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NELR.

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.215/83
M. 11/84

1071

IN THE MATTER OF The Arbitration Act 1908

AND

IN THE MATTER OF The Sharemilking Agreements Order 1977

BETWEEN STEWART WILLIAM GOVAN
formerly of Galatea, now of Waiuku, Sharemilker
Applicant

A N D IAN WILLIAM WEIR
of Galatea, Farmer
Respondent

Hearing: 13 August 1984

Counsel: J.L. Saunders for Applicant
L.A. Andersen for Respondent

Judgment: Delivered 11 SEP 1984

T.J. McGRORY
Deputy Registrar

JUDGMENT OF GALLEN J.

The applicant and the respondent were parties to a sharemilking agreement out of which a dispute arose. Under the terms of the agreement both parties appointed arbitrators who duly appointed an umpire. An arbitration was conducted by way of a full hearing in front of the arbitrators. Both parties were represented by counsel. Evidence was called and

witnesses were cross-examined. The arbitrators were able to agree on their award without reference to the umpire and in due course an award was issued. Unfortunately, the parties were unable to agree that this resolved the matters in issue. The applicant issued a notice of motion for orders remitting the award to the arbitrators in respect of an area where it was contended there was an ambiguity in the award or, alternatively, for enforcing the award. The respondent moved in his turn by way of cross-application for an order setting aside the award of the arbitrators.

The first point at issue relates solely to interpretation. One of the items in issue related to milk cheques. This was dealt with in the award in the following terms:

> "12. (Claim 4) Sharemilker's 29% share Milk Cheque
>
> The Arbitrators award the Sharemilker 29% share of the milk cheques retained by the Owner, together with such other sums as the Owner has received or will receive from Rangitaiki Plains Dairy Co. Ltd. in relation to the production season 1982-83. Interest to be calculated from 25th of each month in which payments fell or fall due. Interest rate to be calculated at 17.5%."

On the face of it, this would appear to be perfectly plain, but it appears however there are varying practices relating to the forwarding of milk cheques. In some cases, one cheque is sent which falls to be divided according to the percentage agreed upon between those involved in the sharemilking agreement. In other cases, the dairy company itself sends separate cheques for the agreed percentages, one to the owner,

one to the sharemilker. The sharemilking agreement itself provides that the sharemilker is to receive:-

> "A share of not less than 29 percent of the cheques for milk or cream from the herd milked by the sharemilker during the period of the agreement....."

The award would therefore appear to simply follow the agreement. It is however, contended by the respondent that since the dairy company forwarded separate cheques for the 29% to which the sharemilker was entitled and the 71% to which the respondent was entitled, that the award is to be interpreted as meaning that the sharemilker is entitled to no more than 29% of the 29% forwarded by the dairy company as his share. The basis of this contention is apparently the fact that the owner has retained the sharemilker's milk cheques and that the award refers to a percentage of these. In view of the terms of the agreement which was before the arbitrators, it would be quite incredible that an award in such terms should have issued.

My view is that the plain natural meaning of the words used in the award is that the applicant is entitled to 29% of all the milk cheques which were forwarded to the owner and this view is confirmed by the fact that the clause in the award goes on to refer to "such other sums as the owner has received or will receive from Rangitaiki Plains Dairy Co. Ltd. in relation to the production season 1982-83."

Clearly in that season the award was for 29% of the total and it would in my view require very strong grounds to

suggest that the arbitrators have arrived at an award as unjust as that which is suggested by the respondent.

In my view therefore the award means - and is to be interpreted as saying - that the applicant is entitled to 29% of all milk cheques forwarded by the Rangitaiki Plains Dairy Company Limited during the currency of the agreement. The applicant of course must give credit for such sums as he has received. I do not see any need to remit the award to the arbitrators.

The respondent however says that the award should be set aside first, because it contains errors of law on its face and secondly, that the arbitrators were guilty of misconduct.

