IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.153/81

BETWEEN: JAMES HUGH DUNNING
of Taupo, Farmer,
CYNTHIA OLIVE LINDA DUNNING
of Taupo, married woman
COLIN ALIAS DUNNING
of Taupo, Farmer
BRIAN DUNCAN DUNNING
of Taupo, Farmer
OWEN HUGH DUNNING
of Auckland, Accountant
ROBERT HUGH DUNCAN
of Auckland, Solicitor
NORMAN JOHN CARTER
of Auckland, Solicitor
Carrying on business under the name and style of the RUAMARA PARTNERSHIP
c/o 46a Williams Street, Cambridge

Plaintiffs

A N D: PARAHEKA STATION LIMITED
a duly incorporated company having its registered office at c/o Messrs Hogg, Young, Casey & Co., NZI Building, Garden Place, Hamilton, and carrying on the business of farming

First Defendant

A N D: RONALD FREDERICK COLES
of RD2 Putaruru, Farmer
GRAHAM JOHN COLES
of RD1, Tokoroa, Farmer
DONALD PERCY COLES
of RD2, Putaruru, Farmer

Second Defendants

Hearing: 19, 20, 21, 22, 23, 26 and 27 March 1984

Judgment: 17 April 1984

Counsel: N J Carter and Miss E Welson for plaintiffs
A L Hassall for defendants

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JUDGMENT OF BISSON,J.

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The plaintiffs are partners in the Ruamara farming partnership which owned two farm properties, one being Paraheka Station, having an area of 1447 hectares

(3576 acres) and situated 14 kilometers from Aria, in the King Country. The other property was a smaller farm of 640 acres in the Taupo region. This action and counterclaim concern the sale of Paraheka Station with certain livestock in 1980. Mr Brian Dunning was then the manager of Paraheka Station and his brother, Mr Colin Dunning, manager of the Taupo property. Mr Hugh Dunning was the managing-partner of the partnership.

By agreement for sale and purchase dated the 17th April 1980, the plaintiffs agreed to sell Paraheka Station to Mr R F Coles (or his nominee), one of the second defendants, at a price of $525,000.00, settlement being due on possession on 3rd July 1980. As the purchaser was not able to meet the requirements of the Land Settlement Promotion and Land Acquisition Act, it was decided that the sale should proceed to a ten-man company. The plaintiffs entered into a fresh agreement for sale and purchase dated the 21st July 1980 to the second defendants, as trustees for a company to be incorporated, the date of possession and settlement being the 8th August 1980. Following the incorporation of the first defendant, it executed an adopting agreement dated the 8th August 1980. Settlement of this transaction was made on due date, but a counterclaim has been brought by the first defendant against the plaintiffs in respect of an alleged short-delivery of hay in terms of the contract and also an alleged breach of a covenant by the plaintiffs

"not to overstock the said property and in particular will not increase the stock level above that which is revealed to the purchaser on his inspection of the property prior to the preparation of this agreement".

The action brought by the plaintiffs relates in particular to an amount which they claim to be the balance owing to them in respect of the sale to the second defendants of the ewe flock. The second defendants have brought a counterclaim against the plaintiffs alleging an overpayment in respect of livestock, and claiming damages in respect of various implied terms of the contract relating to the sale and purchase of livestock.

Paraheka Station was described by Mr Miln, a registered valuer who was engaged by Mr Kinder, solicitor for the defendants, to inspect and report on the property. In his report dated the 14th April 1980 he said :

> "A large store sheep and cattle property, bounded by the Mokau River on west side, natural steep ridges, scenic reserve and State Forest bound the bulk of the property on south and east sides, and a narrow frontage to the north.
>
> Contour is 20 ha easy wheel tractor in vicinity of road and buildings, 50 ha moderate hills with west aspect, remainder rising from the river and two main stream valleys to hilly, steep and very steep broken country. Altitude from approx. 24 metres (80') to 365 m (1200') high points."

