IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2006-443-000631

	BETWEEN	VINCENT WILLIAM SKLENARS AND JENNIFER GAIL SKLENARS Plaintiffs
	AND	JOHN MILTON POLLOCK AND MARGARET FORDYCE POLLOCK Defendants

Hearing: 30 June 2009

Appearances: Mr Sklenars appears in person for the plaintiffs
Ms Hughes QC for the defendants

Judgment: 4 December 2009 at 3 pm

JUDGMENT OF MALLON J

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Introduction

[1] The Pollocks and the Sklenars are in dispute over whether the Sklenars owe the Pollocks any money for Fonterra Co-operative Group Ltd ("Fonterra") shares. The Sklenars were issued the Fonterra shares in the place of shares in Kiwi Co-operative Dairies Ltd ("Kiwi") at a time that the Sklenars ran a dairy farm in part on land they leased from the Pollocks. The dispute was determined in the Pollocks' favour at arbitration. The Pollocks now seek to enter an arbitration award as a judgment of this Court. The Sklenars oppose that entry of judgment. They say that they have leave to appeal the award. Alternatively, they seek leave to appeal the award and for leave to make that application out of time.

Background

The lease

[2] Prior to 1 June 1999 the Sklenars and Pollocks ran dairy farm operations on adjacent blocks. For the purposes of their operations they both held shares in Kiwi. On 1 June 1999 the Pollocks (as Lessors) entered into a lease with the Sklenars (as Lessees). The Sklenars then operated their land and the Pollocks land as one block. The lease was for a three year term. It was renewed for a further three years.

[3] The dispute between the Pollocks and Sklenars concerned clause 25 in the lease agreement. Under this clause:

a) The Sklenars were transferred the Pollocks' shares in Kiwi free of consideration; and

b) The Kiwi shares were to be transferred back to the Sklenars at the termination of the lease without payment.

[4] The clause then contained the following three provisos:

> PROVIDED FURTHER that on the termination or sooner determination of this lease, should the Lessees have acquired from Kiwi extra shares because of their increased production from the property during the term of the lease then, upon a transfer back to the Lessors of those shares, the Lessors shall refund to the Lessees the actual moneys paid by the Lessees to Kiwi to acquire such extra shares PROVIDED FURTHER that should the number of shares held by the Lessees in Kiwi at the termination of this lease be less than the number originally transferred to the Lessees at the commencement of this lease (any bonus shares to be issued by Kiwi on 30th September 1999 shall be deemed to be included in those shares transferred to the Lessees at the commencement of this lease) because of reduced production by the Lessees then the Lessees shall pay to the Lessors a sum equivalent to the amount it would cost the Lessors to acquire back those extra shares from Kiwi to put the Lessors back in the same share holding position as they would have been as at 30th September 1999 had they remained as supplying shareholders PROVIDED FURTHER that any distributions (whether by way of cash, bonus shares or otherwise) issued to supplying shareholders as a result of any amalgamation which takes place between Kiwi Dairies Limited and any other dairy company and which are issued as a result of shares originally owned by the Lessors shall belong entirely to the Lessors.

[5] During the initial three year period of the lease, the dairy industry was restructured. Kiwi became subject to a merger proposal and the Dairy Industry Restructuring Act 2001 was enacted. As a result Kiwi shares were replaced with shares in Fonterra. To be issued with Fonterra shares, shareholders were required to be suppliers. A holder of Kiwi shares who was not a supplier had to surrender the Kiwi shares for a nominal value of $1 a share.

[6] At the conclusion of the lease the Fonterra shares were worth $5.44 per share. The Sklenars converted the Fonterra shares they had been issued into capital notes. The Pollocks were not suppliers and so Fonterra shares could not have been transferred to them. The Sklenars and the Pollocks took a different view about the effect of the restructuring on the Sklenars' obligation under clause 25 of the lease. They referred their dispute to arbitration.

