

**IN THE DISTRICT COURT
AT INVERCARGILL**

**I TE KŌTI-Ā-ROHE
KI WAIHŌPAI**

**CIV-2016-025-000041
[2019] NZDC 324**

BETWEEN

SAUNDERS DAIRY HOLDINGS
LIMITED
Plaintiff

AND

AVONDALE PASTORAL LIMITED
PARTNERSHIP
Defendant

Hearing: 3, 4 and 5 September 2018
Plaintiff's closing submissions filed 28 September 2018
Defendant's closing submissions filed 12 October 2018

Appearances: A Tobeck for Plaintiff
G Wilkin for Defendant

Judgment: 14 January 2019

RESERVED JUDGMENT OF JUDGE P R KELLAR

Introduction

[1] This case relates to a contract to graze a herd of dairy cows. The plaintiff ("Saunders Dairy") leased part of Mr Trevor Saunders' farmland at [address deleted] in Southland with a view to grazing dairy cows over the winter of 2015 on a crop of kale, HT swedes and rape that Mr Saunders Senior had sown the previous spring. The defendant ("Avondale Pastoral") sent a number of in-calf dairy cows to the farm for winter grazing.

[2] Saunders Dairy sent three invoices to Avondale Pastoral, the first two of which Avondale Pastoral paid. Avondale Pastoral refused to pay the final invoice because it

maintains that Saunders Dairy failed to take reasonable care of the dairy cows on account of their poor condition at the end of the grazing contract.

[3] Saunders Dairy claims that Avondale Pastoral owes not only the amount of the final invoice but also for failing to provide the complete number of dairy cows for grazing. Avondale Pastoral cross-claims that it has suffered loss as a result of the dairy cows being returned in poor condition.

[4] It is regrettable that the terms of the grazing contract were not reduced to writing. The parties agree however that the express oral terms of the contract were that Saunders Dairy would offer Avondale Pastoral's cows the equivalent of 15 kg of dry matter per cow per day on the property at [address deleted] for which Avondale Pastoral would pay Saunders Dairy \$32 per cow per week.

[5] The parties are at odds as to whether Avondale Pastoral had to provide 400 cows for grazing from the start of the grazing period throughout the next nine weeks until 28 July 2015. They are also at odds as to the nature of the feed; whether Avondale Pastoral had to provide NAIT numbers within 48 hours of delivery of the cows; and whether Avondale Pastoral had to provide an animal status declaration.

The key issues

[6] The keys issues that determine this proceeding are:

1. Was it a term of the contract that Avondale Pastoral was obliged to send 400 cows to Saunders Dairy at the start of the grazing contract and ensure that there were that number of cows on the property throughout a nine-week period?
2. Did Avondale Pastoral breach the contract by failing to send 400 cows to the property at the start of the contract and ensuring there were that number of cows on the property throughout a nine-week period?
3. If so, what loss (if any) has Saunders Dairy suffered?

4. Did Saunders Dairy breach the contract by failing to offer the cows the equivalent of 15 kg of dry matter per cow per day?
5. If Saunders Dairy did breach that term of the contract what loss (if any) has Avondale Pastoral suffered?
6. Was it an implied term of the contract that the Saunders Dairy would at least maintain the cows in the condition they were in at the start of the grazing contract and, if not, what loss (if any) has Avondale Pastoral suffered.

Conclusions – summary of reasons

[7] For reasons that follow I make the following determinations in respect of each of the above issues:

1. Was it a term of the contract that Avondale Pastoral was obliged to send 400 cows to Saunders Dairy at the start of the grazing contract and ensure that there were that number of cows on the property throughout a nine-week period?

It was a term of the contract that Avondale Pastoral would use their best endeavour to send 400 cows to the property at the start of the contract or as near to it as practicable. However, Avondale Pastoral was not obliged to send exactly 400 cows to the property as the exigencies of farming must be taken into account.

It was also a term of the contract that Avondale Pastoral would use their best endeavours to ensure that that number of cows remained on the property throughout the nine-week period of the contract but they were not bound to do so. Again, this recognises the exigencies of grazing dairy cows which are about to calve and the fact that deaths occur for a variety of reasons. These are the realities of dairy farming and grazing contracts that both parties have to accept.

2. Did Avondale Pastoral breach the contract by failing to send 400 cows to the property at the start of the contract and ensuring there were that number of cows on the property throughout a nine-week period?

No, for the reasons given above. The requirement to deliver 400 cows at the start of the contract and to keep that number on the property throughout the contract is a “best endeavours” obligation taking into account the exigencies of dairy farming and grazing contracts.

3. If so, what loss (if any) has Saunders Dairy suffered?

None.

