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Introduction

[1] The plaintiff is a dairy farming company. Tony and Wayne Hughes are its directors and shareholders. In 2014, the company was farming near Balclutha in South Otago. On the advice of a farm consultant, the Hughes decided to plant 31.5 hectares of land in a mixed pea and barley crop. The intention was to convert this into silage for winter feed. Allan Lyall, the defendant, was contracted to harvest the crop and he did so, with the assistance of other contractors, over a four day period in late February 2014.

[2] On 24 May 2014, when the silage pit was opened, the Hughes were dismayed at the quality of the silage. Those concerns were exacerbated when the cows would not eat the silage and one cow had to be put down after falling ill.

[3] Subsequent testing of the silage confirmed the Hughes' views that the silage was of poor quality. The dry matter (DM) content was too high, the metabolisable energy (ME) content was too low, and it was significantly contaminated with soil. The Hughes attributed this to deficiencies in the harvesting process and advised Mr Lyall they considered him liable for their losses. Mr Lyall denied liability and, in due course, these proceedings issued.

[4] The parties agree that the company entered into an oral agreement with Mr Lyall for him to harvest the mixed pea and barley crop for silage. They also

agree that it was an implied term of that agreement that Mr Lyall would use the care and skill expected of a reasonably competent silage contractor when harvesting and processing the crop. That, however, is where the areas of agreement end.

[5] There is disagreement over the following issues:

- (a) the scope and extent of Mr Lyall's contractual responsibilities;
- (b) whether, and to what extent, the company took responsibility for part of the harvesting process, including whether the person who raked the crop was contracted by it or by Mr Lyall;
- (c) whether Mr Lyall carried out his contractual responsibilities (whatever their extent) with the care and skill expected of a reasonably competent silage contractor;
- (d) whether the company was contributorily negligent by:
 - (i) deferring the harvest of the crop to a point when it was over-mature; or
 - (ii) mowing the crop in such a way that soil was incorporated into the harvested crop;
- (e) whether the company took all reasonable steps to mitigate its loss; and
- (f) if Mr Lyall is liable, what is the quantum of damage he must pay.

[6] In addition, if Mr Lyall is found liable to the company because the third party, Mr Mark Bennett, is found to be Mr Lyall's sub-contractor and is held to have caused or contributed to the company's loss, Mr Lyall claims against him as a joint tortfeasor.¹ Mr Bennett did not appear to defend the claim, relying, it seems, on Mr Lyall's defence of the claim.

¹ Under s 17 Law Reform Act 1936.

What happened when the crop was harvested to make into silage?

[7] The company's main dairy farm, Otanamomo, was 247 hectares in area and ran around 800 head of cattle. The company also owned a 215 hectare run off block, located approximately 12 kilometres away, which was used as a support block for the main dairy farm.

[8] On the advice of Richard Moate, a consultant for Cropmark Seeds, the Hughes planted a mixed crop of peas and barley on part of the run off block to make winter silage. This would produce whole crop silage, which was intended to provide good quality, high energy silage to support lactating dairy cows over the two month period from the end of May to the end of July. The crop was planted by Joseph Cross, a self-employed agricultural contractor who trades through his company, Cross Agriculture Limited (Cross Agriculture).

[9] There was some uncertainty as to when the crop was sown, as no diary notes had been kept by either the Hughes brothers or Cross Agriculture. A date range of late October to early November was referred to in the written briefs, but, by reference to telephone records which had only been exchanged shortly before trial, Wayne Hughes said he thought the crop was sown on 11 November 2013. He recalled speaking to an alternative contractor because there were delays in getting Mr Cross to plant the crop, and he identified a call to that contractor in telephone records. By reference to that date he thought the crop must have gone in on the following Monday, 11 November, when Mr Cross arrived on site. He also noted that it was unlikely the crop was sown in October, because that and subsequent work, was invoiced by Cross Agriculture in late December. If the crop had been sown in October, he thought it would have been invoiced in November.

