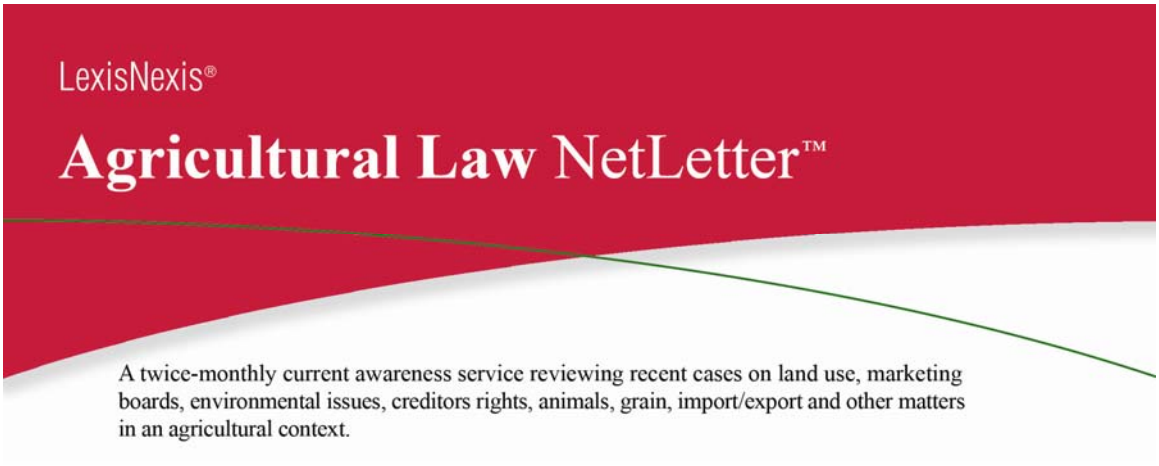

Thursday, June 3, 2010 - Issue 202

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The Manitoba Court of Appeal has allowed an appeal, and has granted a declaration that the conduct of a member of a Manitoba Feeder Co-op and the member's son, constituted "obtaining property by false pretences or fraudulent misrepresentation". The Court held that a judgment against the member and his son for a loan obtained to supply cattle to the member survived bankruptcy. The Court found that the fact that the member had failed to brand the Co-op cattle, and then arranged to have the cattle sold in his son's name with the proceeds being paid to his son, constituted fraudulent conduct. (Ste. Rose & District Cattle Feeders Co-op v. Geisel, CALN/2010-015, [2010] M.J. No. 159, Manitoba Court of Appeal)

* A Justice of the Manitoba Court of Queen's Bench has held that a claimant advancing a claim under the Manitoba Stable Keepers Act must act promptly to enforce the lien granted under the Act. Failure to do so will disentitle the claimant to lien for feed and care for the period after the claim is first made. The Court also considered whether or not a lien in Manitoba could be advanced for pasturing livestock. (Orr v. Stefanson, CALN/2010-016, [2010] M.J. No. 169, Manitoba Court of Queen's Bench)

**** NEW CASE LAW ****

Ste. Rose & District Cattle Feeders Co-op v. Geisel; CALN/2010-015, Full text: [2010] M.J. No. 159; 2010 MBCA 52, Manitoba Court of Appeal, B.M. Hamilton and M.H. Freedman JJ.A. and H.C. Beard J. (ad hoc), May 11, 2010.

Feeder Associations -- Member's Obligation to Brand and Sell Cattle in the Name of the Feeder Association -- Fraud.

Bankruptcy and Insolvency -- Fraud and False Pretences -- Misappropriation of Feeder Association Cattle and Sale Proceeds.

Ste. Rose & District Cattle Feeders Co-op (the "Co-op") appealed to the Manitoba Court of Appeal from a trial Judge's dismissal of the Co-op's application for a declaration that George Edward Geisel ("George") and his son, Christopher William Geisel ("Chris") had not been released from their obligations under a $82,700.00 Judgment by virtue of their discharges from bankruptcy.

The Co-op was a producer's cooperative association. George was a member of the Cooperative. George and his son Chris farmed together.

In November of 2003, the Co-op and George entered into a written agreement which provided that the Co-op would authorize funding so that George could borrow up to $75,000.00 to purchase cattle. The agreement also provided that:

- George would care for the cattle and take them to market by November 17, 2004.

- Title and ownership of the cattle would remain in the Co-op until the cattle were sold.

- The reservation of title constituted a purchase money security interest and that George granted a security interest in the cattle and all proceeds from the cattle.

- George was obliged to ensure that the cattle were all branded with the Co-op's brand.