The competing arguments

[7] The Sklenars took the view that the Kiwi shares had disappeared and were replaced with a different asset altogether which could not be transferred to the Pollocks under the Fonterra Constitution. They considered that the lease did not allow for this eventuality and that it was impossible to comply with clause 25

(through no fault of either party). The Sklenars were prepared to pay to the Pollocks the value of the Kiwi shares at the time of the merger in 1999 (i.e. 37,218 Kiwi shares received from the Pollocks at their $1 nominal value, giving a sum of $37,218).

[8] The Pollocks contended that a portion of the Fonterra shares held by the Sklenars came from, and could be traced as coming from, the Pollocks' Kiwi shares. They contended that clause 25 was intended to ensure that their shares were returned to them at their value at the end of the lease. They contended that if the "supplier only" requirements of Fonterra meant this was impossible, then the Sklenars were required to return the equivalent capital. They contended that this equivalent capital was the fair value of their proportion of the Fonterra shares as at 31 May 2005 (the date the lease came to be an end). They contended that the Sklenars' failure to pay this sum was a breach of contract or a breach of trust.

The interim award

[9] In the interim award (dated 11 September 2006) the Arbitrator found in favour of the Pollocks as to the meaning of clause 25. He considered that the purpose of clause 25 was to enable the lessees to become supplying shareholders on the Pollocks land. They were to have the Kiwi shares (including bonus and other shares) for so long as the lease continued. He considered that the third proviso of clause 25 was intended to ensure that any distribution to the supplying shareholder (the Sklenars) was directed to the lessor (the Pollocks) in relation to the lessors' shares transferred pursuant to the lease. That is, the intent was that the share asset running with the land would be preserved or maintained. He considered that the second proviso (under which the lessor was to be put back in the same shareholding position as if they had remained supplying shareholders) bore this out.

[10] The Arbitrator rejected the Sklenars' submission that the Kiwi shareholding disappeared at the time of the merger. He considered that this submission ran counter to district knowledge and practice and was illogical from a dairy industry viewpoint. He considered that the Pollocks' Kiwi shareholding was reflected as a portion of the Fonterra shares. He considered that there was no impediment to the

Sklenars transferring back to the Pollocks the equivalent capital in monetary terms or capital notes "to the value of 'Pollock shareholding' at the end of the lease term". He determined:

> I find for the claimants, the [Sklenars] being liable for a sum equivalent to the original Pollock shareholding in Kiwi but converted to Fonterra shares.
>
> In the event that, with the assistance of the Registrar of Shares for Fonterra, the parties are unable to agree on the equivalent value as at 31 May 2005 then this matter can be referred back to be dealt with in a final award.

Appeal

[11] The Sklenars sought leave to appeal the award on questions of law. Initially 13 questions of law were specified, but these were refined to three questions. The High Court (*Sklenars v Pollock* HC New Plymouth CIV-2006-443-631, 17 April 2007, Gendall J) granted leave to appeal the award on those three questions which were as follows:

> 1. Does the third proviso to clause 25 of the Lease apply where, following the enactment of the Dairy Industry Restructuring Act, Fonterra issues shares to a lessee in respect of milk supply.
>
> 2. Did the Arbitrator err in law at paragraph 88 of the Award when he applied to the interpretation of the third proviso to clause 25 of the Lease the test in the second proviso:
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>> '… to put the lessors back into the same shareholding position as they would have been had they remained as supplying shareholders'
>
> when this second proviso related to reduced Kiwi Shares because of diminution in milk supply during the term of the Lease.
>
> 3. If the third proviso to clause 25 of the Lease does apply what loss, if any, flows from its breach.

[12] The appeal proceeded to a hearing (*Sklenars v Pollock* HC New Plymouth CIV-2006-443-631, 26 February 2008 Priestley J). The High Court Judge summarised (at [9]) the respective views as follows:

> Both parties were of the view that the other was claiming a windfall. The Pollocks, for their part, considered that they were entitled to be put in the same position they would have been had the transferred Kiwi shares remained in their ownership and given them a Fonterra share entitlement.

> The Sklenars, for their part, considered the Pollocks were seeking the benefits of the Sklenar milk production during the relevant term of the lease, to which the Pollocks had made no contribution.