[10] However, Mr Moate said he inspected the crop in mid-November, and by that time there had been good germination of the barley. He said that what he saw was consistent with the crop being planted about two weeks earlier. I consider that this is independent and reliable evidence which is inconsistent with it being planted as late as 11 November. Having regard to the totality of the evidence, I consider it was most likely that the crop was planted in early November.

[11] The crop was planted using an Amazone Cirrus 4001 Super agricultural seed drill towed behind a tractor. This drill has press wheels which assist in flattening the ground after the seeds are inserted. Mr Moate also advised the Hughes to roll the crop after sowing to help trap moisture in the ground. Wayne Hughes gave evidence that this advice was followed and they rolled the crop with a Cambridge roller. Mr Moate said that on subsequent inspections of the crop, he could see that the ground had been rolled and was in “ideal condition for harvest. There were no obvious clods or lumps of dirt that might get picked up by mowing”.

[12] Mr Moate was in regular contact with the Hughes brothers regarding the crop, saying his role was to “back up our product”. He confirmed what other witnesses said, which was that it was an excellent growing season that year, with plenty of warmth and good rainfall, and the crop grew well. Having checked the crop at regular intervals, he says that on either 7 or 9 February 2014, but more likely the earlier date, he advised the Hughes to harvest the following week. This was because, having checked the physical state of the barely heads, he estimated the crop was at 35 per cent DM, and the ideal time to harvest the crop for silage is when the crop is at 38 to 42 per cent DM. He said that barley and peas mature fast and the window of the best time to harvest is narrow. If the crop was harvested late, when the DM content is higher than this, it would decrease the quality, the protein levels, and the palatability of the resulting silage.

[13] However, the crop was not harvested in the following week as advised by Mr Moate. In fact, Tony Hughes only telephoned Mr Lyall on Thursday, 20 February 2014 to arrange for him to harvest the crop on the following Monday. He also organised Cross Agriculture to be at the silage pit on the main farm to “roll the stack”, that is, to make the silage by stacking and compressing the harvested and chopped plant material which was trucked to the pit.

[14] Mr Lyall arrived at the run off block on Monday, 24 February with his silage harvester, a Claas Jaguar 930, fitted with a whole crop front cutting unit. This machine is designed to harvest the crop and process it for silage in one pass. It does this by cutting the crop, chopping it into short lengths and then blowing the processed crop out into trucks for transporting to the silage pit. Mr Lyall also had

four trucks accompanying him, two of which were his own and two of which were organised through other contractors. These trucks transported the chopped crop to the silage pit on the company's farm, some 12 kilometres away.

[15] Mr Lyall commenced harvesting the crop, starting at the outer edge of the first sown paddock with a view to progressively moving around and in towards the centre. However, before he had completed the first circuit around the paddock, he struck problems. His harvesting machine was constantly jamming, which meant he had to stop and manually pull the plant material from out of the front of the machine. His explanation was that the crop, being over-mature, was longer and of tougher material than would have been the case with a crop at its ideal stage. The lengths of pea stalks tangled around the auger which transports plant material upwards within the harvester. Normally this material would be cut by the time it reached the auger. However, in this case, the cutting process was not working effectively because of the thick, fibrous nature of the plant material. Eventually the reel shaft broke, which Mr Lyall said had never happened to him before.

[16] On the same day, through his contacts with an agricultural machinery supplier, he was able to borrow another whole crop front cutting unit for his silage harvester. However, the borrowed whole crop front could not do the work either, and he had to stop using it, fearing it too would break.

[17] Mr Lyall then contacted Tony Hughes regarding these problems and their impact on the harvesting process, although Tony Hughes disputes the extent of the discussion. After this discussion, an alternative harvest method was adopted which involved a three stage process. First the crop was mowed using a disc mower attached to a tractor, then it was raked into larger rows which were then gathered up and chopped by Mr Lyall's silage harvester with a grass front attached. In other words, he would be treating the mowed and raked material as if it was grass silage, not whole crop silage, and process it accordingly.

[18] The Hughes brothers had their own disc mower and, between them, they started mowing the crop on Tuesday, 25 February. Another contractor,

Mark Bennett, was contacted by Mr Lyall, and Mr Bennett sent out an employee to do the raking.