4. Did Saunders Dairy breach the contract by failing to offer the cows the equivalent of 15 kg of dry matter per cow per day?

No. Saunders Dairy made the equivalent of 15 kg of dry matter available to the cows in a variety of forms including hay and baleage.

5. If Saunders Dairy did breach that term of the contract what loss (if any) has Avondale Pastoral suffered?

None.

6. Was it an implied term of the contract that the Saunders Dairy would at least maintain the cows in the condition they were in at the start of the grazing contract and, if not, what loss (if any) has Avondale Pastoral suffered.

It is an implied term of a contract to graze dairy cows that the grazier will at least maintain the condition of the cows throughout the term of the contract although some loss of condition is not unexpected due to the fact that the cows were “early calving”. However, there is no sufficient evidence to establish what was the condition of the cows at the start of the contract. Nor is there sufficient evidence to show that any loss of condition was attributable to any failure to provide sufficient feed to the cows.

The express terms of the grazing contract

Was it a term of the contract that Avondale Pastoral was obliged to deliver 400 cows to the property?

[8] Mr Dean (known as Jock) Saunders is the sole director and shareholder of Saunders Dairy. In January 2015 a stock agent, Mr David Duncan, called in to see Mr Saunders. Mr Saunders and Mr Duncan began to have negotiations about grazing Avondale Pastoral's dairy cows on the land which Saunders Dairy had leased from Mr Saunders Senior. The initial discussions were that the cows would be fed 16 kilos of dry matter per day for which Saunders Dairy would receive \$33 per week per cow. Mr Duncan would receive \$2 by way of commission and Saunders Dairy would receive the balance of \$31 per cow per week.

[9] Mr Stuart Telfer was a contract milker for Avondale Pastoral's farm. Together with his wife Tristan (known as Max) Collins they managed three farms with some 5,000 cows. Mr Jock Saunders says that, as a result of an issue between Mr Duncan and Avondale Pastoral, Mr Telfer contacted him direct to discuss grazing the dairy cows. Mr Saunders says that a meeting took place between him and Mr Telfer in early May 2015 at which it was agreed that Avondale Pastoral would pay \$32 per week per cow and that the cows would be fed 15 kilos of dry matter per day. He says that the price reduced from \$33 to \$32 per cow per week because Avondale Pastoral would not have to pay Mr Duncan's commission and the amount of feed also reduced because Avondale Pastoral was paying less. Mr Saunders also says that he and Mr Telfer agreed that there would be 400 cows grazed for nine weeks.

[10] Mr Telfer has no specific recollection of the details of the discussion between him and Mr Saunders. He says that they would have discussed the likely numbers of cows and timeframes for grazing. He did recall that there was no discussion concerning HT swedes as the farm for which he was a contract milker had a general policy that HT swedes should not be fed to their cows.

[11] Ms Collins first became aware of Mr Jock Saunders as a grazier through the stock agent, Mr Duncan. Mr Duncan knew that Saunders Dairy was offering grazing.

He also knew that Avondale Pastoral was looking for winter grazing for their cows. Ms Collins says that Mr Duncan was supposed to put an agreement together some time prior to Christmas 2014 but that as they got closer to May 2015 he had failed to do so.

[12] At that stage on 28 April 2015 Mr Duncan sent Ms Collins an email with a copy to the Saunders in which he wrote:

...

Balance of 400 cows to be grazed at \$33 plus per week per head. These cows are expected mid to late May (to be notified by you). As the original ratio has now been altered we have an extra 5 hectares of crop available so we can extend if necessary the nine weeks winter grazing ...

[13] Ms Collins replied to Mr Duncan the following day, 29 April 2015, again sending a copy of her email to the Saunders. She wrote:

I believe there has been some miscommunication with the numbers.

What we were looking for was to graze 100 heifers, 01 May – 01 Aug, and then send 300 cows to you instead of the 400 cows as previously organised.

We do not have an additional 100 animals we are able to send to you.

Due to the very high rate of \$33 per heifer per week we will no longer be looking to bring them to this grazing block.

Please revert to the original plan of sending 400 cows.

Due to the empty rates each grazier will receive slightly less cows than the original estimated number.

The plan at this stage is to walk the 370 cows down on the 26th May. These will be the earliest calving cows, and will be trucked out.

For the \$33 per head per week can you please advise in writing what the cows will receive each day kg/dm, and how often they will be moved, and if they will be back fenced to the troughs or what water facilities are available?

