IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
BUSINESS LIST
COMMERCIAL DIVISION

Revised

Case No. CI-04-03731

HILDA FORREST & ANOR — Plaintiffs

v

MARSDON HOWARD FRASER and
LINDA BARBARA FRASER — Defendants

JUDGE:	HIS HONOUR JUDGE ANDERSON
WHERE HELD:	Melbourne
DATE OF HEARING:	15-18 August 2006
DATE OF JUDGMENT:	20 September 2006
CASE MAY BE CITED AS:	Forrest v. Fraser
MEDIUM NEUTRAL CITATION:	[2006] VCC 1382

REASONS FOR JUDGMENT

Catchwords: Contract - Share farming agreement - Interpretation of clause providing for minimum annual payment - Default notices served by plaintiffs - Defendants voluntarily vacating property.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr P. Crennan	Wakefield & Vogrig Lawyers
For the Defendants	Mr R. Antill	M. Davine & Co

HIS HONOUR:

1 Clifford and Hilda Forrest purchased a dairy farm property at Nilma North in 1998. The farm was operated by share farmers Kevin and Sabrina Mason through the agency of Mr Gerald Aitken.

2 In 2000, Mr and Mrs Forrest lived at Gracedale Lodge, a retirement home. Their daughter, Mrs Kaye Willis, held their Powers of Attorney. Mr Forrest died at age 93 in November 2004. On 7 November 2000, the Forrests had entered into a three year share farming agreement with the defendants, Marsdon and Linda Fraser. The agreement was negotiated by Mr Aitken on behalf of the Forrests. At the time, Mr Aitken was Field Services Manager for United Dairy Power. He also ran his own marketing company. There is a dispute about the construction of the agreement, principally in relation to the remuneration payable by the defendants.

3 The share farming commenced promisingly. Mr Forrest took a personal interest in the property and regularly was driven out to look at the farm and to talk to the Frasers. Mr and Mrs Fraser visited the Forrests at Gracedale Lodge. Mr Aitken was also frequently at the property. Soon after the share farming agreement was entered into, the term of the agreement was extended to 2009 and the Frasers were given first refusal if the Forrests wished to sell the property. In addition, a series of four loan agreements were entered into between November 2000 and June 2001 to evidence the advance to the Frasers of moneys totalling $81,000 to enable them to purchase stock, fertiliser and equipment. An earlier judgment was obtained in the proceeding in relation to one of the loan agreements.

4 The first year of the agreement was successful. Milk production from November 2000 to November 2001 was 263,006 litres. In the following year it was 229,386 litres, and for the period November 2002 to November 2003 it was only 182,596 litres. The year 2002 was apparently a drought year although this did not appear to be reflected by a downturn in milk production in the dairy industry generally until the calendar year 2003..

5 By the second half of 2003, the relationship between the Forrests and Frasers had deteriorated, and in a visit to the farm in October 2003, Mr Forrest told Mr Fraser that he intended to sell the property because the return from the share farming agreement was inadequate. He confirmed that the Frasers would be required to leave the property. This prompted Mrs Fraser to describe Mr Forrest as a "*deceitful old man*".

6 On 25 November 2003, the plaintiff served on the Frasers a Notice of Intention to rescind the agreement. The Notice referred to the Frasers' default in being behind in payments for milk supply of some $18,000. The Frasers responded through their solicitors by a letter dated 23 December 2003. The letter stated in part that, "*Given receipt of the Notice of Intention to Rescind Contract, without admission that it is justly given, our clients agree to vacate the property on the 29th February 2004*".

7 A further Notice dated 29 January 2004 was served on the defendants. It was drafted by the Forrests' solicitors and referred to a shortfall of $16,502.16. The correct amount was apparently $13,376.87.

8 In late 2003, one of the cows in the Frasers' herd was suspected of having Johnnes disease. This matter was reported to the Forrests and to the authorities. A consequence was that the farm would need to be quarantined for a lengthy period. The Frasers decided to sell their herd. It is difficult to determine whether this decision was a consequence of them being required to leave the property by the Forrests, or whether the decision to agree to leave was influenced by the discovery of Johnnes disease in the herd and the significant reduction in milk production over the previous two years. The Frasers vacated the property on 29 February 2004.

9 This present proceeding was commenced on 9 April 2004. The principal issues for decision in the proceeding are:

(1) The construction of clause 5(c) of the share farming agreement and whether a minimum payment of $38,000 applied to each year of the agreement or only the first year.