[13] As to clause 25 the Judge said (at [14]):

> In general terms clause 25 embodies the following features and intentions:
>
> - The Pollocks were to transfer to the Sklenars their Kiwi shares without payment of any sum.
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> - The transfer was for "the purpose" of allowing the Sklenars to become Kiwi suppliers.
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> - The transfer was to last solely for the duration of the lease.
>
> - Upon termination of the lease the Sklenars were obliged to re-transfer, without payment, the shares back to the Pollocks.
>
> - If, on the termination of the lease, the Sklenars had acquired extra Kiwi shares as a result of increased production during the term of the lease on the Pollocks' property, then the Pollocks were obliged to refund to the Sklenars monies which had been paid to Kiwi to acquire those extra shares.
>
> - If the number of shares transferred by the Sklenars to the Pollocks on termination was less than the number of Kiwi shares originally transferred because of reduced production, then the Sklenars would pay to the Pollocks a sum equivalent to the cost of acquiring extra shares in Kiwi to put the Pollocks back into the same hypothetical position in which they would have been at the start of the lease.
>
> - Distributions of shares flowing from any amalgamation of Kiwi "as a result of" the Pollock shares were to be owned by the Pollocks. ...
>
> The first four bullet points summarise the obligations of the parties to transfer and re-transfer Kiwi shares. The fifth and sixth bullet points have the clear purpose of obliging the parties to make adjustments between themselves to reflect any change from the shareholding flowing from increased or decreased milk production during the term of the lease. One of the criticisms made by Mr Keene QC of the Arbitrator's decision was that this adjustment intention cannot permissibly assist with the interpretation of the third proviso.

[14] The Judge reviewed the Dairy Restructuring Act and concluded that this did not assist in determining the issues. He noted as of "some importance" that Fonterra's letter to the Sklenars advised that it now held the Fonterra shares "in place of" the shares held in Kiwi and that the allocations have been based on the records "of your supply". He referred to enquiries and evidence which suggested that Kiwi shareholders owned one share for every 500 gm of supplied product and that two

Kiwi shares converted to one Fonterra share (being the equivalent of 1 kg of product).

[15] The Judge went on to summarise the Sklenars' submissions in more detail including noting that the real issue for the Sklenars was "whether the increase in value of the Fonterra shares should be captured by the Pollocks, who during the term of the lease were not suppliers, or by the Sklenars who were" (at [26]).

[16] The Judge accepted that the Sklenars' entitlement to Fonterra shares was tied specifically to production rather than to an existing Kiwi shareholding formula. The Judge considered, however, that the Kiwi shares too were historically linked to production and the Fonterra shares were issued in the place of the shares held in Kiwi before the merger. The Judge then said:

> [35] For these reasons I have no difficulty in holding that the relevant Fonterra shares issued in October 2001 to the Sklenars fall inside the third proviso of clause 25, and furthermore, that proviso, as a matter of contractual interpretation, represents the intention of the parties. The relevant Fonterra shares were distributions issuing to the Sklenars as supplying shareholders as a result of an amalgamation which took place between Kiwi and Fonterra, part of such distribution obviously issuing as a result of the shares originally owned by the Pollocks.
>
> [36] I consider the Arbitrator is correct in the background approach he adopted ... . The finding he made ... that the Sklenars had been faced with the alternatives of either acquiring the Pollock shares or letting the opportunity to lease the land lapse, is not to be read down. Nor are its consequences to be avoided. For this reason I agree with the Arbitrator's assessment of the purpose of clause 25 ...
>
> [37] Nor do I consider the Arbitrator has erred as a result of his broad description of clause 25 being designed to ensure that a lessor remained in the same shareholding position as would have been the case had they been supplying shareholders. ... [T]he function and purpose of clause 25 is tolerably clear (supra [14]). It is to ensure that the lessor, in his capacity as a supplying shareholder, is neither disadvantaged nor unjustly enriched in respect of the shareholding on the lease's termination.

[17] The questions posed were then answered as follows:

> [38] For these reasons the three questions of law (supra [24]) are answered thus:
>
> a) The third proviso of clause 25 of the lease applies where, following the enactment of the Dairy Industry Restructuring Act, Fonterra issued shares to a lessee in respect of milk supply.

b) The Arbitrator did not err in law at para [88] of the award in applying to the interpretation of the third proviso in clause 25 the test specified in the second proviso.

c) The quantum of the loss (being effectively appropriate compensation to be paid to the [Pollocks]) is remitted back to the Arbitrator for determination.

