IN THE DISPUTES TRIBUNAL **[2009] NZDT 9**

BETWEEN **AAD**

APPLICANT

AND **ZZW**

RESPONDENT

Date of Order: 9 June 2009

Referee: Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that that ZZW Ltd is to pay to AAD the sum of $1,000.00 on or before Tuesday, 23 June 2009.

Facts

[1] AAD was appointed by ZZW Limited ("the Company") and a third party to act as a conciliator in a sharemilking dispute. AAD was appointed to act as a conciliator pursuant to the standard terms of a Sharemilking Agreement, the relevant terms of which are as set out in clauses 138 –158 of the Schedule to the Sharemilkers Agreements Act 1937.

[2] By an agreement dated 13 February 2009, the parties each agreed to pay half the cost of the conciliation.

[3] On 24 March 2009, AAD completed the conciliation and charged the Company the sum of $2,480.63 for its half share.

[4] The Company has not paid the account, as it considers that the work done by AAD was in breach of her contract as conciliator.

Law

[5] The law of contract applies. AAD was appointed by both parties to act, and signed an agreement relating to how the costs would be shared. Being a professional appointment, the law would imply into the contract a requirement that AAD carry out her role with reasonable skill and care.

[6] The Sharemilkers Agreements Act 1937 also applies. The Schedule to that Act sets out the minimum requirements of any Sharemilking Agreement that must be included to protect the interests of the parties. The Sharemilking Agreement in question was a standard form which followed the dispute resolution provisions set out in clauses 138-158 of that Schedule.

[7] AAD was appointed to act as a conciliator for the purposes of those dispute resolution clauses. It would therefore also be implied into her contract of appointment that she would carry out the conciliation as required by the specified dispute resolution procedure.

[8] The Company is defending AAD's claim on the basis that the account should be discounted to reflect failings in the process she adopted.

[9] The issues for determination are therefore as follows:

(a) Has AAD carried out her role as conciliator with reasonable skill and care and in accordance with the specified dispute resolution procedure set out in the Sharemilking Agreement; and

(b) If not, by how much should the account be discounted to reflect this failure?

Decision

Has AAD carried out her role as conciliator with reasonable skill and care and in accordance with the specified dispute resolution procedure set out in the Sharemilking Agreement?

[10] I find that AAD has in part failed to carry out her role with conciliator with reasonable skill and care and in accordance with the Sharemilking Agreement for the following reasons:

(a) The Sharemilking Agreement provides that the conciliator must immediately convene a hearing between the parties (clause 140(d) of the Schedule). This did not occur.

(b) The Sharemilking Agreement also provides that the conciliator must assist the parties to reconcile their views on the dispute to reach an amicable settlement (clause 140(e) of the Schedule). AAD immediately took the view that the dispute was intractable and that she should obtain information from each party

separately, rather than by convening a meeting. In the absence of a meeting, the first obligation to assist the parties to settle would have required shuttle mediation, identifying issues and interests, identifying best and worst alternatives for the parties, providing reality checks, and developing options which satisfy mutual interests and agreed objective criteria. There was insufficient evidence that any process of mediation or conciliation was undertaken to address this first phase of the process. As no meeting was held, AAD took the view that she could best assist the parties by finding out the facts and deciding herself what was fair. However, this on its own is not assistance to reconcile views. Any conciliator's proposal for determining the matter is only required where the meeting or other assistance to settle fails to achieve the desired result.

(c) In addition, the Sharemilking Agreement provides that the assistance to be given in reconciling views must be "independent and impartial".

(i) Independence refers to disinterestedness. I am satisfied that AAD was disinterested and free from bias in the sense that she had no conflict of interest or personal stake in the outcome.

(ii) Impartiality refers to fairness in the process It was not established that AAD herself failed to be impartial. However, I am satisfied that the process she adopted either unintentionally created partiality, or give rise to such an impression of partiality that her proposal could never have been accepted by the Company. As already noted above, AAD did not meet the parties together and appeared to undertake a fact-finding process rather than a mediation. In undertaking this fact-finding process, it was established as being more likely than not that AAD failed to allow the Company to respond to key evidence she had gathered upon which her proposal was based. Whilst a conciliation process is non-binding, the influence that a conciliator can have over outcomes demands that basic rules of natural justice are followed. By basing the proposal on findings

about which the Company had no chance to comment, the Company was left with the impression that the outcome was not impartial. This impression was always going to end in rejection of the proposal and thus in failure of the conciliation process. Some of the evidence not put to the Company gave rise to the inference of serious allegations against the Company (e.g., taking of milk to feed calves, improper retention of stock sale proceeds). In relation to two minor matters, invoices were charged to the Company in error. If AAD had gone back to the Company to check all her evidence, this would not have occurred. Whilst minor, these errors added to the overall impression that the proposal was not even-handed. This left the Company with no option but to reject the proposal, and made the conciliation process of little or no value to them.

