

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

CIV 2011-441-110

BETWEEN STOCKCO LIMITED
Plaintiff
AND JANETTE FLORENCE WALKER
Defendant

Hearing: 11 May 2011
Counsel: B D Gustafson for Plaintiff
B Pearse for Defendant
Judgment: 24 June 2011

JUDGMENT OF ALLAN J.

*This judgment was delivered by
The Hon. Justice Allan
on
24 June 2011 at 2:30pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

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[1] This case is concerned with the priority of claims by each party to interests in about 200 cattle owned by the plaintiff, but in the possession of the defendant.

[2] In its statement of claim, the plaintiff seeks unparticularised damages although, as I apprehend it, the underlying purpose of the proceeding is to obtain possession of the cattle so they might be killed and processed. The precise number of cattle is in dispute. The precise identification of the plaintiff's cattle is also a matter which has not yet been determined. It remains a live issue between the parties.

[3] The present issue for determination is confined to the defendant's claim to a common law lien over the cattle, by reason of a contract between her and a third party, pursuant to which she says she was required to improve the cattle such that she is entitled to retain possession of the cattle until she is paid. Accordingly, the single issue for determination in this judgment is whether the defendant is entitled to maintain the claimed lien.

Factual background

[4] On 5 November 2008, the plaintiff and Capehorn Farming Company Ltd (Capehorn) entered into a Livestock Agreement, whereby Capehorn would procure stock from time to time and the plaintiff would pay the purchase price. On that same day, the plaintiff registered the Livestock Agreement as constituting a security interest in the livestock concerned, under the provisions of the Personal Property Securities Act 1999 (PPSA). Pursuant to its arrangements with the plaintiff, Capehorn procured certain stock and made arrangements with the owners of farm properties for the stock to be raised on the farms concerned. Capehorn's intention was to fatten the cattle and then to derive a profit from the ultimate killing and processing of them.

[5] The defendant owned a farm at Pongaroa in Hawke's Bay. On 26 March 2010 she entered into an agreement with Capehorn under which Capehorn was to deliver a number of bulls to the defendant's property where they would remain until

they were ready for processing (Grazing Agreement). Stock deliveries to the defendant took place between March and April 2010.

[6] The Grazing Agreement between the defendant and Capehorn was in writing. It reads as follows:

1. **Name of Grazier:** WALKER Janette
2. **Name of Livestock Owner:** CAPEHORN FARMING COMPANY LIMITED
3. **The Property:** Birch Hill Stn
241 Sugarloaf Road.
4. **The Grazing Fee:**
\$1.25 plus GST per kilogram of liveweight gained (truckweighed in and out 3 hours off grass) payable 7 days after stock weighing.
5. \$3.00 per week will be paid on the 20th of the month following, at commencement of this agreement, with the balance of monie's [sic] to be paid at end of contract to equal \$1.25 per kilogram of liveweight gain.
6. **Term of Agreement:**
The Agreement is to commence on the **25th** day of **March 2010** until 2010 or such a date as the parties may agree.
7. **Termination of Agreement:**
The Agreement may only be terminated for breach of a condition or conditions of the Agreement.
8. **Animals to be Grazed:**
The Agreement is for the grazing of **200** rising 2 year freisian bulls to be taken through to **Oct Nov** 2010.
9. **Non-Assignment of Agreement:**
The Agreement is personal to the Grazier and to the Livestock Owner and may not be assigned.
10. **Graziers Obligations:**
In consideration of payment by the Livestock Owner to the Grazier of the Grazing Fee the Grazier shall and does hereby agree to provide in respect of the livestock, the following services at the cost of the Grazier:
 - (a) Secure, fully fenced grazing upon pasture of a suitable quality situated upon the property;
 - (b) Access to functional, fully supplied stock water of a sufficient nature, quality and capacity to supply all reasonable anticipated hydration requirements of the livestock and/or such other natural, accessible and contamination free means of achieving such hydration

requirements as may be agreed upon between the parties in writing;

- (c) All such veterinary treatment (drenches, dips etc) as a reasonable and prudent owner of the livestock would themselves provide to the livestock.