[39] On this last question of law, I specifically reserve leave to the parties, to guard against the possibility of my having misunderstood how counsel wanted the quantum issued to be resolved. I very much doubt, however, whether calculation of an appropriate sum and calculation of contract interest needs further determination by either this Court or the Arbitrator. The figures should be capable of *inter partes* resolution in the light of this judgment.

Events leading to Final Award

[18] The Sklenars and the Pollocks were unable to agree on quantum. A "Joint Memorandum of Counsel on Quantum" was filed in the High Court on 9 July 2008. In this memorandum the Sklenars advised that the issue of quantum went well beyond a disagreement about mathematics. They considered that, on the basis that clause 25 applied (as per the interim award and the High Court judgment of Priestley J):

a) At the time of the merger the Sklenars held 37,218 $1 Kiwi shares;

b) The merger formula provided that, calculated upon milk solids supplied, 37,218 Kiwi shares became 18,609 Fonterra shares (2:1 ratio);

c) As at 31 May 2005 (the date of termination of the lease) 18,609 Fonterra shares valued at the surrender value of $5.44 per share gave a figure of $101,233;

d) That figure was to be reduced by the payment of $37,218 made by the Sklenars on 1 June 2005, giving a figure of $64,015;

e) That figure then needed to be adjusted to take into account the different milk solids value distribution policies between Fonterra on the one hand and Kiwi on the other.

[19] As to e), the Sklenars' position was that Fonterra's brief under the Dairy Industry Restructuring Act was to grow to an internationally viable corporation. To do that, the Sklenars said that Fonterra had to secure working capital. They said that Fonterra did that by, rather than paying out all milk solids revenues and preserving a standard price for shares as Kiwi had done, paying a smaller amount out and withholding revenues. In this way the Sklenars considered that the Fonterra shares increased in value at the expense of the revenue which the Sklenars would have expected to come from Kiwi had Kiwi not merged with Fonterra. They considered that the Pollocks were to receive at the end of the lease only what they would have received had Kiwi remained the milk supply company. They submitted that this was to be assessed as at 30 September 1999 and not the lease end date.

[20] The Pollocks' position was that the parties had agreed a percentage of the Sklenars' total Fonterra shareholding that represented the Pollocks' shareholding. The Pollocks considered that this percentage was to be applied to the value of the total shareholding at the end of the 2004/2005 season. From this was to be deducted the cost of additional supply shares purchased in the 2001/02 and 2003/04 seasons and the $37,218 already paid.

[21] The Sklenars considered that the correct methodology for assessing the quantum should be determined by the Court pursuant to the leave already granted. The Pollocks considered that the issue should be referred to the Arbitrator.

[22] It is apparent from the Court file that a telephone conference was arranged to discuss the joint memorandum. This is referred to by both parties and there is a court document recording the arrangements for the telephone conference. I have been unable to find any court minute or note as to what Priestley J directed at that time. However a memorandum from the Sklenars' counsel (dated 26 March 2009) indicates that it was decided that quantum should be put to the Arbitrator and any argument that needed to go before the Court could then be based on the Award.

Final Award

[23] A hearing before the Arbitrator took place on 20 November 2008. The Sklenars contended that Fonterra's distribution policy differed from Kiwi's and the quantum needed to be adjusted for this. As per the position advanced by the Sklenars at the initial arbitration hearing, before Priestley J, and as set out in the joint memorandum, the Sklenars submitted that Fonterra withheld revenues which Kiwi may have paid out to the Sklenars in added value of milk solids. The Sklenars submitted that this policy meant that Fonterra shares increased in value at the expense of the revenue which supplying farmers would have expected had Kiwi not merged with Fonterra. The Sklenars submitted that this meant the increase in the value of shares was not attributable to the original Kiwi shares held but because of the capital retentions made by Fonterra at the suppliers' expense.