[19] On Tuesday afternoon, a concern emerged about whether the Hughes could mow fast enough to keep up with Mr Lyall, and one of the Hughes brothers suggested that another mower be engaged in the operation. Mr Lyall telephoned another contractor, Mr Jonathon Bennett, to come in and commence mowing as well. However, this led to a different concern with the mowing going faster than the raking and chopping, and, after the second contractor had been mowing for about two hours, he was instructed to stop.

[20] On the same day, a further problem arose. Some of the land was quite steep and, because the ground was still damp on these slopes, particularly under the lines of raked crop, the trucks were experiencing difficulty maintaining traction and were slipping. Because of safety concerns, the trucks were only being loaded to around two-thirds of their capacity. Mr Cross said the problem was discussed and Tony Hughes decided that the cut crop in these areas would be processed into bales on site, rather than requiring the trucks to drive on these slopes and take the cut material away. This was done by Cross Agriculture on the following day. Approximately 50 bales were made, and these were subsequently fed to the cows without problem.

[21] The balance of the paddocks were mowed on Wednesday by the Hughes brothers. Late on that day, at around 9.00 or 10.00 at night, Mr Lyall's silage harvester picked up a metal object which caused work to cease for the night. At that point he said he had about two hours work left to do and that portion of the mowed silage, being three to five truck loads, was left out for the night but picked up the following morning, when the last of the silage was made.

[22] In the end, what had been anticipated to be a two day job, took around four days. In due course, Mr Lyall invoiced the company and was paid. Cross Agriculture and the two truck cartage firms involved also invoiced the company directly and were paid by the company. The two hours of mowing undertaken by Jonathon Bennett were billed to the company's farm, Otanamomo. However, the

raking undertaken by Mark Bennett's employee was billed to Mr Lyall, although he says the invoice was forwarded to the Hughes to pay Mr Bennett directly.

What was wrong with the silage?

[23] Approximately three months later, the Hughes brothers opened up the silage pit in order to start using it. They observed that on the face of the silage pit there was "a black slimy compost-looking material". While Tony Hughes said it is not unusual to have some "off" silage at the start of a stack or pit, he had never seen a face that looked as bad as this. Even once they had cut away about a metre of the face of the pit, where they reached material that looked more like silage ought to look, they said it looked like poor quality silage and it smelt "off". Wayne Hughes said that he could see that it was full of dirt.

[24] Nevertheless, they fed the silage to their cows but said the cows were not interested in it. Tony Hughes said the cows nosed through it, licking up the odd grain kernels, but leaving 90 to 95 per cent of it. They continued to feed the silage out to the herd for another two days but with the same results. The cows simply refused to eat it. They also noticed that, as they moved further into the silage pit, the silage turned black on exposure to air and started going off.

[25] However, matters came to a head when one of the cows which had been fed the silage fell ill and was put down by a vet on 28 May. Concerned the illness may have been caused by the silage, the Hughes brothers took samples of the silage and sent them to R J Hill Laboratories Limited (Hill Laboratories) for some basic testing, including for the presence of listeria or salmonella. The testing for listeria and salmonella came back negative. However, before they received these results, the Hughes decided they could not risk feeding out any more of the silage to their stock. Mr Lyall was advised of their concerns and put on notice that they would look to him to compensate them for the loss of the winter feed.

[26] Further samples of the silage were taken by Mr Peter O'Neill, a dairy farm consultant, in mid-June. Hill Laboratories analysed the six samples taken by Mr O'Neill from various points in the silage stack. Testing showed that the DM content of the samples varied significantly, between 34.9 and 54.5 per cent, but

averaged 46.4 per cent, which was higher than desirable. ME levels of the samples ranged from 6.5 to 8.8 which placed them in the ‘poor’ (8.0 – 9.5) or ‘inferior’ (<8.0) category.