He also referred to there being 840 hectares of effective pasture, 337 hectares of manuka and second-growth bush providing some rough grazing, and 270 hectares of native bush with some millable timber but with difficult access. He referred to there having been development of reverted

areas, and to new subdivisional fences of a good standard having been erected on the steep country being re-developed over the past three years. As to stocking levels, he said :

> "Proposed to winter 1980-4300 ewes, 1500 hgts, 100 R & K, 300 br. cows, 100 rsg 2 yr heifers, 200 rsg 1 yr M.S. cattle and 9 bulls. Total stock units 8472 = 10 s.u.'s per ha (or 4 s.u./ac.) on an efffective area of 840 ha plus rough grazing in scrub. This is considered to be maximum stocking rate for the property in present condition, necessary in a development situation, as this is, but affects per head stock performance . . . stock performance has not been good."

There were various meetings and telephone conversations between, in particular, Mr J H Dunning and Mr R F Coles, relating to the sale of the land and the livestock. It was decided at a meeting at Mr J H Dunning's home in Cambridge on the 10th may 1980 that the ewes would be mustered and a count and valuation take place at Paraheka Station on the 19th May 1980. Each party appointed a valuer. The valuers agreed on valuations of the ewes in five categories, and these valuations were thereupon accepted by the parties. A count of 4141 ewes was made. This was a convenient time for the muster, and it enabled the second defendants to ascertain the source of a ewe flock for the property and its cost, so that they could settle financial arrangements for the whole transaction. It also resolved for the plaintiffs the ultimate disposal of their ewe flock on the sale of the property.

On the 11th July 1980 a further meeting of the parties took place at Paraheka Station, when cows

and ewe hoggets were inspected and, without the assistance of valuers, a price of $250.00 each for cows and $17.50 each for ewe hoggets was agreed upon. Only 182 cows had been mustered but there were others on the property and the second defendants were prepared to purchase 210 cows at the agreed price. The ewe hoggets were not counted but the second defendants agreed to purchase 1150 ewe hoggets at the agreed price. The second defendants also took an option, at $20.00 each, in respect of 380 ewe hoggets which had been brought on to the property that month. Mr Brian Dunning then wrote out two copies of an agreement which was signed by Mr J H Dunning and Mr R F Coles recording the matters agreed that day, and also including reference to the sale of the ewe flock. It read :

" 11/7/80

STOCK AGREEMENT

between Ruamara Partnership and R F Coles

210 cows @ $250 subject to tally
1150 ewe hoggets @ $17.50 subject to tally
4150 ewes Total Value: $83,520.00

380 ewe hoggets (long wool) option @ $20 till 19/7/80.

Sgd: "J H DUNNING"
"R F COLES" "

It is to be noted that the number of ewes has been rounded off at 4150 and a total price of $83,520.00 agreed upon.

At that time the date for possession was to be the 25th July 1980 but the new agreement for sale and purchase provided for possession and settlement on the 8th August 1980.

On the 6th and 7th August 1980 the ewe hoggets were counted and crutched and the cows counted in accordance with the agreement of the 11th July 1980, which stated the sale of that stock was "subject to tally". On the 8th August 1980 an impasse developed in regard to the ewe flock. Mr J H Dunning claimed there had been an agreement to buy all the ewes on the property at $83,520.00 without any muster or tally, the buyers taking the risk of there being more or less in number than the stated number of 4150 ewes. Mr R F Coles disputed any such agreement, and insisted on an opportunity to count the ewes before making payment. Mr J H Dunning was not prepared to settle the contract for the sale and purchase of the land without at the same time receiving payment in full for the livestock.

This impasse was resolved by the parties making telephone calls to Mr Kinder, solicitor for the defendants, who devised a solution, not uncommon in conveyancing transactions, that a sum of money be held in trust pending settlement of the disputed part of the transaction. Settlement took place between the solicitors on the afternoon of the 8th August 1980, upon the basis of the following letter which Mr Kinder handed to Mr MacKenzie, solicitor for the plaintiffs :

> "Re: Coles from Ruamara Partnership
> Settlement Purchase of Stock
>
> We confirm that it is agreed by our respective clients that the following stock is being sold and purchased :

" 1. 209 cows @ $250.00 $52,250.00
2. 1129 ewe hoggets @ $17.50 19,757.50
3. 4150 ewes @ $20.00 83,000.00

$155,007.00

In consideration for settlement of the sale land Ruamara Partnership to Coles part settlement of the purchase of stock is hereby effected by the payment of $146,000.