(2) The validity of the Notice of Intention to rescind the agreement dated 25 November 2003.

(3) As at 25 November 2003, whether there was any other basis for the plaintiffs to treat the defendants' conduct in relation to their operation of the dairy farm as a repudiation of the share farming agreement.

(4) If the Notice was invalid, whether the defendants' solicitor's letter dated 23 December 2003 operated to accept the service of the Notice as a repudiation of the agreement.

(5) The effect of a further notice served on the defendants on about 29 January 2004 or how otherwise the agreement was terminated.

(6) Whether the Forrests were entitled to damages as a consequence of any breach of the share farming agreement by the defendants and, if so, in what sum.

(7) Whether the Frasers were entitled to damages as a consequence of any breach of the share farming agreement by the plaintiffs and, if so, in what sum.

(8) Whether the defendants are entitled to be compensated by the plaintiffs for the cost of capital improvements carried out by the defendants to the property.

(9) Whether the defendants are entitled to payment by the plaintiffs for the value of items of materials and equipment left on the property and which later apparently disappeared.

Clause 5(c) of the Share Farming Agreement

10 The agreement provides in clause 5(c) that the defendants shall, during the continuation of the agreement, "*pay the owner thirty per cent (30%) of the dairy company proceeds. (This amount is to exceed thirty-eight thousand dollars ($38,000) in a calendar twelve months (12 months) from the start of this contract. If for any reason the amount is not paid in the calendar year, then the shortfall will be payable by the share farmers from the next available milk cheque*".

11 Both parties agreed with the submission of defence counsel, Mr Antill, that the interpretation of this clause was "*a matter of construction of the words of the document itself. However, in addressing the question of construction, the Court is entitled to look at the objective circumstances and the objective context of the facts known to both parties, and also the neutral subjective intentions of the parties at or before the entry into the share farming agreement*".

12 Plaintiff's counsel, Mr Crennan, submitted that a plain reading of the document favoured the interpretation that the base figure of $38,000 applied to each year of the agreement, rather than simply to the first year. Mr Crennan submitted that the use of the word "calendar" indicated a recurring obligation and that the commercial purpose of the agreement was to provide a guaranteed minimum return for the whole of the term, rather than simply for the first year.

13 In response, Mr Antill referred to a number of matters, including "*negotiations and discussions after the agreement was made*" and the way the parties conducted themselves during the term of the agreement. There is conflicting evidence between Mr Fraser and Mr Aitken as to the pre-contract negotiations. Mr Fraser says that he was told by Mr Aitken that the minimum figure of $38,000 would only apply to the first year, this is denied by Mr Aitken. I see no basis for preferring the evidence of either witness, generally or in relation to this particular matter. They both presented reasonably credibly although there evidence diverged significantly on a number of critical matters.

14 I consider, however, that the construction issue can be determined from a reading of the document. The primary obligation by the share farmer was to pay 30% of the "*dairy company proceeds*". This was clarified in paragraph 4(f), which allowed the share farmer "*to collect seventy per cent (70%) of the milk cheque less any relevant moneys owing each calendar month*". The milk cheque was paid monthly and this would ensure regular payments to both the owners and the share farmers.

15 The second sentence of clause 5(c) is contained in an opened bracket. The bracket is not closed, but it is clear that it should be closed after the words "*the start of this contract*". This indicates that the second sentence qualifies the first primary obligation. The shortfall in the period of 12 calendar months would not be apparent until the milk cheque for November was received in early December. If the monthly payments during the calendar year did not total at least $38,000, then the shortfall was to be made up from the next available milk cheque.

16 In my view, the better interpretation of the clause is to read the provision as if the base figure applies to each year, rather than simply to the first year. The clause reads: "*a calendar twelve months*", rather than "*the calendar twelve months*" and, in the circumstances, it seems to me that a plain reading of the clause and the general structure of the agreement favours the plaintiff's interpretation.

17 Although there is disputed evidence about the conduct of the parties during the operation of the agreement, the objective facts tend to support the view that the parties were operating on the basis that the minimum of $38,000 applied to each year. The documents show that, during the period of operation of the agreement, the milk receipts and payments were as follows:

Period	**30% of proceeds paid**
Year November 2000 to November 2001	$46,201.46
Year November 2001 to November 2002	$36,198.88
Year November 2002 to November 2003	$24,623.13

18 Mr Fraser prepared spreadsheets on his computer which he apparently submitted from time to time to Mr Forrest and Mr Aitken. The spreadsheet notes, "*Farm income share greater than $38,000*". Spreadsheets were prepared by Mr Fraser for the period beyond the first calendar year and yet the later spreadsheets included calculations of how the 30% payments compared with the minimum payment under the share farming agreement of $38,000.