It is contended that there are four errors of law apparent on the face of the record. The first of these relates to the award in respect of the claimed loss of production. The respondent contended that there was a loss of production as a result of an alleged failure of the sharemilker to carry out his duties under the agreement. The paragraph in the award is in the following terms:-

> "1. Loss of Production
>
> We the Arbitrators cannot substantiate this claim, after considering all evidence presented. We would draw attention to clauses 37, 38 and 39 of the Sharemilking Agreement Order 1982 or clauses 35, 36 and 37 in the signed agreement. These clauses give the Owner a number of options which were not used to remedy any of the alleged management defects on the part of the Sharemilker."

Mr Andersen says that the use of the words "cannot substantiate" indicates that the arbitrators regarded their function as inquisitorial rather than judicial and that this is a clear error of law on the face of the award. The term must in my view, be considered in context and that context refers to a consideration of the evidence. While the meaning contended for is possible, it is my view that the arbitrators are effectively referring to a conclusion on the evidence and either mean that the positive contentions of misconduct have not been substantiated or have used that term in a sense of a conclusion on the evidence. Mr Andersen supported his contention however by drawing attention to the further reference in the award to the clauses of the agreement which provide certain powers for the owner relating to management. Mr Andersen rightly says that these clauses give certain options to the owner but are not to be considered as the only remedies available. If the arbitrators did so regard them, then this would amount to an error of law. Whether it would or not, I do not read the references in the award as a conclusion that the arbitrators are saying in respect of this claim, the owner is confined to his rights under the agreement. Rather, I should read the reference as a confirmation of the conclusion to which the arbitrators had come on the evidence to which of course they refer.

In other words, the clause seems to me most likely to mean that the arbitrators after considering the evidence, have

concluded that the claim is not substantiated and that they are confirmed in their view by the fact that the owner did not at the appropriate times, choose to take action under the powers which he undoubtedly had under the agreement, a fact which tends to confirm that either the failures did not occur or were not regarded as significant when they did.

The second alleged error relates to an alleged loss in respect of calves sold. The paragraph in the award is in the following terms:-

"4. Loss on 30 calves sold

We the Arbitrators award a portion of the loss to Owner.

Sharemilker's payment to Owner $450
Interest to be calculated from
January 25, 1983"

Mr Andersen says that the arbitrators were required to consider whether or not there was a loss as a result of any alleged failure on the part of the sharemilker and if there was, what was the extent of such loss. He says that it was quite inappropriate that any loss should be apportioned - that there was no power to apportion a loss and if the arbitrators did so, then they clearly approached the matter in the wrong way.

This contention arises again as a result of the terminology used in the award. In my view the award could be interpreted as amounting to a decision that a portion of the loss claimed was awarded. The way in which that amount was arrived at does not appear from the award and I am in no position

to go behind the award to determine whether it was arrived at by way of reducing the total loss for various reasons or by some other method. The totality of the evidence is not before me. Apart from anything else, I do not have any access to the material elicited before the arbitrators by way of cross-examination. The use of the term "a portion" does not necessarily involve the conclusion that the arbitrators having ascertained that a loss had occurred, apportioned it between the parties. Even if it did however, there is always the possibility that the evidence in some sense justified such a conclusion but I cannot speculate as to this.

The third error claimed arises out of the following paragraph:-

"5. Loss of four cows

This is a loss of 2.4% and must be accepted. Therefore the Arbitrators dismiss the claim."

It is alleged that the claim arose out of allegations that the sharemilker's failure to carry out his duties resulted in the loss of four cows and that these matters were canvassed in the evidence before the arbitrators. Mr Andersen says that either the sharemilker did or did not carry out his duties in relation to those four specified cows and if he did not, then the owner has a claim. He says that the percentage loss that the owner may have suffered is irrelevant and if the arbitrators endeavoured to consider the validity of the claim on a percentage basis, they had approached the matter in the wrong way so that there is a clear error of law on the face of the record.