Further, we confirm that we are holding not less than $10,000 in our Trust Account and undertake to hold same pending completion of the count of ewes upon the property. Once the count is completed to the satisfaction of all parties necessary adjustments will be made without delay."

It is accepted that Mr Kinder referred to the price for the ewes being $20.00 each totalling $83,000.00 in error for $20.12 each, totalling $83,520.00.

Following settlement on this basis, the second defendants, with some assistance at times from the plaintiffs, mustered ewes for crutching and counting. On the 18th August 1980 two stock agents made a count of mustered ewes which had been held for counting. The agreed total was 3501. Mr J H Dunning thereupon asked Mr R F Coles to accompany him on a paddock count of ewes, which he contended had not been mustered. Mr Coles declined. Mr Dunning went alone. He was followed by Mr Donald Coles, who ordered him off the property, as also did Mr R F Coles who had joined his son. Mr Dunning left, and the sequel is this action and counterclaim involving small amounts compared with a transaction of over $600,000.00, and involving a protracted hearing of 7 days with 266 pages of evidence.

The issue for determination in the action is whether the second defendants are liable to pay for any more ewes than the 3501 ewes counted on the 18th August 1980. I have selected the following two passages of evidence as they are particularly relevant to the matters in dispute. In the course of Mr Hassall's cross-examination, Mr J H Dunning said :

"Q. Where was it that you say you came to this agreement on 19th May with the Coles that they would accept or do this deal, purchasing these ewes without a muster on the day of settlement?

A. I can't recollect.

Q. This is the crucial point of this dispute that's been going on for years. You haven't any recollection of where the agreement was made?

A. On 19th May the agreement was agreed to, the number and value.

Q. I'm asking questions deliberately, one by one. You told us, for instance, you were on the porch on 11th July. Where were you on 19th May when you made this verbal agreement that there would be no muster on possession?

A. The principle of that agreement was discussed well before 19th May. I can't pinpoint the place and date. The whole idea of having a valuation and count at that stage was to avoid having a muster.

Q. I asked whether you reached that agreement on 10th May and you said "No, 19th May". Now you are saying it was some occasion earlier than that?

A. I cannot pinpoint the actual time that agreement was reached.

Q. Have you no mental picture of this occasion at all?

A. No.

Q. Can you tell us who was present?

A. No.

Q. You don't know where it took place?

A. No, not now. I can't recollect now.

Q. ... You just told us it was earlier than 19th May. How much earlier? Any idea?

A. Sufficient time that we agreed that 19th May would be the day we teed up the Valuers to be there. Could have been ten days or a fortnight.

Q. That would put us back to the beginning of May?

A. Round 10th May.

Q. Almost two months before expected settlement?

A. Yes.

Q. Did you discuss with Mr Coles, either of them or any of them, what was to happen if sheep died between the count of 4141 on 19th May and settlement?

A. Yes.

Q. What was agreed?

BENCH:

Q. What did you say to Mr Coles, so far as that was concerned?

A. That we count the sheep, we came to a value, total value of the sheep; if there were more sheep on the property at the time they took over that was their good luck, if less, that was their misfortune. The stock on the property at the time of 19th may muster we worked them out on the value, that is, the sheep we could see, and came to a total value and said "That is going to be the total value of the ewe flock" because after that date the ewes were going to the back of the property and very difficult to muster until after the winter was well over. The whole principle of doing that count and valuation at that stage was to catch them while they were there. Arrive at a total value for the mixed aged ewe flock and that is the figure, providing there were no major catastrophes, those sheep would be there. We shifted no sheep from the property. The only way, apart from death, would be if we shifted them off the property. Sure, some could stray and get back later in the season. Between Loflands and ourselves we would have as many as 100 stray each way. At the time of shearing you found your neighbour's, and they came and got them. For the $5\frac{1}{2}$ years we had no problem.

