IN THE HIGH COURT OF NEW ZEALAND A. 98/81

CHRISTCHURCH REGISTRY

BETWEEN JOHN WILLIAM CHILTON

PLAINTIFF

A N D NOEL CHILTON

FIRST DEFENDANT

A N D MARK CHILTON

SECOND DEFENDANT

A N D DOROTHY ELEANOR JANE CHILTON

THIRD DEFENDANT

Judgment: 19 APR 1984

Hearing: 2, 3, 4, April 1984

Counsel: A.W. Robinson for Plaintiff
G.T. Mahon for First Defendant
J.L. Cameron for Second and Third Defendants

JUDGMENT OF CASEY J.

The Plaintiff and his late brother Ernest George Chilton had carried on a partnership as pig farmers at Belfast near Christchurch for over 20 years prior to the latter's death on 1st September 1978. They entered into a simple partnership agreement on 6th May 1958 under which the capital consisted of just under 47 acres of land which they owned as tenants in common in the proportions of three-quarters to Ernest and one-quarter to the Plaintiff. The agreement also recited that they owned the stock and chattels on the land in equal shares and provided that the capital of the partnership would consist of these items together with all monies standing to the firm's credit. Net profits were to be divided equally and there were the usual provisions about conduct and management of the business. Clause 10 provided that if either partner should die then the partnership should be wound up and the assets distributed as provided by the Partnership Act, 1908.

The Third Defendant, Dorothy Eleanor Jane Chilton, was appointed the executor and trustee of the estate along with Mr Hill, a Christchurch solicitor who had acted for the family for many years. The Plaintiff carried on the business after his brother's death in a way demonstrating his intention to take it firmly under his control and there were early differences between him and Mrs Chilton and her two sons (the First and Second Defendants) over the extent and valuation of partnership plant for duty purposes. Mr John Chilton wished to buy out the estate interest on the basis that the partnership assets (including the land) should be treated as being owned in equal shares by each partner for the purpose of winding up and purchase notwithstanding the difference in actual proprietorship, this being taken care of by the correspondingly greater figure credited to the deceased in the partnership capital account. On the other hand Mrs Chilton and her advisors took the view that the land - and at one stage, all the partnership assets - should be divided in the proportion of three-quarters to the estate and one-quarter to the Plaintiff. It proved impossible to resolve this dispute and Mr John Chilton carried on the business in the meantime. Although he proposed that he purchase it at an independent valuation, Mrs Chilton adopted the firm view that the whole partnership property should be put up for public auction and she maintained this attitude throughout.

It was clearly impossible to arrive at any division of the assets until the shares had been decided and eventually this question, along with other matters in dispute, was referred to arbitration. It did not proceed very far before the estate asked for a case to be stated to the High Court. Although Plaintiff's Counsel strenuously opposed this on the grounds that there was no question of law, the Arbitrator decided to do so, and in due course it was argued before Cook J. who gave judgment on 27th March 1981 in the Plaintiff's favour. The following June a settlement was negotiated between the parties and confirmed by an agreement for sale from the estate to Mr Chilton on 28th August 1981, which has been duly completed.

These proceedings arise out of the strained relations which existed over that period between Mr Chilton on the one hand and Mrs Chilton and her family on the other. Each family occupied a house at opposite ends of the farm property, his being adjacent to the piggery, with its fattening sheds and outbuildings. While his brother was alive relationships were amicable and mixed farming operations were conducted over the whole property, with the pig raising concentrated on the lower-quality land at the Plaintiff's end. I have already referred to the arguments over valuation shortly after Ernest's death and it is only too clear that Mrs Chilton and her sons felt that he was going to take advantage of his position and get more than his fair share of the partnership. The dispute over valuation did little to dispel this suspicion, which was followed by allegations from him that they were responsible for the disappearance of plant and equipment, noticed over a period of some months after the date of death, and which Mr Chilton said cost him some $800 to replace. He regarded this as the start of a campaign of harrassment and interference with his business activities culminating at the end of 1980 with the release of 384 pigs from the fattening shed, interference with a bulk trailer and the removal of implements.

