IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CIV-2019-054-000167
[2019] NZDC 11201

BETWEEN	KEVIN ALLAN ATKINSON Plaintiff
AND	JANICE MARY HAWORTH WARREN RICHARD HAWORTH Defendants

Hearing: 7 June 2019

Appearances: T Manktelow for the Plaintiff
A Harris for the Defendants

Judgment: 14 June 2019

RESERVED DECISION OF JUDGE L C ROWE
[On application for stay]

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[1] Kevin Atkinson was a share milker on a farm near Feilding, owned by the Haworths.

[2] The relationship between Mr Atkinson and the Haworths was governed by a standard Federated Farmers NZ Herd Owning Share Milking Agreement entered on 29 April 2015.[1] That agreement operated for the period 1 June 2015 to 31 May 2018.

[3] Under the agreement Mr Atkinson managed his herd on the Haworths' farm and received 50 percent of the Fonterra milk payments. Fonterra made milk payments in arrears by sending a monthly supplier's statement to both the Haworths and

[1] Mr Atkinson initially farmed with his wife. They have separated, and their property settlement gives Mr Atkinson the sole interest in the proceeds of the share milking agreement.

Mr Atkinson, which set out the payment Mr Atkinson was entitled to. Mr Atkinson's payment was then credited by Fonterra to his account on the 20th of the month.

[4] Mr Atkinson left the Haworths' farm on 31 May 2018 at the end of the share milking contract and received his share of milk payments in arrears for June and July as usual.

[5] The Haworths however, stopped the milk payments to Mr Atkinson for August, September and October, amounting to $96,550.51, with the effect the payments were instead directed, in full, to the Haworths' account.

[6] The Haworths claim that Mr Atkinson left the farm in very poor condition. They claim there was damage to the cow shed and fences, the effluent ponds were left overflowing and the grazing paddocks were covered in weeds and potholes, in breach of Mr Atkinson's obligations under the agreement concerning maintenance of the farm, its infrastructure and paddocks.

[7] The Haworths claim to have spent significant time and money remedying the damage caused by Mr Atkinson to allow their new share milker to take over the farm. They have engaged a rural expert, Gary Massicks, who has provided a report estimating that Mr Atkinson's breaches have caused, or will cause, losses of not less than $182,000, but that the probable losses will exceed $260,000.

[8] Mr Atkinson disputes the Haworths' claim. The share milking agreement contains a dispute resolution clause requiring discussion, conciliation and ultimately arbitration of disputes. There is no question the Haworths' claim, if pursued by them, is subject to that dispute resolution regime.

[9] The sharemilking agreement, however, contains a "no set off" clause in respect of milk payments. Mr Atkinson has applied for summary judgment for the unpaid milk payments in reliance on that clause.

[10] The Haworths have applied for the summary judgment application to be stayed on the grounds they have a counterclaim or set off against the milk payment which

exceeds the amount of the milk payment. They say the contract requires that counterclaim or set off to be determined through the dispute resolution process in the agreement. In this way, the Haworths say that their obligation to pay the milk payment to Mr Atkinson is also subject to the dispute resolution process.

[11] On 27 May, I issued a direction that the stay application needed to be determined first, and on 7 June I heard argument from the parties as to whether the plaintiff's application for summary judgment ought to be stayed.

Principles and discussion

[12] Any requirement to stay the summary judgment application is based on Article 8 of Schedule 1 of the Arbitration Act 1996, which provides:

> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, *or that there is not in fact any dispute between the parties* with regard to the matters agreed to be referred.
>
> (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
>
> (my emphasis)

[13] Mr Manktelow, for Mr Atkinson, argues that the "no set off" clauses in the agreement mean there is, in reality, no dispute to refer to arbitration in terms of the Haworths' obligation to pay Mr Atkinson's share of the milk payment. He relies particularly on clauses 17.27 and 17.29 of the agreement which provide:

> 17.27 During a dispute, each party must continue to perform its obligations under this agreement.
>
> 17.29 The owner will pay the sharemilker its agreed percentage of all milk payments in full, without deducting or withholding any amount. The owner has no right of set off in relation to the sharemilker's agreed percentage of milk payments under this agreement.

