

THE KENNEDY STRANG LEGAL GROUP – A NEW AFFILIATION

You will note that the design of our Rural Newsletter has changed. This reflects our new affiliation with firms in Victoria, Queensland and South Australia which will not only assist those of our clients who operate across state borders but also provide benefits, through an expanded "experience base", for clients who only operate within New South Wales. The affiliation does not alter the total independence of each affiliated firm which will continue to practice under its existing name.

THE FAMILY FARM – AND FAMILY DISPUTES

It is a regrettable fact of life that family farming operations, usually involving dad, mum and some or all of the children, and occasionally involving different branches of the one family, sometimes do not work out. It is best, from the point of view of the physical and mental health of the participants, and the dollars involved, to record properly the arrangements under which the farming business is being conducted.

It is too often easy to say that "because its family all will be okay".

Quite often it isn't "okay" – and when problems develop it is a wearing and expensive process to resolve them.

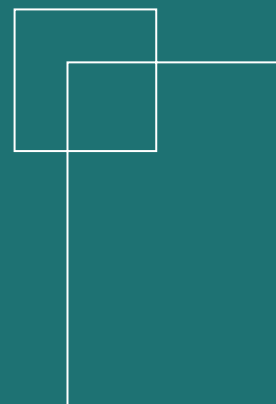
There have been several cases in recent years dealing with a son's claim against his parents, where the parents have held out to their son that if he works on the property with his parents, one day the property would be his. This situation may work well for some years but, in the cases in question, stresses developed and the relationship between the parents and the son deteriorated to the extent that the son was told to leave the property. In these cases, the courts found that because of the promise held out to the son, on the strength of which the son worked on the property for some years, the parents held the property on a constructive trust for the son. This meant, in effect, that the son had acquired an interest in the property which was held on trust for him by his parents. In general terms,



depending on the facts of the case, the parents may face the likelihood of having the court direct them to transfer the property to their son.

Reducing to writing the arrangements for the handling over of the family farm will not necessarily prevent such a falling out between family members, but it should force those members to address succession issues in a realistic way with all parties knowing the program for the devolution of control of the farm, rather than working on different assumptions and having different expectations which may well "change" over the years according to the circumstances.

We have partners who are accredited by the Law Society as experts in Property Law and Wills and Estates who would be happy to talk to you about these matters.



PROBLEMS WITH NEIGHBOURS

Relations with a neighbour may be cordial – so much so that valuable rights may be enjoyed over the neighbour's land with nothing more than a handshake. But those cordial relations may last only as long as the friendly neighbour remains a neighbour; when he dies or sells, the new neighbour may be less accommodating.

Such was the situation in the case of *Salmon v Water Administration Ministerial Corporation*, heard in the New South Wales Land and Environment Court in December 2001. In short, A, the owner of lands separated from the Murrumbidgee River by the lands of B, held a licence under Section 10 of the Water Act to extract water for stock and domestic purposes from the river, using his pump situated on B's land and then piping the water across B's land to his property. The rights enjoyed by A to use B's land were by way of a personal arrangement and were never formalised.

After B died, A did not enjoy the same friendly relationship with B's successor, C. Indeed, there was a degree of antagonism between them and C declined to continue the permissive occupancy for the pump site and piping.

On two occasions when the licence was due for renewal, C objected and a Land Board hearing was required to deal with the objections. On both occasions the licence was renewed under Section 13A of the Water Act (which gave A what is akin to a statutory easement through C's land).

When the licence next came up for renewal, the Department of Land and Water Conservation refused to support the granting of a further licence under Section 13A on the basis that some of the requirements of that section were not satisfied – that is, the Ministerial Corporation thought that A could make provision for a

supply otherwise than through C's land and also was not satisfied that C's interests would not be unreasonably affected (pump noise and interference with enjoyment and privacy if C built a house on her land).

A appealed the decision of the Ministerial Corporation to the Land and Environment Court and was successful in seeking an order that the Ministerial Corporation grant a further licence under Section 13A. The Court was satisfied that, amongst other things, it was not reasonably practicable for A to make provision for the supply of water otherwise than pursuant to the Section 13A licence and that as C did not then live on her land she would not be unreasonably affected by the granting of the application. (A had agreed to move the pump site and pipeline to another site on C's land if she did decide to build).

The moral of the story is that if you enjoy rights over a (friendly) neighbour's lands, you should endeavour to formalise those rights. If A had done so he would have saved himself the trouble and expense of two Land Board Hearings and one Land and Environment Court hearing.

Similar considerations will apply once the water licensing provisions of the Water Act 1912 are replaced by those of the Water Management Act 2000, as under the new regime an application to the Supreme Court under Section 88K of the Conveyancing Act will replace the Section 13A licence application where access across intervening lands is needed. Indeed, formalising the arrangement by agreement will be more important than ever as the applicant's costs associated with a Section 88K application will undoubtedly exceed those of a Section 13A Land Board hearing.