The Plaintiff issued this writ against Mrs Chilton as Third Defendant and her two sons, Noel and Mark, as First and Second Defendants respectively, setting out the actions complained of and the losses incurred thereby, and alleging physical and mental distress as a result of which he became susceptible to leptospirosis incapacitating him for over three months. He attributes these activities to the First and Second Defendants jointly and severally, and in addition to claiming the specific losses they caused, he seeks $2,500 general damages for the general distress and inconvenience, and a further $2,000 as aggravated, exemplary and punitive damages. Allegations are also made against Mrs Chilton and her two sons of conspiring to interfere with the Plaintiff's business and with his legal rights under the Partnership Act, with a view to coercing him to accede to her demand that she was entitled to three-quarters of the partnership assets.

Particulars are set out at some length in paragraph 21 of the Amended Statement of Claim, and the same damages are sought against her. When the hearing commenced I allowed the Plaintiff to include a further cause of action against her as a joint tort-feasor along with her two sons in the various activities alleged against them. At the close of the Plaintiff's case I dismissed an application for non-suit by Mr Mahon on behalf of Noel Chilton, and subsequently reserved similar applications by Dr Cameron in respect of the claims against Mark Chilton and Mrs Chilton. She did not give evidence but her two sons did. I now deal with the specific allegations of misconduct.

(a) Theft of tools. As I have said, $800 was claimed under this head. Mr Chilton and his son Richard gave general evidence of being unable to lay their hands on various tools and items of equipment which had previously been in the workshop, over a period of some months following Ernest's death. Apart from one or two specific items such as scales, a shearing hand piece and arm and other small articles there was no description of the missing items, and their absence was only noted when they were needed. As I indicated to Counsel, the evidence was altogether too vague to enable me to reach any conclusion about what had disappeared, who was responsible and what the items were worth.

(b) Disappearance of two fleeces - $25. This is a niggly little item which Mr Robinson acknowledges would have been ignored in isolation. It was suggested that the Defendants uplifted two fleeces from two of the Plaintiff's sheep which had been sent to a neighbour for shearing. In the end, the evidence pointed at the worst to a mistake by Mrs Chilton's daughter, who may well have taken the fleeces under the impression they were from her own pet sheep.

(c) Removal of bulk feed - $410. It is alleged that Noel either by himself or in conjunction with Mark took up to two tons of meal from the bulk storage in the piggery shed over a period of up to two years from their father's

death. The evidence on this was purely circumstantial. Both Defendants denied taking anything more than one drum of meal shortly after he died, on the assumption they were entitled to continue a long-standing practice between the families that the children could raise pigs of their own and could take meal to feed them and the household poultry. It was quite clear from their evidence that they believed they were entitled to the benefit of all the partnership assets to the extent to which they had been accustomed while their father was alive and they regarded the Plaintiff's assumption of control as an intrusion. For his part, he said he made it clear that he had no objection to their taking meal provided they obtained his permission so that the quantities could be properly accounted for. This point was made in letters passing between the solicitors. Mr Chilton says he first remonstrated with the two boys when he saw them together taking a drum of meal across the farm on a tractor, and came across them again when they were on foot. The situation is complicated by the fact that Mark had suffered a very serious accident some twelve months before his father died and there was no doubt that he was physically handicapped and would have been unable to carry heavy loads, and his sight was also badly impaired. Nevertheless Mr Chilton persuaded me that he was associated with his brother in an active way on at least these two occasions.

The evidence about the actual deficiencies is necessarily quite vague. It is based on the known capacity of a full hopper and the unexpected shortages that were experienced when they were fed out to pigs. Although such evidence is open to obvious criticisms, I was impressed with Mr Chilton and his son in the witness box as reliable witnesses and I am satisfied that their experience - particularly the former's - would enable them to form a ready appreciation of any deficiencies and their likely amount. Mr Chilton detailed the steps he took to secure the meal, including emptying out the chutes into drums and locking them up inside the sheds, and described how the locks were cut off on some four or five occasions. His solicitor's letter of 8th February 1979 records two instances when he alleged the two boys had broken into the

shed and removed meal. It was suggested in cross-examination that a neighbour, Mr Blake, could have been responsible but I am satisfied he was nowhere around for a good part of the material time. On the other hand, I believe the meal could have found a ready use on the farm of Mrs Chilton's friend, Mr Miller, whom she subsequently married. When the question of outside involvement was put to him, Mr Chilton was adamant that his study of the footprints around the sheds persuaded him that strangers were not involved.