10.(sic) Compensation For Death of Livestock:

In the event of the death of any livestock excluding 1% in number of the livestock grazed, the Grazier shall forthwith pay to the Livestock Owner compensation by either replacement animals of the same value or a deduction in the Grazing Fee payable in respect of livestock deaths exceeding 1% in number of livestock grazed. If an animal is put down for humane reasons and proof of this is supplied, that animal is not counted as part of the 1% deaths.

11. Transport of Livestock

The Livestock Owner will cover all costs pertaining to transporting livestock to and from said grazing property.

Grazier will be responsible for any cartage costs incurred transporting livestock between Graziers own properties.

12. Liveweight Gain

If liveweight gain is deemed to be inadequate (eg below 0.5kg a day) or animals are losing condition due to poor farming practice or inadequate feed, the livestock may be removed with all subsequent costs to be paid by Grazier.

13. Tags

A penalty fee of \$50 will apply to any cattle not correctly tagged upon pickup from Graziers Property and subsequent delivery to Livestock Owners Property.

DATED this 26 day of Mar 2010.

SIGNED by the Grazier)
in the presence of:)

SIGNED by the Livestock Owner)
in the presence of:)

[7] The defendant's first invoice to Capehorn was duly paid but later invoices were not.

[8] On 20 December 2010 Capehorn was placed in receivership.

[9] On 21 December 2010 the plaintiff advised the defendant that it would pay grazing fees from 21 December 2010 onward. By arrangement between the plaintiff and the defendant, the stock remained on the defendant's farm for the time being.

[10] On 26 January 2011 the defendant served a notice of general lien in respect of the Capehorn bulls on the receivers of Capehorn and on the plaintiff.

[11] On 28 January 2011 she served a notice of sale of stock pursuant to s 3 of the Wages Protection and Contractors' Liens Act Repeal Act 1987.

[12] On 21 February 2011 the plaintiff commenced this proceeding. Its statement of claim was accompanied by a without notice application for an order directing the defendant to permit the plaintiff to uplift the Capehorn bulls, but that order was declined. Since that time, the Capehorn bulls have remained on the defendant's farm pending delivery of this judgment. Mrs Walker sold the farm with settlement on 1 June 2011. However, the stock remain on the property in the short term, pursuant to an arrangement with the new owner. For present purposes, they remain in the defendant's possession.

The Issues

[13] Counsel framed the relevant issues slightly differently. In my view, the questions for determination are these:

- (a) Whether or not the defendant has a common law possessory lien over the Capehorn bulls on her property.
- (b) If so, does the lien secure the whole or only part of the sum owed to the defendant pursuant to the contract with Capehorn?
- (c) If the defendant does not have a common law possessory lien, does she have a contractual lien?
- (d) If any lien exists, does it take priority over the plaintiff's security interest, registered pursuant to the PPSA?

- (e) If the defendant does not have a lien which takes priority over the plaintiff's security interest, does she nevertheless have a right to equitable set-off against the ultimate sale proceeds obtained for the Capehorn bulls?

The last of these issues requires determination only if the defendant is unable to establish the existence of a lien which takes priority over the plaintiff's registered security interest.

Common law lien

[14] A lien is the right of one person to retain possession of property belonging to another or to have a charge over it, pending satisfaction of the lien-holder's claim against the other person. At common law, a lien is possessory only and depends on the lien-holder having rightful and continuous possession of the property concerned until the claim is satisfied.¹ It is well established that at common law a person expending labour and skill on the improvement or repair of chattels delivered for that purpose is entitled to a lien over them for payment of charges for that work.² But a significant body of authority supports the proposition that there can be no lien for the mere maintenance of chattels or for work done to prevent their deterioration as distinct from their improvement.³

[15] As a general rule, a possessory lien is lost by the outright delivery of the article to the owner or his or her agent and cannot be revived if possession is subsequently obtained.⁴ However, a lien may subsist when the article is released to the owner on a temporary basis, on terms that it is to be returned after use and that the lien should continue.⁵

¹ *Laws of New Zealand* Lien at [1].

