

PLAN FOR THE BEST... and prepare for the worst

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The sad demise of Greenshell NZ has affected many in the mussel farming industry, whether they had direct relationships with the company or not. Two of the companies most directly involved ended up in court as a result of Greenshell being placed in receivership in the case of *Greenshell NZ Ltd (in Receivership) v Tikapa Moana Enterprises Ltd* [2014] NZHC 1474.

In the wake of Greenshell being placed in receivership, two companies, Tikapa Moana Enterprises Ltd and Kennedy Bay Mussel Company (NZ) Ltd (KBMC), decided to cancel the leases and licences they had granted Greenshell to operate marine farms on sites for which they held coastal permits. The receivers of Greenshell applied to the High Court for orders preventing that cancellation, in part because of its impact on the value that they could recover from the assets of Greenshell. Tikapa and KBMC opposed the action, though Tikapa eventually negotiated a resolution with the purchaser of Greenshell's assets and stepped aside from the case.

KBMC continued to defend the case, arguing that it should not be forced into a relationship with that purchaser against its will. Ultimately, the Court upheld KBMC's exercise of the cancellation rights contained in its leases and licences, leaving the company free to negotiate whatever new arrangements it chose.

The case should serve as a spur for many in the industry to ponder whether the documentation of their business arrangements would be robust enough to survive a legal challenge in such difficult circumstances. Like many small to medium sized businesses, marine farmers often maintain business relationships that aren't underpinned by written agreements, or for which agreements are signed at the start of a relationship, then not reviewed or

updated for years or decades.

It will come as no surprise that lawyers will tell you it's better to have such agreements written down and regularly reviewed. But that is particularly true in the marine farming industry, where operations are ultimately reliant on coastal permits that don't provide anything like the certainty that land ownership or leases do. Statutes and centuries worth of case law have established principles for resolving disputes that relate to land, but little legal guidance exists on how to unwind arrangements for operating marine farms.

The court case KBMC found itself involved in would have been trying enough, but imagine the position the company would have been in if there was no written agreement between the parties at all, or if the agreements didn't give KBMC the right to cancel. Even though the court declined to make the orders sought by the Greenshell receivers, its decision does not give any hint as to how the parties were to deal with the fact that Greenshell, presumably, retained ownership of the lines and crop on the sites at the time of cancellation.

When business relationships are working well it's human nature not to give much thought to what might happen when and if things go bad. But that's precisely the time when it is easiest (and cheapest) to get the paperwork straight.

All parties in the industry could benefit from asking themselves a number of questions: Are our business arrangements clearly documented? Have those documents been kept up to date, so that they reflect how the parties actually interact today, or have practices changed in a way that differs from the written agreements? Do the documents include mechanisms for regularly reviewing line


fees or other payments, so that they keep pace with the market? And do they make it clear when and how either party can bring the arrangement to an end, and what happens once they do?

With respect to the last point, everyone should be cautious of agreements that provide, for example, that the parties will "agree" on the value of lines and crops left on the water when the relationship ends. The reality is that, by the time a business relationship has come to an end, the parties might not be in a good position to reach agreement on such a crucial question. Mechanisms that can resolve disagreements before they get to court are always preferable.

Finally, for the cynics who will write this off as just another example of lawyers

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seeking to line their pockets: who do you think will pay more to their lawyers – the small farmer who gets a lawyer (one who has experience in the field) to review their leases, or the one who didn't and had to take or defend a court case to protect their interests?

Makes you think of that old saying about an ounce of prevention being worth a pound of cure... 

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