Q. On the subject of deaths, what did you say?

A. I can't recollect.

Q. On the subject of deaths, what did Mr Coles say?

A. No recollection.

"Q. When this agreement was made, what did you say?

A. In effect, that no further muster would be required of the ewe flock.

Q. What did Mr Coles say?

A. My understanding is he agreed.

Q. What did Mr Coles say?

A. I can't recollect actual words.

Q. I'm bound to put it to you that all three Coles will emphatically deny that they ever agreed to there being no muster on possession?

A. I could not accept that.

Q. You are saying that these experienced farmers, about two months before expected possession, were prepared to make an agreement with you to take the risk of stock dying, straying, stolen, being removed off the property, being drowned in the river, disappearing into the State Forest area - prepared to take the risk of those things?

A. Yes, that was a normal risk of that property."

Mr R F Coles in his evidence-in-chief said :

"A. On the subject of the ewes, as we understood it we were in the process of drawing up an agreement and we had the number of cows at 210, the ewe hoggets were 1150 there .. as we had tallied those ewes on 19th May they were 4141, and Mr Dunning in preparing the docket of sale, wrote down 4150 and as I said to him that was not the correct number of sheep on the property so he said to me "But there will be more sheep here than that". He said "They have just brought 38 sheep back from the neighbour" so I said "Well, we haven't inspected those 9 sheep." If you have 4141, you add a further 9 to that, that gives 4150. When those sheep were tallied out of the yard there was 4141. He is adding a further 9 which we haven't inspected. I reminded him of that. He said: "There'll be more sheep here than that", than the 4141. He insisted that 4150 be written on the paper. Written is the total price $83,520 on the paper. I believe that was calculated out by the Dunnings, that that was the price that Mr Hugh Dunning had his calculator and he calculated that price out. For that price of $83,520 I was to get 4150 ewes. I heard Mr Dunning give evidence to the effect that on a number of occasions, which he can't recall the

" date of, I had agreed that I would pay the $82,520 for the ewes on the property and if there were more than 4150 that was my good luck and if there were less than 4150 that was my bad luck. We told Mr Dunning that we were running very tight on finance. We didn't want any deal like that. We wanted to know what we were getting and what to expect. It was pointed out that we would take only 4150 sheep, no more than that.

BENCH:

Q. I take it you are agreeing he did put it to you you would take all the ewes at that price, whether some more or some less? Are you accepting he did put that to you and you refused? Is that what you say? That is the way you answered?

A. Yes.

Q. Is that right?

A. He maintained there were more sheep, so we said we are not interested in anything above 4150. They are not in the deal. Take them away.

Evidence-in-Chief continues . . .

Mr Dunning did not suggest to me that in return for the $83,520 cash I would be entitled to have, as well as the 4150, any surplus over and above that number that might be found on the property.
He did not suggest that if there were to be found to be less than 4150 ewes on the property we would still be obliged to pay $83,520.
The handwritten document of 11th July (Ext.7) I recognize that as the document signed on the 11th July by myself and Mr Dunning. There are the words "subject to tally" written in in respect of the cows. Those words were written in because at this stage 210 cows had never been produced. With respect to the hoggets the same words are used. They were used because those sheep had never been produced.
I have heard Mr Dunning give evidence that I agreed with him on a number of occasions, the date of which he can't recall, that on settlement there would be no muster and count of the ewes. That is not correct. Definitely not."

This judgment would be inordinately long if I set out other relevant passages of the evidence. In the end, the Court must make findings of fact based on all the evidence, and in accordance with the onus and

standard of proof based on the balance of probabilities. My findings are :

1. THAT the plaintiffs have not satisfied me that the second defendants agreed to pay $83,520.00 on the date for possession of the land, irrespective of how many ewes since the count of 4141 on the 19th May 1980 had either died, strayed, or been removed by the 8th August 1980. Such an extraordinary agreement would need to be very clearly spelt out, and it was not. The situation would be otherwise of course if the property in the ewes and the risk passed to the second defendants on either the 19th May 1980 or the 11th July 1980, as Mr Carter submitted, applying ss.18, 19 20 (Rule 1) and 22 of the Sale of Goods Act 1908. Property, and with it the risk, passes when it is intended to pass. There is nothing in the evidence to indicate that property and risk were intended to pass other than on delivery on the date for possession of the land.