This contention does occasion more difficulty. I agree that if the arbitrators had simply tested any allegations against a percentage, it might be possible to suggest that they had approached the matter on a wrong basis. However the allegations were contested. With some hesitation, I reach the conclusion that the clause must be looked at in the same light as that relating to loss of production. The arbitrators having found the claim not made out, they find confirmation of their conclusion by looking at the overall percentage loss. If this were not so however, I do not accept that reference to a percentage would necessarily be irrelevant or wrong. In a contested situation where there were conflicting claims, a reference to an accepted percentage loss might affect the balance of probabilities one way or the other.

The final point made in support of this submission is placed on the following clause:-

> "6. Loss in value on fifteen cows
>
> The Arbitrators believe the list was given in good faith by the Sharemilker, and was not substantiated by the Owner, therefore they dismiss the claim."

Mr Andersen says effectively that the good faith of the sharemilker has nothing to do with the matter. If there were defects for which the sharemilker was responsible, then the owner is entitled to recover whether the evidence of those defects was found from material made available by the sharemilker or in any other way. He points out that in the nature of things,

the defects which relate to milking problems would only have been apparent to the sharemilker - it might be the only evidence available. Effectively however, allegations that the sharemilker is responsible for loss of value of the kind contended, depend upon breaches of the agreement. The presentation of a list of defects does not of itself indicate that there were any breaches of agreement or that the sharemilker was responsible for the defects listed. The onus of proving such a claim falls on the owner and in my view the paragraph says that the owner has not discharged that onus. A list may be a catalogue of defects, but does not necessarily amount to a confession of liability.

There were also four matters relied upon as amounting to misconduct on the part of the arbitrators. First, is that the arbitrators failed to decide all the matters that were referred to them. Matters which it is alleged were referred and not answered were firstly, whether there was a loss of production as a result of breaches alleged on the part of the sharemilker. This contention arises out of the paragraph already referred to and set out above. It depends upon a reiteration of the view that the wording adopted by the arbitrators suggest that they did not make a decision in respect of it. I cannot accept this contention. I think it is clear that the arbitrators did make a decision in respect of this claim. The terminology used must be considered in relation to the context and I think that the reference to a consideration of the evidence is significant.

The second point made relates to the loss of the four cows referred to above and depends upon the contention that the arbitrators resolved the dispute on the basis of the application of a percentage loss, but did not consider the allegations in respect of the individual cows. The wording used in the clause is that the arbitrators dismissed the claim. I think this has to be regarded as a decision.

The third point relates to the alleged loss in value of the 15 cows. Once again the clause itself refers to the claim being dismissed. In my view, the question was answered.

The second allegation of misconduct is that the arbitrators failed to comply with the terms of the arbitration in that they decided the question of loss of production otherwise than on the evidence. This submission depends upon the contention that the reference to the rights of the owner under the agreement suggests that the arbitrators considered that this should have disposed of the matter rather than a decision in the arbitration. As I have already indicated, I do not accept this interpretation of the wording used in the award and in my view the reference to the powers of the owner under the agreement is not a decision that the owner is confined to those powers in respect of the items in issue, but a confirmation of the conclusion to which the arbitrators have independently arrived.

The next allegation is that the arbitrators received evidence in the absence of both parties. Initially the submissions proceeded on the basis that the arbitrators, or one of them, had

made enquiries outside the formal setting of the arbitration. It was also contended that an inspection carried out by the arbitrators in the absence of the parties, was improper. However, there are special provisions relating to sharemilking contracts which allow such an inspection and as I understand it, this particular part of the contention was abandoned.