[24] The Pollocks disagreed. They contended that the increase in value had nothing to do with either the Pollocks or the Sklenars but to the increase in the value of dairy products. They submitted that they were entitled to this increase because this would return them to the position they would have been in had they continued as the supplying shareholders.

[25] In the Final Award dated 18 December 2008 the Arbitrator rejected the Sklenars' submission. He saw the position as answered by his interim award upheld by the High Court. He considered that clause 25 was solely to enable the Sklenars to supply for the duration of the agreement. He considered that the lease required "the transfer back of the Pollock's shareholding or, in the alternative, the equivalent capital sum at the end or termination value". He said that it so happened that the Fonterra share value was higher but clause 25 was neutral as to value. He said that if the subsequent Fonterra share value was lower than Kiwi then that would have set the capital equivalency.

[26] On the basis that the Pollocks' initial shareholding as "bonused" up for their last season of production equated to 58.9% of the total Fonterra holding by the Sklenars at the date of termination of the lease, the Arbitrator calculated an amount

owing of $112,846.19 plus interests and costs which meant a total amount owing of $212,030.33 (plus Judicature Act interest incurring on a daily basis).

[27] On 30 December 2008 the Sklenars requested (pursuant to Art 33, First Schedule to the Arbitration Act 1996) that the Final Award be amended because of a computation error in respect of interest. This was done in a document entitled "Correction to Final Award Dated 18 December 2008" dated 8 January 2009 and the revised total sum of $210,497.07 was determined as payable by the Sklenars to the Pollocks with interest pursuant to the Judicature Act to apply from 8 January 2009.

Applications before me

[28] The Pollocks made their application to enter the award as a judgment on 26 February 2009. The application was made in respect of the award dated 18 December 2008.

[29] The Sklenars filed a "Memorandum of Appellants Concerning Hearing of Appeal on Quantum (Leave Granted)" dated 26 March 2009 within the framework of leave granted. In this memorandum they said that they "wish[ed] to argue issues relating to quantum under Justice Gendall's Judgment. Accordingly the appellants request a hearing date for that purpose". At this time the Sklenars, who had up until this point had counsel acting for them, gave notice that they would now be acting in person. On 27 March 2009 the Sklenars filed a notice of opposition to the application to enter the award as a judgment. The notice advised that the grounds of opposition were that it sought "to enforce an award of quantum in respect of which leave to appeal has been granted and not yet argued".

[30] The proceeding came back before the High Court (Priestley J) on 8 April 2009. The Judge commented in a minute that the Sklenars "seem to be of the view that the leave to appeal, granted by Gendall J in April 2007, somehow applies to their disagreement with the arbitrator's quantum award". As to this, the Judge said that "I doubt very much whether [this] contention is arguable" although he noted that he had not had the benefit of argument.

[31] The proceeding then went before the High Court (Hugh Williams J) for directions. The Judge said that if there was extant leave pursuant to the judgment of Gendall J then the Pollocks needed to file a notice of opposition. He further said that "[a]lthough the authorities mentioned seem to suggest the leave granted by Gendall J may possibly extend to the quantum question and perhaps remains extant, there has, as yet, been no notice of appeal filed specifically in relation to the quantum findings of either the 18 December 2008 or 8 January 2009 awards". His Honour proposed that the Sklenars file on a precautionary basis an application for leave to appeal the quantum finding of the awards and an application for leave to file the appeal out of time.

[32] In accordance with the Court's directions on 12 May 2009 the Pollocks filed a notice of opposition to "the Interlocutory Application contained within the Memorandum of the Appellants dated 26 March 2009 for leave to appeal and/or Notice of Appeal"; and on 18 May 2009 the Sklenars filed (on a precautionary basis) an application for leave to appeal the 18 December 2008 and 8 January 2009 awards and for leave to appeal out of time. The questions of law on which leave to appeal was sought were said to be:

