IN THE DISPUTES TRIBUNAL **[2010] NZDT 17**

BETWEEN	**AAT**
	FIRST APPLICANT
AND	**AAU**
	SECOND APPLICANT
AND	**ZZH**
	RESPONDENT

Date of Order:	24 August 2010
Referee:	Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Applicants' claim be dismissed.

Facts

[1] On 1 September 2003, AAT and others, as trustees of the LM Trust, leased a 250 ha farm property at [a town] to the PM Trust Partnership.

[2] Two professional trustees, PO and AT, were named as lessee. ZZH was in fact the person undertaking the day-to-day management of the farm under the lease, and guaranteed the Partnership's obligations. ZZH is treated for the purposes of this claim as if he were the lessee. It was not disputed that the lease bound ZZH to perform the lease as if he was the principal (clause 14.1(b)).

[3] ZZH made monthly payments of $8,333.33 + GST under the lease ($100,000.00 per annum).

[4] The Lease subsisted for approximately five-and-a-half years. It terminated as per clause 1.2(d) on 31 March 2009. The Lease proceeded without incident, and all rent under the lease was paid on time.

[5] The lease stated that on termination, ZZH was to leave the property in good grass pasture (clauses 8.11 and 8.12(b)) and a minimum grass cover of 1,200 kgs dry matter/ha, with deficits covered by supplementary feed (clause 8.12(c)). ZZH complied with this. He was under no obligation to leave hay (clause 1.12, 8.13) and was under no obligation to leave swedes (clause 8.12(a)).

[6] The lease also did not require ZZH to leave any silage on termination. However, AAT believed that shortly after the lease was signed, he orally agreed that ZZH could use part of a silage pit that clause 15.4 of the lease had reserved to the BVs [AAT's family] so long as ZZH replaced the silage at the end of the lease with an equivalent amount. AAT believed that ZZH then went ahead and used the silage. It is not disputed that ZZH emptied the silage pit shortly after he took possession of the property in 2003, and that he did not

replace the silage on termination in 2009. Given this failure to replace the silage in 2009, AAT brought a claim against ZZH for its value in 2003, which he calculated at $12,150.00.

[7] ZZH defended the claim on the basis that he had not used the silage, as it was not good enough quality, and that he had merely emptied the pit for his own use by spreading the silage on a paddock to get rid of it. Having emptied the pit, he found the pit to be not suitable for use by him, and he did not use it again. He denied any agreement that, contrary to the Lease, he would leave any replacement silage on termination.

[8] At the hearing, AAT was represented by his accountant, AAU, who is a professional trustee of the LM Trust. AAU did not have standing in his own right to represent the trustees, as he acknowledged that under the terms of the Trust he was not jointly entitled, having no beneficial interest in the Trust (s 38(3)((c), Disputes Tribunals Act 1988 ("DTA").) However, the hearing proceeded with AAU as representative at AAU's request given that:

(i) AAT currently resides in Australia, and was therefore for sufficient cause unable to appear in person (s 38(3)(e), DTA);

(ii) The Tribunal was satisfied that AAU had dealt with ZZH about the matters in issue since the termination of the Lease, and had sufficient knowledge of the case and authority to bind his fellow trustees (s 38(4), DTA); and

(iii) AAU was not a lawyer or a person regularly engaged in advocacy before Tribunals (s 38(7)(c) DTA).

[9] It is important that there be a level playing field in the Tribunal and parties are generally not able to be represented. However, for the reasons noted above, whilst AAU would not normally be accepted as having standing to represent the BVs, it was not considered that there was any prejudice to ZZH in allowing the hearing to proceed with AAU's representation. Also, following a discussion on the matter, ZZH agreed for the hearing to proceed on this basis.

Law

[10] The law of contract applies.

[11] The lease was silent about replacement of silage on termination. However, if there had been a subsequent oral side-agreement about silage which in effect varied the lease, then this would bind ZZH.

[12] To succeed in his claim, the AAU had the onus of establishing that:

(i) AAT had entered into an oral agreement with ZZH that he could use his silage so long as he replaced it on termination;

(ii) ZZH had used the silage;

(iii) ZZH had not replaced the silage on termination; and

(iv) the silage had a value on termination of $12,150.00.

[13] Each is considered in turn.

Decision

Did AAT enter into an oral agreement with ZZH that he could use his silage so long as he replaced it on termination?

[14] Having heard extensive evidence from AAU and ZZH, and considered additional evidence from AAT on this issue, I am unable to make a finding that the oral agreement existed on the terms alleged by the Applicants. Such an agreement may well have existed, but ZZH denied this. Given the conflict of recollections, and the lack of documentation, the matter simply remained in balance.

[15] I have had regard to all the surrounding evidence to see whether I can infer that such an agreement must have been entered into. In particular, I have had regard to AAU's argument that I could not infer that AAT intended to gift the silage with no obligation to replace it. On the face of it there is some weight in this argument given the quantity and

quality said to have been in the pit, and its value as assessed by the applicants. These factors (quality, quantity and value) were established to some degree by the following evidence.