² See for a discussion of the development and nature of such liens *Tappenden v Artus* [1964] 2 QB 185 at 195.

³ See, for example, *Grazing & Export Meat Co Ltd v Anderson* [1976] 1 NZLR 187 (SC); *Re Southern Livestock Producers Ltd* [1964] 1 WLR 24.

⁴ *Leeward Holdings Ltd v Douglas* [1982] 2 NZLR 532 (HC); *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621.

⁵ *Great Eastern Railway v Lord's Trustee* [1909] AC 109 (HL); *Rose v CMS Operations Ltd* [2002] EWHC 59 (Ch).

[16] The plaintiff relies on the foregoing statements of principle in two respects. It contends that:

- (a) The Grazing Agreement between the parties was a simple agreement for the agistment of the bulls - in other words, they were to be maintained and fattened - but the contract did not require the defendant to improve the animals in a manner that entitled her to maintain a common law lien.
- (b) In any event, the contractual arrangements between the parties necessarily required the defendant to surrender possession of the bulls before she was entitled to payment. As a consequence, she is unable to maintain her claim to a common law lien.

[17] I deal with each of these arguments in turn.

[18] It is well established that a mere contract for agistment will not support a claim to a common law lien. For example, in *Re Southern Livestock Producers Ltd*,⁶ the applicant undertook to take care of, and maintain, certain pigs. The court was required to determine whether the arrangement gave rise to a lien that would entitle the piggery to sell the pigs and retain from the proceeds its costs and expenses. The court held that the mere supervision and care of the pigs did not result in any improvement in them such as to give a right to a particular lien. The claim to a lien failed. Pennycuik J gave the common example of a contract for the agistment of a horse. He said:⁷

The principle has been stated again and again in almost identical terms. So it has been held as regards animals that there is a lien in favour of a person who trains a horse, a person who provides the service of a mare, and a person who cares for an animal through illness. On the other hand, it is equally well established that there is no lien in favour of one who merely keeps a horse in a livery stable. The ground on which it has been so held is that in such a case there is no improvement of the chattel.

⁶ *Re Southern Livestock Producers*, above n 3.

⁷ *Ibid*, at 27.

[19] These basic principles have been applied on a number of occasions in New Zealand. For example, in *Grazing & Export Meat Co Ltd*,⁸ the plaintiff was entitled to graze its cattle on the defendant's farm but was to be responsible for the management of its animals and farming programme. Macarthur J, giving an oral decision on an application for an interlocutory injunction, held that in the absence of special agreement the agister has no lien upon the livestock as he merely takes care of them and supplies them with food: *Re Southern Livestock Producers* was relied upon.

[20] Later, in *O'Gorman v Hocking*,⁹ the defendants had permitted the plaintiffs to graze their deer on the defendants' land for several years. Grazing fees being in arrears, the defendants gave notice and then sold certain of the animals. Holland J held that the arrangements amounted to a contract of agistment for which no lien existed and that the defendants were liable in damages to the plaintiffs.

[21] Where, however, a contract requires the improvement of goods rather than mere maintenance, a common law lien may arise. In *AJ Hollander (NZ) Ltd v Owens Coolair Services Ltd*,¹⁰ Henry J held that a contract for the storage of meat necessarily included freezing the meat, so altering its nature in a way that improved its quality for consumer purposes. He held that in such circumstances a lien arose.¹¹

[22] Whether work done amounts to an improvement, so giving rise to a lien, or is confined to maintenance, is a question of fact and degree. Historically, where a claim to a lien is based on both maintenance and improvement and the two heads of claim could not be severed, the claim as a whole would fail.¹² But the severity of that principle has been doubted in recent times, at least in New Zealand. For example, in *Ermine Holdings Ltd v Benjamin*,¹³ Thomas J said:

With all due respect, this reasoning has little or no appeal to me. It would seem to suggest that where work which would provide a basis for a lien cannot be severed from work which would not, the person in possession of

⁸ *Grazing & Export Meat Co Ltd*, above at n 3.