[27] There was clear evidence of soil contamination, primarily indicated by the high ash levels produced on testing. Hill Laboratories described this as “heavy soil contamination of the herbage sample”. The iron levels were also extremely high which, again, indicated soil contamination.² However, the pH levels were appropriate, indicating the ensiling process had worked properly and the silage was safe to feed to stock.

What steps did the company take to mitigate its loss?

[28] The company addressed its inability to use the silage for its dairy cows in a range of ways. For some of the stock, it arranged alternative grazing on other properties. The total cost incurred for this was \$102,936.50, including transport to the alternative grazing sites. The company also brought baleage and palm kernel to feed the stock it retained, at a total cost of \$158,736.00. In addition, 35 cows were dried off and 30 more were culled.

[29] To mitigate its loss, the company endeavoured to sell the unused silage and advertised it in the local newspaper and on the Trade Me website. In late July, a local sheep farmer, Mr Steven Jack, bought 454 tonnes of the silage, at \$34.30 per wet tonne, for a total price of \$15,663.00. However, Tony Hughes gave evidence the company incurred \$3,450 in machine costs to load the silage out and \$8,248.36 to dispose of the remaining stage. Mr Jack fed the silage to his sheep that winter.

What damages are claimed?

[30] The company claims the total cost of finding alternative feed for the cattle, being \$261,672.50 (including GST).³ It also claims what it describes as the “loss of value” of 65 cows which it had planned to winter milk. The company had not winter milked before but decided to do so in the winter of 2014 on the understanding that a

² Ranging from 3,850 mg/kg to 9,590 when the maximum recommended is 1,000 mg/kg.

³ The pleaded loss was \$272,257.90 (including GST), but the figure is adjusted to reflect the adjustment in evidence given at trial on these costs.

premium would be earned on the milk obtained during this period. With the loss of the silage, that decision was abandoned. However, as it transpired, milk prices dropped and there would not have been a net return to the company, so no claim was made for lost income. Instead the company claims compensation for what it says is the loss in value of the 65 cows it planned to winter milk. Had it milked the 65 cows through winter then, at the end of that season, it says the value of those cows would have been \$119,600, comprising 52 lactating cows and 13 culls. However, the actual value was \$85,100 being 28 cows in calf and 37 culls. There is also an unexplained claim made in evidence for \$16,744 in grazing costs for these animals. This totals \$51,244.00 (including GST). However, the pleaded claim for loss of value is \$44,560.00 (including GST). Thus, the total loss claimed, including GST, is just over \$300,000.

What were the defendant's contractual obligations?

[31] The company alleges that Mr Lyall had obligations, as an implied term of the oral agreement to harvest the crop to:

... perform the following services in a good and competent manner:

- (a) employ and oversee all necessary staff and/or sub-contractors to harvest and process the peas and barley in a timely manner;
- (b) harvest and process the peas and barley with all due care and skill;
- (c) transport the harvested peas and barley to a silage pit;
- (d) ensure that the harvested peas and barley would have sufficient nutritional value to properly service stock feed, specifically:
 - (i) that it would have an acceptable percentage of dry matter, crude protein and mineral content;
 - (ii) that it would be free of soil-borne contaminants causing undesirable fermentation.

[32] Mr Lyall accepts that there was an implied term in the contract that, in harvesting and processing the peas and barley, he would use the care and skill expected of a reasonably competent silage contractor. However, he denies any more extensive contractual obligation, saying it was not his task to decide the correct time

of harvest or to ensure that the resulting silage would have a particular nutritional value.

[33] The two breaches of the implied contractual terms alleged were that Mr Lyall contaminated the harvested peas and barley with soil during harvesting and that he left the harvested peas and barley “one day before further processing”.

What legal principles govern the implication of terms into a contract?

[34] The question of whether there is an implied term in a contract usually arises where there is a perceived gap in the contract. As Lord Hoffman stated:⁴

The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so.

[35] However, in the present case, there was no written contract, and the evidence as to the original terms discussed orally comprise no more than agreement that Mr Lyall would harvest the company’s crop for silage with his harvester, commencing on 24 February 2014. In such circumstances, there can be little doubt that terms need to be implied into the contract to give it business efficacy. The only dispute is as to the extent of such terms, in particular when the harvest could not proceed as originally proposed.

