IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

M.No.57/83

1029

BETWEEN MICHAEL LINDSAY THURMAN
C/- Petrocorp, New Plymouth
and SHIRLEY MAREE THURMAN
his wife Married Woman

Appellants

AND IAN SWARD McKENZIE of Patea
Registered Medical
Practitioner

Respondent

Hearing: 29 August, 1984.

Counsel: B. Henderson for Appellants
R. Handley for Respondent

Judgment: 29 August, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is an appeal brought to this Court against a decision of District Court Judge J.W. Dalmer, Esq., in the District Court at Hawera given on 30 September, 1983 in proceedings in which the appellants were the defendants and the respondent was the plaintiff. The decision was given in respect of an action brought by the respondent in which he claimed the sum of $10,119.78 alleged to be due and payable to him by the appellants in respect of obligations on their part arising out of a share-milking agreement between the parties.

The claim was advanced under three heads, these being, one, a claim in respect of certain dairy cows sold by the respondent to the appellants, secondly, a claim in respect of the proceeds of the sale of certain stock and, thirdly, a claim in respect of

electric power costs. In the District Court the respondent succeeded to the extent of $8,801.28 and judgment was given for that sum together with interest thereon computed from 1 December, 1980 to the date of judgment.

In the points setting out the appellants' grounds of appeal to this Court it is made clear that the appeal is confined to certain aspects only of the judgment and these are as to the claim in respect of the stock sold, first, as to the number for which an allowance was made, secondly, the basis of computation of the respondent's share of the price realised and, thirdly, the award of interest.

Before I deal with the specific matters in respect of which the appeal is thus advanced it is first necessary that I should advert to the fact that twice in the course of the summary of the points on appeal furnished to this Court in accordance with the prescribed practice, there is a reference to alleged bias on the part of the District Court Judge. The first reference is worded "The appellants further allege that the District Court Judge was biased in favour of the respondent". The second, "The appellants allege that the District Court Judge was biased in favour of the respondent in the adjustment for herd replacement". In each case the statements so worded are followed by specific reference to findings of fact contained in the course of the judgment as given in the District Court, a record of which of course is before me. The first is a reference to the finding "the parties orally agreed that the calves (including bull calves) other than those required for herd maintenance (20%) would be held and the nett proceeds of the

sale divided equally". As regards the second statement what is said in counsel's written submissions is, "The appellants allege that the District Court Judge accepted the unsubstantiated evidence that the appellants were entitled to 18 heifers under the herd replacement provisions whereas in the appellants' written submissions to the Lower Court the submission maintained that 34 heifers were applicable under the provisions of herd replacement."

I make particular reference to these matters because of the grave responsibility which clearly rests upon counsel who advances a personal attack upon a judicial officer on the ground that he gave a judgment which was influenced by bias. The matters to which reference is made in the submissions and the passages in the judgment referred to are, I find, simply references to findings of fact made by the Judge on the basis of the evidence. He has clearly, as he makes it plain in the course of the judgment, preferred the evidence of the respondent to that of the appellant Mr Thurman in a number of respects. This, of course, as Mr Henderson before me today freely acknowledges, is something that the Judge was obviously entitled to do and indeed something which he was doing in fulfilment of an important part of his ordinary functions. Mr Henderson was unable to put before me any matters of fact whatever which would serve to justify the inclusion of reference to bias on the part of the District Court Judge and it is therefore, I consider, very regrettable indeed that statements of this kind should have been made and included in a document forming part of the records of this Court. Mr Henderson, however, has given this Court an undertaking that he will personally tender an

apology to the District Court Judge concerned and this apology, I think, should clearly include a specific retraction of the statements made on the basis that no evidence whatever was advanced to justify their having been made.

I proceed then to consider the specific points advanced. I deal with the second point first, i.e. that as to the basis upon which the proceeds of the sale of stock should have been divided for the purpose of ascertaining the amount payable to the respondent. The passage which I have earlier quoted from the judgment gives an indication of the matter here under consideration. The situation as the judgment shows was that initially the parties were proceeding under the basis of a sharemilking agreement for the use by the sharemilker of a smaller area of land. The second agreement entered into between them, under which the present claim arises, was dated 21 July, 1978 affected an additional area of land of 36.55ha and because of the availability of this additional area the provision with regard to the sale of stock reared on the property was changed and Clause 10(a) of the new agreement to which reference is made in the judgment was incorporated because the intention from this time on was that after the usual prescribed proportion of 20% of the calves in any particular season had been taken out as retained for replacement purposes others would be selected and reared on the property and sold as beef cattle. It was in respect of these latter stock that the claim arose. The appellants at the hearing endeavoured to contend that they had an entitlement not simply to the 50% share to which the clause in question referred but to a further allowance in respect of work which had been done by them outside the scope of the ordinary

sharemilking agreement. Mr Henderson today conceded that although this oral arrangement was advanced at the hearing there was in fact no specific evidence which he could point to upon which the concluding of an agreement providing such a basis of division could be substantiated. The Judge deals with this matter in the course of his judgment and says:

