

**IN THE DISTRICT COURT
AT ROTORUA**

**I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

**CIV-2022-063-000253
[2023] NZDC 4472**

BETWEEN DEBRA MARY EDITH MCKAY
NIGEL WARD MCKAY
Appellants

AND KMS DAIRY LIMITED
Respondent Company

Hearing: 26 January 2023

Appearances: M Branch and K Shaw for the Appellants
E Reilly for the Respondent Company

Judgment: 15 March 2023

**JUDGMENT OF JUDGE P W COOPER
[On appeal from Tenancy Tribunal]**

Background

[1] KMS Dairy Limited (“KMS”) is the owner of a dairy farm at Corbett Road, Ngakuru. Mr and Mrs McKay (“the McKays”) were engaged by KMS as contract milkers under a contract milking agreement dated 13 March 2018. The contract provided for a residence for the McKays’ use.

[2] The McKays brought proceedings in the Tenancy Tribunal under the Residential Tenancies Act 1986 in relation to that residence. The Tenancy Tribunal held that the Residential Tenancies Act did not apply to the arrangements between KMS and the McKays and the Tenancy Tribunal had no jurisdiction to determine their dispute.

The appeal

[3] This is an appeal against that determination. The appeal is concerned with the question of jurisdiction only. The details of the substantive dispute between the parties were not put before the Court.

The Tenancy Tribunal decision

[4] The Tenancy Tribunal determined that having regard to the terms of the contract milking agreement and the nature of the premise of s 5(1)(b) of the Residential Tenancies Act, operated to exclude the jurisdiction of the Residential Tenancies Act.

[5] Section 5 of the Act provides:

5 Act excluded in certain cases

- (1) This Act shall not apply in the following cases:
 - (a) where the premises are commercial premises:
 - (b) where the whole or a substantial part of the tenant's income is derived from the use of the premises for agricultural, pastoral, horticultural, or other similar purposes:

The appellant's submissions

[6] In summary, the McKays argue that:

- (a) The nature of their occupancy is as a "service tenancy".
- (b) The provisions of s 5(1) do not apply to exclude jurisdiction, having regard to the terms of the contract milking agreement and the nature of the premises. In particular, the residence provided for their use was a separate premises within the wider premises of the farm.

[7] The appellant refers to the definition of “premises” in s 2 of the Act which states:

premises includes ...—

(a) any part of any premises

[8] And the definition of “residential premises”, which is:

residential premises means any premises used or intended for occupation by any person as a place of residence, ...

The respondent’s submissions

[9] In summary, the respondent submits:

(a) The McKays’ occupancy is not as a service tenancy.

(b) The nature of the agreement between the parties is that of a partnership – a joint operation between the parties to maximise profit.

(c) The premises in question is a farm and therefore a commercial premises and in any event, the whole of the McKays’ income is derived from the use of the premises for agricultural and pastoral purposes and thus s 5(1) applies to exclude jurisdiction. At the heart of the respondent’s argument is a submission that the residence is indivisible from and/or incidental to the agricultural and pastoral and commercial purposes of the property.

[10] These are simply the main points for each party – their submissions were much more detailed, and I do not intend to repeat them here.

Discussion and analysis

The contract milking agreement

[11] Clause 1 of the agreement describes that KMS is the owner of the farm property and that will provide a specified number of cows for the purpose of the agreement.

[12] Clause 1(c) provides:

THE OWNER and the CONTRACT MILKER agree to operate the business of dairy farming on a contract milking basis (the CONTRACT MILKER being remunerated by the OWNER through the Dairy Company in a cents/kg milksolids basis, with expenses shared as per Schedule 1 of this Agreement) on the land with the stock and effects subject to the terms and conditions appearing in this Agreement.

[13] Clause 3 provides:

STATUS OF THE PARTIES

- (a) THE relationship of the parties shall be deemed to be that of Landowner and Independent Contractor. The CONTRACT MILKER shall not be deemed by any reason of his occupation of the land to be a tenant of the OWNER either in respect of the land or any building on it. The Agreement shall not be deemed to create a bailment of any stock or chattels belonging to either party.

[14] Clause 7 provides:

DWELLINGS

- (a)
- (i) THE OWNER shall provide and maintain one CONTRACT MILKER'S residence, and three other dwellings for the use of the CONTRACT MILKER and their staff. The cost of electricity for lighting, heating and power arising from occupation of the said dwellings shall be the responsibility of and paid for by the CONTRACT MILKER as per Schedule 1 of this Agreement. The CONTRACT MILKER shall be responsible for keeping the houses and their surroundings in good clean and tidy condition (including the regular mowing of lawns) and shall be responsible for any damage resulting from the CONTRACT MILKER'S and CONTRACT MILKER'S staff's neglect of the houses and related buildings during the CONTRCT MILKER'S occupation, fair wear and tear excepted.
- (ii) THE OWNER shall be permitted to obtain from the CONTRACT MILKER a bond on all accommodation of 4 weeks rent per house which shall be lodged with the Ministry of Housing as per the Residential Tenancies Act 1986.
- (iii) QUARTERLY inspections of the provided accommodation will be jointly undertaken by the OWNER (or their duly appointed agent) and the CONTRACT MILKER.
- (iv) THE OWNER (or their duly appointed agent) shall be entitled to enter the dwelling and surrounding area to carry out other

reasonable inspections PROVIDED that the OWNER has first given 48 hours written notice of such inspection.