2. THAT the ewes were mustered and tallied on the 18th May 1980 to obviate another muster of all the ewes on the date for possession when a complete muster would be impossible because of the adverse weather conditions, the ewes being in lamb and the very nature of the back country making mustering difficult. That there was such an agreeement is supported by the signed agreement of the 11th July 1980 which provided that the sale of cows and the sale of hoggets were subject to tally, but did not

so provide in respect of the ewes. Further more, the evidence does not satisfy me that the second defendants expected or required all the ewes to be brought in by the plaintiffs and yarded for a count on the 8th August 1980. That would be a tremendous task, and not desirable when the ewes were due to be brought in in convenient numbers from day to day for crutching by the second defendants. The second defendants arrived at Paraheka on the 6th August 1980 and there followed the counting of hoggets and cows. The hoggets were also crutched so that they could be taken out to the back of the property and the ewes brought forward for crutching, and to lamb or clear country. There was no credible evidence that this farming practice should be disrupted.

3. THAT as there was no agreement for the ewes to be mustered and delivery made of ewes in the yards on the 8th August 1980, delivery would be made of the ewes by the plaintiffs simply making the ewes available to the second defendants on Paraheka on that date. Physical possession and control of the ewes would be handed over with the land on which they were depastured. However, a purchaser of goods must be allowed a reasonable opportunity and time to inspect the goods on the seller making delivery. The second defendants were therefore entitled to inspect the ewe flock and to make a count. It was a sensible agreement to hold back $10,000.00 of the purchase price "pending completion of the count of ewes upon the property".

I think those words are significant as they do not require the plaintiffs to muster the ewes for a count in the yards, and adds weight to my finding that there was no obligation on the plaintiffs to again muster all the ewes for a count. Mustering and straggle mustering proceeded in the course of getting the ewes in for crutching and drenching, leading up to the count of 3501 ewes being made on the 18th August 1980. The second defendants, as stated in Mr Kinder's letter of the 27th August 1980, accepted this count as final for all purposes, and sought immediate payment of the amount of the overpayment made on settlement. However, as Mr Kinder's letter of the 8th August 1980 stated, the count must be completed to the satisfaction of all parties. It was not completed to the satisfaction of the plaintiffs, but the plaintiffs have failed to satisfy me that they made delivery of 4150 ewes to the second defendants. The count was 649 ewes short. I asked Mr R F Coles, as an experienced farmer and with his knowledge of the property, for his opinion as to the reason for the short-fall as so many possibilities had been canvassed in the evidence. He said :

"A. During that period we must accept some deaths, perhaps 160 or 170. That is an estimate.

Q. You are a farmer and you can make a considered estimate. Nearly 500 more to account for. What happened to them?

A. As I explained to Mr Dunning, and I wanted him to come and tell me where these two-tooth ewes were. There were 1381 two-tooth ewes supposed to be there, and I could only ever get 840.

/Cont'd. . .

Q. That is approximately the missing number. What do you say, in your opinion, judging the property and what sheep do, what happened to the 500 two-tooths?

A. They definitely were not there.

Q. What happened to them?

A. They've disappeared.

Q. I know. You know the property, you know what sheep are like. In your opinion, how could they have vanished?

A. They must have been taken off the property for them not to be there."

I must say at once that, having seen and heard Mr J H Dunning and his two sons and the shepherd Mr McKee give evidence, I am satisfied, it being a question of credibility, that no ewes were removed from the property prior to the sale. Mr J H Dunning rode over parts of the property on horseback immediately after the count to look for ewes not included in the count. He said that prior to being ordered off the property

> "I got up to over 400 sheep that I had counted and estimated. Some areas there were too many to virtually count. I had to estimate numbers. The point paddock, there were over 200; Tilers, I counted 78; the terraces I could only see the bottom quarter of the paddock and counted 45 there. That is some of them."