19 Mr Fraser said that this was an oversight and that the figures were automatically generated or he simply typed figures Mr Aitken dictated. He said that a copy of the spreadsheet taking the figures through to February 2003 was not prepared on his computer. I do not accept the evidence of Mr Fraser in relation to these matters. The spreadsheet at defendants' Court Book p.36 recommences for the second calendar year in mid November 2001. This must have involved a manual insertion by Mr Fraser. This is confirmed by reference to the formulas shown on the spreadsheet

in exhibit P7.

20 Mr Fraser said that the second year involved a shortfall of approximately $2,000, upon which Mr Forrest took no action. It is perhaps not surprising that Mr Fraser adopted a benign approach, particularly as the return from the first year had exceeded the minimum payment by a significant margin. Mr Aitken gave evidence of a conversation, at which he said he had been present between Mr Forest and Mr Fraser, in which Fraser provided an explanation for the shortfall and that this was accepted by Forrest.

21 Although I regard Mr Aitken's evidence as a more probable version of events, I do not consider that Mr Forrest's conduct is inconsistent with the interpretation of clause 5(c), which is now contended for by plaintiffs' counsel. There is an insufficient basis for the maintenance of an estoppel as relied upon by the defendants.

Plaintiff's Notice of Intention to rescind dated 25 November 2003

22 The notice dated 25 November 2003 was drawn by Mr Aitken. It reads as follows: "*We the undersigned give notice of our intention to rescind the contract we have with you. This is to take place on or before the 29th day of February 2004 when you will give us the property in a state as per the contract. We will expect the 120 dairy cows held as security to be left on the property unless paid for same in full is satisfied before this date. We remind you that currently you are as per the attached list some $18,000 behind in payments for milk supply as per the contract and this balance will be due and payable on the 16th December 2003*".

23 In fact, the November milk cheque was not received until mid-December 2003 with notice of the amount being received earlier in the month. It would only be at that time that the extent of any shortfall over the period of 12 months could be calculated. The agreement provided in Clause 5(c) that the shortfall would be payable from the next available milk cheque, i.e. the December cheque received in January 2004. The Notice, therefore, could not affect the rights of the parties, although clearly by mid January 2004 the defendants would have had to find a substantial sum of money if

they were not to be in breach of the share farming agreement.

24 There apparently followed correspondence between the parties' solicitors. The Court Book index referred to a letter from the defendants' solicitors to the plaintiffs dated 2 December 2003. This document was not in the Court Book and was not put in evidence. A letter from the defendants' solicitors dated 23 December 2003 at defendants' Court Book p.144 is in evidence. It refers to, and appears to be, a response to letters from the plaintiffs' solicitors dated 15 December and 23 December 2003.

25 These earlier letters are not in evidence, although they apparently made complaints about the conduct of the defendants which were not limited to the defendants' failure to make the minimum payment of $38,000. The letter dated 23 December 2003 from the defendants' solicitors responds to these allegations. At the commencement of the letter, however, as the defendants' solicitors stated: "*Given receipt of the Notice of Intention to rescind contract, without admission that it is justly given, our clients agree to vacate the property on 29 February 2004*".

Plaintiff's further notice dated 29 January 2004

26 The plaintiffs' solicitors served a further Notice on the defendants on 29 January 2004 requiring payment of the shortfall for the 12 month period from November 2002 to November 2003 to be made from the next available milk cheque, the December cheque received in January 2004. The plaintiff in its further amended Statement of Claim conceded that the amount of the shortfall set out in the Notice, namely $16,502.16, was not accurate. The plaintiff did not dispute that the payments for the calendar year totalled $24,623.13, as referred to in the Defence, which would have made the shortfall $13,376.87.

27 It follows, in my view, that both the Notice of Intention to rescind contract dated 25 November 2003 and the Notice of Breach of Covenant served on 29 January 2004 could not, by reason of the specific breach alleged, affect the rights between parties. It is clear, however, that at the latter date, the defendants were liable to pay a

substantial sum of money to the plaintiffs.

