

**IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE**

**CIV-2021-425-000047
[2022] NZHC 966**

BETWEEN AVONDALE PASTORAL LIMITED
PARTNERSHIP
Appellant

AND SAUNDERS DAIRY HOLDINGS
LIMITED
Respondent

Hearing: 16 November 2021

Appearances: A D G Hitchcock for the Appellant
A S P Tobeck for the Respondent

Judgment: 9 May 2022

JUDGMENT OF NATION J

Introduction

[1] Between 26 May 2015 and 27 July 2015, Avondale Pastoral Ltd Partnership (Avondale) grazed 396 dairy cows on a property leased by Saunders Dairy Holdings Ltd (Saunders Dairy) in Southland. Avondale did not pay the invoice for the third instalment of grazing fees. They complained about the condition of their cows at the end of grazing. Saunders Dairy made a claim in the District Court for the outstanding grazing fees and some other sums. Avondale, by way of set off or counterclaim, claimed damages for the loss they said they had suffered through the cows not being looked after as they should have been.

[2] In a judgment of 14 January 2019, Judge Kellar dismissed Saunders Dairy's claims for the loss they suffered through Avondale's breach of contractual obligations

to graze 400 cows for a slightly longer period than occurred.¹ He dismissed Avondale's claim for loss which Avondale said they had suffered through Saunders Dairy's failure to feed the cows sufficiently and take reasonable and proper care of the stock.

[3] Following an application to recall that judgment, in a further judgment of 14 April 2021, Saunders Dairy obtained judgment against Avondale for the amount of its third invoice, \$48,156.14, together with interest and costs.²

[4] Avondale appealed the judgment dismissing their claim against Saunders Dairy.

Background

[5] The sole director and shareholder of Saunders Dairy is Mr Dean (known as Jock) Saunders. The land on which the cows were grazed (the Saunders property) was leased by Saunders Dairy from Mr Saunders' father.

[6] Mr Stuart Telfer, together with his wife Tristan (known as Max) Collins, were contract milkers for Avondale. They managed three farms with some 5,000 cows.

[7] In May 2015, Avondale and Saunders Dairy agreed that Avondale would graze 400 cows on the Saunders property and would pay \$32 per cow per week, and the cows would be fed 15 kg of dry matter per cow per day.

[8] On 25 May 2015, 357 cows belonging to Avondale arrived on the Saunders property. Another 39 cows were delivered to the Saunders property on 10 June 2015. They were from a different company (Thames Dairy) but also managed by Mr Telfer and Ms Collins.

[9] There was no written agreement recording the terms on which the cows were to be grazed.

¹ *Saunders Dairy Holdings Ltd v Avondale Pastoral Ltd Partnership* [2019] NZDC 324.

² *Saunders Dairy Holdings Ltd v Avondale Pastoral Ltd Partnership* [2021] NZDC 7034.

[10] Most of the Avondale and Thames Dairy cows left the Saunders property and returned to their home properties on 27 July 2015. Avondale claimed a number returned in poor condition.

[11] On 13 April 2017, Saunders Dairy filed an amended statement of claim for \$52,954.18 and exemplary or general damages in the sum of \$50,000. On 26 April 2017, Avondale filed a statement of defence to that amended statement of claim and, by way of set off and counterclaim, a claim for \$241,655.55. That claim was reduced at the hearing to \$129,996. This sum included alleged losses from missing or euthanised stock, and the loss of production from the culled cows and those returned in poor condition.

District Court judgment

[12] In the judgment of 14 January 2019,³ the Judge held the contract required Avondale to use their best endeavours to both send 400 cows to the property and ensure the cows remained on the property for nine weeks. To recognise the exigencies of farming, they were not required to send exactly 400 cows for exactly nine weeks. The Judge accordingly found Avondale was not in breach for failing to provide 400 cows for nine weeks.⁴

[13] The parties agreed Saunders Dairy would offer the cows the equivalent of 15 kg of dry matter per cow per day.⁵

[14] The Judge referred to evidence from various witnesses as to the dry matter they calculated or said had been fed to the cows.

[15] The Judge said, based on Mr Saunders' and a farm consultant's evidence, there was enough feed on hand, in various forms, to comply with the terms of the contract.⁶

[16] The Judge held there was an implied term of the grazing contract that Saunders Dairy would take reasonable care of the cows. The Judge did not consider his

³ Above n 1.

⁴ At [7].

⁵ At [23].

⁶ At [37].

determination of the issues turned on where the burden of proof lay but said “to the extent that it is helpful to make a finding about where the burden lies I am satisfied that it lies on the grazier to disprove negligence on its part”.⁷ The Judge said it was for Avondale to prove what taking reasonable care of the cows meant.

[17] The Judge said the questions before him were as to:⁸

- (a) what condition the cows were in when they arrived on the property;
- (b) did Saunders Dairy offer the cows 15 kg of dry matter per cow per day;
- (c) did Saunders Dairy fail to take reasonable and proper care of the cows beyond the provision of feed;
- (d) what condition were the cows in when they were returned to Avondale; and
- (e) if they were in poor condition, what was the cause or causes of their condition.

[18] The Judge referred to the scant evidence available as to the condition of the cows at the start of the grazing contract.⁹

[19] The Judge said Mr Telfer visited the property on 12 June 2015 and said the cows were not getting any skinnier than when they arrived on the property but they were not getting any fatter.¹⁰ He had visited the property on two other occasions, 24 June and 4 July. His farm manager gave the cows an injection on 15 July. No issue was raised as to the condition of the cows as a result of those visits to the property. Avondale had not checked the condition of the cows at any time between 15 July and the date on which the cows returned to the property.

⁷ At [27], citing *McDermott v Davis* (1922) GLR 586 (SC); *Humphrey v Phipps* [1974] 1 NZLR 650 (SC); *Newton v Andrews* HC Whanganui CP 11/94, 1 December 1994.

⁸ *Saunders Dairy Holdings Ltd v Avondale Pastoral Ltd*, above n 1, at [29].

⁹ At [30].

¹⁰ At [34].

[20] The Judge said a significant number of cows returned to the Avondale property in poor condition.¹¹ He referred to evidence from Sally Taylor, a veterinary surgeon, that the majority of the cows had a body condition score (BCS) of less than five. He said another witness, Warren Arlidge, whose involvement with Avondale had begun on 1 May 2016, analysed various documents and concluded that, unless there were other clinical symptoms, the only conclusion one could reach to explain the condition of the cows was that they were severely malnourished.

[21] The Judge referred to evidence given by two veterinarians as to there being some potential for the ability of a grazier to improve the BCS of cows while they are being fed on a winter crop but difficulties associated with that when the cow was due to calve.¹²

[22] The Judge concluded the cows were offered 15 kg of dry matter per cow per day. He was not able to exclude the possibility that the poor condition of the cows was due to their condition at the start of grazing or underlying disease or environmental problems not the fault of Saunders Dairy. Saunders Dairy therefore established they took reasonable care of the cows.¹³

[23] In the recall judgment on 14 April 2021, the Judge granted judgment against Avondale to the sum of \$48,156.14, being the amount of the unpaid invoice.

Approach on appeal

[24] Appeals from the District Court are generally addressed by way of rehearing.¹⁴ This means the appellate court must reach its own view of both the facts and the law.¹⁵ The appellant bears the onus of satisfying the appeal court it should differ from the decision under appeal.¹⁶ If the appellate court's opinion is different from the conclusion of the court below, then the appeal must be allowed.¹⁷

¹¹ At [38].

¹² At [39].

¹³ At [42]–[43].

¹⁴ District Court Act 2016, s 124; High Court Rules 2016, r 20.18.

¹⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].

¹⁶ At [4].

¹⁷ At [16].

Submissions for the appellant

[25] For Avondale, Mr Hitchcock said the overall essence of the appeal was that the Judge failed to properly appreciate the evidence of the amount of feed supplied to the animals. Further, he failed to properly assess the potential other causes for loss of condition and then made an effective finding that Saunders Dairy had not caused the cows loss of condition, which was not available on the evidence.

[26] As to the law, Avondale submitted the agister or grazier has an obligation to establish affirmatively that claimed losses cannot be attributed to its fault or negligence. He contended the Judge incorrectly considered that Saunders Dairy only needed to raise the possibility that the cows' loss of condition was caused by something other than Saunders Dairy's actions.

[27] Avondale then detailed what it submitted was the uncontradicted evidence "of the dreadful condition the stock were in at the end of winter grazing with Saunders".

[28] Avondale referred in detail to the evidence, contending the Judge's finding that the cows had been fed 15 kg of dry matter each per day was not available on the evidence.

[29] Avondale next submitted the Judge had been wrong in concluding there was insufficient evidence to establish the condition of the cows at the start of the grazing contract or to show that any loss of condition was attributable to a failure to provide sufficient feed to the cows.

[30] In summary, Avondale contended the Judge "applied a wrong onus and/or failed to appreciate the impact of the evidence put forward by both parties and, in particular, a significant body of unchallenged evidence from Avondale". Avondale submitted the evidence clearly established, on the balance of probabilities, that Saunders' failure to properly care for and adequately feed the cows was the most likely cause of what they asserted was their "dreadful" condition when returned to Avondale.