- (v) ALL domestic and household waste is to be placed in appropriate waste receptacles provided by the OWNER. No domestic waste is to be disposed of elsewhere on the farm.
 - (vi) The use, presence or possession of illegal drugs and/or the possession of drug paraphernalia in the premises is strictly forbidden.
 - (vii) The premises are not to be used for any unlawful purpose.
- (b) IN the event that any of the dwellings are not required by the CONTRACT MILKER for the accommodation of themselves or their labour, no right to sublet the dwellings shall be conferred upon the CONTRACT MILKER.
- (c) UPON expiration of this Agreement from whatever cause house inspections and drug residue testing will be conducted. The CONTRACT MILKER shall leave the houses and surrounds in a clean and tidy condition, including the cleaning of all house interiors to a professional standard, and should the CONTRACT MILKER fail to do so, the OWNER shall be entitled to professionally clean the premises, repair any damage, professionally remove any drug residues and tidy the surroundings and deduct the cost of such work from the Bond or any money due to the CONTRACT MILKER.

Relevant provisions of the Residential Tenancies Act

[15] Section 2 defines “premises”:

premises includes ...—

- (a) any part of any premises; and
- (b) any land and appurtenances, other than facilities; ...

residential premises means any premises used or intended for occupation by any person as a place of residence ...

service tenancy means a tenancy granted under a term of, or otherwise as an incident of, a contract of service or a contract for services between the landlord as employer and the tenant as employee or contractor, whether or not a separate tenancy agreement is concluded in writing between the parties, and whether or not any rent is payable for the tenancy; ...

commercial premises means premises that are not residential premises

[16] Section 5(1)(a) and (b) - already referred to.

[17] Regarding s 5(1)(a) and (b), the appellant argues that although the farm is used for commercial and agricultural/pastoral purposes, the McKays' dwelling itself is residential in nature and falls within the definition of "premises" in s 2 as being "part of any premises" (ie part of the wider the farm property). Its residential nature is divisible from the otherwise agricultural/pastoral/commercial nature of the farm.

[18] The appellant submits that the McKays' occupation of the dwelling falls within the definition of "service tenancy" where KMS is the landlord and employer, and the McKays are the tenant by virtue of them being a "contractor".

[19] The appellant submits that s 5(1)(b) does not apply because the McKays' income is not derived from the use of the premises for agricultural or pastoral purposes but rather is derived by the provision of their management and labour.

First issue

What is the nature of the premises, the subject of the dispute?

[20] In my view, the premises in dispute are not the larger premises of the farm as a whole, but rather the dwelling house and its surround which are part of that larger property. Being part of such larger premises does bring it within the ambit of the Residential Tenancies Act having regard to the definition of "premises".

[21] It follows that if the premises are the dwelling house and its surrounds, they are not being used for agricultural/pastoral/commercial premises but simply are a dwelling house within the definition of residential premises, ie premises used or intended to be used for occupation by any person as a place of residence.

[22] If the "premises" are seen in that light, it cannot be said that "the whole or a substantial part" of the McKays' income is derived from the use of the "dwelling house". Their income is derived from the use of the balance of the farm and the management of the stock.

[23] Clause 3 of the contract milking agreement, which deems the McKays are not tenants of the land or any building on it, as far as their residence is concerned is overridden by s 11 of the Residential Tenancies Act.

[24] The provision in clause 7(a)(ii) “the owner shall be permitted to obtain from the contract milker a bond on all accommodation of 4 weeks rent per house which shall be lodged within the Ministry of Housing as per the Residential Tenancies Act 1986” on the one hand does not make an awful lot of sense because no rent was payable under the agreement, but on the other hand appears to imply that the Residential Tenancies Act has some application to the arrangements between the parties. Nothing much turns on this.

[25] A case referred to in argument is *Main v Main*,¹ where premises were leased partly for commercial and partly for residential purposes. The Court of Appeal took the view that the premises were let principally for commercial purposes and the appellant’s residential use was incidental to that commercial purpose. The Court noted that the premises were operated as a storage in a second-hand dealer’s business. The Court noted:

The appellant stayed in the premises as a matter of convenience and was thereby able to keep his eye on the stored goods as a kind of watchman. Moreover, his residential use of the premises was intermittent and the so-called flat was not fully “operational” in residential terms.

[26] The Court held that there was “dual use” of the premises. *Main v Main* can be distinguished because of the nature of the premises in that case and because my finding is “the premises” in this case are to be seen as the dwelling and immediate surrounds. The premises do not have a “dual use,” rather the use is exclusively residential.

[27] I find that the nature of the McKays’ occupation of the residential premises of the dwelling and immediate surrounds in this case is as a service tenancy – granted under a term of or otherwise as an incident of (the contract milking agreement) which is essentially a contract for services between KMS as employer and the McKays as a contractor.

¹ *Main v Main* [2007] NZCA 306.

[28] It follows that the Residential Tenancies Act does apply and the Tenancy Tribunal does have jurisdiction to determine the dispute between the parties.

[29] The appeal is allowed, and the matter is referred back to the Tenancy Tribunal for its determination in the light of this judgment.

[30] The appellant is entitled to costs on the appeal. Counsel for the appellant to file and serve a memorandum as to costs within seven days of the release of this judgment. The respondent is to file its response within seven days of service of the appellant's memorandum.

Judge PW Cooper
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 15/03/2023