- George was required to and did sign a promissory note to the Co-op for $75,000.00, plus interest and execute a separate security agreement.

- George was required to notify the Co-op when the cattle were sold and "to ensure that the entire proceeds of sale of the Livestock will be paid directly to the Association".

- The Co-op was to pay to George any sale proceeds in excess of the amount owed by George to the Co-op.

The Co-op advanced a $75,000.00 loan to George. George used it to purchase 126 cattle. George did not brand the cattle with the Co-op's brand. The Co-op did not register its security interest in the Manitoba PPSA. George decided to sell the cattle in November of 2004 and told the Co-op that he would be doing so.

However, George and Chris decided to have the cattle shipped and sold in Chris's name, because according to George's evidence, he and Chris "had tax problems". Chris was aware of the Co-op's interest in the cattle.

The sale proceeds were deposited into Chris's account at a credit union. The credit union seized the sale proceeds pursuant to a security agreement to satisfy Chris's outstanding debt to the credit union. This had not been intended by Chris or George.

The Co-op sued both George and Chris for the amount due to it. The Co-op also alleged that the transfer of the cattle from George to Chris, the sale of the cattle by Chris and the receipt and application of the sale proceeds by one or both of them were fraudulent transactions against the Co-op.

The Co-op's actions were not defended and Default Judgments were entered against both George and Chris in the sum of $82,700.00 in July of 2006.

In February of 2007, George and Chris each filed assignments of bankruptcy. Each were discharged in November of 2007. Shortly thereafter, the Co-op filed an application seeking a declaration that the judgment was not released by their discharges from bankruptcy.

At the material time, Section 178(1) of the Bankruptcy and Insolvency Act (the "Act") provided that a discharge from bankruptcy did not release the bankrupt from certain debts and liabilities, including:

> ...
>
> (d) any debt or liability arising out of fraud ... while acting in a fiduciary capacity...
>
> (e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation...

The trial Judge held that while the transaction constituted a fraudulent conveyance, the fraudulent conveyance had no relation to the initial "debt" and that Section 178(1)(d) of the Act therefore did not apply.

The trial Judge also found that neither George nor Chris were acting in a fiduciary relationship to the Co-op.

With respect to subsection 178(1)(e), the trial Judge found that there had been no allegations of false pretences or fraudulent misrepresentation with respect to the contract with the Co-op that gave rise to the initial debt, and that the claim of fraud and false pretences could not succeed on this ground.

Decision: Freedman, J.A., Hamilton and Beard, J.J.A. concurring, allowed the appeal under Section 178(1)(e) and declared that George and Chris had not been released by their respective discharges of bankruptcy [at para. 117]. Freedman, J.A. considered the following issues:

(a) Whether George had been acting in a fiduciary capacity within the meaning of Section 178(1)(d).

Freedman, J.A. observed that the Co-op had failed to make any registration regarding its security interest under the PPSA to ensure that the cattle had been properly branded [at para. 57]. He indicated that there was virtually no evidence to establish the vulnerability required to establish a fiduciary capacity, referring to the dicta of Wilson, J. from Frame v. Smith, 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99.

(b) Whether there was a "debt or liability for obtaining property by false pretences or fraudulent misrepresentation".

Freedman, J.A. observed [at para. 61] that shortly after the discharge from bankruptcy, Section 178(1)(e) was amended to read as follows:

> ..."any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim."

The issue before the trial Judge was based on the section prior to amendment. The issue [at para. 65] was "...whether the debt or liability which the Co-op sought to survive discharge resulted from obtaining property by false pretences or fraudulent misrepresentations."

Freedman, J.A. concluded that the trial Judge had failed to consider the distinction between a "debt" and a "liability" [at para. 67 and 68].

Freedman, J.A. considered the statutory interpretation of "debt" and "liability" at para. 70 to 78 and concluded that "debt" and "liability" clearly have distinct meanings [at para. 79]. Freedman, J.A. held [at para. 85] that there was a second obligation which had been tainted by fraud or false pretences:

> There was a second obligation that arose. Of course its existence was not independent of the existence of the debt, since had the debt not existed, neither would the second obligation. Nevertheless, conceptually that second obligation stands on its own. It came into existence when George and Chris fraudulently caused the cattle to be sold as if they were owned by Chris, obtained the proceeds by what was clearly false pretences or fraudulent misrepresentation (to be discussed further below) and then arranged for the proceeds of sale to be deposited, not with the Co-op, as required by the Agreement, but in Chris's financial institution. That second obligation, which in my view was an obligation of both George and Chris, was tainted by fraud at the outset, and when viewed from the perspective I have described, fits squarely within the well-accepted definition of a "liability."

