IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2013-470-521
[2013] NZHC 3249

BETWEEN	ELAINE EVELYN COXHEAD Plaintiff
AND	RODGER WALLBANK Defendant

Hearing:	5 December 2013 (HEARD AT AUCKLAND)
Appearances:	M B Beech and E A Smith for plaintiff C Muston for defendant
Judgment:	5 December 2013

(ORAL) JUDGMENT OF LANG J
[on appeal on question of law
and application to set aside interim arbitral award]

---

[1] The plaintiff, Ms Coxhead, owns a dairy farm near Waihi. On 3 August 2010, she entered into a private sharemilking agreement with the defendant, Mr Wallbank.

[2] Relations between the parties deteriorated to the point where, on the morning of 21 November 2010, Ms Coxhead ordered Mr Wallbank to leave her property when he arrived for work at about 5 am. On 14 January 2011, Mr Wallbank served a notice of claim on Ms Coxhead in which he alleged Ms Coxhead had caused him to suffer loss in a variety of ways.

[3] Mr David Stewart was appointed as an arbitral tribunal to determine the issues set out in the notice of claim. On 7 March 2013, the arbitrator heard evidence and submissions from the parties in relation to a preliminary question. This related to whether or not Mr Wallbank had validly commenced his claim against Ms Coxhead. In an interim award issued on 10 May 2013, the arbitrator found in favour of Mr Wallbank in relation to this issue.

[4] In this proceeding, Ms Coxhead challenges the interim award on two grounds. First, she appeals against the award on a question of law. The question of law relates to whether or not the arbitrator correctly determined that Mr Wallbank had validly commenced his claim.

[5] Ms Coxhead also seeks an order that the interim award be set aside[1] on the basis that the arbitrator breached the principles of natural justice in reaching his decision. This argument is based on an allegation that the arbitrator went well beyond his brief in determining the preliminary question that was argued on 7 May 2013. Ms Coxhead contends that the arbitrator determined issues that did not form part of that preliminary question, and he did so in circumstances where neither party had the opportunity to call evidence or make submissions in respect of those issues.

---

1 Under Article 34(2)(iii) of Schedule 1 to the Arbitration Act 1996.

[6] Before considering the issues that the proceeding raises, it is necessary to briefly set out the legislative background against which those issues need to be determined.

The legislative background

[7] The Sharemilking Agreements Act 1937 ("the Act") governs every sharemilking agreement made between an employer and a sharemilker in any case where the dairy herd is owned or provided by the employer.[2] It is common ground that the Act applies to the private sharemilking agreement that Mr Wallbank and Ms Coxhead entered into on 3 August 2010.

[8] Section 3 of the Act relevantly provides:

> **3 Sharemilking agreements to which this section applies not to contain conditions less favourable to sharemilker than those specified in Schedule**
>
> …
>
> (2) Notwithstanding anything to the contrary in any sharemilking agreement to which this section applies (whether such agreement has been entered into before or is entered into after the passing of this Act) the agreement shall, on and after the 1st day of August 1938, operate not less favourably to the sharemilker in any respect than if the terms and conditions specified in the Schedule hereto were incorporated in the agreement on that date.
>
> (3) Any terms and conditions included in the sharemilking agreement that are inconsistent with the terms and conditions specified in the Schedule hereto (in so far as they would operate to the disadvantage of the sharemilker) shall, on and after the 1st day of August 1938, or the date of the agreement (whichever is the later), be deemed to be null and void.
>
> (4) Notwithstanding any other provision of this section, the Limitation Act 1950 shall be read subject to the terms and conditions specified in the Schedule hereto.

[9] It is also common ground for present purposes that the terms and conditions prescribed by the Sharemilking Agreements Order 2001 ("the 2001 order") formed the terms and conditions specified in the schedule referred to in s 3(2).