[36] In *BP Refinery (Western Port) Pty Ltd v Shire of Hastings*, the Privy Council lay down a five point test for the implication of terms.⁵ In summary, the term must be:

- (a) reasonable and equitable;
- (b) necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (c) so obvious that it “goes without saying”;

⁴ *Attorney-General of Belize v Belize Telecom Ltd* [2009] UK PC 10 at [17].

⁵ *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376.

- (d) capable of clear expression;
- (e) not contradict any express term of the contract.

[37] In 2009, Lord Hoffman slightly altered the *BP Refinery* test in *Attorney General of Belize v Belize Telecom Ltd*, when he held that the five criteria in *BP Refinery* should not be seen as a series of independent tests which must each be surmounted, but:⁶

...rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means or in which they have explained why they did not think that it did so.

[38] The New Zealand Courts have embraced the *Belize* approach. However, in doing so, they have continued to consider the *BP Refinery* criteria as relevant in that they are “various expressions of the central question of what a reasonable person would have understood the contract to mean”.⁷

Should the pleaded terms be implied into the contract for harvesting?

[39] Having regard to all the circumstances in which the contract was agreed and undertaken, I consider that the implied terms pleaded by the plaintiffs go well beyond the terms which can reasonably be implied into this contract.

[40] As noted, Mr Lyall was engaged following a short discussion by telephone. It was envisaged that he would use his silage harvester to harvest the crop, and, as with all previous jobs, he was engaged on an hourly rate. Mr Lyall had no input into the date of harvest or the quality of the crop at harvest. He had no overall control of the harvest process. For example, it was the Hughes not Mr Lyall who called in, and then dismissed, the additional mowing contractor, and who decided to make baleage out of the cut crop on the damp slopes.

[41] I do not think it is reasonable in those circumstances to imply terms which require Mr Lyall to take responsibility for the harvest process or for the resulting

⁶ *Belize*, above n 4, at [27].

⁷ *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43 at [64] in 43.

nutritional value of the silage. In particular, I do not consider it could reasonably have been an implied term of the contract that the resulting product would have an acceptable percentage of dry matter, crude protein and mineral content, nor that it would be free of soil-borne contaminants causing undesirable fermentation. The quality of the silage was the result of numerous factors, including the type of crop sown, the condition of the ground, the crop's maturity at the date of harvest and the handling of the plant material at all stages of the process, including when it was mowed and when it was rolled at the silage pit. These factors involved the company taking advice from other sources, such as Mr Moate, and making its own decisions, such as who to engage to roll the stack, and engaging and then dismissing, an additional mowing contractor.

[42] Equally importantly, there was a major change to the original agreement when it proved impractical to harvest the crop with the silage harvester fitted with the whole crop front head. The scope of the implied terms must be considered in light of the circumstances which dictated that change.

[43] Thus, I proceed on the basis that the implied term of the contract as to Mr Lyall's obligations, is no more than is admitted by Mr Lyall, which is that in harvesting and processing the peas and barley, he would use the care and skill expected of a reasonably competent silage contractor. That standard must be assessed in light of the circumstances encountered on the job at Otanamomo and the extent of any discussions and agreements reached between the plaintiff and Mr Lyall.

What was the extent of the duty of care owed by the defendant?

[44] Similar issues arise in relation to the claim in negligence. The plaintiff claims that Mr Lyall "knew that the stock feed was required by the plaintiff for feeding the plaintiff's herd over the 2014 winter period" and that Mr Lyall therefore owed a duty of care to the company to:

- (a) exercise the reasonable skill and care expected of any person holding himself out as a professional agricultural contractor with specialisation in harvesting stock feed by mechanised means;

- (b) monitor the condition of the harvested stock feed to limit the consequences of any defects in the defendant's process;
- (c) avoid, remedy or mitigate contamination of the stock feed by soil in the course of the harvesting process;
- (d) ensure that any sub-contractors maintained the same professional standards as those expected of the defendant; and
- (e) safeguard against economic loss arising from negligent commission of the defendant's duties in his capacity as agricultural contractor.

