the SafePlus register of independent accredited assessors so businesses can now directly engage with assessors.

For more information about SafePlus, click [here](#). ■

Casual or fixed-term employment? Be careful

The summer holiday period often sees a mix of casual and fixed-term employees working on the farm. You must have a written employment agreement in place from the outset for both types of employees. The consequences of getting it wrong can be expensive as you will see from a recent case¹ below.

Farm hand, Phil Stewart, had been employed on a temporary basis for two weeks, and the job was then renewed for two more periods of two weeks. When his employers, David Lee-Jones and Cathy Douglas, let him go Mr Stewart claimed unjustified dismissal.

Mr Stewart had originally claimed he had been given a permanent job. He had signed a casual employment agreement but said he did not notice it was a casual agreement.

The Employment Relations Authority endeavoured to find the true nature of the employment relationship.

If the agreement had been casual then Mr Stewart could have had no expectation of ongoing employment. If it was not casual, the employment relationship must have been either for a fixed term or ongoing. Mr Lee-Jones gave evidence that the job was always temporary. When faced with the evidence of his ex-girlfriend, Mr Stewart accepted he had known the arrangement was temporary while his employers looked for a permanent farm employee. He said he thought his temporary job should have been considered a trial for the permanent position. The Authority considered that, on

this basis, the job was not intended to be ongoing.

In order for a job to be a valid fixed-term arrangement, there must be a written employment agreement specifying the way the employment will end and the reasons for ending the employment that way, in accordance with s66 of the Employment Relations Act 2000. If there is failure to comply, the employer cannot rely on the fixed-term nature of the agreement to bring it to an end. The agreement signed by the parties in this particular case contained no such clauses.

In considering whether the arrangement was casual or fixed-term the Authority reviewed case law. While both are temporary in nature, casual employment has irregular and short engagements whereas fixed-term employment has set hours and days of work. Fixed-term work must relate to a specified

¹ *Stewart v Lee-Jones and Douglas* [2017] NZERA Wellington 100, 6 October 2017



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Loan Documents

- » Generally the bank will have rights of access to the borrower's property to allow the bank to inspect its security.

Additional specific covenants

There will also, almost certainly, be specific covenants relating to compliance with relevant legislation such as the Resource Management Act 1991. Relating to that legislation, there will be a covenant to comply with any consents issued under the Act, not to allow any consents to be surrendered and to notify the bank if any action is taken under the Act against you.

Apart from specific covenants such as those mentioned above, the terms and conditions will inevitably have a 'cover all' event of default such as *"any other event (or series of events) occurs which, in the opinion of the bank, may have a material adverse effect on the debtor ... or on the ability or willingness of the debtor to comply with the debtor's obligations to the bank"*.

What the above shows is that it is not only financial obligations in which the bank is interested. If, for example, a borrower has a series of Health and Safety at Work Act 2015 or Resource Management Act 1991 prosecutions, these could give a bank the

ability to call up its loan or enforce its security.

The bank has more control than you think

Therefore, if you're borrowing you must be aware that bank's standard terms and conditions give it a great deal of control – not only over the farming business generally but also, in some instances, quite specifically in relation to what the farm can and can't do without the bank's consent. While some of these terms may seem unfair or 'over the top', generally the courts do not go too far past the wording of the contract between the borrower and the lender in the event of a dispute.

The lesson for farmers is that your bank is not just interested in receiving your repayments when they are due; it can take a wider view of your farming operation and the way it is being carried out as a whole.

Given the political nature of environmental, animal welfare, and health and safety issues these days, it would not be at all surprising if banks are more inclined to give these type of factors more prominence when dealing with farm customers, rather than just their ability to pay. ●

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Over the Fence

project or situation such as coverage for parental leave.

In this case, while Mr Stewart's position was described as casual, it bore little relation to that type of employment arrangement described on page 4. Each engagement was for two weeks for the purpose of filling in while a permanent worker was found; that indicated it was something other than a casual job. That Mr Stewart referred to the position as 'temporary' also indicated it was of a fixed term nature.

The Authority concluded the position was a fixed-term one but, because the agreement did not comply with s66 of the Act, the dismissal was unjustified. In this case no compensation was awarded because Mr Stewart gave little evidence to support such a claim. As well, the Authority found it difficult to find how Mr Stewart would have been hurt or humiliated by the occurrence of an event he accepted he knew was both intended and coming.

The Authority ordered Mr Lee Jones and Ms Douglas to pay \$7,705 gross in lost wages.

As you can see, this area of employment law is tricky. If you need help with your employment agreements, please give us a call at the outset. ●

Hefty penalties in first decision of new health and safety regime

In the Spring edition we noted that the first sentencing under the Health and Safety at Work Act 2015 was about to be released. The decision in *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd*² saw the court impose hefty penalties for breaches of the new health and safety legislation.

The case involved an employee who had his hand amputated after it was caught in a plastic extrusion machine. Budget Plastics was found to have failed to comply with a number of industry standards and guidelines. Recommendations made from an earlier health and safety audit had not all been implemented. The case was not considered so serious that the company should be fined so heavily it could have been put out of business (although in some cases that may be appropriate). The court imposed a fine of \$100,000, reparation of \$37,500 and costs of \$1,000.

If you haven't yet reviewed your health and safety compliance since the new regime came into force on 4 April 2016, we recommend you do this immediately. It's essential for your farming operation and all who work on it. ●

² *WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395