---

2 Sharemilking Agreements Act 1937, s 3(1).

Appeal on a question of law

[10] Ms Coxhead's appeal in relation to a question of law revolves around the issue of whether or not Mr Wallbank gave her adequate notice of his claim as required by clause 138 of the 2001 order. It provides:

> **Clause 138** No claims by the farm owner against the sharemilker or the sharemilker against the farm owner in any way arising out of this agreement in relation to operations during any one milking season (whether the agreement is renewed or not) is recognised or sustainable, and no action in respect of any claim is enforceable, *unless full details thereof in writing are served by the claimant on the respondent within 21 clear business working days of the claimant becoming aware of the alleged breach of the agreement but in any event no later than 21 clear business working days from the end of the season to which the breach relates,* time being strictly of the essence of the contract. If a claim is made by either party, a period of 10 clear business working days after the claim has been lodged is permitted within which to make a counterclaim, but in no cause is a counterclaim valid if made more than 30 clear business working days from the end of the season.
>
> (Emphasis added)

[11] There was some dispute between counsel regarding the meaning to be given to Clause 138. As will be evident, the clause prescribes two separate time periods within which a claimant must provide the other party with full details of his or her claim. First, the clause requires the claimant to provide full details "within 21 clear business days of the claimant becoming aware of the alleged breach of the agreement". Secondly, it requires that, in any event, the claimant shall provide details of the claim "no later than 21 clear business working days from the end of the season to which the breach relates." The sharemilking season ends each year on 31 May.

[12] Counsel for Mr Wallbank submits that the effect of the clause is to enable a claimant to provide full details of a claim at any stage up to and including 21 clear business working days from the end of the season to which the breach relates. I do not agree with this interpretation. In my view, the meaning of the clause is clear. If a claimant becomes aware of a breach during the course of a season, he or she must provide full details of the claim to the other party within 21 clear business working days of becoming aware of the breach. If a claimant becomes aware of a breach after the end of the season, he or she must give full details of the claim within 21 clear business working days of the end of the season. If a claimant becomes

aware of a breach after the expiration of 21 days from the end of the season, no claim may be brought.

[13] The object of the clause is clearly to ensure that the parties to a sharemilking agreement provide each other with full details of claims as soon as they become aware of them. If the argument for Mr Wallbank is correct, this objective would be significantly undermined. It would also largely rob the requirement to provide full details of a claim within 21 days of any utility. The prohibition on giving notice of a claim after the expiration of 21 days after each season permits sharemilkers and farmers to begin each season free of the prospect that they may be subject to claims arising during previous seasons.

[14] Mr Wallbank contends that he provided full details of his claim against Ms Coxhead in two separate documents. The first is a letter dated 22 November 2010. There is no dispute that Mr Wallbank, or somebody acting on his behalf, personally delivered this letter to Ms Coxhead on 22 November 2010. The second document is a letter that Mr Wallbank's solicitor, Ms Hackshaw, sent to Ms Coxhead on or about 17 December 2010. I shall refer to the two letters as the "McVeigh" letter and the "Hackshaw" letter respectively.

The "Hackshaw" letter

[15] The arbitrator found that the Hackshaw letter provided Ms Coxhead with full details of Mr Wallbank's claim in terms of clause 138 of the 2001 Order. Essential to his reasoning was his conclusion that Ms Coxhead received that letter on 17 December 2010. This meant that she received it 20 working days after 21 November 2010, being the date of the alleged breach upon which Mr Wallbank relies.

[16] I do not consider the arbitrator was entitled to reach this conclusion. There was no evidence as to when the McVeigh letter was posted. In addition, the letter had to travel from Mr Wallbank's solicitor in Papatoetoe to a rural delivery address near Waihi. Even assuming that Mr Wallbank's solicitor posted the letter on 17 December, there was no evidence to assist the arbitrator as to when it was likely to have been received by Ms Coxhead. Common sense would suggest that it may well have taken two or three working days for the letter to make its way from Papatoetoe

to Waihi. 17 December 2010 was a Friday. It is therefore probable that, if Ms Coxhead received the letter at all, she would have done so on 21 or 22 December 2010. In that event she would have received the letter outside the 21 business working day limit prescribed by clause 138.