Looking at the evidence on this aspect against the background of ill feeling which obviously existed over the period between the two families, I am satisfied that a large quantity of meal did disappear as alleged by Mr Chilton and that nobody else could have been responsible other than Noel and Mark. In view of the latter's participation with Noel in the two incidents in which he was observed, I can see no reason to conclude that he was not an active participant on the other occasions. The figure of $410 claimed for the approximate two tons taken is necessarily an estimate and I may be doing an injustice to these two Defendants in allowing the full amount. I will reduce this to $350.

(d) New Driveway - Mr Chilton claims $200 and 60 hours of his time in constructing a new driveway next to his house, replacing the one used previously, which crossed the paddock further up the road to the old homestead and then turned towards the piggeries. He says this was necessary so that he could more closely police the movements and activities of people including the Defendants on the farm property and to avoid further loss and damage. There was a substantially formed driveway already in existence next to his house giving access to the yard beyond and it continued to the piggery in a more basic form. As I understand it his work was to upgrade the whole area, providing a very much more suitable access to the piggery and outbuildings beyond the house. As a matter of common sense I think Mr Chilton would have done this work sooner or later; his nephews' activities may have spurred him into earlier action, but I believe it resulted in a sensible

improvement to the farm now under his sole control, and I do not think they should be responsible for its cost.

This brings me to the problem with the signs. As a result of the new entrance next to his house, Mr Chilton posted signs at the old gate directing farm traffic further down the road. They were removed and altered on occasions between 1st and 21st May 1979 causing him obvious annoyance. I regard these as acts of mischief and, like the other incidents I have discussed, I can see nobody else responsible but Noel and Mark, continuing the family vendetta. Mr Chilton asked for special damages as might be proper to compensate him for the trouble and annoyance. It is a relatively minor matter and after five years I am not disposed to make any separate award under this heading.

(e) Opening gates. The next allegation is that on 22nd April the First and Second Defendant deliberately failed to close a gateway at one entrance to the farm property as a result of which a sow escaped and was hit by a car. There was no damage to the animal, but the owner of the car made a claim. Mr Chilton confirmed that neither he nor his insurer paid out. I am far from satisfied that the escape of this animal was other than accidental. Mr Chilton said gates were left open on numerous occasions, attributing these to the general policy of harrassment. There is a small paddock next to Mrs Chilton's house with a hay shed on it and other out-buildings which were fenced off from the main farm, to which access was obtained through a removeable section of fence. There was a gate on the road side and over the period in question both the boys used the hay shed and an adjoining lean-to to park their cars. The family also kept poultry and some pet sheep in the paddock, evidently following a custom of many years.

After the episode involving the sow, Mr Chilton gave notice to Mrs Chilton about April 1980 that he intended closing the gate permanently and that the boys should get their cars out of it. Clearly he made his mind up to bring in

the paddock and the buildings as part of the farming operations. He took prompt steps to carry out his threat and went to the length of installing a strainer post in front of the gate to prevent it being opened, effectively blocking access to the paddock on which one of his nephews' cars was still garaged. I am satisfied that between them they had the post sawn down promptly and restored the status quo. Whatever the rights and wrongs of this episode, I regard it as simply another escalation of this unfortunate family argument and there was little evidence to support the allegation of material disruption to farming operations in paragraph 23 of the Amended Statement of Claim.

(f) Interference with bulk trailer. This event occurred in early November 1980. Noel's car was parked as usual in the hay shed and Mr Chilton was drilling seeds. It was necessary to store the bulk trailer load of seed under cover and as the farm buildings around the piggery were not available he tried to get the use of the hay shed over Noel's objections. He was finally prevailed on to move the car by threats to tow it out, and the trailer was put in. During the week it was there four tyres were let down and Mr Chilton described the effort required to tow it back to his own premises and pump them up. As with the other incidents in which I have held him responsible, all the circumstances point to Noel and I have no doubt that this piece of vandalism was his work in spite of his denials.