Submissions for the respondent

[31] For Saunders Dairy, Mr Tobeck first submitted there was no jurisdiction for the Court to consider this appeal because it had been filed out of time. He referred to r 11.4 of the District Court Rules 2014 and r 20.4 of the High Court Rules 2016. He said he had not found any case on point which dealt with the situation where a judgment had been recalled but the later judgment did no more than provide an addendum or supplementary judgment to the initial judgment.

[32] Mr Tobeck submitted it was open on the evidence for the Court to find that the cows were fed 15 kg of dry matter per cow per day. He submitted there was “insufficient evidence in this case to ascertain what the specific terms of the agreement were and what the obligations of each party to the contract had in terms of animal health”.

[33] With reference to the judgment in *Big Top Hereford Pty Ltd v Thomas*, counsel submitted this agreement was neither a bailment nor a lease because both Saunders Dairy and Avondale had access to the land to attend to the cows.¹⁸ Saunders Dairy accepted they had the role of feeding the cows. They submitted it was Avondale’s role to attend to the health of the cows.

[34] Saunders Dairy submitted Avondale had the onus of proving there had been the claimed loss of condition of the cows and that Saunders Dairy was negligent in their care of the cows. Saunders Dairy submitted there was a lack of evidence as to the condition of the cows at the commencement of the grazing arrangement.

Discussion

The preliminary issue – Was there jurisdiction for the High Court to hear the appeal if it was filed out of time?

[35] The chronology, apparent from the District Court file, indicates:

- (a) hearing on 3, 4 and 5 September 2018;

¹⁸ *Big Top Hereford Pty Ltd v Thomas* [2006] NSWSC 1159, (2006) 12 BPR 23,843.

- (b) Saunders Dairy's closing submissions filed 28 September 2018;
- (c) Avondale's closing submissions filed 12 October 2018;
- (d) reserved judgment released 14 January 2019;
- (e) application by Saunders Dairy for recall of judgment to deal with Saunders Dairy's claim for amount due on third invoice filed 20 May 2019;
- (f) hearing on application to recall judgment on 13 October 2020;
- (g) judgment granting application to recall judgment and awarding judgment in favour of Saunders Dairy against Avondale in the sum of \$48,156.14 on 14 April 2021; and
- (h) notice of appeal filed on 12 May 2021.

[36] On 17 June 2021, counsel filed a joint memorandum in the High Court for the initial case management conference on the appeal. Counsel agreed points on appeal were not required. The time for hearing was estimated to be a half day. The memorandum records:

Counsel for the respondent has raised an issue that the appeal is out of time because the initial decision which was subsequently recalled was given on 14 January 2019. Counsel for the appellant takes the view that the recalled decision ceases to exist when it is recalled and it is the substituted decision of 14 April 2021 that is appealed and that the appeal has been filed and served within time.

[37] The appeal was heard in the High Court on 16 November 2021, both as to the jurisdiction issue and the substance of the appeal.

[38] Rule 20.4 of the High Court Rules states:

20.4 Time for appeal if there is right of appeal

- (1) This rule applies if a party has a right of appeal to the court.
- (2) An appeal must be brought—
 - (a) within the specified period if the enactment that confers the right of appeal specifies a period within which the appeal must be brought;
 - or

- (b) in every other case, within 20 working days after the decision appealed against is given.
- (3) By special leave, the court may extend the time prescribed for appealing if the enactment that confers the right of appeal—
 - (a) permits the extension; or
 - (b) does not limit the time prescribed for bringing the appeal.
- (4) An application for an extension—
 - (a) must be made by an interlocutory application on notice to every other party affected by the appeal; and
 - (b) may be made before or after the expiry of the time for appealing.

[39] The Court may extend the time for appeal only if the statute conferring the appeal right does not limit the time for appeal or permits an extension to be granted.¹⁹

[40] Both parties here had a general right of appeal to the High Court under s 124 of the District Court Act 2016.

[41] Rule 11.12 of the District Court Rules relevantly states:

11.12 When judgment takes effect

- (1) A judgment takes effect when it is given.

...

[42] A judgment against Avondale dismissing its set-off/counterclaim against Saunders Dairy was given on 14 January 2019. The appeal against that judgment was not filed until 12 May 2021, so it was well beyond 20 working days after the first judgment was given.

[43] Rule 20.4(4) of the High Court Rules permitted Saunders Dairy to apply for an order from this Court extending the time prescribed for appealing but that had to be made on an interlocutory application on notice to Avondale. The application could

¹⁹ Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR20.4.02] with reference to *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 (HC) and *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 407.

have been filed after the expiry of the 20 working day period for appealing. No such application was filed for Avondale.

[44] Nevertheless, the delay in Avondale filing their appeal was understandable. It was only with the successful application for a recall of the judgment and the Judge issuing a further judgment on 14 April 2021 that Avondale found itself with a judgment debt to Saunders Dairy for \$48,156.14 with interest, costs and disbursements. It was only with the issue of that judgment that Avondale knew the first judgment would not be recalled and replaced by a new judgment. The notice of appeal was filed within 20 working days of the release of that second judgment.

[45] There was no suggestion after the notice of appeal was filed that the delay had prejudiced Saunders Dairy. The appeal would be proceeding based on the Court's record as to what happened at the original hearing. There was no suggestion that an application would be made to present fresh evidence. Although Saunders Dairy had raised an issue over the time for filing an appeal, they did not ask for that issue to be determined before the hearing of the appeal. Both parties prepared for the appeal to be heard on its merits and presented detailed submissions on that basis at the hearing.

[46] Had an application been made in advance of the appeal hearing for an extension of time for filing an appeal, it would have been granted.

[47] Against that background, the issue is whether a failure to comply with the rules already referred to has resulted in the High Court having no jurisdiction to hear this appeal.

[48] I consider relevant legislation and the rules permit this Court to apply the rules in a way which allows the Court to do justice between the parties and deal with the merits that are at issue on this appeal.

[49] Rule 20.19 of the High Court Rules says, after hearing an appeal, the Court may make any decision it thinks should have been made or any order it considers just.

[50] The Court of Appeal has shown itself willing to treat an application for “special leave” as an application for extension of time where an extension of time was not sought.²⁰

[51] In *Slater v Blomfield*, Mr Slater filed an application in the High Court for leave to appeal against an interlocutory decision of a District Court Judge.²¹ The application was filed in the High Court well beyond the 20 working days within which the High Court Rules required the application to be made. Asher J said:

[14] It is clear that Mr Slater did not file any appeal in the High Court within 20 working days after Judge Blackie’s decision. What is therefore sought is effectively an extension for the time to file the appeal, a matter that I clarified in the course of the hearing. The application for leave to appeal should have in fact been an application to extend the time for filing an appeal. The application can be made after the expiry of the time for appealing. I am prepared to treat Mr Slater’s application for leave to appeal as an application to extend time to file an appeal applying the discretion referred to in rr 1.5 and 1.6 of the High Court Rules. It was on the basis that the question was whether the appeal should be allowed to proceed that the parties made submissions to me, and I am satisfied that there is no prejudice to Mr Blomfield if the application is treated this way.

[52] Asher J held that r 20.4(3) allows a court to extend the time prescribed for appealing where the enactment allowing the appeal permits an extension or does not limit the time prescribed for an appeal. He saw no reason to construe “or” to mean “and”.²² He went on:²³

To impose a higher threshold would be to put a real constraint on appeals and effectively create a draconian cut off point for appellants, who might have an explanation for the delay and an appeal which on its merits deserves to be heard. Such an inflexible cut-off would be inconsistent with the objective of the Rules to achieve a “just, speedy and inexpensive determination of court proceedings”. In cases like this it could be unjust and add little to speed. It would also be inconsistent with r 1.5 which provides that a failure to comply with the requirements of a High Court Rule “must” be treated as an irregularity. As I see it, r 20.4(3) gives the Court a discretionary power to take such steps as are just to cure a failure to observe the appeal time limit, although this must be done in a principled way.

²⁰ *Pearce v Pearce* [2012] NZCA 378, [2012] NZFLR 863 at [12].

²¹ *Slater v Blomfield* [2014] NZHC 612, (2014) 21 PRNZ 743.

²² At [17].

²³ At [18]. Footnotes omitted.

[53] In *Slater v Blomfield*, Asher J helpfully, and with reference to authority, set out the overall tests courts apply when deciding whether granting an extension would “meet the overall interests of justice”.²⁴ This includes considering:

- (a) the reason for the delay;
- (b) the length of the delay;
- (c) the extent of the prejudice caused by the delay;
- (d) any other features of the parties’ conduct in proceedings;
- (e) the prospective merits of the appeal; and
- (f) whether the appeal raises any issue of public importance.

[54] I consider it appropriate to treat the notice of appeal filed by Avondale as also an application for an extension of time to file the appeal. Avondale did not expressly ask for the appeal to be treated as such and Saunders Dairy understandably made no submissions on the issue. They had however prepared fully for the appeal to proceed on a substantive basis with arguments as to the merits. This is a case where it is appropriate to extend the time for filing and serving the notice of appeal. Time is extended accordingly.