Unlike the claim in contract, the plaintiff does not plead an obligation to achieve a particular result.

[45] In breach of that alleged duty of care the plaintiff says that the defendant negligently:

- (a) contaminated the harvested peas and barley with soil during chopping of the crop; and
- (b) left harvested peas and barley one day before further processing.

[46] Again the defendant admits he owed a duty of care to the company to use the care and skill expected of a reasonably competent silage contractor when harvesting the peas and barley, but denies the particular allegations of breach.

[47] Where there are concurrent duties claimed both in contract and tort, they will, in most cases, be co-extensive.⁸ In the absence of a written contract, or of evidence as to particular matters being agreed orally, there is nothing in this case to suggest that the duty of care owed by the defendant to the plaintiff was anything other than co-extensive with his implied contractual obligation. In other words Mr Lyall was required to do no more than use the care and skill expected of a reasonably

⁸ As discussed in *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA).

competent silage contractor in the circumstances presented to him. I go on to consider the pleaded claims in that light.

The factual issues in dispute

[48] There are a range of factual issues which arise to be determined as a consequence of the alleged breaches of the implied contractual terms and the duty of care. These are:

- (a) whether Mr Lyall adopted an unacceptable process for harvesting this crop;
- (b) whether Mr Lyall allowed excessive quantities of soil to be incorporated into the harvested crop reducing its value as stock feed;
- (c) whether Mr Lyall left cut crop in the paddock overnight causing it to dry out and have too high a DM content.

[49] Mr Lyall denies these claims and he also says that:

- (a) the crop was over-mature at harvest which contributed to its poor quality;
- (b) the plaintiff failed to roll the crop after sowing and this led to soil unavoidably being incorporated into the silage;
- (c) soil was likely incorporated in the crop, at least in part, through the plaintiff's mowing of the crop;
- (d) if soil was incorporated during the raking, the raker was not a sub-contractor of Mr Lyall, but was contracted to the company, albeit he had been organised by Mr Lyall.

I now address each of these issues, although not in the order listed above, but as the issues arise chronologically.

Was the crop over-mature at harvest?

[50] There was a considerable dispute over whether the crop was over-mature at the time of harvest. This was relevant because, as Mr Butcher (a farm consultant) explained, as the crop reaches maturity, carbohydrate and total yield increases, but the energy content (ME), digestibility and protein decreases. It is important to pick the time when yield is maximised but the quality is still sufficient to satisfy the needs of stock. If harvest is delayed, this will result in low ME values, making it an unsuitable feed for lactating dairy cows.

[51] The optimum stage for harvest of a crop such as this is when the barley grains are described as having the consistency of “cheesy dough”, indicating they have reached approximately 38 per cent DM. As the crop gets dryer, it has less food value, and the ME levels drop off. It also becomes progressively harder to compact in the silage pit. At over 42 per cent DM, Ms Patricia Lewis, a ruminant nutritionist, said it would be getting difficult to make good silage from it. This is because, as the crop ages, the stems became more “lignified”, which means in practical terms, they are tougher and more brittle, making it harder to compact the plant material in the silage pit.

[52] In this case, the maturity of the crop was relevant because that could both have contributed to the difficulties Mr Lyall experienced with his whole crop front cutter, necessitating the use of a different harvest method, and could have caused, or at least contributed to, the poor quality of the silage produced.

[53] As the date of sowing was not known exactly, the number of days between planting and harvest could not be calculated with accuracy. In any event the experts gave a wide range of dates between sowing and ideal harvest time, ranging from 70-90 days given by Mr Butcher, to 110-125 days given by Mr Moate and Dr Gibbs.

[54] In my view, little assistance is to be gained from reference to average sowing to harvest periods when these were not agreed, and when the date of sowing was not known with certainty. Instead I placed weight on the evidence of physical inspections of the crop, both shortly before and at the time of harvest, and of the silage produced from the crop.