> The questions of law arising out of the awards relating to quantum are:
>
> a) Did the Arbitrator apply the correct legal interpretation to the third proviso of clause 25 of the lease agreement as contracted by the parties in awarding quantum
>
> b) Did the Arbitrator err in law when awarding monies to the lessor which did not flow from either the original Shares of the lessor as required by the third proviso of clause 25 nor from any additional contribution to the company by the lessor
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> c) Did the Arbitrator err in law by awarding monies contributed by the lessee to the value of the share as a result of that lessees [sic] participation and supply to the Dairy Co-op, to the lessors as damages payment
>
> d) Did the Arbitrator err in law by assuming that the increase in share value flows to the lessors as a function of the share whereas the Dairy Restructuring Act 2001 and the Dairy Company Constitution clearly describe the increase in value as a function of production
>
> e) Did the Arbitrator err in law by assuming that the requirement of the lease to transfer Shares for no consideration is lawful under the current Dairy regulations, when those regulations require "fair value" to be paid when transferring Shares

f) Did the Arbitrator err in law by awarding monies as damages which were not in the contemplation of the parties at the time the contract was signed

The Arbitration Act

[33] Unless otherwise agreed between the parties, appeals on questions of law are permitted by agreement between the parties (before or after the award is made) (s 6(1)(b) and (2)(b) and cl 5(1), Schedule 2 of the Arbitration Act) or with the leave of the Court. In this case the parties have not agreed that an appeal can be brought and so any appeal which the Sklenars now wish to pursue must either be pursuant to an existing grant of leave or a new grant of leave.

[34] An application for leave to appeal must be brought within three months from the date on which the award was received by the party who is seeking the leave (s 6, cl 5(8), Schedule 2, and art 34(3) Schedule 1 of the Arbitration Act). That time limit is prescribed by statute and there is no power conferred on the High Court to extend that time period. Where a request for a correction of an award is made within 30 days, the three month period runs from the date the request is determined by the Arbitrator (cl 5(8), Schedule 2, art 33(1) and art 34(3), Schedule 1).

Is there existing leave?

[35] If the High Court has not answered the third question on which leave was granted then that must be answered before the Final Award can be entered as a judgment. As I understand it from the oral submissions made to me, the Sklenars submit that the High Court determined that clause 25 applied to the Pollocks' Kiwi shares that became Fonterra shares, but had not determined whether the Pollocks were entitled to the increases in value of the Fonterra shares which were attributable to Fonterra's investment and pay out strategy (which differed from the position under Kiwi). The Sklenars submit that the Arbitrator calculated the quantum assuming that the High Court had answered this question in favour of the Pollocks when that was not the case. It is therefore necessary for me to determine what the High Court did decide.

[36] Question 1 on which leave was granted asked whether the third proviso of clause 25 applies to Fonterra shares issued following the enactment of the Dairy Industry Restructuring Act. It appears to be a question directed solely to the submission made for the Sklenars at the first arbitration hearing that the Kiwi shares had disappeared and had been replaced with a new kind of share would could only be held by a supplying shareholder. It did not ask whether the Pollocks were to receive the increase in value of the Fonterra shares between the date Kiwi shares became Fonterra shares and the termination of the lease. The Court found (at [38] a)) that the third proviso of clause 25 did apply.

[37] Question 2 asked whether the Arbitrator erred in applying the test in the second proviso (which relates to adjustments for decreases in the number of shares because of reduced production) in interpreting the third proviso. As to this, the High Court concluded (at [38] b)) that the test specified in the second proviso was relevant to the interpretation of the third proviso.

[38] Question 3 asked "what loss, if any, flows from" the breach of clause 25. The Court answered this by saying (at [38] c)) that the quantum of loss, being effectively appropriate compensation, was referred back to the Arbitrator.

[39] In answering these three questions the Judge has not expressly addressed whether the Pollocks were entitled to the full value of the Fonterra shares as assessed at the date the lease is terminated. I can therefore understand why the Sklenars consider that the Court has not dealt with a question of law on which leave was granted. However, a close review of the Judge's reasons shows that the Judge had rejected the Sklenars' submission that the Pollocks were not entitled to the full value of the Fonterra shares at the termination of the lease. I say this for the following reasons.

[40] It is clear that the Judge understood the Sklenars' submission about this. The Judge specifically referred to the respective submissions made about who would receive a windfall.

[41] In finding that clause 25 applied to the Fonterra shares the Judge relied on the correspondence from Fonterra that the shares were issued in the place of the Kiwi shares. The Judge accepted that Fonterra shares were tied to supply/production but did not see this as significant because Kiwi shares too were historically tied to production.