> "I do not agree with this approach. It is not in accordance with the arrangement negotiated by the parties and recorded in their written agreement. I think the term (nett proceeds) means the price received at auction or on sale less direct expenses such as advertising, cartage and auctioneers commission."

This is a finding of fact which is attacked in this appeal. In my view, on the evidence before the Court there was clearly a proper basis in the evidence for such a finding and the Judge was entitled to reject the alternative basis which was put forward. In relation to a question of fact such as this it is necessary to bear in mind of course the position in which this Court stands in dealing with an appeal advanced as regards the findings of fact in the District Court. The situation was made very clear in the judgment of the President in the decision of the Court of Appeal in Kenny v. Fenton (1971) NZLR 1 at p.11 where it is said:

> "There is no doubt that from time to time their Lordships in the House of Lords have thought it right to warn Courts of Appeal of the danger of preferring the view they form on a reading of the record to the opinion of the Judge who heard and saw the case develop and had the opportunity denied to them of judging the worth of the oral evidence given by the witnesses. In particular there may be cited the often quoted dictum of Lord Sumner in SS Hontestroom v. SS Durham Castle (1927) AC 37, 47 where that learned Judge, in speaking of this matter, said:
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> > 'If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I under-

> stand the decisions, be let alone ... We must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.'"

That aspect applies even more strongly as regards the second point advanced. A perusal of the evidence shows that there were inconsistent statements made in the course of the evidence by the appellant Mr Thurman as to the number of cows being milked at the start of the season upon the basis of which the 20% figure that I have referred to above would of course require to be calculated. It is not necessary for me to refer in detail to the inconsistencies. They were referred to in the argument. Elsewhere in his judgment the Judge made reference to his being dissatisfied with aspects of the evidence of the appellant Mr Thurman and he makes the statement that he did not impress him as a witness. This is not really surprising in view of the conflicts to which I have briefly adverted. In any event, this is another question of fact. The Judge proceeded upon the basis of the respondent's evidence as to the number of cows being milked at the relevant time and calculated the number which the appellants were entitled to retain for replacement purposes in accordance with the respondent's figure of approximately 90 milking cows in the last season. This was clearly a matter of fact on which he was fully entitled to proceed in this way. That point also accordingly cannot be accepted by me as having any validity.

The final matter is the question of interest. Here the first point raised is that the Judge, it is suggested, "misdirected himself" in allowing interest from 1 December, 1980 and it is pointed out that the action was not commenced until

1 December, 1981 It seems to have been assumed solely on the basis of the coincidence in the month and the day of the month that the Judge intended to allow interest from the date when the proceedings were commenced but inadvertently failed to so. When the judgment is examined however, it is patently clear that this is not the position at all. In the judgment it is said:

> "The Plaintiff has been kept out of his money for a long time and the Defendants have had the use of that money. I think this is an appropriate case to award interest which will run at the rate of 11% from 1 December 1980, at which time this matter should have been resolved..."

When the evidence is looked at it is plain that the Judge here had in mind the fact that the claim had been formulated some time before this and of course, as Mr Henderson acknowledges, the section in question, viz., s.62B of the District Courts Act 1947 as inserted by s.4(1)(a) of the District Courts Amendment Act 1982 specifically empowers the District Court to allow interest for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

The second point raised is that there was no prayer for relief in the statement of claim in the action specifically referring to a claim for interest and as it was put "no pleadings as to hardship or other facts related to the question of interest." With regard to the latter point, it is not, so far as I am aware, the practice to include any such specific pleadings as to matters of fact of this kind as these matters would ordinarily arise from the facts of the case itself.

As to the question of the omission of the specific prayer, there is, as Mr Henderson acknowledges, authority to show that interest may be allowed notwithstanding the fact that there is no specific prayer in the statement of claim.

The appeal accordingly in my view cannot be substantiated on any of the grounds advanced and it is dismissed accordingly. The respondent is entitled to costs in respect of this appeal and I allow these at the sum of $175.

SOLICITORS:

Till, Greiner, Lee & Co. New Plymouth for Appellants.
Treadwell Gordon & Co. Wanganui for Respondent.