[55] Alternatively, I would hold that, with the Judge allowing the application to recall the earlier judgment, that earlier judgment was “given” again only when the Judge in his second judgment did not vary the earlier judgment except to the extent of giving judgment for Saunders Dairy on the claim for \$48,156.14. Avondale’s notice of appeal was filed within 20 working days of that second judgment.

[56] I now consider the appeal on its merits.

²⁴ At [20], citing *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622 (CA) at [5]; and *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 at [19].

What were Saunders Dairy's legal obligations as grazier?

[57] I am satisfied the parties had an expectation Avondale or its staff would be able to go onto the Saunders property to check on the cows when it was reasonable to do so or when particular circumstances might require them to do so. I am also satisfied both parties understood it would be Avondale's responsibility to deal with any cows Mr Saunders observed as having particular problems.

[58] This is consistent with the following evidence:

- (a) Sarah Kennedy, an experienced dairy consultant who gave expert evidence for Avondale, said it was her expectation that the owners of cows would check on them when they were away for winter grazing about every week to 10 days.
- (b) Mr Saunders contacted Ms Collins when he had observed something had happened with the cows and arranged for staff from Avondale to come and look at them.
- (c) Mr Telfer went to the property and looked at the cows on at least two occasions. On one occasion, Mr Telfer told Mr Saunders he would be coming but it was not suggested he did this to obtain permission to go onto the property. On another occasion, he went to the property in the evening without telling Mr Saunders he was doing so or had done so.

[59] In *Humphrey v Phipps*, Beattie J referred to the common law with regard to contracts of agistment as stated in *Halsbury's Laws of England* as follows:²⁵

... Agistment is in the nature of a contract of bailment, ... and arises where one man (the agister) takes another man's cattle, horses, or other animals, to graze on his land for reward (usually at a certain rate per week) on the implied term that he will redeliver them to the owner on demand.

The agister is not an insurer of the beasts taken in by him, but he must take reasonable and proper care of them, and is liable for injury caused to them by negligence or neglect of such reasonable and proper care ...

²⁵ *Humphrey v Phipps*, above n 7, at 651, citing *Halsbury's Laws of England* (3rd ed, 1952) vol 1 Animals at [1297] and [1298].

[60] Beattie J then referred to *King & Hollis v Hay* which questioned how applicable that statement of law was to the situation in New Zealand.²⁶ He referred to evidence from witnesses as to what they considered to be common conditions associated with grazing contracts.

[61] Beattie J said:²⁷

In the absence of any express arrangements between the parties to a grazing contract in New Zealand, one would expect that the owners of the land on which the cattle grazed should at least see that the cattle roamed over the area allocated for grazing, and that the owner of the cattle, or his agent, should from time to time inspect the cattle. I also consider it is the responsibility of a cattle owner to see that the grazing is suitable for his requirements, either doing this personally or through an agent. His own inspection from time to time ... should reveal to an experienced cattle man how long his grazing would last. On the other hand, I consider that the farmer grazing the cattle has a duty to advise the owner if he sees anything untoward happening, such as illness or accident to the animals.

[62] There, Beattie J was dealing with beef cattle grazing on grass. Nevertheless, the expectations which Beattie J said both parties would have were consistent with the way in which Saunders Dairy and Avondale proceeded with their grazing agreement. Beattie J said, if the arrangement was to be treated as a usual bailment case where the onus of disproving negligence rests on the bailee, he was satisfied that the defendants had answered the various allegations of negligence against them. He concluded however by saying:²⁸

For these reasons I do not find the defendants liable for injury and damage arising from negligence, or any lack of reasonable and proper care for the cattle concerned. The defendants undertook no express liability for losses of any of the animals or any deterioration in their condition. As was said in *Nadon v Pesant* (1904) QR 26 SC 384:

Although one who takes animals to pasture them should give them the care of a 'bone pere de famille,' the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, and the custom of the locality. It is unreasonable to expect that for a moderate price a man should watch the animals constantly; and if one of them disappears, it is the owner who should bear the loss – at least, unless he can prove negligence on the part of the owner of the land.

²⁶ At 651–652, citing *King & Hollis v Hay* SC Wellington, 24 April 1964.

²⁷ At 656.

²⁸ At 657.

[63] In *Glaister v McHaffie*, the owner of the cows contended the cows had to be improved or maintained in excellent condition.²⁹ In the District Court, the Judge said the cows needed to be kept in reasonable condition taking into account the winter season. The owner's contention as to the grazier's obligations was rejected. On appeal in the High Court, Tipping J stated:³⁰

Although this case turns on the contract which the Court has found the parties entered into, it should be noted that the contract as found is in accord with the general law on the duties of an agister of cattle: see *Humphrey v Phipps* and Halsbury. In the absence of a specific contractual term or notorious custom there is no general liability on an agister for loss of condition. His duty is no more than to take reasonable care of the animals.

[64] Tipping J held the District Court Judge was correct in finding it was not a term of the contract that, at the end of the grazing contract, the cows would be in no worse condition than they were at the start.

[65] Here, Avondale agreed to a grazing arrangement with the stipulation that Saunders Dairy would provide the cows with 15 kg of dry matter per cow per day. Although there was no evidence that Avondale had checked the nature of the available crops before the cows went to the Saunders property, they must have had enough knowledge of what was proposed to enter into the grazing arrangement. They had the dairy consultant Ms Kennedy visit the property and check on the available crops. They continued with the contract on the basis feed would be available for the cows on the Saunders property. There was nothing in the way the parties negotiated the grazing contract or in the way they conducted themselves after the cows had gone to the property to suggest Saunders Dairy had accepted an obligation to maintain the cows in no worse condition than they were at the beginning of the contract or to improve them.

[66] Avondale submitted that contracts of agistment are in the nature of a contract of bailment where the agister:³¹

... takes another person's livestock to feed or graze on the agister's land for reward usually at a weekly rate on the implied term that the agister will redeliver the stock on demand.

²⁹ *Glaister v McHaffie* HC Dunedin AP102/88, 16 July 1990.

³⁰ At 15. Citations omitted.

³¹ With reference to *Grazing & Export Meat Co Ltd v Anderson* [1976] 1 NZLR 187 (SC).

[67] Avondale submitted:³²

Terms are implied into contracts of agistment that the agister should ensure the stock is grazed properly, the agister should inspect the stock from time to time and should advise the owner of the stock if anything untoward is observed. An encompassing implied term is that agister must take reasonable and proper care of the animals he takes in and will be liable for injury caused by negligence or neglect of such reasonable and proper care of the animals he takes in and will be liable for injury caused by negligence or neglect of such reasonable and proper care.

[68] I accept that terms to that effect are normally implied. However, that does not mean a term will be implied requiring stock be returned in no worse condition than they were in at the start of the contract or that the agister will be liable for *any* loss to the animals over the course of the contract.

Who had the onus of proof as to the issues that arose in this case?

[69] *Cross on Evidence* states:³³

The general (but probably not universal) rule in civil cases is that the plaintiff must prove all the elements of liability that together constitute the cause of action.

[70] It is stated in the *Laws of New Zealand*, in civil cases “the general rule is that the legal burden of proof in respect of any allegation lies on the party making it, and not on the one who denies it”.³⁴

[71] There is however an exception to the general rule where a bailment has arisen when one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor).³⁵

The essential element in determining whether a bailment has been established is that of possession ... The element common to all types of bailment is the importation of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods.

³² With reference to *McDermott v Ross*, above n 7.

³³ Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [2.3.2].

³⁴ *Laws of New Zealand Evidence* (Reissue 1) (online ed) at [9].

³⁵ J McCartney *Laws of New Zealand Bailment* (online ed) at [1].

[72] As stated in the *Laws of New Zealand*:³⁶

When a chattel entrusted to a custodian is lost, injured or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of any neglect on the part of himself, or on the part of his employees acting within the course of their employment, to use such care and diligence as a prudent or careful person would exercise in relation to the property.

[73] With reference to *Big Top Hereford Pty Ltd v Thomas*, Saunders Dairy argued that the arrangement here was not in the nature of a bailment because Saunders Dairy did not have exclusive possession of the cows.³⁷

[74] In that case, Brereton J, in the New South Wales Supreme Court, had to determine whether a particular agistment contract was a bailment. He held it was not. Instead, he found the cows were on the property pursuant to a licence. Referring to authority, he accepted that an agistment of livestock could involve a bailment if the owner of the stock had no right to enter the land on which the stock would be grazed and was not responsible for their care. If there is a bailment, he said the owner of the property on which the stock are agisted is the bailee who has possession of the cattle, and who must take reasonable and proper care of the stock. He contrasted that with a licence situation where the owner of cattle simply has permission to graze his cattle on the licensor's land and to enter the land to take care of them. He said the important distinction between bailment and licence was whether the landowner undertakes responsibility for care of the stock.³⁸

[75] In this instance, Saunders Dairy accepted they had a responsibility to feed the cows but said Avondale was responsible for the health of the cows. In the District Court, the parties accepted it was an implied term of the grazing contract that Saunders Dairy would take reasonable and proper care of the cows and would be liable for injury caused to them by negligence or neglect of such reasonable and proper care. There are no particular circumstances to suggest Saunders Dairy did not take possession of the cows through an arrangement in the nature of a bailment.

³⁶ At [48].

³⁷ Above n 18..

³⁸ At [36].