(i) *Quantity:* The BVs had just ceased a partnership at the time the Lease was entered into, and the silage had belonged to the partners equally. The partners hired a consultant to measure the stack, and one partner (NE) removed his share. The other partner, PO, left his in the pit, which was reserved under clause 15.4 of the Lease for his use. Given that NE only took his half, it is fair to assume that half the stack remained. ZZH did not dispute this;

(ii) *Quality:* The quality of the silage was disputed. NE confirmed by way of statement that, but for the last 2–4 metres, the silage was of good quality. Unfortunately, the consultant who measured the size did not note the quality. ZZH stated that it was all poor quality and that all he did was spread it on one paddock to get rid of it. Given the time that has elapsed and the conflict of evidence, it is hard to make findings on quality or consistency across the stack. However, I find that it is more likely than not that some of it must have been usable. If it was not, NE is unlikely to have expended time and effort to remove his half.

(iii) *Value:* The applicants put the value of the silage at $12,150.00 + GST. However, given that quality cannot be accurately assessed, value cannot be accurately assessed. Nevertheless, whilst ZZH states that he simply dumped it, I find it hard to believe it was all of no value. I therefore find that he is more likely than not to have had some use out of it, or at least the potential for some use out of it.

[16] In summary, it is considered more likely than not that ZZH removed half the original stack as measured, and that an unknown quantity of it was likely to be usable in some form and to have some value. Given the quantity of silage left behind, and PO's removal of his half of the stack, it seems more likely than not that the silage was worth some thousands of dollars.

[17] However, this information does not enable me to infer that there was an oral agreement to vary the Lease to require ZZH to leave silage on termination. Feed is often

treated differently to other assets on the passing of possession. It would be easier to infer that a tractor, or an electric fence unit, was not meant to be given, and was to be returned or replaced at the end. By contrast, feed is a consumable, at times of indeterminate value, and it is an item in relation to which there is often much give and take on the taking of possession with a farm lease. Even given the finding that the silage had a value in the thousands of dollars, this must be seen in the context of a Lease during which ZZH made total payments for over five and half years of over $550,000.00 + GST. ZZH also noted that he took over some paddocks with stubble that he was required to leave regrassed, and that he was therefore entitled to assume that the silage was left as recognition of that. These factors are not noted in any way to detract from the value of the silage, but they do put in evidence the importance and value of the ensuing relationship, the difficulty in valuing feed exchange, and the possibility that, objectively speaking, the silage could be viewed as having been left for the lessee.

[18] I have had regard to AAU's argument that there must have been a discussion about the silage after the Lease was signed. I agree that this is more likely than not, as the silage in question was in the silage pit reserved for the BVs in clause 15.4. ZZH could not have emptied the pit without being in breach of the Lease unless there was some conversation about it. However, I will never know the contents of that conversation. ZZH's clear recollection of it was that he was entitled to clear it out so he could use the pit himself, the silage being of little or no use to him. He notes that AAT left a neighbouring pit of whole crop silage to waste, and that this provides further objective proof that he was entitled to assume that the silage in question was also of no use to the BVs. Again, these arguments simply leave the matter in balance.

[18] For these reasons, AAT may well have understood in his own mind that he was leaving the silage on the basis that it be replaced, but there was insufficient evidence for me to make a finding that there was a meeting of minds on the matter, or that, viewed objectively, any express agreement existed.

[19] I have also had regard to whether I could imply a requirement for ZZH to leave the same quantity of silage that he emptied out of the pit. A requirement to replace is commonly

negotiated in leases, particularly where the lease is due to end close to the winter. However, I am unable to imply such a term in this case for two reasons.

[20] Firstly, a term may be implied if it is necessary to give business efficacy to the Lease. However, the Lease works without implication of this term, and the requirement for replacement is inconsistent with its express terms. Even allowing for the oral variation said to have been made allowing use of the silage, it is not then so obvious that it goes without saying that what was used had to be replaced. It is possible, but not so obvious in the context of this Lease, given its length, the wastage of the silage in the next pit and the stubble paddocks to be regrassed.

[21] Secondly, a term may be implied by custom or usage. However, to be implied in this way, a term must have such notoriety that ZZH must be taken to have known of it, it must be certain, and the custom must be proved by clear and convincing evidence. In other words, to be implied by usage, a requirement to replace must be so common as to be able to be taken for granted, so prevalent that it forms part the Lease unless it is expressly excluded, or implicit in the language of the Lease. On the contrary, the Lease is specific about the obligations on termination, and does not require silage to be left. Even leaving that point aside (given that a subsequent oral variation is claimed), I cannot imply from the removal of the silage from the pit a requirement by custom to replace. For the same reasons as are noted above, feed replacement requirements are different in every Lease and are common areas of give and take. It is not always to be taken for granted that what is used is to be replaced.

[20] Given the findings above, it is not necessary to consider the remaining issues. However, as noted above, had the Applicants established an agreement to replace (there being evidence upon which to infer some usage and some value), it would still have been difficult to fairly establish quantum. Leaving aside the dispute that remained over actual use and quality, the alleged breach, being at the termination of the Lease, was in not replacing what was taken out of the pit. It seems that the proper measure of loss would have been the cost of replacement at that end of the Lease, not the value of what was removed at the start.

Conclusion

[21] I can understand the Applicants' disappointment and sense of loss upon discovering that ZZH did not intend to replace the silage he took from their pit. However, the onus was on the Applicants to establish that there was a contractual obligation on ZZH to replace it. In the circumstances of this case, such an agreement was possible, but was not able to be established on the balance of probabilities. For these reasons, an order has been made dismissing the claim.