LexisNexis® Agricultural Law *NetLetter*

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**** HIGHLIGHTS ****

* A Justice of the Alberta Court of Queen's Bench has concluded that a clause in a farm insurance policy which excludes coverage for "business pursuits" other than farming prevented a farmer who bred and sold horses from being covered for a claim for personal injuries sustained by a horse buyer to whom he provided horse riding lessons. The Court held that providing horse riding lessons did not fall within the definition of "farming" under the policy. [Editor's Note: The results of this decision seem harsh; however the lesson to farmers is clear. If farmers are involved in businesses other than farming, they must be careful to ensure that they obtain proper insurance coverage for both farming and other business activities.]. (Burch v. Intact Insurance Co., CALN/2014-021, [2014] A.J. No. 540, Alberta Court of Queen's Bench)

* A Justice of the Ontario Superior Court of Justice (Small Claims Court) has considered the doctrine of emblements, which permits tenants to enter on land following the termination of a lease for the purpose of harvesting crops planted by the tenant on the land. In this case, the Court held that a tenant could not rely on the doctrine, because when the tenant planted a winter crop of triticale in the fall of 2010, the farmer had no "reasonable expectation" that he would be able to lease the land in 2011, only a "hope" that he might be able to outbid other potential tenants for the land. (Vieraitis v. Fitzgerald, CALN/2014-022, [2014] O.J. No. 2596, Ontario Superior Court of Justice)

**** NEW CASE LAW ****

Burch v. Intact Insurance Co.; CALN/2014-021, Full text: [2014] A.J. No. 540; 2014 ABQB 306, Alberta Court of Queen's Bench, S.J. Greckol J., May 20, 2014.

Insurance -- Farm Policies -- Exclusions for Other Business Losses.

Terry Burch ("Burch") brought an application to compel Intact Insurance Company (the "Insurer") to pay a judgment which Burch had obtained against Christopher Miller ("Miller"), a farmer, whose activities included horse breeding.

In November of 2000, Miller sold Burch an untrained horse.

As part of the sale, Miller agreed to train the horse for 90 days and to provide Burch with 30 days of lessons on how to ride and handle the horse for a fee of $500.00.

In May, 2001, Burch was thrown from the horse and injured during a lesson.

Miller died later that year and Burch notified the Insurer of a potential claim.

In May, 2003, Burch commenced a personal injury action against Miller's Estate.

Burch obtained a judgment in April of 2011 which was not paid by Miller's Estate.

When Miller obtained insurance, he advised his broker that he had no occupations other than farming, and that he was a full-time farmer (horse breeder). Miller did not disclose the fact that he provided horse riding lessons.

Had Miller made the disclosure, the risk would have been stated on the application, and the Insurer would have been required to approve the application. The type of coverage would have had to have been provided by a speciality market insurer.

The policy excluded coverage for bodily injury arising out of "business pursuits, except farming. The wording of the exclusion is quoted below.

The issues at trial were whether:

1. Miller failed to disclose or misrepresented a material fact in obtaining the policy, or
2. An exclusion clause in the policy applied.

Decision: Greckol, J. dismissed Burch's action [at para. 49].

Greckol, J. concluded that Burch had made out a prima facie case under s. 530 of the Insurance Act (Alberta) but held that Burch was "subject to the same equities" as Miller Estate would have had vis-à-vis the Insurer, meaning that the Insurer could raise the same defences against Burch as it could have raised against the Miller Estate [at para. 29].

Greckol, J. considered the following issues:

1. Whether Miller had failed to disclose, or had misrepresented, a material fact?

After reviewing the law concerning disclosure and misrepresentation of material fact [at para. 31 and 32], Greckol, J. concluded that the Insurer had not proved Miller failed to disclose or misrepresented a material fact within his knowledge at the time he applied for the insurance, because there was no evidence that Miller intended to sell horse riding lessons when he completed his farm insurance application in July of 2000 [at para. 34].

2. Whether the exclusion clause applied?

Greckol, J. summarized the relevant provisions of the exclusion clause [at para. 38 and 39] as follows:

> "...This insurance does not apply to:
>
> a. "Bodily injury" ... arising out of "business" pursuits of any "Insured" except:
>
> (1) Activities therein which are ordinarily incident to non-business pursuits; and
>
> (2) Farming;
>
> (3) "Business" pursuits stated on the Declaration Page and for which a premium has been charged.
>
> [39] The definitions in aid of the "business pursuits" exclusion are:
>
> "'Business' means any continuous or regular pursuit undertaken for financial gain including a trade, profession or occupation, but does not include farming or farm activity"; and
>
> "Farming" means ownership, maintenance or use of premises for the production of crops or the raising or care of livestock, including all necessary farming operations. Farming also includes the operation of roadside stands and farm markets maintained principally for the sale of the Insured's farm products."

Greckol, J. relied on the interpretation of a similar exclusion in Tam (Litigation guardian of) v. Lee 1998 CanLII 14935 (On SC), (1998), 167 DLR (4th) 353, [1998] OJ No. 4567 (QL) (Ct J (Gen Div)). In this decision, Lax, J.:

> "...held that the correct approach to applying the defintion was to (i) "look to see if the activity in question is undertaken for financial gain and bears the hallmarks of continuity or regularity" and (ii) "consider if the pursuit can reasonably be regarded as one analogous to a trade, profession or occupation." She further held that, "[i]t should not matter if the pursuit is undertaken on a temporary basis. Nor should it matter if it is undertaken with another pursuit which is compatible with it..." [quoted in para. 40].