[76] However, I do not consider that in New Zealand the grazier has the burden of disproving negligence or default on their part unless it has been first established, at least on a prima facie basis, there was harm to or a loss of stock for which they were responsible.

[77] As previously referred to, Beattie J in *Humphreys v Phipps* referred to the common law with regards to contracts of agistment in *Halsbury's Law of England* and *King & Hollis v Hay* where the Judge questioned how applicable these rules are to New Zealand.³⁹

[78] Beattie J proceeded on the basis that, to him:⁴⁰

The question for consideration is: assuming that there is a duty of initial inspection on the plaintiffs and no express duties were placed on the defendants either under any bailment or under the term of any contract, did the defendant ... act as a reasonably prudent farmer so placed would act, in all the circumstances?

[79] As to that question, Beattie J did not say the onus of proof was on Mr Phipps as the grazier although he said, if there was such an onus, Mr Phipps had discharged it.⁴¹

[80] In the District Court, in *Glaister v McHaffie*, the Judge had deducted from fees claimed by and owed to the grazier the value of one cow which had been lost during the agistment. Tipping J in the High Court said:⁴²

There was no satisfactory evidence as to how the cow came to be lost. The judgment under appeal does not discuss the basis upon which the Judge decided to deduct an allowance for the value of one missing cow. [Counsel for the owner of the cows] accepted that his client could not sustain the deduction, there being no finding that Mr McHaffie had been negligent in any material way and indeed no evidence upon which such a finding could have been based. The point having been conceded there is no need for me to discuss upon whom the onus of proof may have lain ...

³⁹ Above at [58]–[59].

⁴⁰ *Humphrey v Phipps*, above n 7, at 653.

⁴¹ At 656.

⁴² *Glaister v McHaffie*, above n 29, at 15–16.

[81] Tipping J nevertheless discussed the evidence as to how the cows had been looked after in that case and found it was not possible from the evidence to come to the view that the grazier was negligent.⁴³

[82] I have found the grazier is not under an obligation to return the stock grazed on its land in the same or a better condition than they were in when they were delivered to the grazier. Requiring the grazier to prove that any loss of condition in cows while they were on the grazier's land was not due to the grazier's negligence or default would effectively require it to maintain the cows in at least the same condition as they were when they came to their property. Putting the onus of proof on a grazier in that way would be to impose obligations on the grazier which it has been accepted, subject to any specific agreement between the parties or common practice, the grazier does not have.

[83] Avondale submitted the Judge erred in the way he found there was an onus of proof on Saunders Dairy but failed to recognise that onus in his ultimate judgment. Avondale submitted that Saunders Dairy, as the grazier or agister, bore an obligation to establish affirmatively that claimed losses could not be attributed to its fault or negligence. In support of that, they referred to *Fletcher Construction Co Ltd v Webster* where Callan J approved a statement of Tindal CJ in *Davis v Garrett*:⁴⁴

But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he would show, not only that the same loss might have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

[Emphasis added].

[84] I do not disagree with that statement but it applies to a situation where a loss has actually happened during the time and in circumstances where it can be said the alleged wrongdoer was responsible for the loss and default had been established.

⁴³ At 6.

⁴⁴ *Fletcher Construction Co Ltd v Webster* [1948] NZLR 514 at 519, citing *Davis v Garrett* (1830) 6 Bing 716 at 724.

[85] In *Fletcher Construction v Webster*, a worker's tools had to be stored overnight in a shed provided by his employer. There was a burglary of the shed. It was held that Fletcher Construction was negligent and the shed had not been properly secured. On appeal, Fletcher Construction asserted the loss did not result from the breach because a burglar might have been able to break into the shed even if it was properly secured. That was the context in which Callan J made his remarks.⁴⁵

[86] In the circumstances of this case, Avondale had to prove its cows had lost condition, a number had died and others had failed to produce milk in the way that would normally have been expected of them as a result of the way they were looked after on the Saunders property. It was only if they had proved, at least on a prima facie basis, they had suffered losses due to Saunders Dairy's actions that the onus shifted to Saunders Dairy to prove, on the balance of probabilities, that those losses were caused by something other than their lack of reasonable care.

[87] I thus do not accept that the Judge was correct in saying in the District Court that Saunders Dairy had the onus of disproving negligence on its part. However, that does not mean there was any error in the decision he ultimately came to. He found, on all the evidence, that the grazier had discharged, what the Judge held to be, the grazier's onus of proving that any loss of condition in the cows had not resulted from Saunders Dairy's negligence.

[88] There was evidence in this case that a proportion of the cows returned to Avondale at the end of grazing were in less than ideal condition. A few were dangerously unhealthy. Avondale had to prove the cows were not in that condition when they went to the Saunders property for grazing and that any deterioration in their condition resulted from what happened to them while they were on the Saunders property. Only once that had been established did Saunders Dairy, as the grazier, have the onus of proving there was an explanation other than their fault or negligence for cows being in that condition.

⁴⁵ In a similar way, the onus of proof shifted to the bailee only after the bailor had proved 2,000 of 8,000 sheep had been lost while in the agister's care in *Spring v Young* [1927] SASR 115. See also *Pipcella v Stagg* (1983) 32 SASR 464 where a filly agisted for reward inadvertently was put in foal during the agistment.

Did the Judge err in finding the evidence was insufficient to establish what condition the cows were in when they went to grazing?

[89] In the District Court, the Judge held there was a paucity of evidence as to the condition of the cows before they went for grazing. Avondale submitted the Judge's finding in this regard was not available on the evidence.

[90] Avondale submitted it would be "beyond even a counsel of perfection" to prove the cows' BCS at the outset of winter grazing. It submitted the Judge should have inferred the Avondale cows sent to the Saunders Dairy property were in a good condition from a number of factors, including:

- (a) Avondale had a herd of 1,100 cows which milked well in the 2014-2015 season;
- (b) cows sent by Avondale to other farms came back in good condition. The cows from Saunders Dairy did not;
- (c) the cows were pregnancy tested by Avondale's veterinarians on several occasions. The vet did not raise any issues over the condition of the cows generally; and
- (d) Stephen Blyth, a representative of MyFarm who supervised the management of Avondale farm, confirmed at the end of March 2015 the cows were in reasonable condition with an average BCS of 4.5.

[91] Amongst the documents referred to in evidence and produced in the common bundle was a document titled "DairyNZ Body Condition Scoring: the reference guide for New Zealand dairy farmers" (the BCS guide). It explained that BCS is a subjective assessment of a cow's energy reserves, but a skilled assessor can accurately categorise the "fatness" of a cow. It is a score that rates the "fatness" of a cow on a scale of one to 10, where one is emaciated and 10 is obese. BSC scoring requires a hands-on feeling at eight particular points of the body. An assessor will first calibrate their eye by assessing 15 cows with a range of BCS, and then assess at least 70 randomly selected cows to calculate the average and range of BCS of the herd.

[92] The BCS guide stated:

Although cows may graze off on winter crops for 8–10 weeks, case study results suggest cows gain around 0.5 of a BCS unit during this period when well fed. Unless smoothly transitioned from pastures to crops, cows do not gain much BCS in the first 3–4 weeks due to the adjustment to a change in diet. Therefore, sufficient time must be allowed between dry off and calving to ensure that cows achieve the BCS targets. Correct management and feed allocation are the most important factors in ensuring cows achieve target BCS.

[93] Veterinarians who gave evidence agreed it is unrealistic to expect cows to be putting on condition during the first few weeks of winter grazing because of the time their stomachs need to adjust from feeding on grass to feeding on crop. Again, consistent with evidence from the vets, the guide said cows do not gain BCS in the month before calving because so much energy is required for pregnancy. The Avondale cows sent to the Saunders property were early calvers. Some cows calved while on the Saunders property.

[94] The evidence was that the Avondale cows were dried off around May 2015 but went to the Saunders property on 26 May 2015. This would have made it difficult for them to gain weight over the first few weeks of grazing.

[95] A veterinarian also gave evidence for Avondale. Ms Taylor said, although cows should be managed according to what is best for their welfare, in 2015 it was common in Southland for cows to be dried off around that date because the milk payout was high then. I infer from what she said that, from an animal welfare point of view, the cows should have been dried off earlier.

[96] The BCS guide says:

The most important time to body condition score cows is during summer and autumn. This allows individual groups of cows to be managed differently to ensure BCS targets at calving are met.

A pre-Christmas assessment determines if cows have gained BCS since planned start of mating and a management plan for the autumn can be set up.

Assessing cows in mid February to mid March determines if the management plan is working or whether some cows should be dried off early, milked once-a-day (OAD) or preferentially fed.

[97] On 4 August 2015, Ms Taylor wrote to Ms Collins and Mr Telfer with a report following the BCS scoring of 146 cows. She said she was told the group was a mixture of cows that came back from different graziers and were due to calve from 12 August 2015 onwards. In that report, she said the target was to have mature cows at BCS 5.0 with less than 15 per cent of the herd below 5.0 and less than 15 per cent above 5.5. The scoring showed three cows (two per cent) at 3.5, 58 cows (40 per cent) at 4.0 to 4.5, and 83 cows (56 per cent) at 5.0 to 6.5. She said:

Perhaps this high level of variation highlights the value of body condition scoring pre-winter in late lactation and management of wintering groups with consideration of BCS and age as well as calving date.