(d) I have had regard to the facts that AAD is not a member of a professional body of mediators, such as AMINZ or LEADR, and is not a member of the National Panel of Conciliators. The Sharemilking Agreement requires the conciliator to be a Panel member. However, I do not consider that AAD should be penalised for this. There is no Panel member in Southland, and the parties agreed to appoint AAD knowing that she was not on the Panel. However, the parties could still expect that any person who accepted the appointment would follow the conciliation process as set out in the Agreement. AAD acknowledged that this was the intention.

(e) I have had regard to the fact that AAD did not complete the conciliation within the timeframe envisaged by the process set out in the Sharemilking Agreement. Again, I do not consider that AAD should be penalised for this. The failure to complete the conciliation within the specified timeframes allowed the Company to opt out of the conciliation if they chose, and given the length of time taken, had they done so, they would have avoided most or all of the cost. They did not choose to do so, as they believed in the potential benefits of the process notwithstanding the delay. Their best defence is that

these benefits were taken away from them not by the delay, or AAD's qualifications, but by failures of the process explained above.

(f) I have had regard to AAD's argument that she did not convene a meeting because she did not want a "war". However, she accepted an appointment which required her to use her skills to mediate conflict. Even accepting that a shuttle process was acceptable as a "meeting", there was insufficient evidence that any mediation took place. Instead, the evidence established that AAD had passed over the first obligation to mediate and gone straight into the proposal stage. It therefore appeared from the process, and from the way the final report was written, that she had seen her role more as an arbitrator, rather than as a conciliator.

(g) I have had regard to the fact that AAD did seek clarification from the Company on specific points by telephone (e.g., where the milk came from to feed calves). However, there was insufficient evidence that she sought clarification on all key points, and she did not meet with the parties again after her initial gathering of evidence. As acknowledged AAD, this impression (that the Company was not given a chance to respond) was strengthened by a lack of reference to this in her proposal. Thus, even if there had in fact been no bias, the Company was left with the impression of bias because of the way the process was handled and the way the proposal was written.

(h) I have had regard to AAD's point that it was clear to her from the start this was an intractable and complex dispute. I agree that as the parties were no longer working together there was little room for mutual interests. However, the conciliator can at any time terminate the conciliation if it considers that there is nothing to be gained from the process. In such a case, it is questionable whether she should have glossed over her initial responsibility to provide mediation, and then proceeded to spend nearly $5,000.00 of the parties' money on investigations that were largely undertaken either on her own, from confidential witnesses, or with only one of the parties present.

(i) I have had regard to AAD's evidence from other consultants and people who have had previous dealings with the Company that the Chamberlains are difficult to deal with and are the cause of the problem. However, this information is highly prejudicial to the Company, and does not prove anything in relation to the claim before the Tribunal. I could give it no weight. By the same token, I also gave no weight to suggestions that AAD had told the Chamberlains during the process that she was "sick of it", that she "wished she had not got involved" and that she alleged that they were "bullying and intimidating her". AAD strongly denied these allegations, and in the absence of further proof, they were not established.

(j) In summary, I find that there were some failings in the process adopted by AAD that significantly reduced the opportunities and benefits that could have been achieved from the conciliation process.

By how much should the account be discounted to reflect this finding?

[10] I find that the account should be reduced by 60% (rounded up to $1,000) to reflect the manner in which the appointment was carried out. This is so for the following reasons:

(a) It was established that there were flaws in the process adopted.

(b) However, I do not consider that no charge should be payable. The Company chose AAD knowing she was not on the Panel and continued the process notwithstanding some of these flaws. It could have opted out during the process once the conciliator was out of time, or once it became concerned with the process. It acknowledged that there was little chance for the dispute to resolved through conciliation given its complexity and the lack of ongoing relationship between the parties.

(c) I have had regard to the Company's evidence that other Panel members do not charge as much as AAD. That may be the case, but I could give no weight to this evidence, as these members did not appear as witnesses to be cross-examined. Also, this did not amount to evidence of what this particular conciliation should have cost. The Company failed to specify the basis of charges prior to the appointment. The appointment agreement was inadequate and did not protect either party from what subsequently ensued.

(d) I have had regard to the comment from the Company that it should be able to recover its arbitration costs from AAD. However, it has filed no counterclaim seeking this, and it is hard to create a direct causal link between the failure of the conciliation and the arbitration costs given the complexity and nature of the dispute. Having said that, some opportunity has undoubtedly been lost which is impossible to quantify, and is best reflected in the 55% reduction in payment of the account.

(e) The level of reduction is set at 55% because whilst the Company contracted to use AAD's services and continued to do so notwithstanding her process, ultimately, the onus was on AAD to perform her services as a conciliator and give the parties the opportunity of avoiding the costs of arbitration. She was contracted to do this not by undertaking an arbitration herself, but by facilitating negotiations between the parties, and only making a proposal if this was not successful. This did not happen, and her proposal then appeared to be at least partly based on evidence that the Company did not have a chance to respond to. The merits therefore fall on the Company's side.

(f) Accordingly, an order is made for the Company to pay the sum of $1,000.00 on or before 23 June 2009.