[17] There was also no evidence as to whether Mr Wallbank's solicitor sent the letter by registered post or ordinary post. In the absence of anything on the face of the letter to suggest otherwise, common sense would suggest that it was sent by ordinary post. Clause 137 of the 2001 Order, which prescribes the manner in which the parties to a sharemilking agreement may serve documents on each other, does not expressly permit notices to be served by ordinary post. It provides:

> **Clause 137** A notice given to the farm owner or the sharemilker is sufficiently served if –
>
> (a) It is sent by registered post to the addressee's last known address in New Zealand, and any notice sent by registered post is served on a day 2 clear working days after the day of posting, or
>
> (b) In the case of a company or other body corporate, it is sent to its registered office; or
>
> (c) It is handed to the addressee; or
>
> (d) It is served by any other legally recognised means of service.

[18] Counsel for Mr Wallbank seeks to argue that the act of sending a document through the ordinary post is a legally recognised form of service in terms of Clause 137(d). He referred me to r 10(1)(c) of the Disputes Tribunals Rules 1989, which permits documents relating to proceedings before a Disputes Tribunal to be served by ordinary post. Similarly, s 388 of the Companies Act 1993 permits documents other than legal proceedings to be served on a company by ordinary post.

[19] I accept this submission as far as it goes, but I do not consider it assists Mr Wallbank's cause for two reasons. First, the person who drafted the 2001 Order clearly turned his or her mind to the issue of whether the postal service could be used as a means of service under the Order. The fact that Clause 137 permits service by registered post is a clear signal that service by ordinary post is not sufficient. More importantly, if service by ordinary post was permissible, it would still be necessary to fix the time at which service is deemed to have been effected. That could not

logically be less than the two working day period prescribed in respect of service by registered post under Clause 137(a). As a result, the Hackshaw letter would be deemed to have been served on 22 December 2010. This would be outside the 21 business working day limit prescribed by Clause 138.

[20] For these reasons, to the extent that the arbitrator based his decision on the receipt by Ms Coxhead of the Hackshaw letter on 17 December 2010, he was clearly in error.

The "McVeigh" letter

[21] There is no dispute for present purposes that Ms Coxhead was served with this letter within the period of 21 days after the incident that occurred on 21 November 2010.[3] There is, however, an issue as to whether the McVeigh letter provided Ms Coxhead with full details of Mr Wallbank's claim. Counsel for Mr Coxhead contends that it did not. He submits that the letter was no more than preliminary advice to Ms Coxhead that Mr Wallbank had issues that he wished to raise with her. He points out in this regard that the letter was headed "Request for mediation". He submits that the tenor of the letter was to the effect that Mr Wallbank wished to engage in mediation or other forms of dispute resolution procedures in order to determine these issues. He therefore submits that the letter does not constitute notice in terms of clause 138 of the 2001 Order.

[22] I do not accept this submission. The letter is couched in considerable detail. Central to the letter is a claim by Mr Wallbank that Ms Coxhead has breached an implied term of the sharemilking agreement by refusing to allow him access to the milking shed on her property. The letter points out that Mr Wallbank is unable to fulfil his obligations under the sharemilking agreement unless he has access to the milking shed. The letter also advises Ms Coxhead that if she continues to refuse Mr Wallbank access to the milking shed, he will have no option but to conclude that she has repudiated the sharemilking agreement. The letter also contains other discrete and detailed complaints relating to the manner in which Ms Coxhead had been

[3] There may, however, be a dispute at the substantive hearing as to whether Mr Wallbank became aware of the facts underpinning individual claims referred to in the McVeigh letter more than 21 business working days before 22 November 2010, being the date on which the McVeigh letter was served.

treating Mr Wallbank's son, and the fact that Ms Coxhead's actions had caused the physical condition of the dairy herd on the property to deteriorate. Mr Wallbank alleges in the letter that these actions were causing him loss.