[98] On the information before me, I do not agree with the submission for Avondale that it would require a “counsel of perfection” to have expected there to have been body condition scoring of the cows before they went to the Saunders property.

[99] The information in the guide was that, with appropriate body condition scoring earlier in autumn, cows could be managed to improve BCS at dry off and to help them achieve target BCS over winter. For instance, cows with a BCS below 4 could be put on once a day milking and fed dry matter such as whole crop silage plus pasture from 130 days pre-calving.

[100] It was not suggested the Avondale herd had been managed in that way. Because the herd had not been body condition scored it would not have been possible to do this.

[101] The BCS guide states:

Part-season OAD [one-a-day] is a particularly good option for farms that run multiple herds in their system. In mid to late lactation, the cows that will benefit most from achieving the BCS targets (low BCS, early calvers and rising three year olds) can be milked OAD in a separate herd, with any high BCS or high SCC [somatic cell count] cows maintained on twice a day. On average, cows milked OAD for three months in late lactation will be 0.5 BCS units fatter at dry-off than those milked twice a day, providing cows milked OAD are well fed.

[102] It was not necessary for the Judge to draw the inference that, because the Avondale cows that went to the Saunders Dairy property were early calvers, they must have been in good condition when they went there.

[103] The BCS guide says that fatter cows at calving will cycle early. The cows that went to the Saunders property were going to calve in August 2015. That would have been consistent with them being in good condition and fatter in the early summer of 2014/2015. Their early pregnancy was not necessarily an indication of their condition at the end of the 2014–2015 milking season and at the time they had been dried off to go to grazing.

[104] The normal vet at the time for Avondale was Samantha Lewis. She said she scanned the Avondale herd on 22 January 2015 to check the pregnancy rates and again on 6 March 2015. She said she had no concerns about the herd. She did not body condition score the cows at the time. I do not consider the fact she said she had no concerns about the herd at that time provided reliable evidence as to the condition of all the cows that went to the Saunders property in May 2015. Her pregnancy checks were of the whole Avondale herd, not the particular cows that went to the Saunders property. She said she scanned 216 cows on 8 May 2015 that had been dried off a little earlier than the bulk of the herd. She recalled that generally those appeared lighter than target condition which would have been between 4.5 and 5.0 as a general rule. She would not have expected the condition of those cows to have improved if they were sent to grazing and had only maintenance feeding.

[105] The fact the cows that went to the Saunders property were early calvers thus did not mean they all had to be at the recommended BCS in May 2015. There was no dispute that, when grazing arrangements were first discussed with Mr Saunders, it had been agreed that 400 cows would go to grazing. The Judge held, with the exigencies of farming, that figure could vary. In a later email, Ms Collins told Mr Saunders that they might only have 370 cows to graze due to a higher “empty rate complicated by a poor mating result”, i.e. there were less cows in calf than anticipated.

[106] Mr Arlidge gave evidence for Avondale. He has a veterinary science degree from Massey University and had been working in the dairy industry in New Zealand

and overseas since 1979. From June 2016, he began working with a company which took over the management of particular farms from MyFarm Management Ltd, including the Avondale farms. Although aligned to Avondale, he considered himself able to give evidence independently and objectively as an expert.

[107] As to the question of whether the cows sent to Saunders Dairy for winter grazing were all of lighter condition, Mr Arlidge said “the cows were sorted based on calving date and not body condition and you would not expect all of the early calving cows to be light”. Consistent with that evidence, a light cow could still be an early calver.

[108] Stephen Blythe had the role of overseeing the physical and financial resources of Avondale for MyFarm Management Ltd. Mr Blythe said he visited the Avondale property on 31 March 2015. He made a note that the final pregnancy scan for the milking cows had been booked for 14 May 2015, before the cows went away to grazing. All transport for the cows had been booked for the last week of May and early June. He put the BCS of the milking cows at 4.4 to 4.6, which he said is the ideal range for that time of the season. He said he made a visual assessment of the milking herds on the property at the time by looking at the mobs of animals, picking out several cows from each of those and working out an average.

[109] Mr Blythe did not say he had looked separately at the mobs going away to the Saunders property.

[110] From the way Mr Blythe said he had arrived at those figures, I am satisfied he was assessing an average for the herds as a whole. He had not body scored individual cows as Ms Taylor subsequently did. While assessing an average is a useful tool in optimising the management of a herd, it cannot be taken to prove there were no cows in the herd which required particular management to avoid problems later on. Nor could it ensure that, after the assessment and before grazing, the cows were managed in a way which would ensure their condition would improve to a point where, if it was maintained over grazing, the cows would be at the target score on return home. As was stated in the introduction to the BCS guide:

Although target BCS recommendations tend to be herd-focused, the review also highlighted the need to consider individual cow BCS. Animal welfare is concerned with the state of the individual cow and not the average of the herd as a whole. Achieving the desired herd average target may still leave a significant proportion of cows that are too thin and too fat.

[111] I note also the range Mr Blythe referred to was less than the 5.0 target which was the target for the mature cows that went to the Saunders property.

[112] It was also put to Mr Saunders, and consistent with evidence given by Mr Telfer, that, at the time Mr Telfer sorted out the 359 cows that went to Saunders Dairy property, he took two of them out because they were not “well rested”. I infer from that there were two cows not in good enough condition to walk the 17 km to the Saunders property.

[113] There was evidence that some of the cows were “light” when they first went to grazing. As mentioned earlier, the veterinarian Ms Lewis made that observation of 216 cows she saw on 8 May 2015. Mr Saunders’ father considered the cows to be “light” when they first arrived at the Saunders property.

[114] A farmer who had observed the herd as they were walking the 17 km to the Saunders property said that, from where he was, the cows looked to be in very light condition. He thought about four cows had been left behind on the road and they were in particularly poor condition. Nevertheless, from the evidence, it seemed that all cows that started off from the Avondale farm ended up on the Saunders property. Neither Mr Saunders Snr nor the farmer were dairy farmers.

[115] There was no error in the Judge’s determination that the evidence was not sufficient to establish the condition of the cows when they went to grazing. On my consideration of all the evidence, I make the same determination. That is important.

[116] Mr Arlidge accepted, if cows are not in the condition you want them in by the time they go to grazing, that is how they will come back.

[117] Avondale had the onus of proving there had been a loss in the sense of harm to the cows over the course of the grazing contract. To do that, they had to prove what

the condition of the cows was at the beginning of the contract. They were not able to do that.

Was there other evidence sufficient to prove the cows had been harmed while being grazed on the Saunders property?

[118] Avondale submitted the Judge had been wrong to find there was insufficient evidence to show that any loss of condition was attributable to a failure to provide sufficient feed to the cows.

Management of the cows during grazing

[119] I first consider such direct evidence as there was as to the management of the stock and their condition while they were being grazed.

[120] Mr Telfer was at the Saunders property with Mr Saunders when the Avondale cows first arrived at the Saunders property. He was with Mr Saunders when the cows were divided into three herds of 100 and one herd of 57. There was no evidence of any attempt to divide the cows on the basis there might be a need to manage the feed for the herds differently because of variations in the condition of the cows.

[121] Mr Telfer saw the particular crops the cows were going to. He accepted one paddock was in swedes. Although Mr Telfer said Avondale's policy was not to put cows on a crop of HT swedes, he made no issue as to the cows being fed swedes either when he first saw they would be fed swedes or when he received Ms Kennedy's report as to the crops she had observed and her calculations as to the dry matter that would be available for the cows.

[122] Mr Saunders' evidence was that, while the cows were under his care, he moved the electric wire every day except for about three days. On those occasions, his father moved the wire. Mr Saunders said he moved the wire fences every day to give the cows fresh food every day and because that also gave him the opportunity to see the cows and adjust their feed supply if they needed it. Ms Kennedy gave evidence that the ideal is to move a wire twice a day, but it was not suggested in cross-examination of Mr Saunders that he should have been moving the wires more than once a day.

[123] Mr Saunders said while the cows were in his care only one died. This cow had slipped its calf. His father walked it out of the paddock and it died in the lane. While the cows were in Mr Saunders' care, 10 of them went home early because they had either aborted their calves or calved. The dates they went home were as follows:

10 June – one went home;

13 July – two went home;

20 July – four went home; and

22 July – three went home.

[124] This must have been an indication to Mr Telfer and Ms Collins that Mr Saunders was managing the cows and keeping them under observation to the extent that could be expected with the grazing contract. There was no suggestion in Mr Telfer's evidence that the return of these cows raised an issue as to how they had been cared for while on the Saunders property.

[125] On 1 June 2015, Mr Saunders said he noticed a small number of lame cows. He removed them from the herd, put them in the cattle yards and sent a text to Ms Collins to inform her the cows needed checking. Ms Collins texted back on 3 June 2015 and asked if workers could check the cows between 9.00 and 10.00 am on 4 June 2015. Mr Telfer said Francis, the farm manager, went and checked a couple of the cows which Jock Saunders advised them appeared lame. Francis' view was that the cows were fine. No one raised a concern about the condition of the cows.

[126] On 9 June 2015, Ms Collins said another 40 cows would be arriving the next day, and 39 cows arrived. These were the cows from the other farm, Thames Dairy.