These figures were strongly challenged because they had not been made known to the second defendants until the hearing. But Mr R F Coles himself admitted he knew of 21 ewes, not mustered and included in the count, which he had not brought to account. There is a conflict as to what was said at the time Mr J H Dunning was ordered off, but it is common ground that Mr J H Dunning did not say he had seen any ewes, and it is common ground that

Mr Donald Coles was in an upset state. I prefer Mr Dunning's account that Mr Donald Coles was "not interested in talking about ewes at that stage". Mr R F Coles refused to accompany Mr J H Dunning, because of his concern for his cows,yet he was able to follow his son and instead of joining Mr Dunning he sent Mr Donald Coles to track down Mr Dunning. I can see no reason for Mr Donald Coles ordering Mr Dunning off the property if he had said he had not seen any ewes. Nor can I credit that a young man like Mr Donald Coles would order a man very much his sennior off the property if he had not been told by his father to do so, or knew full well that was why he had been told by his father to track down Mr Dunning. I cite the following passage from the cross-examination of Mr Donald Coles :

"Q. I suggest, Mr Coles, that you were so hot and bothered at chasing this man around the farm while he was counting sheep, and all you wanted to do was to get rid of him. You knew the sheep were still in the paddocks, Mr Dunning was counting them, and your sole concern was to get him off the property?

A. Well I ordered him off the property. I was upset, that's why I ordered him off.

Q. Well if he'd actually told you that he had seen no ewes, as you've maintained, why order him off?

A. Because I was upset. That's all I can say.

Q. Well why were you upset again?

A. Alright - well, I was going through a lot of emotion. It was apparent that these sheep were not on the property. We had mortgage requirements to meet. We were relying on a certain number of sheep to be on the property. You start to wonder how you're going to meet these commitments. The sheep are thin, they're not going to produce as well, you've got a lot of things on your mind. I may be not to your calibre but I can't distinguish emotion.

> "Emotion just comes into my body and I can't apportion it out to this one and that one, I'm afraid."

Mr Donald Coles was most unconvincing. By ordering Mr Dunning off the property, the plaintiffs were denied the opportunity to carry out a paddock count of unmustered sheep so that "the count is completed to the satisfaction of all parties". Mr R H Duncan, who is a partner of Mr MacKenzie, the solicitor acting for the plaintiffs and who is himself one of the plaintiffs, wrote to Mr Kinder on the 20th August 1980, as follows :

> "Twice last week we asked you to ensure that a joint count did take place and we confirmed that you acknowledged, after reference to your clients, that they would yard the ewes for crutching and that the count would thus be made. We made it clear to you that in addition to yarding the ewes a paddock count of stock left on the farm required to be undertaken, and you agreed that Mr J H Dunning and Mr Coles would establish the best method of doing this."

This letter also requested an explanation for Mr Dunning being ordered off the property, but none was given.

The Court must make an assessment of the number of unmustered ewes. The second defendants did not have accurate farming accounts which could be relied on, and their shearing tally in early 1981 would not be reliable as again there would probably be unmustered sheep, the plaintiffs having missed 144 in their shearing muster in April 1980. Mr Brian Dunning, who had been the Manager of the property for five years, had the best knowledge of the property at the time of the sale.

He described it in this way :

> "The property, starting from the front, there is a couple of paddocks hay could be made of. We made hay of one paddock, in part, each year. Through the property it gets steeper. Triangular shape with main access along the river. As you went down the property it would deteriorate from straight grass to grass with rushes, uneven. Further back there were ridges and scrub. Scrub from small scrub to tall scrub to 40 feet high. Very uneven, steep. It was ranging in height from the river, which was approximately 90-100 feet above sea level, to points round 1100 to 1200, rising roughly 1000 feet from river to top of hills. In the back of the property there was approximately 600 acres virgin bush. There were a lot of what you would call blind gullies that lead nowhere. A very difficult property to muster, requiring considerable time, especially the back portion where they had to come out of the gully and up the river. I can't think of anything else. It was very difficult to muster. It took me 2 or 3 years really to get the hang of actually moving stock, mustering them where they would naturally run."