28 Mr Antill contended that the Notice of Intention to rescind contract constituted a repudiation of the share farming agreement, and that the repudiation was accepted by the defendants' solicitors by the letter dated 23 December 2003. This submission has no substance. The Notice wrongly stated that the balance of the previous year's payment would be due for payment on 16 December 2003. The Notice anticipated that the payment would not be made and that the contract would be brought to an end with the defendants vacating the property by 29 February 2004. The Notice was therefore predicated upon a default at a future date. Further, the letter dated 23 December 2003 from the defendants' solicitors did not suggest that the Notice had been treated as a repudiation of the agreement by the plaintiffs.

29 In fact, what appears to have happened was that the agreement wasbrought to an end by a further agreement of the parties. The language used in the letter of 23 December 2003 by the defendants' solicitors suggests that, notwithstanding the contentions by both parties about their rights contained in the correspondence, the share farming agreement was to end by the vacation of the property on 29 February 2004.

30 Mr Crennan submitted that the defendants’ solicitors’ letter was conditional and reserved the defendants’ position in relation to the herd, or that effectively it was a counter-offer as a release was sought. Although the chain of correspondence is not in evidence, I consider that the better view is to regard the agreement as having been brought to an end by a further agreement of the parties. Effectively the defendants agreed that in consideration of being relieved of their obligations to further perform the agreement they would vacate the property on 29 February 2004.

31 The further Notice served by the plaintiffs' solicitors on 29 January 2004 threatened re-entry of the property if payment of the balance owing was not made within 21 days of the service of the Notice, which would have been a date prior to 29 February 2004. In my view, however, the parties had, by 29 January 2004, agreed that the

agreement was to be brought to an end by the defendants leaving on 29 February 2004. Although the parties might sue upon its terms, the plaintiffs could not terminate an agreement which would effectively end at the agreed date.

Other reasons for regarding the defendants' conduct as a repudiation of the share farming agreement

32 The plaintiffs had a proper basis to terminate the agreement by mid January 2004. The shortfall of $13,376.87 remained unpaid and there should be judgment for the plaintiffs in this amount.

33 The plaintiffs contend that there were other substantial breaches of the share farming agreement and, in particular, the obligations in clause 1 of the share farming agreement for the defendants to share farm the property "*as a dairy farm in a good and husband-like manner in accordance with the terms of this agreement*" and in clause 5(b) to "*keep and maintain the production of quality milk*".

34 There is in evidence correspondence between the parties from mid 2003. The letter at defendants' Court Book p.143 is dated 25 June 2003 and the response from the defendants is dated 27 June 2003. Although Mr Aitken gave evidence that his letter was served at an earlier date and the response from the defendants was received at a later date, I consider it more likely that the documents were sent and received at about the dates they bear. The matters raised in the correspondence relate to boundary fences, the application of fertiliser to the property and the number and types of animals permitted on the property.

35 In relation to the maintenance of pastures, clause 5(d) of the share farming agreement provided that the defendants would "*keep and maintain the said pastures on the said property and the rented land in good order and condition and top-dress [and] said pastures at least once in each year at a minimum rate of 500 kilos of fertiliser per hectare at such times as shall be agreed by the share farmer*".

36 In Mr Aitken's letter dated 25 June 2003, he passed on the plaintiffs' request "*for the fertiliser to be spread in two sequences, say 16 tonne in October and 16 tonne in*

March. This fertiliser is to be made up as 2 and 1 super. Cost is $367.40 per tonne (at present) delivered to farm or spread for $385 per tonne. The owners are prepared to finance this cost with $1,000 per month paid from the milk cheque each month to cover the amount".

37 The defendants responded as follows: "*Soil tests were taken in 2001 and the average Olsen P was 14. The most economical level is 18 (as determined by Ellinbank Research Centre). 2,000 kg of phosphorous is transported off the farm in the milk. An application of 32 tonne of 2 and 1 per year would reduce the Olsen P by 0.4. An application of 420 cubic metres of fowl manure would increase the Olsen P by 2.3 for each year it is applied. 2 and 1 would cause an imbalance in the system by adding too much potassium. Our intention is to apply at least 420 cubic metres of fowl manure per year split into six applications, which would make better use of the nitrogen which is inherent in the fowl manure. The last sentence in Item 3 is ambiguous as it is not clear who was going to pay for the fertiliser*".