[127] Mr Telfer had seen the feed available for the cows on 26 May 2015. The dairy advisor Ms Kennedy assessed and reported on the feed available on 27 May 2015. A reasonable inference to draw from Ms Collins and Mr Telfer sending the further 39 cows from Thames Dairy to the Saunders property on 10 June 2015 is that, at that time, they had no concerns as to the feed available for the cows or the care Mr Saunders was taking of them.

[128] In June 2015, Mr Telfer went to the Saunders property to inspect the cows. Mr Saunders joined him. When Mr Saunders arrived, Mr Telfer was in a kale paddock. Mr Saunders said Mr Telfer told him that he was happy with the cows and congratulated Mr Saunders on not having any break outs. Mr Saunders gave undisputed evidence that the main reason cows break out is because they are hungry and want more food. The fact there had been no break outs suggests the cows had been able to feed to the extent they needed or wanted from what was available within the breaks as they were.

[129] Mr Saunders' evidence was that, during this inspection, Mr Saunders mentioned to Mr Telfer that some of the cows were a little light in condition. He said Mr Telfer snapped back at him saying he could take the cows away if Mr Saunders wanted that. A couple of days later, after this inspection, Mr Saunders said Mr Telfer informed him he was happy with the cows but asked if Mr Saunders could feed them more. Mr Saunders said, if he was going to increase their daily available feed allocation, Mr Telfer would have to pay more. To that, Mr Telfer replied "in that case just leave it as it is".

[130] Mr Telfer's evidence was that he rang Mr Saunders a few days after that visit. Mr Telfer said he expressed a concern that Mr Saunders was not working off Ms Kennedy's figures for crop yield and that Mr Saunders agreed the cows would be fed more.

[131] It was apparent from Mr Telfer's evidence that he raised an issue over this, not as a result of any observation as to the condition of the cows, but on calculations he made back at his home as to what feed would be available given the size of the breaks and what Ms Kennedy had calculated as being the dry matter yield that would be available for the cows from each break.

[132] What I take from the evidence of both these witnesses is that, as a result of this visit, Mr Telfer had no concerns as to the then condition of the cows. He accepted Mr Saunders' assurance that the cows would be fed 15 kg of dry matter per cow per day required under their agreement.

[133] Mr Telfer said he worked out, from the size of the breaks, that the cows were getting between 12 and 13 kg of dry matter per cow per day. He worked out, on the basis of 80 per cent of the crop being utilised, the cows would consume 10 or just over 10 kg of dry matter per cow per day.

[134] The evidence for Saunders Dairy was that, including hay, the cows were getting 15 kg of dry matter per cow per day. Nevertheless, I note that Mr Telfer calculated, even if they were getting between 12 and 13 kg, that would have been enough to *maintain* the cows body condition.

[135] Mr Telfer said, a little while after this, he decided, when driving past the Saunders property one evening, to call in and look at the cows. He did not tell Mr Saunders what he was doing. He says he walked into the paddock where the cows were and could tell then that the cows were still “only being fed a maintenance diet”. He did not raise any concern with Mr Saunders about the situation. I infer from that evidence that, from what Mr Telfer saw of the crop the cows were feeding on, they were receiving enough to maintain their condition.

[136] Mr Telfer’s evidence was that some three weeks prior to calving the cows had to be given the Rotovec vaccine. The farm manager, Francis, had that responsibility. He had 5,000 cows to inject over a number of farms. On 15 July 2015, Francis was at the Saunders property to inject the cows.

[137] Mr Telfer’s evidence was that Francis reported to him that the cows seemed slightly lighter than other cows he had seen on other graziers’ properties. While they were aware of this, Mr Telfer said they were not overly concerned. He said no one from Avondale checked the cows again between that time and when they were returned to Avondale on 27 July 2015.

[138] The cows were then only three weeks or so from calving. Because it is difficult for cows to put on condition when they come close to calving, there could have been no expectation that their condition would improve between that time and 27 July 2015 when they returned home.

[139] Mr Arlidge, the veterinarian later associated with Avondale, said Francis commented that the cows were okay. Mr Arlidge thus assumed Francis was happy with the condition of the cows after seeing them on 15 July 2015.

[140] The evidence as to what Francis observed is hearsay but the fact there were no further checks made of the cows is consistent with Mr Telfer accepting that what Francis had told him was likely true and there had been no deterioration in the condition of the cows between 26 May 2015 and 15 July 2015.

[141] Mr Arlidge was willing to assume that there had been no harm to the cows up to 15 July 2015. He expressed the opinion “if they were okay [on 15 July 2015] but they were not when they arrived home, something must have happened in between these two periods”.

[142] The preponderance of evidence thus establishes that, certainly until 15 July 2015, the cows were being looked after in a manner that maintained the condition they would have been in when first delivered to the Saunders property. There was no evidence they had been harmed over that time or that Mr Saunders had failed to take reasonable care of them. The evidence was to the contrary.

[143] Consistent with that, neither Mr Telfer nor his manager, or any other Avondale staff considered it necessary to make regular checks of the cows, what they were being fed or how they were doing. That was despite the fact, as Ms Kennedy said, it would have been good practice for dairy farmers to check on their cows during grazing every week to 10 days.

[144] In his evidence as briefed, Mr Telfer said, from his experience:

... it seems to me that the feed for the cows was simply stopped, and maybe just for a couple of days prior to the cows being collected. My feeling is that the cows were simply left in the yards with no food for a couple of days prior to them being collected.

[145] He said it seemed to him that Mr Saunders may have put the cows into the yards either on Friday afternoon or Saturday morning and left them there until Monday morning when they were collected by the transport company.

[146] In his evidence as briefed, Mr Arlidge said:

Some of the cows that died were condition scored on 30 July by Sally Taylor. It (sic) can be seen from this result that, it is not all the low condition score cows that died. About half of the deaths were conditions (sic) score 4 or better. This confirms that something serious happened to the cows immediately before they came home from grazing at Saunders Dairy Holdings Ltd and clearly from previous observations after vaccination. This supports the discussion about the cows being severely stressed in the weeks before they came home as the most likely conclusion of the major health problems. The only real explanation based on a lack of other clinical symptoms is a severe nutritional check (starvation).

[147] Accordingly, to prove the cows had been harmed and had lost condition while on the Saunders property, Avondale had to prove the cows, over the period between 15 July 2015 and 27 July 2015, had been significantly under-fed or, as Mr Arlidge put it, starved.

[148] No evidence was provided by Avondale to establish directly that the cows had been neglected or ill-treated in this manner over the period. It was not suggested in cross-examination of Mr Saunders that he had reduced the feed available for the cows or in any other way mistreated or underfed the cows during that time, for instance by keeping the cows in yards for a long period prior to trucking on 27 July 2015.

[149] Mr Saunders was asked questions as to whether he had gone to Te Anau in connection with his birthday. He said he went to Te Anau and met up with friends there on the Friday night but did not stay there on the Saturday night. All that was established in the evidence was that Ms Collins had wanted to arrange for the cows to be picked up on 26 July 2015. Mr Saunders wanted that to happen on 27 July 2015. Independently of Ms Collins, he arranged with the trucking company for the cows to be collected on 27 July 2015.

[150] It was Ms Collins' evidence that communication between the parties deteriorated over the last few days of the grazing contract, it seems over the arrangements that were being made for the collection of the cows. Subsequent communication between the parties involved swearing and hostile interactions. I cannot properly infer from this that Mr Saunders ill-treated the cows in the extreme manner Mr Telfer and Mr Arlidge speculated might have happened.

[151] As already referred to earlier, while on the Saunders property, some 10 cows calved. Mr Saunders advised Ms Collins of this and arrangements were made for those cows to be taken back home. Ms Kennedy said, ideally, graziers would note from the cows' udders when calving was imminent and would advise the owners of this so the cows could be returned home before they actually calved. This had obviously not happened with the cows that had calved earlier, but there was no suggestion from either Ms Collins or Mr Telfer that they expected Mr Saunders to deal with those cows differently than he did.

[152] Fifteen calves were born effectively overnight before all the cows were trucked back to Avondale. Mr Saunders did not tell Ms Collins of the birth of those calves on the Sunday but he put the calves aside for them to be returned separately to Avondale. He knew they and their mothers were going to be collected the following day.

[153] Mr Arlidge's suggestion that the cows had been starved over the last two weeks of grazing was speculation. Crucial to that was what he said was "a lack of other clinical symptoms".

[154] As the veterinarian Ms Taylor explained, the period close to calving is stressful for cows. The energy demand of the foetus is very high and the rumen capacity of the cows is less. Mr Arlidge's speculation also assumed there were no other clinical symptoms which could have provided an explanation for the poor condition of the cows over which there was concern. As I will refer to later, only two cows that died were autopsied. Apart from the evidence as to the BCSs for cows at the end of July and early August, there was no evidence as to what had been the condition of the cows or any symptoms of illness in the period through to 11 December 2015, the period over which deaths had occurred and which Avondale claimed was a loss for which Saunders Dairy were responsible.

The veterinary evidence

[155] Avondale submitted the evidence of all three veterinarians, Mr Arlidge, Ms Taylor and Ms Lewis, was that the most likely cause of the Avondale cows being in a poor condition was a lack of feed.