[23] I accept that the McVeigh letter does not go on to say that Ms Coxhead is to take the letter as formal notice under clause 138 of the 2001 Order. That is not surprising, because Mr Wallbank told the arbitrator at the hearing on 7 March 2013 that he was not aware of the existence of the 2001 Order until some considerable time later. In my view, however, this omission is immaterial. The only requirement of clause 138 is that the claimant must provide the other party with full details of his or her claim within the prescribed period. I consider that the McVeigh letter dated 22 November provides sufficient detail of Mr Wallbank's claims to satisfy that requirement.

[24] Counsel for Ms Coxhead also submits that the claims contained in the McVeigh letter are considerably at odds with those contained in the notice of claim that Mr Wallbank formulated on 14 January 2011. I disagree with that analysis. Although the notice of claim refers to Ms Coxhead having "unilaterally terminated" the sharemilking agreement, that phrase is broadly synonymous with the word "repudiation" that Mr Wallbank used in the McVeigh letter. The notice of claim also contains claims relating to Ms Coxhead's treatment of Mr Wallbank's son, and to the manner in which Ms Coxhead's actions had contributed to the physical deterioration of the dairy herd.

[25] Counsel for Ms Coxhead also criticises the notice of claim and the McVeigh letter because they both referred to the repudiation, or termination, of the agreement as having occurred on 15 November 2010. He points out that the arbitrator had found, based on Mr Wallbank's evidence, that the events giving rise to the alleged termination or repudiation had actually occurred on 21 November 2010. This does not mean, however, that the notice of claim and/or the McVeigh letter are invalid. Rather, it simply reflects the fact that they do not accurately set out the date upon which Ms Coxhead allegedly breached her obligations under the sharemilkers agreement. It is immaterial for present purposes that the event relied on as causing a breach may have occurred on a date other than that alleged in the letter and notice.

[26] I am therefore satisfied that Mr Wallbank's claim was validly commenced to the extent that it incorporates the matters referred to in the McVeigh letter. To the extent that the notice of claim contains claims not referred to in that letter, those claims will not have been validly commenced. Clause 138 prohibits such claims being pursued because Mr Wallbank did not provide Ms Coxhead with full details of them within 21 business working days of having become aware of the facts upon which they are based.

[27] I therefore conclude, albeit by a different route, that the arbitrator did not err in law when he concluded that Mr Wallbank had validly commenced his claim.

Application for order setting aside the interim award

[28] As noted above, the second aspect of Ms Coxhead's application relates to the manner in which the arbitrator approached his task in determining the interim award. Counsel for Ms Coxhead contends that the interim award purported to decide issues that the arbitrator was not required to determine as part of the preliminary question, and that the award should be set aside for that reason.

[29] Article 34(2)(a)(iii) of Schedule 1 to the Arbitration Act 1999 permits the Court to set aside an arbitral award where it deals with a dispute that does not fall within the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

[30] The interim award refers in several places to issues that were not strictly before the arbitrator for determination. To the extent that these observations represent conclusions reached by the arbitrator, they were obviously made without jurisdiction and are of no legal effect.

[31] Ultimately, however, the only firm conclusion that the arbitrator reached was that Mr Wallbank had validly commenced his claim. I have upheld that finding, albeit for different reasons than those given by the arbitrator. For that reason it would not be appropriate to set aside the interim award, or to declare it unenforceable. This aspect of Ms Coxhead's claim fails as a result.

Result

[32] The appeal on a question of law is dismissed. The application seeking an order that the interim award be set aside is also dismissed.

Costs

[33] Both parties have succeeded and failed to some extent. Although I have upheld the interim award, counsel for Ms Coxhead succeeded in persuading me that the Hackshaw letter did not constitute valid notice in terms of Clause 137. Conversely, counsel for Mr Wallbank succeeded in persuading me that the McVeigh letter constituted valid notice in terms of that clause.

[34] In those circumstances I make no order as to costs.

_____

Lang J

Solicitors:
Holland Beckett, Tauranga
Counsel:
C Muston, Whangarei