⁹ *O'Gorman v Hocking* HC Christchurch CP60/92, 21 December 1992.

¹⁰ *AJ Hollander (NZ) Ltd v Owens Coolair Services Ltd* HC Auckland CL66/90, 3 July 1991.

¹¹ *Ibid*, at 15.

¹² *Sanderson v Bell* (1834) 2 Cr. & M 304 at 311; *Re Southern Livestock Producers Ltd*, above n 3 at 29.

¹³ *Ermine Holdings Ltd v Benjamin & Anor* HC Auckland CP1144/90, 7 August 1990.

the chattels will lose a right which would be possessed by someone rendering the lesser range of services. Furthermore, in today's complex technological age, which has reached into all areas of livestock management, including horse breeding, the practical difficulty of separating work which brings about an improvement to livestock from work which does not is abundantly plain.

I consider that Mr Browne's approach is to be preferred. If the services provided as a whole bring about an improvement in the livestock, it is logical that the person providing those services have the same protection and security as anyone else doing work which attracts the protection of the Act. There is, as far as I can see, no reason why those services should not be looked at in the round. It is their combined effect in bringing about an improvement in the chattel that is significant.

[23] Similar views were expressed by Henry J in *Hollander*:¹⁴

The distinction between maintenance and improvement or repair has been seen as significant. The rule is referred to by Pennycuik J in *Re Southern Livestock Producers Limited* [1963] 3 All ER 801, where an obligation to take care of pigs was held to be no more than maintaining them and insufficient to found a worker's lien. That case was followed by Macarthur J in *Grazing & Export Meat Company Limited v Anderson and Another* [1976] 1 NZLR 187. *Halsbury* 4th ed., vol.28 para.539 also sets out the principle. For myself, I find the distinction can have an air of unreality, and doubt its validity where the maintenance has involved expenditure of time effort and money, but be that as it may I have no doubt that labour and skill was here expended by Owens, well beyond what could properly be described as merely maintenance.

[24] The approach of Thomas and Henry JJ has drawn sympathetic comment from the learned authors of *Garrow & Fenton's Law of Personal Property in New Zealand*:¹⁵

The distinction between improvement and maintenance seems anachronistic and difficult to justify in a modern age. The carriers' and inkeepers' liens, neither of which involve improvement in the accepted sense, have been allowed to develop a separate categories of lien, and there is good reason to ask why the distinction between improvement and maintenance should be perpetuated.

Does Mrs Walker have a lien?

[25] Mr Gustafson for the plaintiff argues that the Grazing Agreement between the defendant and Capehorn is nothing more than a conventional agistment contract,

¹⁴ *Ibid*, at 15.

¹⁵ Roger Fenton and James Garrow *Garrow & Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 1 at 679.

pursuant to which the defendant is obliged to maintain the bulls but not to improve them. Mrs Walker gave evidence that she had done a great deal more than simply maintain the stock, for example, she had:

- (a) provided treatment for intestinal worms and lice without which the bulls could have deteriorated;
- (b) administered antibiotics to treat wounds and infection as and when required;
- (c) provided copper and salt blocks by way of dietary supplement in order to enhance the overall health of the stock and to assist them to get through the tough winter months;
- (d) brought her skill and experience to play in sorting stock into appropriate mobs in order to minimise fighting, which can result in weight loss;
- (e) provided an effective system of fencing which helped to keep the stock in the right place and to avoid injury.

[26] Mr Kight filed affidavits for the plaintiff in which he said that the totality of the services provided by Mrs Walker amounted to no more than usual and common services normally provided in agistment agreements.

[27] There was evidence on either side as to the quality of Mrs Walker's care of the bulls. For her part, she compared the weight and condition of the bulls on her property with the poor condition of bulls agisted on neighbouring and regional properties. Mr Kight, on the other hand, said that these particular bulls had fared considerably worse than average, drawing on the plaintiff's database compiled over some years.