[42] In reaching his conclusions on questions 1 and 2 the Judge agreed with the Arbitrator as to the purpose of clause 25. That purpose was viewed as being to transfer ownership and control of the shares to enable the Sklenars to fulfil the supplying shareholder requirement. This transfer was for no consideration and was only for the duration of the lease. At the end of the lease the shares were to be transferred back for no consideration, except insofar as any losses due to reduced milk production were to be made good by the lessees and any gains due to increased production were to be reimbursed by the lessors. The Judge also agreed with the Arbitrator that clause 25 was designed to ensure that the Pollocks remained in the same shareholding position as would have been the case if they had been supplying shareholders – that is, so that they were neither disadvantaged nor unjustly enriched on the lease's termination.

[43] On this reasoning the Pollocks (had they remained the supplying shareholders in respect of their Kiwi shares) would have been issued with Fonterra shares in the place of Kiwi shares. Therefore, under clause 25, the Pollocks were entitled to the Fonterra shares that the Pollocks would have received from their Kiwi shares had they remained supplying shareholders. The Judge has not explicitly said that the Pollocks receive the full value of the Fonterra shares that replaced their Kiwi shares but this is implicit in the Judge's reasons. The one replaced the other. The Pollocks get the replacement.

[44] It is apparent that the Judge viewed the assessment of quantum as purely a mathematical exercise. I say this because in answering Question 3 the Judge has not referred to the "if any" component of the question, the Judge was of the view (at [39]) that the calculation should be able to be done *inter partes*, and the Judge had earlier commented (at [25] of the judgment) that "[t]he Sklenars apparently converted all their relevant Fonterra shares into capital notes and redeemed them

shortly after the termination of the lease and so I doubt whether quantification will be a problem".

[45] It follows from this that the Judge viewed the Pollocks as being entitled to the redeemed value of the Fonterra shares. The number of shares would be determined by the number of shares the Sklenars received for the Pollocks' Kiwi shares at the time the Fonterra shares were issued. It is also apparent that the Judge had rejected the Sklenars' position that as a non-supplier the Pollocks were entitled only to the $1 face value of the Kiwi shares. If that submission had been accepted then there would be no loss for the Arbitrator to quantify.

[46] The Judge's reasons have therefore dealt with the issue of methodology for determining loss and the date this is to be determined. The Arbitrator correctly applied the High Court decision in approaching the quantum calculation by treating clause 25 as neutral as to value and awarding the Pollocks the value of the number of Fonterra shares that represented the Pollocks' Kiwi shares. I therefore consider that there is no extant leave in respect of the issue of whether the Pollocks or the Sklenars are to have the benefit of the increase in value of the Fonterra shares.

[47] In submissions before me, and as set out in the precautionary application for leave ([32] above), two further issues relating to quantum were raised. The first of those is that set out at e) of the application. It raises a question as to whether the current Dairy Regulations permit an agreement to transfer shares at no consideration. A similar, though not identical, question was amongst the 13 questions of law on which leave to appeal was initially sought (refer [11] above). It is a question which concerns the legality of clause 25. The legality of clause 25 does not fall squarely within the three questions, as reformulated or refined, on which leave was granted. Nor does it appear from the judgment of Priestley J that the issue was raised before him. It appears therefore that the issue was not pursued and that there is no extant leave for this issue to now be considered by the High Court.

[48] The other issue raised is that set out in f) of the precautionary application for leave (above [32]). As I understand it, the Sklenars here are raising whether there

should be any compensation payable at all when clause 25 contemplated a share transfer, not damages in lieu of shares if it became impossible to transfer the shares.

[49] The original 13 questions on which leave had been sought included questions as to whether any loss suffered by the Sklenars was caused by a breach of contract or a breach of trust (the two grounds on which payment has been claimed by the Pollocks) and specifically whether the obligation under clause 25 changed to requiring the Sklenars to pay the equivalent value of Fonterra shares when it could not transfer the shares. It is not clear whether the "if any" limb of question 3 was intended to raise this issue. The leave judgment does not assist in this respect because the Judge noted and applied the usual practice that if leave is to be granted it is not appropriate to express a view on the merits.