Greckol, J. concluded [at para. 42] that:

> "..."Farming" is defined in the Policy as "ownership, maintenance or use of premises for the production of crops or the raising or care of livestock, including all necessary operations". It "also includes the operation of roadside stands and farm markets maintained principally for the sale of the

> Insured's farm products". While horse breeding (that is, "the raising or care of livestock"), one of Miller's farm activities, clearly falls within this definition, providing horse riding lessons does not."

Vieraitis v. Fitzgerald; CALN/2014-022, Full text: [2014] O.J. No. 2596; Ontario Superior Court of Justice, J.D. Searle Deputy J., May 20, 2014.

Landlord and Tenant -- Emblements and the Entitlement to Harvest Crops after Termination of a Lease.

An Ontario farmer, John Vieraitis ("Vieraitis") had been renting land from a landlord, Gerald Fitzgerald ("Fitzgerald"), Vieraitis sued Fitzgerald for damages for $25,000.00 for the loss of a triticale crop.

Triticale is a hybrid grain that is planted in the fall for harvesting in the summer of the following year.

Vieraitis argued that he had leased the land for both 2010 and 2011.

Fitzgerald denied that he had leased the land in 2011; denied that he had given Vieraitis permission to plant a winter crop in 2010 for harvest in 2011 and indicated that he had told Vieraitis that he would not lease the land to Vieraitis but to a third party.

In the spring of 2011, Fitzgerald decided to lease the land to a Mr. Choy who was willing to pay more rent. Fitzgerald authorized Choy to turn under Mr. Vieraitis' crop, and he did so.

Decision: Searle, J. dismissed Vieraitis' action at para. 33.

After considering the evidence in some detail, Searle, J. concluded [at para. 18] that Vieraitis did not have a valid lease for 2011.

Searle, J. then considered whether Vieraitis had a claim based on the "doctrine of emblements".

Searle, J. adopted the definition of emblements in Anger & Honsberger: The Law of Real Property, 3rd edit; Canada Law Book. Emblements are:

> "The produce of sown or planted land. The word 'emblement' is derived from the old French 'emblaement', from the verb 'emblaer' and the Latin "imbladare', meaning to sow with corn being used in the European sense of wheat and other grains."

Searle, J. concluded that there was no dispute that triticale is an emblement.

Searle, J. quoted the doctrine of emblements, in Anger & Honsberger, as follows [at para.15]:

> "The right to emblements is a right given by law to a person who has an estate of uncertain duration that unexpectedly comes to an end through no act or fault, to take growing crops which were sowed or planted. Emblements comprise only produce of a species that grows by industry and that ordinarily repays the labour by which it is produced within the year in which the labour is bestowed and the rights extends to only one crop of a species that yields more than one crop. The species are grains, roots, clover, potatoes and hops, but not growing grass even if produced from seed and ready to cut as hay. The doctrine of emblements also does not extent to other natural products of the soil that are not planted annually for present profit only, but are planted for the future profit of the tenant and successive occupants.
>
> If the tenant sows the land for crops that are harvested annually and dies before harvesting them, to compensate for labour and expenses, the tenant's personal representatives are entitled to the crops as emblements. This is because the life estate was ended by "an act of God", and that it is a maxim of the law that no one is to suffer from an act of God; furthermore, good management is for the public benefit and should have all the security the law can give. The doctrine of emblements does not apply if the estate of the person who sowed the crops is ended by that person's own fault or act, as where the estate is forfeited for breach of a condition. The common law determined that where a widow who held land during widowhood remarried, that constituted an act or fault that terminated the life estate and the right of emblements did not apply.
>
> Since the doctrine of emblements is based upon uncertain duration of the estate, it applies to a tenant pur autre vie who, upon the dealth of the cestui que vie, is entitled to the crops sown and extends to a tenant under a lease granted by a life tenant or otherwise determinable upon a life, so that, when the tenant's lease is terminated by the death of the life tenant or other person whose death terminates the lease, the lessee is entitled to the crops that were sown.
>
> Whoever has the right to emblements has the right of entry upon the land to gather them, if shown that the crop is fit for harvesting or needs care or cultivation."

Searle, J. observed that Vieraitis took the position that when he planted the triticale in late 2010, he did not know that his tenancy would be terminated before being able to harvest the crop and that the tenancy was for an uncertain duration that unexpectedly came to an end [at para. 17].

Searle, J. referred to a number of decisions concerning leases that were "time certain" and "uncertain duration":

1. Burrowes v. Carisn [1845] O.J. No. 113, 2 U.C.R. 288;

2. Thoma v. Szusz et al [1980] O.J. No. 203 (HCJ); and

3. Van Kruitstum v. Dool 1997 CanLII 12284 (ON SC), [1997] O.J. no. 6336, 35 O.R. 3rd 430 (O.C.G.C.).

Searle, J. adopted the conclusions in Thoma and Van Kruitstum [at para. 31] that:

> "...the right to emblements in the doctrine of emblements can arise from uncertainty of termination (as distinct from uncertainty of term), depending on "what is known or expected by the tenant at the time he sows his crops".

Searle, J. concluded that Vieraitis could not have had a reasonable expectation that he would lease the land in 2011, only the "hope" that he might be able to outbid competition for the land [at para. 32].

** CREDITS **

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