[28] Ms Pearse acknowledged, on behalf of the defendant, that the services and work carried out by Mrs Walker did include care and maintenance of the sort that was directed principally at preserving the bulls. But she argued also that there was

evidence of additional skill, time, energy and money which, considered in its totality, brought about an improvement in the Capehorn bulls.

[29] In my view, it is unnecessary to make findings as to the disputed contentions of Mr Kight and Mrs Walker respectively. Neither is it necessary to reach a decided conclusion as to the state of the law where a claimant's work can be said to have both maintained and improved a chattel. That is because the answer lies, in my opinion, in the terms of the contract between Mrs Walker and Capehorn.

[30] Mrs Walker was entitled to be paid \$1.25 plus GST for each kilogram of liveweight gained by each animal during the currency of the contract. In order to provide a degree of cash-flow, she was entitled to \$3.00 a week, paid monthly, effectively as an advance against her eventual entitlement. But the whole of her remuneration was to be based upon the extent to which the bulls gained weight while on her property. If there was no weight gain, then there was no payment.

[31] In my opinion, this was not truly a grazing contract at all. Rather, it was a contract for improvement. Although in cases such as *Southern Livestock Producers* a view was expressed that weight gain arising by reason of natural processes did not amount to an improvement, that approach cannot be extended, in my view, to a case where the whole purpose of the contract was to convert the animals into a profitable commodity. That approach is reinforced, in my opinion, by the provisions of cl 12 of the Grazing Agreement which enabled Capehorn to remove stock from Mrs Walker's farm if they were losing condition due to poor farming practices or inadequate feed. This clause effectively required Mrs Walker not only to improve the stock, but to do so at a stipulated rate. This requirement separates this case from those in which mere actual weight gain was considered not to give rise to a lien.

[32] In my opinion, Mrs Walker is entitled to a common law lien which she may rely upon unless the arrangements for payment necessarily entailed Mrs Walker surrendering possession of the stock before payment. I turn to that question now.

Possession

[33] It is common ground that a common law lien may be lost if the claimant voluntarily parts with possession of the good concerned prior to payment. That has not occurred here. Mrs Walker retains possession. But Mr Gustafson submits that the defendant's lien, if it ever existed, must be lost prior to payment. He relies on cl 4 of the Grazing Agreement which provides that the calculation of the "Grazing Fee" is to be undertaken by reference to the truckweighing of the stock "... three hours off grass". In other words, he argues Mrs Walker has agreed to part with possession of the stock prior to weighing and because payment is to be made seven days after stock weighing, there will be a fatal interval of time between the loss of possession and the payment date.

[34] In response, Ms Pearse argues that cl 4 says nothing about possession. The clause is equally consistent, she maintains, with Mrs Walker's intention to maintain possession of the stock at the time of truckweighing and beyond, until payment has been made. There is nothing in the contract which obliges Mrs Walker to surrender possession of the stock prior to weighing. Although the cost of transport to and from the defendant's property was to be met by Capehorn, there is no evidence of the precise physical arrangements for weighing the stock. I was informed by counsel from the Bar that facilities were available at Dannevirke and that Mrs Walker would, if necessary to preserve her lien, accompany the stock there and maintain possession of the stock thereafter until payment.

[35] Continuity of possession will not be broken if the chattel or article is delivered for a limited purpose with the intention of preserving the lien. However, a possessory lien will be lost by the outright delivery of the article to the owner or his or her agent and cannot be revived by obtaining subsequent possession.

[36] The contract was not professionally prepared. It seems fairly obvious that the parties never turned their minds, when negotiating and executing the document, to the question of the availability of the common law lien. It is, accordingly, not possible to derive the presumed intention of the parties from the language of the contract itself. But in my view, Mrs Walker's proclaimed intention to retain

possession until payment would not be inconsistent with the contract. Although Capehorn was obliged to pay for cartage costs on and off the farm, there is nothing in the contract that requires Mrs Walker to surrender possession to Capehorn for the purposes of weighing the stock.