I have regard to the evidence of Mr McKee that deaths could have accounted for 200 ewes, and that because of lack of boundary fencing some ewes could have strayed off the property and not returned. Mr R F Coles put losses of all sheep from deaths at 600 a year. I do not find sheep-stealing to be a reasonable possibility. A few ewes may have drowned in the river. Taking all these matters into account, and the evidence of Mr Dunning as to the ewes he counted or estimated, I am satisfied that in addition to the 3501 ewes counted there were a further 323 ewes running on Paraheka which were delivered to the second defendants on the date of possession, and for which they must pay at the agreed average price of $20.12 each. The plaintiffs also succeed on their claims of $83.15 for drench and $25.00 for the freezer, which were not really contested.

I turn now to the counter-claims. The first defendant alleges that the plaintiffs left only 462 bails of hay on giving possession of the property, in breach of their covenant to leave 800 bales of hay. Mr R F Coles and his son, Mr Ian Coles, gave evidence that they counted the bales of hay. Mr J H Dunning and Mr Brian Dunning had not counted the bales of hay on giving possession. Mr R F Coles could not remember when he made his count, but said it was in the early part of the week. He said Mr Dunning used some hay after the 8th August 1980 and that he, Mr Coles, also used 10 or 12 bales of hay a day for the first few days for feeding out to cattle. I do not regard the use of hay, nor any other action on the part of the first defendant, to amount to an acceptance in terms of s.37 of the Sale of Goods Act 1908. Mr Ian Coles did not give the date on which he counted 462 bales of hay. It was agreed that the hay was worth $2.00 per bale. In the absence of more precise details, and allowing for Mr Coles having used some hay before his count, I find the plaintiffs in breach of their covenant to the extent of 300 bales of hay at $2.00 per bale. It is to be noted that the number of 800 bales of hay dates back to the first contract in April 1980, so there could well have been some reduction in hay on hand by August 1980.

The first defendant also alleges that the plaintiffs were in breach of their covenant not to over-stock the property by introducing 380 hoggets to the

property in July 1980. I accept the evidence that this increase in stock numbers was annual practice for the past three years and did not increase the overall stocking of the property as made known to the second defendants from the outset, as evidenced by Mr Miln's report and Mr Kinder's file note. The first defendant must be deemed to have the same knowledge. Furthermore, the second defendants made no complaint of over-stocking when taking and option over the 380 hoggets and, by allowing them to remain on the property after not exercising the option, they showed that they did not regard there to be any question of over-stocking. The first defendant therefore fails on this counter-claim.

The second defendants claimed an overpayment of $3823.50, based on the sale and purchase of the following livestock at the following prices :

| | |
|---|---|
| 209 cows @ $250.00 each | $52,250.00 |
| 1137 ewe hoggets @ $17.50 | 19,897.50 |
| 3501 ewes @ $20.00 | 70,020.00 |
| | $142,167.50 |
| Amount paid.. | 146,000.00 |
| Overpayment .. | $3,832.50 |

Correcting the number of ewes to the figure of 3824, and the price to $20.12, the following calculation is arrived at :

| | |
|---|---|
| Cows as above.. | 52,250.00 |
| Hoggets as above.. | 19,897.50 |
| Ewes.. | 76,938.88 |
| | $149,086.38 |
| LESS PAID.. | 146,000.00 |
| SHORT PAYMENT.. | $3,086.38 |

The claim of an overpayment by the second defendants accordingly fails.

The second defendants further claimed that the plaintiffs should have accepted the count of 3501 ewes, but refused to authorize the release of the sum of $10,000.00 and to make payment of the alleged overpayment of $3832.50 to the second defendants. It was alleged that in consequence the second defendants were not able to purchase replacement ewes and thereby suffered a loss of income by way of lambs and wool. (Mr Hassall agreed that the claim should be reduced from a loss of 448 to 300 lambs). The amount now due to the second defendants out of the sum of $10,000.00 held in trust is $6913.62.