(g) Removal of implements. Although not next in time, this episode also relates to the hay shed. Mr Chilton explained that the roof had blown off his implement shed and he felt it necessary to store them under cover, although there was some argument about whether any of them would have suffered if left out in the open. In any event they were put into the hay shed without reference to Mrs Chilton or her family, and I was told that this caused real problems, because not only was the shed used for their own domestic purposes, but they had also stored a quantity of coal as part of a fund-raising drive for the local football club, and arrangements had been made to

have it taken out and distributed the following weekend. The upshot was that with the assistance of Mr Miller and a friend's tractor the implements were removed (with the exception of one item) and left lying around the paddock and the entrance gate was also padlocked against Mr Chilton.

He heard about this from his son and on his return had a confrontation with the three Defendants, asking why they had locked the gate. They replied it was to keep him out. He said Noel asked a very significant question in the heat of this discussion, demanding to know why he had put the lock on the piggery - although, in the note produced by his solicitor with Mr Chilton's report of this episode, he is recorded as asking "Why did you put a lock on that shed door down there?". I share the Plaintiff's view of the significance of this comment; it indicated Noel's presence around the piggery buildings and sheds over a period when he denied ever having been near that property. His explanation that this might have come from other sources in the family is unconvincing. It fits in with the earlier damage to the locks described by Mr Chilton in relation to the disappearing meal, but I think it has more relevance to the very recent release of pigs, as it could also apply to the fattening shed.

The removal of the implements was seen by the Plaintiff's son, Richard, from their house and he recognised Mark and Noel and Mr Miller as being involved, helping to balance the machinery as it was being taken out by the front end loader. He reported the incident to the police and rang his father at Southbridge. In fact, this is the only one of the numerous incidents complained of in which the assistance of the police was sought. I am satisfied that Mr Chilton did not want to take the matter outside the family and the fact that he did not report the other incidents does not affect my view of the credibility of his evidence about them. I accept Richard's account of this episode but, as with the removal of the strainer posts from the gate, I think the Defendants had some justification for their actions. There were faults on both sides, clearly the result of the

accumulated suspicion and frustration that had been built up over the previous two years.

(h) <u>Release of pigs</u>. This is the most serious of the allegations. Both Mr Chilton and his son described how 384 pigs were released overnight on 5th November from the fattening shed and were found running around the property. They detailed quite graphically their efforts to capture and put them back, and the very serious disruption this caused to the pigs themselves and to the fattening programme. Mr Chilton is a pig farmer of many years experience and I fully accept his account of the effects on the pigs, of which 14 died immediately, and 17 others succumbed to pleurisy contracted as a result of their sudden release from the carefully controlled environment in which they had grown up. The disruption to their accustomed social life in the pens and the fighting which ensued was also significant, and it was inevitable that there would be bruising, weight loss and a drop in the expected receipts, as well as extra feed costs. No detailed figures were put before me, but I see no reason why I cannot rely on Mr Chilton's estimates of the amounts, which are based on his long and specialised experience in this field and seemed reasonably - indeed, conservatively - based. His evidence was not seriously challenged in cross-examination and received some support from Mr Evans, who was then the Area Supervisor for the Canterbury Frozen Meat Company.

Looking at this episode against the background of what had happened previously and the other problems occurring around that time, I have no doubt that Noel was responsible. Whoever carried out this operation would have had to know the layout of the piggery and the fattening shed, and the location and type of the locks, doors and gates - not only the external ones, but the internal gates enclosing each of the numerous pens of pigs inside. Noel knew this and his question about the padlocking of the shed indicates a recent presence there on this or other occasions. There was bad feeling between the two families, giving him a motive to injure his uncle in this way and, most significantly, all further harrassment stopped

after Mr Chilton's solicitors threatened Court proceedings for these episodes. In the light of all these circumstances, I cannot believe that some unknown third party was responsible, and nobody was able to suggest who it might be.

Mr Chilton claimed $4,738 for loss of profit from sales, $1,705 for dead pigs and $2,520 for extra feed, making a total of $8,963 under this heading and I consider this figure has been substantiated against Noel as the person responsible. However, I am not satisfied that Mark was involved in this episode. He was not observed visiting the sheds in any other capacity with Noel other than the transport of meal, and because of his disabilities I am not prepared to draw the inference that he was there with his brother engaged in an operation which would have required a fair amount of agility in poor light. He may have been, but suspicion is not enough.