[14] Mr Manktelow's position is strongly supported by the recent case of *Colebrook v Okarahia Downs Limited*[2] where Associate Judge Lester held that, in relation to an identical issue, the defendant land owner was prohibited from asserting a dispute in relation to milk payments when, in context, it was governed by the "no set off" clause.[3]

[15] Mr Harris, for the Haworths, suggests *Colebrook* is distinguishable because it concerned an application to liquidate a company following a Companies Act notice, where the applicable test was whether there was *a genuine and substantial dispute*, rather than the Arbitration Act test of whether there was an *actual dispute. Colebrook,* however, is not distinguishable on this basis. Lester AJ expressly found that the (identical) terms of the share milking agreement in that case meant the parties had expressly agreed there was *no dispute* for referral under the agreement.[4]

[16] Mr Harris agreed in submissions that the Haworths could not point to any issue about the volume of milk processed, the amount paid by Fonterra and the 50 percent calculation of that amount payable to Mr Atkinson under the agreement. Apart from the claimed set off, there is no dispute raised in terms of the Haworths' obligation to pay over Mr Atkinson's share of the milk payment.

[17] Mr Harris submitted this Court had no jurisdiction to hear a claim for unpaid/withheld milk payments as there was no express provision for this in the agreement. The only express provision for dispute resolution is via the process referred to, including arbitration. The position in law is actually the opposite. This Court has jurisdiction to hear civil claims unless they are excluded.[5] For the reasons discussed in *Colebrook* the District Court's jurisdiction is plainly not excluded.

[18] Mr Harris has raised an issue as to the enforceability of Mr Atkinson's claim to interest on the unpaid milk payment. Mr Harris argues it is an unenforceable penalty. This issue is capable of being considered contemporaneously with the

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[2] *Colebrook v Okarahia Downs Ltd* [2019] NZHC 241.
[3] At [47].
[4] Again at [47].
[5] District Court Act 2016, s 74.

Haworths' liability to make the milk payment. If the interest claim is not upheld, that would not have the effect of thwarting Mr Atkinson's claim for the milk payment.[6]

[19] Applications of "no set off" clauses and a "pay now, argue later" approach are familiar to contract law, the common law and statute.[7] As the authorities demonstrate, clear "pay now, argue later" clauses constitute agreements or requirements to make such payments under a contract separate from, and despite, alternative dispute resolution processes. It would thwart the clear intent of the parties to interpret such clauses otherwise.

[20] The present case is clearly such an example. The parties expressly agreed to undertake their obligations, including making milk payments, while resolving issues in dispute. There is no dispute, as Mr Harris properly concedes, with the amount of the milk payment due to Mr Atkinson under the agreement, against which the parties have agreed there is no right of set off.

[21] This is therefore not a situation where there is merely an arguable defence to Mr Atkinson's claim which would require the matter to be referred as a dispute to arbitration.[8] Rather, in terms of Article 8, this is a case where there is not, in reality, any dispute to refer to arbitration in terms of the Haworths' liability for Mr Atkinson's share of the milk payment.

[22] There is no requirement to refer all claims under the contract to the one arbitration hearing, as urged by Mr Harris, when the contract expressly treats the parties' respective claims separately and provides that there is to be no set off against milk payments. The contract severs the respective claims by its express terms.

[23] Accordingly, the Haworths' application to stay the summary judgment application is dismissed.

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[6] *Colebrook v Okarahia Downs Ltd* at [56] and [78].

[7] *Browns Real Estate Limited v Grant Lakes Properties Limited* [2010] NZCA 425, *Simple Logistics Limited v Real Foods Limited*, HC Auckland, CIV-2011-404-3497, 14/09/2011 at [23] and [24] and the Construction Contracts Act 2002, s 79.

[8] *Zurich Australian Insurance Limited v Cognition Education Limited* [2014] NZSC 188 at [36].

[24] Whether interest is payable on any milk payment found to be due following the summary judgment hearing, is a matter that can be argued also at the summary judgment hearing. The outcome of that argument is not determinative of whether the Haworths are liable to make the milk payment.

Directions

[25] The summary judgment application will be heard in the Palmerston North District Court on 12 July 2019 at 10.00 am. There is other business set down for that day but there should be sufficient time during the day to fully hear the parties.

[26] The defendants have filed affidavits by Warren Haworth and Gary Massicks. Those affidavits will now be read in the context of the defendants' opposition to the plaintiff's application for summary judgment. If the defendants wish to oppose the application for summary judgment they are required to file and serve a notice of opposition and any further affidavits by Tuesday 25 June 2019.

[27] The plaintiff is to file and serve any affidavits in response by Tuesday 2 July 2019.

[28] The parties are to file and serve any submissions on the summary judgment application by Tuesday 9 July 2019, with authorities.

[29] Costs on the stay application are reserved in favour of the plaintiff but will not be fixed until the summary judgment application has been heard and determined.

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Judge L C Rowe
District Court Judge

Date of authentication: 14/06/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.