[50] It is not clear on the papers before me whether this issue was pursued before Priestley J. His judgment does not refer to this issue. However it is clear that the Judge determined that compensation was payable. That is because the Judge has not asked the Arbitrator to determine "if any" compensation is payable. Rather he has said that the appropriate compensation is remitted to the Arbitrator for determination.

[51] If the Fonterra shares could not be transferred back to the Pollocks under the Fonterra Constitution, then the Sklenars did not breach clause 25 when they failed to transfer any Fonterra shares to the Pollocks. However the Court found that the effect of clause 25 was that the Fonterra shares were intended to be owned by the Pollocks at the conclusion of the lease and that the Sklenars would be unjustly enriched if they were entitled to retain the proceeds of those shares when converted to capital. It follows from this reasoning that the Sklenars were required to account to the Pollocks for the proceeds. The Judge has therefore effectively dealt with this issue as well.

[52] For these reasons I conclude that the question of whether there was loss was dealt with by the High Court and only the mathematics of that loss was left to the Arbitrator. I consider that the questions set out in the precautionary application for leave are seeking to re-litigate issues already determined against the Sklenars by the High Court. I therefore consider that there is no existing leave pursuant to which the

issues as to quantum the Sklenars wish to pursue, in respect of the Arbitrator's interim or Final Award, can be appealed.

Application for leave

[53] If the Sklenars wished to appeal the Final Award they needed to so within three months of their receipt of it. If the three month period runs from 18 December 2008 then the application for leave needed to be made by 18 March 2009. If the three months runs from the corrected Final Award given on 8 January 2009 (if received by the Sklenars that day) then the application for leave needed to be made by 8 April 2009. After the 18 March 2009 date but before the 8 April 2009 date the Sklenars filed their "memorandum dated 26 March 2009". They also filed the notice of opposition to the Pollocks' application to enter the award as a judgment.

[54] The Sklenars submit that the three months runs from the date of the corrected Final Award. They submit that if an application for leave to appeal is needed then their memorandum of 26 March 2009 clearly raised the issue they wished to have determined and that this should be treated as an application for leave to appeal. The Pollocks submit that it is not an application for leave and any application for leave needed to be made by 18 March 2009.

[55] I consider that, providing the memorandum squarely put the Pollocks on notice of their intended appeal, it could be treated as an application for leave even though it was not in the form provided by the High Court Rules. Irregularities or defects in procedure of this kind are able to be corrected under those Rules (an example is *Hirstich v Kahotea* HC Auckland M/404/184-SW02, 3 April 2003). It is also arguable that the three month period runs from the date of the corrected Final Award. (In *Opotiki Packing & Coolstorage Limited v Opotoki Fruitgrowers Co-operative Limited (In Receivership)* [2003] 1 NZLR 205 the High Court and Court of Appeal indicated that in respect of some issues time might have run from the date of the uncorrected award. It was not necessary to decide this because the application was made well beyond three months after the corrected award.)

[56] However, even if the memorandum is treated as an application for leave and it was made within the three month time frame I would not grant the Sklenars leave on the questions they have raised. This is because I consider the Sklenars are relitigating issues which the Arbitrator and the High Court has decided against them. The only new issue is that at e) in the application, but if the Sklenars wanted to raise that issue it ought to have been pursued as a specific question in respect of which leave was sought at the time the application for leave was heard by Gendall J. It was an issue arising out of the Interim Award, rather than the Final Award. The Sklenars are now out of time in respect of this issue.

Entry of judgment

[57] For completeness, I note that there was an issue about whether the Sklenars' notice of opposition to the application for entry of judgment had been filed in time. His Honour Hugh Williams J directed that if that issue was to be pursued an application to strike out the notice should be filed. No such application was filed and the point was not raised before me.

[58] The grounds raised for refusing the Pollocks' application for entry of judgment are not made out. The application seeks to enter the 18 December 2008 award as a judgment. I order that this award, as amended by the correction made on 8 January 2009, is to be entered as a judgment.

Mallon J

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