The case against Mrs Chilton in conspiracy and as a joint tort-feasor also falls short of proof. There is no direct evidence connecting her with the incidents, and while she may have been aware of what her sons were doing and even approved of them, and did nothing to stop them, this is not enough to implicate her. Undoubtedly she was hostile to Mr Chilton because of the view she formed at an early stage about the division of partnership assets, and no doubt resented the exclusion of her sons from the farm. But without further evidence, it is a big step to say that she involved herself in their activities against him as a party. She did not give evidence and I find the case against her unproved.

Turning to the question of general damages, the sum of $2,500 is claimed for distress, mental suffering, anguish and inconvenience as a result of the general harrassment inflicted on Mr Chilton. I have already mentioned that much of the stress he experienced over this period would have arisen from the uncertainty about his future on the farm because of Mrs Chilton's attitude that the whole business should be put up for public auction. Another factor would no doubt be the split in the family and the unhappy relations and mutual

suspicion generated by their opposed views over the property and how it should be run. But I am also satisfied that, apart from these natural consequences of such a family dispute, the actions of Noel, and to a lesser extent Mark, detailed in this judgment added substantially to his troubles. It is difficult to view them as other than a deliberate policy of annoyance and harrassment ranging over such diverse matters as conversion of the meal, trespass and damage to property and goods. Bearing in mind the family nature of this dispute and the other factors I have mentioned, and the time which has now elapsed since the worst incidents at the end of 1980, a substantial award is not justified and I think a figure of $500 would be adequate. This together with the special damages is more than enough to bring home to the Defendants the seriousness of their wrong-doing and to compensate the Plaintiff for his injured feelings, and I do not think any award of aggravated, exemplary or punitive damages is justified.

Mr Chilton sued on the basis that from the date of his brother's death until the distribution of the partnership assets and liabilities, he carried on the business on his own account, and the assets affected by the Defendants' conduct were his own property, giving him the right to claim damages for injury to it, as well as for the trouble inflicted on him personally. Dr Cameron disputed this assumption of proprietorship and submitted that the situation was governed by s.41 of the Partnership Act, providing that after dissolution the authority of each partner to bind the firm, and their rights and obligations shall continue, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

The partnership was dissolved by Ernest's death on 1st September 1978. However, it is quite artificial to view the Plaintiff's conduct over the ensuing two years as merely a continuation in order to wind up its affairs and complete outstanding transactions. He took over sole control of the business and this essentially is what led to the rift

between him and the Defendants. I agree with Mr Robinson that the provisions of s.45 apply, since the Plaintiff carried on the business of the firm with its capital and assets, but without any final settlement of accounts between it and the estate. In this situation the latter is entitled to either a share of the profits made since dissolution, or interest at 5 percent of the amount of the deceased partner's share. When it came to the final settlement concluded in June 1981, the estate elected to take interest at this rate for Mr Chilton's use of the partnership assets. I agree with Mr Robinson that it is beyond all logic to suggest that a former partner who carries on the business of the firm in this way with the partnership assets is precluded from suing for injuries or damage to them. In any event, as I see it the meal which was taken and the pigs which were let loose did in fact belong to the Plaintiff at the relevant dates, as stock and chattels acquired by him through the use of partnership assets. They were certainly not in existence as assets of the partnership when it was dissolved. I therefore find that Mr Chilton was entitled to maintain this action and recover the damages assessed.

He also claims interest under the Judicature Act. This is a matter for my discretion, and having regard to the special family background and the overall settlement achieved in 1981, I do not think it an appropriate case for an award. The Plaintiff will have judgment against the First and Second Defendants for the sum of $350 in respect of the pig meal taken, and $500 for general damages. He will have judgment against the First Defendant for $8,963 in respect of the release of the pigs. Although there is a prayer for injunction, there is no evidence of further problems since the end of 1980, so this is no longer appropriate and is dismissed. I have found the allegations against Mrs Chilton unproved and there will be judgment for her. I reserve all questions of costs for further submissions if Counsel are unable to agree. In my view the Plaintiff was justified in bringing the proceedings against all three Defendants. At present I feel that Noel,

as the one principally to blame, should bear the substantial costs, but it would not be appropriate to make an award of costs in Mrs Chilton's favour, having regard to her association with the other two Defendants throughout this unfortunate saga.

McCasey J.

Solicitors:

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Malley Mahon & Co., Christchurch, for First Defendant
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