Thanks Max

[14] Ms Collins says that she rang Mr Jock Saunders and agreed over the telephone on a figure of \$32 per cow per week for the grazing. She also says that she and Mr Jock Saunders discussed the dates they were thinking about for the early calving cows but there were no exact dates agreed upon. She also says that there was no specific discussion between Mr Jock Saunders and her as to the quantity of feed to be given to

each cow and there was no discussion in respect of HT swedes. Her evidence is that in any dealing between owners and graziers one can never be absolutely precise with dates and times for moving animals because everyone must work around the availability of transport and of personnel. She says that she and Mr Jock Saunders discussed the number of cows that were to go to the Saunders Dairy land. Ms Collins says that Mr Jock Saunders originally wanted 400 cows but that she said they had around 370 cows that they were looking to graze with him.

[15] Ms Collins says that just as with dates one cannot be precise with cow numbers either. The reason for this is it depends on the animals themselves. Some cows may have slipped (or aborted) their calf, some may not be fit to travel or to go to grazing, and some of the cows expected to go to grazing may not have got pregnant at all. She says that all graziers understand this and are relaxed about cow numbers which are usually not actually confirmed until the cows get to the grazing. The same sort of flexibility has to apply with dates of cows returning to the home farm as it depends in the expected calving date of the majority of the cows. Some will calve early and need to be returned early. The same sort of flexibility has to apply with sick or poor performing cows. Ms Collins says that these matters are just a fact of life for farmers and graziers.

[16] Mr Jock Saunders agreed in cross-examination that grazing cows is not an exact science. He also agreed that for “a whole bunch of reasons” an agreed number of cows might not make it to grazing. Mr Saunders also agreed with the proposition that there can never be a guarantee of a precise number of cows going to grazing but he stated that if one made a contract one should honour that contract.

[17] Mr Saunders and Ms Collins had different expectations about the terms of the contract. Mr Saunders expected that he would receive 400 cows or at least the 370 that Ms Collins referred to in her email of 29 April 2015. Ms Collins expected that Avondale Pastoral would send as close to that number of cows as was practicable. In fact, only 357 cows arrived on the property at the start of the grazing period on 26 May 2015. He divided the cows into three lots of 100 and one herd of 57 and took the cows to their respective lots. It was not until 9 June 2015 that Ms Collins informed Mr Saunders that another 40 cows would be sent to the property the following day. The

next day 39 cows arrived and, as Ms Collins requested, Mr Saunders added them to the herd of 57 bringing the total herd to 396.

[18] Although Mr Saunders expected 400 cows to arrive at the start of the grazing contract the exigencies of dairy farming are that that may not be possible for a variety of reasons as Ms Collins explained. To that extent, I accept her evidence that graziers understand that they might not receive the exact number of cows agreed upon. Mr Saunders appears to have understood that that was the position because Saunders Dairy's first two invoices were for the number of cows actually grazing for the number of days that they were actually there.

[19] Furthermore, the last invoice dated 10 September 2015 well after the end of the grazing period, was for the number of cows actually grazing for the number of days they were on the property. One would expect that if Saunders Dairy had considered that it was entitled to charge Avondale Pastoral for the full 400 cows then it would have sent invoices for that number rather than the actual number that were sent. The failure to send invoices for the full 400 cows is a piece of evidence that tends to support Ms Collins' evidence as to the degree of flexibility in grazing contracts. Indeed, Saunders Dairy's initial pleading was based on the actual number of cows for the actual number of days grazed. Hence, I determine that although Mr Saunders expected that 400 cows would be delivered Avondale Pastoral were under no obligation than to use their best endeavours to do so.

Was it a term of the contract that the cows would remain on the property for a period of nine weeks ending 28 July 2015?

[20] The parties do not appear to have specifically agreed that the cows would necessarily remain on the property for the full nine weeks ending on 28 July 2015. As with the issue of cow numbers there is a degree of flexibility inherent in grazing contracts depending on a range of factors. Ms Collins explained that the duration of the grazing contract depends on the availability of feed, the health of the cows, the due dates for calving and transport. Mr Saunders does not appear to have taken issue with her evidence. Again, I accept her evidence that graziers understand that the duration of the grazing period is dependent on those factors.

[21] As with the numbers of cows, the Saunders Dairy invoices provide support for the view that Mr Saunders accepted that the period of the grazing contract could come to an end before expiry of the nine-week period. Neither of the invoices, which were rendered during the grazing period nor the invoice rendered in September 2015 made a claim for the remainder of the nine-week period. Hence, I determine that it was not a term of the contract that Avondale Pastoral was obliged to leave the cows on the property for the full nine-week period.

Was it a term of the contract that Saunders Dairy would offer the cows 15 kg of dry matter per cow per day and take reasonable care of the cows during the grazing contract?