Freedman, J.A. also rejected the argument that there was no definitive evidence of the egregious conduct necessary to establish fraud, stating [at para. 93] "The fact that the

original debt was legitimate does not legitimize the subsequent liability the respondents incurred for fraudulently dealing with the proceeds of sale" and [at para. 97] that "...a transaction that was innocent and in good faith at the outset, and reflected in a debt untainted by fraud, became tainted by fraud by a second, related transaction, giving rise to a liability for obtaining property by false pretences or fraudulent misrepresentation that survives discharge."

Freedman, J.A. also concluded that both George and Chris made deceitful statements which resulted in their obtaining property by false pretences or fraudulent misrepresentation [at para. 100]. He summarized the evidence which established the false pretences and fraud [at para. 101 to 107] as follows:

(1) George

> 101 George withheld relevant information from the Co-op. Specifically, while he told the Co-op the cattle were going to be sold, he did not tell the Co-op that he would be causing the cattle to be sold in the name of Chris. He did not tell the Co-op that the proceeds would not be paid directly to the Co-op as the Agreement required. He did not tell the Co-op that the proceeds would be taken by Chris and deposited into his own account. The Co-op relied on George's fraudulent misrepresentation to its detriment.
>
> 102 This deliberate non-disclosure fits squarely within the concept expressed in Alevizos where Scott C.J.M. said that "silence and half-truths can amount to a fraudulent misrepresentation" (at para. 24). In my view, that is the correct characterization of George's conduct. On this basis his liability survives discharge.
>
> 103 Further, by his conduct in participating in the fraudulent disposition of the cattle and obtaining of the proceeds by Chris, George (jointly with Chris) perpetrated the false pretence that Chris was entitled to the proceeds. On this basis also, George's liability to the Co-op survives discharge.

(2) Chris

> 104 As stated above, the judge found that any deceitful statement made by Chris "was not made to or acted upon" by the Co-op. Thus, he held that the Co-op had not "acted upon a fraudulent misrepresentation or false pretence made by Chris" (at para. 46). The two concepts should be dealt with separately. In Chris's case, it is necessary to deal only with false pretences.
>
> 105 Chris falsely held out to the transport driver and the auctioneer that the cattle were his to sell. More importantly, he held out to the auctioneer that he was entitled to obtain the proceeds of sale. These were representations of present fact, falsely made, depriving the Co-op of property to which it was entitled. To paraphrase what was stated in Buland, Chris made something that was not the case appear to be true. In my opinion, his

conduct constitutes obtaining property by false pretences.

106 The Co-op need not show that it relied on any representation made to it by Chris, for the "false pretences" portion of subs. (e) to be satisfied. As the judgment against him shows, he deceitfully held out to the transport driver and auctioneer that he owned the cattle, and it is undisputed by the Co-op thereby suffered loss. Although he had no relationship or dealings with the Co-op, he nevertheless obtained its property by pretences which he knew to be false. The judgment against him is based on that knowledge. It is not released by his discharge.

107 Having found that Chris obtained property by false pretences, it is not necessary also to decide whether his liability continues on the basis of fraudulent misrepresentation, as the two bases of liability are alternatives. Only one must be proved to engage the subsection. Therefore, whether, for purposes of the Act, a fraudulent misrepresentation must be made directly to the creditor claiming loss is a question best left for another day, when it is necessary to decide it.

108 Finally, Freedman, J.A. held that Section 178(d) and (e) ought to be construed broadly, and that the fact that George and Chris had not been motivated by dishonest intent and that their actions were the result of "inadvertence, negligence and incompetence" was no defence. After referring to a number of authorities [at para. 108 to 114], Freedman, J.A. adopted the position of the Alberta Court of Appeal on this point, stating [at para. 115 and 116]:

115 In McAteer v. Billes et al, 2006 ABCA 312 (CanLII), 2006 ABCA 312, 297 A.R. 365, in commenting on the purposive approach to subs (e), Fruman, J.A. said (at para. 10):

> The bankruptcy scheme is intended to benefit honest, but unfortunate, debtors: Giannotti (Bankrupt), Re 2000 CanLII 16928 (ON C.A.), (2000), 138 O.A.C. 316; 51 O.R. (3d) 544 (C.A.). In their own way, courts have taken a purposive approach to interpreting s. 178(1)(e), to ensure that dishonest debtors do not benefit from their dishonesty.