This counter-claim must fail as it is based on the false premise that the plaintiffs were bound to accept and be satisfied with the count of 3501 ewes. The plaintiffs were justified in also requiring a paddock count of ewes, but the second defendants, by ordering Mr J H Dunning off the property, prevented him from satisfying himself as to the count which had been made. Accordingly the sum of $10,000.00 was properly still held in trust, pending the dispute being resolved by the Court. This amount has been interest-bearing and the accrued interest on the amount due to the second defendants will adequately compensate them for their loss while awaiting payment, they being partly responsible for causing the delay.

In the alternative, the second defendants alleged that if the plaintiffs had agreed to sell 4150 ewes without further tally, then it was an implied term that the plaintiffs would ensure that 4150 ewes would be delivered to the second defendants on possession of the property being given and taken, and that there had been a breach of that implied term. It is my finding that, as pleaded by the second defendants, they agreed to purchase up to 4150 ewes which was a round-figure number representing what was believed, on the 11th July 1980, to be the number of ewes on the property based on the count of 4141 ewes on the 19th May 1980. However, there was no implied term that such a number of ewes would be on the property on the 8th August 1980. There had been an agreement for the sale and purchase of the ewe flock up to a maximum number of 4150. The plaintiffs delivered the ewe flock on due date. The actual number delivered has now been established by the Court. The plaintiffs were under no obligation to deliver more than the actual number of ewes on the property up to a total of 4150 on the date of possession. This claim accordingly fails.

By way of a further cause of action, the second defendants alleged a breach of an implied term that the condition and value of the ewes at the date of possession would be equivalent to their condition and value as at the 11th July 1980 (or for that matter the 19th May 1980). I cannot accept such an implied term. Clearly, ewes on a

development property suffer in condition during the winter. As I do not find over-stocking as alleged by the first defendant, and no mismanagement by the plaintiffs, the ewes were in no worse condition than would be expected in all the circumstances on the 8th August 1980. It is significant that the second defendants did not, at the time of the count on the 18th August 1980 by two stock agents, see fit to ask them for a valuation then - and it is further significant that their solicitor, in his letter of the 27th August 1980 in seeking final settlement, did not question the condition of or price for the ewes. This claim fails.

Finally, the second defendants, as an alternative, alleged a breach of an implied term that the plaintiffs would maintain the ewes by good farm husbandry in a condition and value consistent with that prevailing at the 11th July 1980 (or, for that matter, the 19th May 1980) down to the date of settlement. I am satisfied that the plaintiffs were not in breach of any such implied condition. They did not neglect properly to care for the ewes, their condition at the 8th August 1980 being consistent with the nature of the property, the known stocking rate, and the time of the year. This claim also fails.

In conclusion, there will be judgment for the plaintiffs on their action against the second defendants for $3194.53. Interest at eleven per cent (11%) is claimed from the 8th August 1980 down to the

date of judgment. This is not allowed as the plaintiffs are entitled to the interest which has actually accrued on that amount as part of the $10,000.00 held in trust.

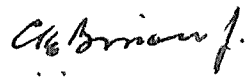
The action against the first defendant is dismissed. There will also be judgment for the first defendant on its counter-claim against the plaintiffs for $600.00 with interest thereon at eleven per cent (11%) as claimed from the 8th August 1980 down to the date of judgment.

There will be judgment for the plaintiffs on the counter-claim of the second defendants.

As to costs, I allow the plaintiffs' costs according to scale on their judgment against the second defendants both on the action and the counter-claim, together with witnesses expenses and disbursements as fixed by the Registrar. I certify for 6 extra days at $200.00 per day, and for extra counsel at $150.00 per day for 7 days, such certificates and witnesses expenses shall relate only to judgment on the action in respect of which I also certify for the whole costs of the action.

I allow the first defendant costs, according to scale, on its judgment against the plaintiffs with witnesses expenses in respect of Messrs R F Coles and R I Coles for one half-day each, and disbursements as fixed by the Registrar.

There is no occasion to allow the first defendant costs on the dismissal of the plaintiffs' action against it, as it was not involved in any costs beyond those incurred by the second defendants in defending the action.



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