LEGAL BRIEFS

When Mr Jones was dying, he devised a plan to take some of his considerable wealth with him. He called the three people he trusted the most – his priest, his doctor and his solicitor. He gave them each an envelope with \$50,000 in cash and asked them to place the money in his coffin so that he could take it with him. All three agreed.

At the funeral, each in turn approached the coffin and placed an envelope inside.

When leaving the cemetery, the priest said to the other two:

'I must confess to you both that I only placed \$30,000 in the coffin. My church is in dire need of repairs and I took the rest of the money to accomplish this worthy project'.

The doctor then spoke: 'I must also confess that I kept \$25,000 to buy new medical equipment to save lives. I felt that this was something Mr Jones would have agreed to if he had really thought about it'.

The solicitor then said: 'You both should be ashamed of yourselves. I followed Mr Jones' instructions to the letter. When I put the envelope into the coffin, I enclosed my personal cheque for the full \$50,000'.

Acknowledgement – 'The Jokes On Lawyers' (Ross)

BORES – CARE NEEDED

We were recently involved in a matter where a small parcel of land (which was part of the vendor's much larger holding) on which was located a licensed bore (with an allocation of, say, five thousand megalitres) had been purchased by a neighbour. The Contract for Sale provided that the full allocation of five thousand megalitres was to pass to the purchaser, and he accordingly paid for that allocation in the purchase price.

However, following completion of the purchase, the then Department of Land & Water Conservation refused to record the purchaser as the holder of the allocation of five thousand megalitres. The Department was prepared to permit a small allocation, say two hundred megalitres, to go with the property being acquired, with the balance to remain attached to the lands retained by the vendor.

It was at this point that we were instructed to act for the purchaser to endeavour to recover the situation. The Department pointed to the fact that one of the conditions of the Bore Licence (indeed, it is a usual condition) was as follows:

"The allocation has been determined for the total area of the land described in the licence. In the event of part of the land being disposed of, the allocation will be subject to review."

We pointed to section 117 of the Water Act which is in the following terms:

"A licence shall be deemed to be held by and shall operate for the benefit of the lawful occupier for the time being of the land whereon the bore is sunk or proposed to be sunk".

The other factor which had to be considered was that section 115 of the Water Act provides that the Ministerial Corporation may issue a bore licence "subject to such limitations and conditions as it may deem fit and proper".

The Department's view was that as the whole area of the vendor's property had been taken into account in calculating the bore allocation and, as transfers of bore allocations in that area had not been introduced, the allocation to be attached to the purchased lands had to be calculated in a pro rata fashion – that is, using the ratio of the area of land transferred to the whole of the area of the vendor's property which had been taken into account in determining the original allocation.

Ultimately, after a conference between Departmental officers, our client, his groundwater consultant and ourselves, a compromise reasonably satisfactory to our client was able to be reached based upon particular issues which applied in that case.

The point to be made here, however, is that when lands are purchased with the benefit of a bore allocation which has been calculated having regard to lands additional to those being purchased, the purchaser should first check with the Department as to whether the allocation sought by the purchaser is able to pass with the lands being purchased.

The problems created by the factual situation in the transaction described above will not entirely be overcome with the implementation of Water Sharing Plans permitting bore entitlement transfers, as purchasers will need to guard against the possibility that bore entitlement transfers, although theoretically possible, may be refused due to adverse local conditions.

UPDATE ON WATER REFORMS

Last month we commenced proceedings in the New South Wales Land and Environment Court, on behalf of Upper Namoi Water Users Association, Lower Namoi Groundwater Advisory Association and others to challenge the validity of the Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003.

The Court has laid out a timetable for the parties to deal with all preliminary matters before the hearing which, on present indications, will not take place before late this year.

We are about to commence similar proceedings to challenge the

Water Sharing Plans for the Gwydir Regulated River and the Lower Gwydir Groundwater Sources and have instructions to advise in connection with a challenge to the Lower Murrumbidgee Groundwater Plan.

The effect of a successful challenge to a Water Sharing Plan will be that all or part of the Plan will be set aside by the Court on the basis that it is invalid. The Court does not have the power to impose a different Water Sharing Plan or to change the Plan under challenge. Accordingly, a challenge to a Water Sharing Plan must be seen as part of an ongoing process of negotiation and political action to attempt to obtain better outcomes in the water reform process.

WATER SUPPLY EASEMENT – AND ACCESS TO MAINTAIN

The case of *Biki v Chessells & Anor.*, which was heard in the Supreme Court of Victoria in November 2002, concerned the rights of an irrigator, having the benefit of an easement for water supply, to enter onto the land where the easement was situated to repair, maintain and alter the channel located within the easement.