116 That approach is, in my respectful view, the correct one, which I adopt and apply here. The respondents ought not to be allowed to benefit from their dishonesty, regardless of motive.

Animal Keepers Liens -- Manitoba Stable Keepers Act -- Loss of Lien by Delay.

Harold Orr and Heatherington Properties Ltd. ("Orr" and "Heatherington") sought a judgment against Douglas Stefanson and Interlake Wapiti Ranches Ltd. ("Stefanson") for the value of elk which they claimed were due to them pursuant to an investment arrangement they had made with Stefanson, who had an elk ranch. Stefanson claimed judgment against Orr and Heatherington for costs allegedly due to Stefanson for feeding and caring for the elk. An issue arose at trial as to whether or not Stefanson could maintain a lien against the elk for the 2 1/2 year period it took for the claim to come to trial.

This summary is restricted to the decision of the Court concerning the availability of a possessory or a Stable Keepers Lien under Manitoba law.

Decision: Dewar, J. held [at para. 93] that a party claiming a Stable Keepers Lien had an obligation to act quickly in enforcing its lien. Failure to do so could disentitle the claimant to lien rights. Dewar, J. stated [at para. 89 to 93]:

> [89] There is no doubt that the defendants provided some care and maintenance to the plaintiffs' property and they may have been entitled to advance a common law possessory lien upon the animals.
>
> [90] There is also currently an open question as to whether fencing animals in a pasture or fenced area such as existed here would make the defendants eligible to claim a stable keeper's lien pursuant to The Stable Keepers Act, C.C.S.M. c. S200. Although Scurfield J. in the case of Ference v. Wohlers, 2006 MBQB 156 (CanLII), 2006 MBQB 156, held that a farmer who allowed another's buffalo herd to be pastured on his farm was eligible to claim a stable keeper's lien, the Manitoba Court of Appeal at 2007 MBCA 68 (CanLII), 2007 MBCA 68, at para. 8, specifically left that question undecided until another day, preferring instead to dismiss the farmer's claim because he had not complied with the notice provisions of The Stable Keepers Act.
>
> [91] I too need not decide the question as to what kind of lien was being advanced. Whether it was a Stable Keepers Act lien, or whether it was a possessor lien, I am not prepared to allow the corporate defendant any monies for any care given to the animals of the plaintiffs after September 15, 2007. Absent clear statutory authority, a person claiming a lien is not entitled to charge the owner for maintaining the animals while he prevents their release. A similar sentiment was expressed in the case if Pease v. Johnston, 1905 CarswellNWT 27, (1905), 1 S.L.R. 208, where a party claiming a lien on two horses was not entitled to charge for caring for the horses during the time he was exercising his lien. In coming to its decision, the court made the following comments, at para. 8:
>
> > ... In the first place, no case was cited to me nor can I find any in

> which it was held that a person holding a lien upon personal property has the right to make such charges against the property; in fact, the decisions are quite the other way, and it is only necessary to refer to the case cited by Winters's advocate at the trial -- Somes v. British Empire Shipping Co., 8 H.L.C. 338, 11 Eng. Rep. 459. I refer to the judgment of Lord Wensleydale, at p. 345 of 8 H.L.C. He is reported as follows: "Two principal points have been raised in this case. The first is whether if a person who has a lien upon any chattel chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has by law a right to add to his lien upon a chattel a charge for keeping it until the debt is paid. That is in truth a charge for keeping it for his own benefit, not for the person of the peson (sic) whose chattel is in his possession". This view was practically concurred in by all members of the Court. As I understand it, what is intended by the party keeping the property for his own benefit is that he is keep ing (sic) it for the purpose of enforcing his claim, and that he will not be allowed therefore to make such charge. ...

[92] I am of the view that the corporate defendant is not entitled to any maintenance charges after September 15, 2007. Essentially, the defendants are trying to have their cake and eat it too. They did not allow the plaintiffs to have access to their herds, yet still insist on claiming a maintenance fee for the animals during the period that they would not let the plaintiffs remove the animals.

[93] It seems to me that where a party has a wasting asset over which it claims a lien, it should act quickly in enforcing its lien, including the right of sale associated with that lien, if any. However, it cannot sit, and make money from the animals when there is no concurrence on the part of the owners to pay any ongoing maintenance fees. I do not accept that the corporate defendant is entitled to sit and continue to feed and house the animals for two and one-half years after asserting its lien of whatever description, and expect the plaintiffs to pay for the costs of its delay, especially where the maintenance fees charged exceed the value of the animals which were retained.

** CREDITS **

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