The arbitrators gave evidence and were cross-examined and during the course of that cross-examination, the arbitrator Mr Moore, indicated that he had approached a bank manager to obtain information on the current rate of interest and the result of these inquiries was then incorporated in the award. Clearly this evidence was obtained in the absence of the parties and there is strong authority to the effect that in an arbitration of this kind, such a course is sufficient ground for setting the arbitration aside. See Eastcheap Dried Fruit Company v. N.V. Gebroeders Catz' Handelsvereeniging (1962) 1 Lloyd's Reports 283. See also the comments of the Privy Council in Grand Trunk Railway v. R. 1923 A.C. 150.

In this case, the arbitration was conducted by way of a formal hearing. I do not think it can be said that the obtaining of information as to an interest rate is so immaterial that it would not affect the position. The parties may well have had views on the appropriate rate of interest and indeed, the rates imposed by banks vary from time to time and in respect of different kinds of transaction. Although I have no doubt as to the good faith of the arbitrators, I think this action did amount to misconduct in the very technical sense in which that

word is used in relation to arbitrations and that this must have consequences as far as the award is concerned. In the case of Garland and Lyn Jones Limited v. Winwood 1957 N.Z.L.R. 334, Gresson J. was faced with an analogous situation. He concluded that having regard to the circumstances, the receiving of evidence in the absence of a party infringed a fundamental principle. He accepted however, that misconduct had occurred only in the technical sense in which that word is used in cases of this kind. At p.336 he said as follows:-

> "The Court should bear in mind that the parties agreed to settle their differences by arbitration, and, unless the conduct of the arbitration has been marred by misconduct of so serious a nature as to unfit the arbitrators for their task, the award can properly be remitted to them so that the parties are not put to the expense of starting de novo. The arbitrators and umpire have obviously gone to much trouble to settle their award, and their misconduct has been in regard to procedure only."

In my view, similar considerations apply in this case and rather than simply set aside the award, I propose to refer it to the arbitrators requiring them to determine the question of the appropriate interest rate by way of a re-opening of the hearing at which the parties would be entitled to be represented and to call any evidence and to cross-examine.

The respondent also submitted that the arbitrators failed to act in a proper judicial manner. This contention depended upon a number of matters. The first was that in respect of their award as to loss of production, they had not

acted judicially. This contention is similar to those already raised. It depends upon a view of the award which I have already rejected, that is, that the arbitrators did not make a decision on the evidence before them.

Secondly, it was contended that the decision in relation to loss of production was inconsistent with two other decisions, one relating to a finding that there had been a loss of two bales of hay and the second, that there had been a loss of ten calves. I do not think there is any necessary connection between an alleged loss of production and a finding of the specific breaches to which reference has been made. Depending on the evidence, the one could have occurred without the other. This was a matter for the arbitrators to determine.

The next contention raises again the allegation that clause 4 involved an improper apportionment. I have already rejected this contention.

It is then submitted that the use of the percentage was an improper way of dealing with the claim in respect of the four cows. I reject this contention for the reasons already given.

Then it is contended that in respect of the claim for loss of value on fifteen cows, unless the evidence was found to be untrue, there should have been an award. I cannot accept this contention. Evidence of loss of value does not - any more than a list of defects - indicate the existence of liability.

Finally, Mr Andersen relied upon statements made by Mr Moore under cross-examination to the effect that he considers himself entitled to take into account his own experience and expertise. Whether or not he was entitled to do so, the evidence does not establish that he did and there is no positive evidence to the effect that any such an approach had any bearing on the ultimate award.

I do not accept then that there is any error of law on the face of the award which justify setting it aside. Because however of the enquiry as to interest made outside the formal hearing, I order that the award be remitted to the arbitrators to determine the question of the interest payable on such evidence as the parties may choose to put before them. When they have done so, then they may, if they so desired, amend the award which in other respects in my view must stand. The parties may, if they wish to do so, make submissions in writing on the question of costs.

R D Hammond J.

Solicitors for Applicant: Messrs Buddle, Harvey and Partners, Whakatane

Solicitors for Respondent: Messrs Osborne, Handley, Gray and Richardson, Whakatane