[22] These two issues are inextricably linked and it is convenient to consider them together.

[23] Of the few things on which the parties agree, it is agreed that Saunders Dairy would offer the cows the equivalent of 15 kg of dry matter per cow per day. It also appears to be common ground between the parties that it is an implied term of a contract to graze dairy cows that the grazier will take reasonable care of the cows. The issue however is what it means to take reasonable care of the cows in the context of the grazing contract and who bears the burden of proving whether Saunders Dairy breached the implied term.

[24] This is made all the more difficult in this case because of the absence of a written contract. It seems to be generally assumed however that by feeding the cows 15 kg of dry matter per cow per day will at least maintain the cows of the cows. The condition of cows is determined in large part by a Body Condition Score (BCS) that is assessed by reference to a number of observable physical characteristics of a cow. But it is not an exact science and a number of factors, aside from the amount and type of feed, can affect the BCS of dairy cows. It also seems to be generally agreed that as the majority of the cows were early-calving that the best that could be hoped for is that the cows would maintain their BCS throughout the grazing period. And, a slight loss of condition would not be unexpected. But the real difficulty in this case is knowing what it means to take reasonable care of the cows. For instance, if Saunders Dairy

made 15 kg of dry matter available to each cow each day but some cows died or became sick (as happened) could it be said that Saunders Dairy failed to take reasonable care of the cows?

[25] I am satisfied that it is an implied term of a contract for the winter grazing of in-calf dairy cows that the grazier shall take all steps necessary to take reasonable care of the cows during the contract. I am less certain as to what it means to take reasonable care of the cows beyond provision of the specified amount of feed.

[26] The disagreement amongst counsel as to who bears the burden of proving that the grazier failed to provide reasonable care to the cows is more apparent than real. Counsel for Saunders Dairy submits that the burden lies on Avondale Pastoral to prove, on the balance of probabilities, that the cows were in worse condition when they left the property than when they arrived and that any fall in the condition of the cows was attributable to the fault of Saunders Dairy.

[27] Conversely, Avondale Pastoral contends that the burden lies on the grazier to prove, to that same standard, that the grazier was not responsible for any lessening of condition of the cows. For reasons I explain below, determination of these issues does not turn on where the burden of proof lies. However, to the extent that it is helpful to make a finding about where the burden lies I am satisfied that it lies on the grazier to disprove negligence on its part.¹

[28] However, it is for Avondale Pastoral to prove what taking reasonable care of the cows means. I am satisfied that it is an implied term of the grazing contract that Saunders Dairy would take reasonable and proper care of the cows and is liable for injury caused to them by negligence or neglect of such reasonable and proper care.

[29] The questions therefore are what condition were the cows in when they arrived on the property; did Saunders Dairy offer the cows 15 kg of dry matter per cow per day; did the grazier fail to take reasonable and proper care of the cows beyond the provision of feed; what condition were the cows in when they returned to Avondale

¹ McDermot v Davis (1922) GLR 586; Humphrey v Phipps [1974] 1 NZLR 650; Newton v Andrews (CP 11/94)

Pastoral; if they were in poor condition, what was the cause or causes of their condition.

[30] There was scant evidence as to the condition of the cows at the start of the grazing contract. Mr Saunders senior, who by his own admission is not and never would want to be a dairy farmer, observed that the cows were a “bit light” when they arrived on the property. Mr Stoddart, who has been farming in the region for some 25 years, said that from where he was looking the cows appeared to be in very light condition. He is not a dairy farmer either but he said that he noticed some cows that appeared to have been left behind as the other cows walked to the property. His evidence was that it was obvious that those cows were in poor condition.

[31] Mr Craig is truck driver of long standing who encountered the herd as they were being walked to the property. There was some controversy about what an exchange that is said to have taken place between him and Mr Telfer but that is of no moment. His evidence however is that he noticed that there were a couple of cows at the bottom of a hill that could have been lame or not strong enough to make the trip. He drove through the herd of cows again and noticed two cows on the road before the hill but of course he could not say if they were the same cows he had seen earlier.

[32] Mr Telfer accompanied the cows during their walk to the property. He referred to his contractual obligation to the owner of the cows under his management to ensure that as at 1 May in any year the cows would have a minimum BCS of 4.5 and an average BCS of 4.7. Some photographs of cows were produced but they are inconclusive as to the BCS of the cows that went onto the property. The then Agri-Business manager for MyFarm Management, Mr Blyth prepared a report dated 31 March 2015 in respect of a total of 510 cows on the grazing area in which he recorded that the milking herd were being fed 15 kg of dry matter and 2 kg of pasture silage per day. He also noted that a mob of lighter conditioned cows were getting additional feed. He recorded that the final pregnancy scan for the milking cows had been booked in for 14 May before the cows go away for grazing and that all transport for cows to wintering had been booked in for the last week of May and early June. He wrote “BCS of the milking cows is 4.4-4.6 which is the ideal range for time of season.