[156] Ms Taylor was asked what her explanation had been for the 10 cows she examined on 27 July 2015 being in a poor condition. She said “[h]aving just come out of winter, you would question how the animals ... had been fed in the weeks or months prior to [her] looking at them”. She did not say under-feeding was the cause of their condition.

[157] Ms Taylor body condition scored 262 cows on 30 July 2015. She returned to the farm on 4 August 2015 and body condition scored 146 cows which she was told were a mixture of animals that had come back from different graziers and were due to calve from 12 August 2015 onwards. In her report of 4 August 2015, Ms Taylor recommended that any deaths should be autopsied to rule out underlying disease. That would include cows that had died and cows that were euthanised.

[158] In explaining why she made those recommendations, Ms Taylor said:

I included that recommendation just to ensure that we had a full picture of what was going on. Mostly ... because the cows hadn't previously been monitored by the staff that I was dealing with on that farm, so the history of them I couldn't ... clearly say ... how long it had taken for an animal to get into the condition that I had seen it. Those sorts of factors would contribute to my diagnosis.

[159] Ms Taylor confirmed she had done only two autopsies. She accepted that, without doing autopsies on 24 of the 26 cows that died or were put down, it would be difficult to say what caused them to either die or get into a condition where they had to be put down.

[160] Contrary to Avondale's submission, Ms Lewis said that, on reading Ms Taylor's reports, she had the impression the cows were not in an acceptable condition “but to determine the full picture of that and the full picture of their unacceptable condition, I would want to run a few more tests”. When asked as to what would be at the top of her mind as a diagnosis, she said “[i]t could be multiple reasons”, with under-feeding being an option, but there were a number of diseases she would have wanted to rule out.

[161] It was not the evidence of all three veterinarians that lack of feed was the likely cause of the cows being in a poor condition.

The condition of the cows on return home

[162] I next consider whether the evidence as to the condition of the Avondale cows when they returned from the Saunders property proved they had been underfed or starved while on the Saunders property.

[163] Mr Telfer's evidence was that he was at the Thames Dairy property when a truck load of 37 cows were returned from the Saunders property. He said he noticed "that the animals were in very poor condition and looked very skinny". He then received a telephone call from Francis, the manager at Avondale, to say that Avondale's cows were being unloaded and were not in good condition. Mr Telfer said he drove immediately to the Saunders property. From the evidence of Mr Telfer, Mr Saunders and Mr Saunders' father, there was clearly an immediate abusive exchange. Mr Telfer said, while he was there, one truck had to be unloaded because a cow had collapsed inside the truck. Another cow had collapsed in the race. Mr Saunders said in his evidence that, after the loading ramp had become dirty, cows were slipping on it but that was not a problem after he fixed batons to the ramp.

[164] Mr Telfer then returned to Avondale. He said cows were coming off the truck and simply sitting down on the concrete.

[165] He arranged for Ms Collins to ring the vet and Steve Blythe from MyFarm.

[166] There was no evidence from Francis.

[167] Mr Blythe recalled visiting Avondale cows on one of the other two grazing properties. He did not view the cows on the Saunders property. After being told by Ms Collins that the cows were not in good condition on the return home, he visited the Avondale farm on 5 August 2015. He said the cows were in very poor condition and were very skinny. He had no ongoing hands-on management of the cows. His evidence was in very general terms.

[168] Ms Taylor said she went to Avondale and was asked to examine 10 cows on 27 July 2015. One of the cows had a BCS of 2.5 and was described by Ms Taylor as being in very poor condition. Three cows were given a BCS of 4.0. Another had a

BCS of 5.5 but had an abscess on its face. Two cows were scored at 3.5 and two were scored at 3.0. Ms Taylor said it would be difficult to put condition on the cows in their final month of pregnancy. She had blood tests done for seven of the cows to check for signs of liver damage. There was no indication of swede associated liver disease. She said she could not really do a test to see if cows had been “starved” but could only test their energy levels at the time of testing. Although some of the cows had concerningly low BCSs, there was nothing in Ms Taylor’s reports to suggest there was a marked decline in those cows while they were on the Saunders property.

[169] Of the 262 cows Ms Taylor body condition scored on 30 July 2015, 23 per cent had a BCS of 5.0 or higher, which was within the range of ideal BCSs at calving. 49 per cent of the cows had a BCS of 4.5 or higher, which was within the range Mr Blythe noted when visiting the Avondale property on 31 March 2015. Of the 146 cows Ms Taylor scored on 4 August 2015, 84 per cent of the cows had a BCS of 4.5 or higher, and 58 per cent had a BCS of 5.0 or higher.

[170] On 6 August 2015, Ms Taylor euthanised and autopsied two cows. As she confirmed in a later email to Ms Collins of 12 May 2016, one had Johne’s disease. Johne’s disease is a wasting disease that causes cows to lose weight despite being well fed. It was Ms Taylor’s evidence that Johne’s disease would have been contracted when the cow was very young. As to the other cow, Ms Taylor said “an underlying cause of weight loss was not determined histologically”. She said in her email that she had noted in her gross findings that both animals autopsied had metritis with peritoneal adhesions.

[171] As referred to earlier, in a report to Ms Collins and Mr Telfer of 4 August 2015, after Ms Taylor body condition scored the further 146 cows, she said any deaths should be autopsied by a vet to rule out underlying disease, including both cows that die and cows that are shot or euthanised. And, “[i]t is important in cases of severe condition loss to rule out underlying disease and we must do this with blood sampling and post mortem examinations”.

[172] Mr Arlidge said 39 cows sent to the Saunders property died or were euthanised by 11 December 2015, some four months after the cows had returned from winter grazing.

[173] Ms Taylor's BCS reports mention the deaths of 11 cows. The causes of death are not all identified. Deaths amongst a herd are part of the exigencies of farming. Mr Arlidge's evidence was that the normal annual death rate of dairy cows is four per cent, and therefore 25 more cows than average died after being grazed on the Saunders property.

[174] Mr Blythe said he understood the vet euthanised some cows and, in his experience, he never had a vet recommend euthanising cows on BCS.

[175] Mr Arlidge's evidence was that Avondale does have Johne's disease on the farm as most Southland dairy farms do. He said the cows that were in poor condition and died were not diagnosed as having Johne's disease by the VetSouth staff. The evidence was that VetSouth staff (Ms Taylor) had only autopsied two cows that were euthanised. One of them was diagnosed with Johne's disease. Mr Arlidge referred to records as to how further deaths of cows through to December 2015 had been recorded by Avondale staff, but both the records and the information on which these records were based was hearsay.

[176] 408 cows were body condition scored by Ms Taylor on 30 July and 4 August 2015. The 146 cows body condition scored on 4 August included cows that had not been on the Saunders property. Only 25 of those cows then had a BCS of 3.0 or lower.

[177] On the recommendation of Mr Blythe, Avondale arranged for someone from the Ministry of Primary Industries (MPI) to go to the Avondale property to see what was happening with the cows soon after their return home.

[178] The report from MPI referred to their visit being a proactive one, "after being advised by your veterinarian of issues with low body condition cows returning from grazing". The report referred to "[w]hile it is apparent that there were issues with a small number of cows with Body Condition Score (BCS) of 3 or below", MPI was

satisfied that appropriate action was being taken to immediately deal with these animals as required by the code of welfare.

[179] It could not be inferred simply from the evidence as to the condition of the few cows that had BCSs of 3.0 or lower that those cows lost condition while grazing on the Saunders property or because of the way they had been grazed while on the Saunders property.

The feed available for the cows

[180] Avondale argued the Judge should have been satisfied that the cows were underfed. They argued Saunders Dairy were required to provide the cows with 15 kg of dry matter per cow per day. Had they done that, the condition of the cows would at least have been maintained over winter grazing, if not improved. They argued that Saunders Dairy could not have fed the cows 15 kg of dry matter, firstly, because the condition of the cows deteriorated while they were on the Saunders property and, secondly, because Saunders Dairy did not have the feed available to feed them 15 kg of dry matter per cow per day.

[181] Avondale submitted, on the evidence, the Judge could not have reasonably concluded that Saunders Dairy offered the cows the dry matter required. They submitted the Judge's finding that Saunders Dairy did offer the requisite amount of dry food "resulted in incorrect determinations of both the claim and counterclaim as it demolished Avondale's fundamental concern, namely that the cows were not fed and cared for over the winter grazing period".

[182] As far as assessing the feed available to the cows was concerned, Avondale submitted the Judge's finding was not open to him because of various aspects of the evidence:

- (a) Although Ms Kennedy had undertaken a crop analysis the day after the cows arrived on the Saunders property, the figures she arrived at were only an estimate and were not supported by a scientific dry matter analysis of the sort that is usually undertaken of a crop that is to be fed to cows. Such

an analysis was not undertaken because Mr Saunders said he would undertake to have that analysis done. He did not do so.