[37] I do not accept Mr Gustafson's argument that a "plain reading" of the Grazing Agreement establishes that Mrs Walker was entitled to be paid only after relinquishing possession. In my opinion, it is not possible to reach that conclusion by reference to the language of the Grazing Agreement itself, which is silent on the question of possession at the time of truckweighing and for seven days thereafter.

[38] Mr Kight has sworn two affidavits for StockCo, but the plaintiff did not become involved with the defendant and these particular bulls until after Capehorn's receivership in December 2010. He is therefore unable to give any evidence about the circumstances in which Capehorn and the defendant entered into their contract. No evidence was given by any Capehorn representative. In my view, the contract itself provides an insufficient platform upon which to base the proposition that the defendant is bound to surrender possession of the bulls before she receives payment. Accordingly, she is entitled to maintain her common law lien until payment is made.

Contractual lien

[39] Mr Gustafson mounted an argument to the effect that although the defendant could not rely on a common law lien, she may be able to establish a contractual lien which would, however, rank in order of priority behind the plaintiff's security interest. By reason of my conclusions in respect of the defendant's common law lien, it is unnecessary to deal with this aspect of the plaintiff's argument, except to say that there is nothing in the Grazing Agreement which suggests that the parties intended to create a contractual lien. Indeed, as I have observed earlier, the proper inference is that neither Capehorn nor Mrs Walker turned their minds to the question.

Priorities

[40] Section 23 of the PPSA provides (as relevant):

23 This Act does not apply to -

...

- (b) A lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act [(other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991)] or by operation of any rule of law:

[41] Section 93 of the PPSA (which comes within Part 8) deals with priorities as between liens and a security interest:

93 Lien has priority over ... security interest relating to same goods

A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if—

- (a) The materials or services relating to the lien were provided in the ordinary course of business; and
- (b) The lien has not arisen under an Act that provides that the lien does not have the priority; and
- (c) The person who provided the materials or services did not, at the time the person provided those materials or services, know that the security agreement relating to the security interest contained a provision prohibiting the creation of a lien by the debtor.

[42] I have held that Mrs Walker has a common law possessory lien. In order to establish that her lien has priority over the plaintiff's security interest, it is necessary for her to show that she is able to meet the conditions set out in s 93(a), (b) and (c) respectively.

[43] As to the first requirement, I am satisfied that the defendant provided services that fell within the ordinary course of her business as a farmer. In other words, she entered into her agreement with Capehorn in order to provide services that were part of her farming business.

[44] The second requirement is that the lien has not arisen under any Act that provides that the lien does not have priority. This condition is also satisfied, in that Mrs Walker's lien arises by operation of law and not under any Act.

[45] Finally, it must be shown that Mrs Walker provided the services at a time when she did not know that the security agreement relating to the security interest (the Livestock Agreement) prohibited the creation of a lien. It is common ground that the Livestock Agreement contains no provision prohibiting the creation of a lien by a third party, although it does prohibit the registration of any financing statement on the Personal Property Securities Register.¹⁶

[46] I conclude therefore that the defendant 's common law lien has priority over the plaintiff's security interest, insofar as it relates to those bulls on her property which are the property of the plaintiff.

Equitable set-off

[47] This issue received only scant attention from counsel. Determination of the availability of an equitable set-off requires detailed factual and legal analysis. Given my conclusion in respect of the defendant's entitlement to a common law lien, it is unnecessary to embark upon a discussion of the defendant's right to equitable set-off.

Result

[48] I make a declaration that the defendant is entitled to a common law lien in respect of bulls remaining on her property and owned by the plaintiff, and that she is entitled to retain possession of the bulls until she is paid her entitlement, pursuant to her contract with Capehorn. The plaintiff's security interest is postponed in order of priority to the defendant's entitlement to payment pursuant to her lien. Leave is reserved generally to the parties to make such further application as may be appropriate in light of this judgment, whether in respect of matters arising out of this judgment or in relation to the determination of remaining issues between them.

Costs

[49] The defendant is entitled to costs. Counsel may file memoranda if they are unable to agree.

¹⁶ At cl 2.2.

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C J ALLAN, J.