38 The milk production from the farm dropped off considerably from the first to the third year. This was far in excess of national or State production downturns due to the drought. The plaintiffs concluded from the poor production that the defendants were not maintaining the pasture or, alternatively, that the defendants had diverted their priorities from milk production to cattle rearing. In relation to the latter matter, details concerning the disposition of the defendants' herd after they left the farm are sketchy. Nevertheless the onus of proving this matter rests upon the plaintiffs and essentially the lack of evidence means that they cannot satisfy that onus.

39 In relation to the obligation to keep the pastures in good order and condition and to top-dress with a minimum of 500 kilograms of fertiliser per hectare each year, there are questions of construction and questions of fact which must be determined. The defendants say that they intended to use poultry manure as fertiliser as they set out in their letter to Mr Aitken on 27 June 2003. The use of poultry manure had previously been discussed with Mr Forrest and, although he did not indicate any enthusiasm for the use of that material, it does not seem to have been suggested that

it would breach the terms of the share farming agreement. Indeed, the plaintiffs' expert, Mr Cunningham, agreed that in certain circumstances poultry manure can be regarded as a conventional fertiliser.

40 Mr Cunningham's analysis of the defendants' invoices suggests that a total of 19.63 tonnes of DAP, a phosphate fertiliser, was provided to the property in February, April and May 2002. This amounts to 287 kilograms per hectare, rather than the 500 kilograms of fertiliser required pursuant to the contract. In addition, dockets show that 260 cubic metres of poultry manure was used, which amounts to four cubic metres per hectare. There seems to be some variation in the interpretation of what this might mean, as the percentage of dry matter and the concentration of nitrogen and phosphorous can vary to a considerable extent.

41 Mr Fraser gave evidence that about 2 cubic metres of fowl manure equated to one tonne in weight of the material. According to the supplier’s brochure, this material would be expected to have about 5% nitrogen and 2% phosphorous. Using these figures, the poultry manure when applied would be likely to contain appropriate quantities of nitrogen and phosphorous comparable with commercial fertilisers. Mr Fraser said that it was his intention to carry out further soil tests early in 2004 to determine the best mix of nutrients to be applied to the pasture and whether any supplements were required. The earlier soil tests had been conducted in December 2000 and January 2001. Apparently the interval of about 3 years between testing is not unreasonable. No soil testing was carried out by the plaintiffs when the property was resumed.

42 On this matter, the plaintiffs bear the onus of proof and, in my view, it has not been established that the defendants breached their obligations under the share farming agreement before it was terminated, which would entitle them to an award of damages. Certain other matters are pleaded by the plaintiffs as alleged breaches in their Amended Statement of Claim. Only limited evidence of these further matters was led and the plaintiffs' submissions did not seriously address them.

Capital improvements to the property carried out by the defendants

43 The defendants carried out works on the property which they submitted would result in an unjust enrichment for the plaintiffs if they were not ordered to compensate the defendants for their cost. Most of the main items claimed related to the labour component of works where the cost of the materials had already been reimbursed by the plaintiffs. In my view, the defendants fall far short of establishing that works were carried out of any particular value which would make it appropriate for the Court to require the plaintiffs to compensate the defendants for these matters upon retaking possession of the farm.

Wrongful detention and/or conversion of chattels left on the property by the defendants

44 The defendants were unable to remove all their possessions by 29 February 2004. They later returned to the property, but certain items had been secured. Some of these items were later released by the plaintiffs, although this did not take place until some months later. By that stage, some items were apparently missing and Mrs Willis had taken, what appeared to her to be, property of no value to the tip.

45 The defendants have not established the causes of action relied upon. There is uncertainty about whether particular items were taken by the plaintiffs or detained by them. The values given by Mr Fraser in his evidence cannot be accepted as indicating anything more than the present day replacement cost of new items. This part of the defendants' claim will be dismissed. The defendants are not entitled to damages because it was effectively the defendants' failure to make the payment or to be in a position to make the payment in January 2004 which led to the agreement being terminated, although, as earlier indicated, I accept that this was done by agreement following correspondence where the alternative contentions of the parties were debated.

46 The defendants' counterclaim must fail. The plaintiffs are entitled to judgment for the sum of $13,376.87. I will hear further from the parties as to the appropriate orders to be made and on the question of costs.

Certificate

I certify that the preceding 12 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 20 September 2006.

Dated: 20 September 2006.

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Litsa Pavlou
Acting associate to His Honour Judge Anderson