The essential facts were as follows:

- There was an easement for water supply granted by the owner of certain land (“the servient tenement”) in favour of the prior owner of adjoining land (“the dominant tenement”) to convey water by channel across the servient tenement to the dominant tenement.
- The easement was ten metres wide (“the easement land”) and gave rights to the owner of the dominant tenement to enter the easement land –
 - to dig and construct a water channel and install ancillary works, the channel to be of “such depth and nature” as the owner of the dominant tenement thought to be desirable, and
 - to repair, maintain and alter the channel and ancillary works, and
 - to carry out work, with or without plant and machinery, for all purposes associated with the easement.
- The prior owner of the dominant tenement built the channel which varied between four and six metres wide, although later construction work was carried out to create a new section of channel which was seven metres wide in parts.
- The present owner of the dominant tenement applied to the Court for a declaration that he was entitled, with his plant and equipment, to enter such parts of the servient tenement, outside the easement land, as was reasonably necessary to enable him to repair and maintain and carry out alterations to the channel on the easement land.
- The owner of the servient tenement objected to the application on the basis that what was being sought by the owner of the dominant tenement was inconsistent with the terms of the easement and also on the basis that it was not necessary for the owner of the dominant tenement to go onto the servient tenement outside the easement land to carry out that work.

The Court stated that it was clear that where an easement exists over a servient tenement the law will allow the owner of the dominant tenement such “secondary rights” as are reasonably necessary for the enjoyment and continued



existence of the “primary rights” conferred on him.

In other words, secondary rights such as access for repair and maintenance and reasonable operation of the water supply easement can be implied in favour of the owner of the dominant tenement if not expressly stated in the grant of easement provided that these rights do not unreasonably interfere with the enjoyment by the servient owner of the servient tenement to a greater extent than is reasonably necessary. However, the terms of the secondary rights depend, the Court said, on the terms of the actual grant of easement.

The Court pointed out that the terms of the original grant left it to the owner of the dominant tenement to decide on the width of the channel within the ten metre strip of easement land and also permitted the owner of the dominant tenement to enter onto the easement land to carry out repairs and maintenance and alterations to the channel. There was no basis, the Court said, for the owner of the dominant tenement, in effect, to extend the terms of the grant of easement to permit him to enter upon parts of the servient tenement outside the easement land whilst carrying out repairs, maintenance and alteration work, even though there may not have been sufficient area easily to do this on the easement land given the width of the channel which had been constructed. The Court’s reasoning was that if the dominant tenement owner required a four metre strip on the easement land to carry out the necessary work, the channel width needed to be limited so as to provide this width for access within the easement land. Accordingly, the Court determined that in this case there was no necessity for the law to grant secondary rights to the owner of the dominant tenement to enter upon the servient tenement outside the ten metre wide strip of easement land.

Irrigators should take care to ensure that, in securing rights to be enjoyed under an easement, the easement land is wide enough to allow for the construction of the water supply channel and to permit access for repair, maintenance etc. of that channel. If this is done, no access will be needed to land outside the easement land and a dispute such as this can be avoided.



AGRICULTURAL TENANCIES ACT - CLAIM BY THE TENANT FOR IMPROVEMENTS

The Agricultural Tenancies Act provides, in certain circumstances, for compensation to be given by a landowner to a tenant for improvements effected by him.

In the case of *Lismore City Council v Green Gro Pty Limited*, the New South Wales Court of Appeal considered an appeal from the Council against a decision that the tenant was entitled to compensation for a number of improvements, totalling, in value, \$40,000.00.

The facts were as follows:

- Heads of Agreement were entered into under which the parties agreed that the Council would make land available to the tenant for the development of a turf farm at a rental of \$1.00 per annum.
- The Council was to make available treated waste water effluent from its sewerage works, provide and maintain and fuel a pump, provide a compressor, suitably prepare the site for turf farming, and deliver and spread gypsum and herbicides.
- The tenant was obliged to supply and install an irrigation system, plant turf, provide some equipment, provide and erect a shed and provide labour and other services.
- Profits were to be shared between the parties in the proportions stated in the agreement.
- Ultimately, the joint venture did not succeed. However, whilst it was on foot, the total cost to the tenant of work carried out by it was \$40,000.00.

Under the Agricultural Tenancies Act, "improvement" is defined as follows:

"Improvement means any work or thing carried out on a farm in the course of a tenancy, being a work or thing that would be of value to an incoming tenant, but does not include the repair or replacement of any work or thing already on the farm, except as provided by this Act".

The Court of Appeal held that the tenant must not be put in a position where he improves the land without recourse to compensation. However, it said that the tenant is not put in that position if he is remunerated for his work either under the agreement between the parties or under the Act. It further stated that the Act has no operation where the claimed "improvements" are works which the tenant is obliged to create under the tenancy agreement and that for the tenant to be compensated twice for improvements effected by him – once by a lower than normal rent (rent was only \$1.00) and then by compensation under the Act – would



be unfair. Accordingly, the Court of Appeal reversed the decision of the judge at first instance and held that the tenant was not entitled to any compensation for improvements carried out pursuant to the agreement.

The lesson to be learned here is that landowners, when dealing with tenants or sharefarmers, should structure their agreements in such a way as to limit potential claims for compensation. One way is referred to in this case; but it is not the only one.



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