[33] Hence, there is relatively little evidence as to BCS of the cows that were walked to the property.

[34] Mr Telfer said that he did a calculation as to what the cows were being fed and concluded that they were only being fed 12 to 13 kilos of dry matter each per day. The case for Saunders Dairy however is that Mr Telfer failed to take into account that the cows were also being fed hay, an issue that I will examine shortly. Mr Telfer visited the farm on 12 June 2015 and said that the cows were not getting any skinnier than when they arrived on the property but that they were not getting any fatter. He paid visits to the property on two other occasions, on 24 June and 4 July. Furthermore, his farm manager, Francis gave the cows an injection on 15 July. It seems that no issue was raised as to the condition of the cows as a result of those visits to the property. Furthermore, Avondale Pastoral did not check the condition of the cows at any time between 15 July and the date on which the cows returned to the farm.

[35] Ms Kennedy is a farm consultant who was engaged to measure the crop, which the cows were going to be fed. Using a figure of 14 per cent for chow she calculated the total dry matter available. Mr Arlidge produced a table that showed that the crop would have 199,277 kilograms of dry matter. Further, Ms Kennedy opined that hay should be calculated at 230 kilograms of dry matter and she accepted that a large round bale of baleage is the equivalent of 230 kilograms of dry matter.

[36] Mr Saunders' evidence is that he made available to the cows the crop, which Ms Kennedy assessed to be available, plus some 558 bales of baleage and 180 bales of hay. The baleage would amount to 128,340 kg of dry matter and the hay would be a further 41,400 of dry matter giving a grand total of 369,017 kg of dry matter.

[37] Given what Mr Saunders said was available to be fed to the cows together with Ms Kennedy's evidence about what she measured (if one includes the hay that she did not observe) then there ought to have been enough feed on hand to offer the cows 15 kg of dry matter per cow per day throughout the term of the grazing contract.

[38] A significant number of cows returned to the Avondale Pastoral property in poor condition. A number of cows died or had to be culled during the grazing contract.

Ms Taylor, a veterinary surgeon, said that the majority of the cows had a BCS of less than 5. Her report was supported by a list of individual cows. Mr Arlidge, whose involvement with Avondale Pastoral began on 1 May 2016, carried out a thorough analysis of various documents and concluded that unless there are other clinical symptoms the only conclusion one could reach to explain the poor condition of the cows is that they were severely malnourished.

[39] Both Ms Taylor and another veterinarian who gave evidence, Ms Lewis gave evidence about the ability of a grazier to improve the BCS of cows while they are being fed on a winter crop. She said that it is not easy to put on condition and that it depends on a lot of factors including when the cow is due to calve. She also said that towards the end of the grazing and just before the cow is due to calve it is difficult for the cow to put on weight because they cannot eat as much as the calf is taking more room in the cow.

[40] Ms Lewis said that the condition of the cows should not have deteriorated if they were fed adequately and not suffering from a pathological condition. She said that under good environmental conditions, with cows further from calving and with adequate feed it is possible for cows to put on 0.5 of a BCS over winter but that otherwise it is difficult for cows to put on body condition over the winter,

[41] Both of the veterinary expert witnesses were examined as to whether there are other possible causes for the cows losing condition. Ms Taylor said that she would look for underlying disease that may contribute to weight loss including lymphomas, foreign bodies in the rumen along with abdominal masses, liver disease, septicaemia, and wide-spread infection. She said that one would also look for Johne's disease and a number of other underlying causes that one would look for in an autopsy.

[42] The general proposition is that if the cows were offered 15 kg of dry matter per cow per day then they should not lose condition or at least not lose condition significantly as they came close to calving. I have reached the conclusion that Saunders Dairy offered the cows that quantity of feed in various forms. From the evidence of the veterinarians I am unable to exclude the possibility that the condition of the cows when they returned to Avondale Pastoral was either attributable to their

condition at the start of the grazing contract or underlying disease or environmental factors that are due to no fault on the part of Saunders Dairy.

[43] It follows that Saunders Dairy has established, on the balance of probabilities, that it did not fail to take reasonable care of the cows during the grazing contract. The counter-claim therefore fails.

[44] The plaintiff's claim and the defendant's counter-claim have failed. All things being equal each party should bear its own costs. If however the parties seek costs, the party must file a brief memorandum to that effect.

P R Kellar
District Court Judge