- (b) Ms Kennedy's estimates were generous because they were based on the area of crop as being the area of the paddocks as shown in a map drawn up by Mr Saunders' father, but did not show the actual area in crop.
- (c) The best way to maximise feed utilisation of the crops available was to offer narrower strips of crop and move the fence twice a day so as to minimise cows walking over and defaecating on uneaten crop and trampling available feed into the mud. Mr Saunders only moved feeding breaks once a day.
- (d) The Judge determined that the required amount of dry matter was offered to the cows on the basis that, in addition to the various crops being available, they had also been fed hay. Mr Telfer said he had not seen any hay fed to the cows on any of his visits to the farm. Hay had not been shown or mentioned to Ms Kennedy. Avondale submitted that Mr Saunders put forward no evidence to prove the cows were fed hay.
- (e) The day after the cows were returned to Avondale, Ms Collins had arranged for a helicopter to fly over the Saunders property. They took photos showing there was bailage left on the property at the end of the grazing agreement and there was crop left uneaten at the end of grazing.
- (f) Under cross-examination, Mr Saunders acknowledged he had not prepared a feed budget or undertaken any calculations as to the quantity of feed the cows were actually getting.
- (g) The expert evidence from Avondale was that the most likely cause of the condition of the cows when they returned to Avondale was because they had not been fed enough, indicating the cows had not been fed 15 kg of dry matter per cow per day.

[183] I consider the Judge's determination was reasonably open to him on the evidence.

[184] The Judge could not find that they had been underfed because the condition of the cows had deteriorated while they were being grazed. There were other potential explanations and the evidence did not establish that all the cows were in a significantly better condition on 26 May 2015 when they went to grazing.

[185] In bringing the hay into account, he clearly accepted Mr Saunders' evidence that hay had at times been fed to the cows. Ms Kennedy had been engaged to assess the dry matter available through the crops so there was no reason for her to be shown or told about the hay. Ms Kennedy acknowledged, when examining the crops, she had not looked to see if there was hay on the property and did not look at sheds where hay was stored. It was dark when she finished her assessment.

[186] Mr Telfer went to the Saunders property on very few occasions during the course of the grazing contract. One of those occasions was in the evening. It was not surprising that he did not see hay being fed to the cows. In contrast to crop, hay would be fed on a daily basis and would be eaten by the cows when provided to them.

[187] Ms Kennedy's estimates had been made available to Mr Telfer, Ms Collins and Mr Saunders. Mr Telfer did not require Mr Saunders to increase the amount of crop or feed for the cows.

[188] Mr Saunders said that Ms Kennedy did a good job in estimating the dry matter available for the cows. Mr Telfer's estimate in June 2015 of the dry matter available was based on his measurement of particular breaks in two paddocks, not from all the paddocks. Mr Saunders said he moved the wire in the break depending on the type of crop and food allocation. Even on Mr Telfer's estimate, using Ms Kennedy's calculations, he considered the dry matter available from the crops would be sufficient to maintain the condition of the cows.

[189] Ms Kennedy would have been aware of whatever gap existed between the edges of the various crops and the boundaries of the paddocks. She did not consider it necessary to make an adjustment to her estimates taking into account that gap. In those gaps, there was likely some grass for the cows. There would also have been

some growth of the crops over the winter period which, although limited, would not have been allowed for in Ms Kennedy's estimates.

[190] There was evidence that areas of bailage and chou were still available at the end of the grazing contract. Mr Saunders said that was because the stock had been collected earlier than anticipated. The inference to be drawn from this is that not all crop and bailage had been used while the cows were on the Saunders property. There was no basis on which to infer that the cows had been grossly underfed or starved in the last few days before collection because feed for them had run out.

[191] Mr Saunders' evidence was that he knew and agreed with Ms Kennedy's estimate of the dry matter available from the crops. He was experienced in the management of dairy cows. He made it clear to Mr Telfer that he would ensure the cows received the required dry matter of 15 kg per cow per day.

[192] Mr Saunders' evidence as to how he moved the wire also indicated he was managing the amount of crop available to ensure the cows received the allocation required. I would infer from that evidence that he was managing the grazing mindful of the requirement for the cows to have 15 kg of dry matter per cow per day and that he did so knowing and accepting Ms Kennedy's assessment as to the dry matter that would be available from each crop.

[193] Mr Saunders' evidence was that he fed the cows 180 bales of hay and 558 bales of baleage. He said, when putting the baleage out into the kale crop, the crop had grown to be on average up to the top of the bales. Mr Saunders said he put the hay in because there was not enough crop available to make up the 15 kg.

[194] All of that indicates to me that Mr Saunders assessed how much crop and hay the cows needed to ensure they each received 15 kg per day.

[195] I have carefully considered the notes of evidence and documents in the bundle that Avondale referred to in support of their submission that Mr Saunders acknowledged he had not prepared a feed budget or undertaken any calculations as to

the quantity of feed the cows were actually getting. The evidence I was referred to does not support that submission.

[196] Neither Ms Kennedy nor Mr Arlidge themselves calculated the dry matter that would have been available to the cows after taking into account the hay Mr Saunders said had been made available to them. A consultant, Alistair Gibson, made calculations for Mr Saunders but did not give evidence at the trial. Mr Arlidge commented on Mr Gibson's analysis of the feed available and said in his evidence this would have equated to 15.2 kg of dry matter per cow per day. Mr Arlidge rejected that analysis on the basis that, if the cows had that amount of feed supplied through the winter grazing period, they would have gained condition, even allowing for some wastage. He said they lost condition so clearly the numbers did not match the result achieved.

[197] I have considered all the evidence as to how cows might gain condition over a period of winter grazing, particularly the difficulties they would face in gaining condition at the beginning of winter grazing when having to transition from grass to crop feeding, and at the end as they approached calving.

[198] I consider, in this instance, there could not have been a reasonable expectation that the condition of the cows would improve over the course of the grazing contract.

[199] Mr Arlidge's first rationale for rejecting Mr Gibson's analysis of the feed available was thus not soundly based. His second rationale for rejecting Mr Gibson's analysis was that the cows lost condition. Because of the inadequate evidence as to the condition of all the cows at the beginning of the grazing period, that premise for his opinion had also not been established.

[200] In her evidence, Ms Kennedy referred to a brief of evidence that had been prepared for Mr Gibson. She said she did not disagree with his calculations, assuming the information he had used was correct. The main issue she raised over his calculations related to his allowance for hay. As to that, she emphasised she had not seen or been shown any hay. Under cross-examination, she accepted she had not had the opportunity to see it and she was not in a position to see it.

[201] With the way Mr Saunders talked about feeding hay to the cows in the manner and times he did it, and with his reference to the particular number of bales that had been fed to the cows, there was evidence on which the Judge could properly conclude that hay had been fed to the cows. The Judge did adequately deal with any issue over Mr Saunders' credibility as to that when he found the cows had been given hay.

[202] There was sufficient evidence for the Judge to conclude that the cows had been fed 15 kg of dry matter per cow per day while they were on the Saunders property. The evidence did not establish that, by reason of some shortfall in the feed available, the cows had lost condition while being grazed on the Saunders property.

Overall assessment of the evidence

[203] A number of the cows that came back from the Saunders property at the end of grazing were not in the optimum condition for calving. The condition of some of the cows was distressing. The evidence as to the poor condition of such cows was not sufficient however to prove that their condition at that time resulted from their neglect or inadequate feeding while on the Saunders property.

[204] Because Avondale could not prove the condition of the cows prior to grazing, Avondale had not proved that any loss of condition in cows or subsequent deaths resulted from the way the cows had been grazed.

[205] In the District Court, the Judge said:⁴⁶

From the evidence of veterinarians I am unable to exclude the possibility that the condition of the cows when they returned to Avondale Pastoral was either attributable to their condition at the start of the grazing contract or underlying disease or environmental factors that are due to no fault on the part of Saunders Dairy.

[206] In saying this, the Judge did not wrongly reverse the onus of proof. He was referring specifically to the veterinary evidence in explaining why that evidence alone did not help to prove the Avondale case.

⁴⁶ *Saunders Dairy Holdings Ltd v Avondale Pastoral Ltd Partnership*, above n 1, at [42].

[207] In the following paragraph in the judgment, the Judge said:⁴⁷

It follows that Saunders Dairy has established, on the balance of probabilities, that it did not fail to take reasonable care of the cows during the grazing contract. The counter-claim therefore fails.

[208] I have considered all the evidence, both as to particular issues in the way I have discussed and as a whole. Avondale had failed to prove there had been harm to the cows and they had suffered losses due to the way the cows were grazed on the Saunders property. Even if it could be said some must have lost condition while being grazed on the property, I am satisfied, as was the Judge in the District Court, that Saunders Dairy had proved, on the balance of probabilities, that any such loss of condition could not be attributed to Saunders Dairy feeding the cows less than was required with the grazing contract, any other neglect or their failing to take reasonable care of the cows. There was thus no error in the Judge dismissing Avondale's counterclaim in the District Court.

Conclusion

[209] Avondale's appeal is dismissed.

[210] Saunders Dairy are entitled to costs on a 2B basis. If these cannot be resolved by agreement, Saunders Dairy are to file a memorandum within four weeks as to the costs they seek. Avondale are to file a reply within two weeks of receiving Saunders Dairy's memorandum. Saunders Dairy may file a memorandum in reply within one week of receiving Avondale's memorandum. The memoranda are to be no longer than four pages. If necessary, I will deal with any unresolved costs issues on the papers.

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⁴⁷ At [43].