[55] Mr Moate, who oversaw the plaintiff's crop, gave evidence that it was most likely on 7 February 2014 that he assessed the barley heads as being at 35 per cent DM and recommended that it be harvested "the following week". That would have seen harvest commencing in the week beginning Monday, 10 February. In cross-examination, he elaborated on this, saying he told the Hughes that the crop was "about ready" and that it should be harvested within 15 days. As this crop was harvested between 24 and 27 February, it was most likely harvested 17 to 20 days after Mr Moate inspected the crop and therefore outside his recommended harvest period. I consider this supports the defendant's contention that the crop was over-mature at the time of harvest.

[56] There is other evidence that supports this contention. Mr Charlie Mills, one of the contractors involved in rolling the stack, said that he observed that the peas and barley were overripe, noting "yellowness and drying". Mr Russell Sounness, one of the truck drivers contracted to transport the cut crop to the silage stack, also considered the crop was over-mature because the peas were bitter to eat and some were white and hard.

[57] Furthermore, Mr Lyall attributed the problems he had with his whole crop front cutter to the fact that the peas, in particular, were over-mature and therefore had tough stems. The fact that an over-mature pea crop would create difficulties with harvesting, was confirmed in cross-examination by Mr Moate and by the plaintiff's expert contracting witness, Mr Millar. Dr Gibbs also said that "mature, lignified and lodged stem material can be difficult to mow and jams certain mowing machinery". Mr O'Neill, who took the samples of the silage, also volunteered that it was "obviously quite a mature crop" based on his observations of the size of the chopped stalks in the samples.

[58] The test results were also relied on to support the fact the crop was over-mature. They showed a DM content ranging from 34.9 per cent to 54.5 per cent over the six samples, but averaging 46.4 per cent, which all relevant witnesses acknowledged was too high. They differed on whether this reflected the fact the crop was over-mature at harvest or whether this could have been caused by the crop drying out between cutting and being processed for silage.

[59] Ms Lewis considered that the fact one result gave a DM figure of 34.9 per cent, which was less than the target level of 38-40 per cent DM, indicated that the crop was not over-mature at the time of cutting. Rather, the higher results were more likely to be because the crop had been left to dry out in the paddocks for some time before ensiling. However, as I will go on to explain, I do not accept that very much of the crop was left out in the paddock for any length of time, although I do accept that the method of harvesting meant the crop would have had a higher DM content than if it had been able to be harvested with the whole crop front cutter, in one pass.

[60] Dr Gibbs did not accept that the low DM content on one sample was evidence that the crop was not over-mature at the time of harvest. He thought it more likely that this was the result of variability in the samples and the sample with a low DM content was likely to be an “outlier”, and should be ignored. He also did not agree that the high DM levels could be attributed to a lag between mowing and chopping.

[61] Finally, the test results showed ME levels were lower than expected, even if the dilution factor of the soil was excluded. Ms Lewis calculated that even without the soil, the ME levels would have been 9.3 – 9.4 MJ/kg DM which is slightly less than the average ME levels for whole crop silage.⁹

[62] Dr Gibbs preferred to rely on the Digestible Organic Matter in Dry Matter (DODM) value, which excluded the soil, saying that, at less than 55 per cent, it was “comparatively low” and indicated a crop of advanced maturity at harvest. He concluded “this silage was not a suitable feed for high production lactating cows, as it was too low in metabolisable energy, as a consequence of the stage of maturity of harvest”.

[63] I accept that the preponderance of evidence was that the crop was over-mature at the time of harvest and this was a significant contributing factor to the poor quality of the silage.

⁹ And puts it in the “poor” category of quality of between 8.0 and 9.5 MJ/kg DM given in the Hill Laboratories explanatory notes.

Did the defendant use an acceptable harvest method?

[64] At the outset, it was anticipated that Mr Lyall would use his silage harvester with a whole crop front cutter and this method would have converted the crop into material suitable for ensiling in a single pass. The whole harvest would then have probably taken only two days.

[65] The plaintiff's case is that, by changing to the cut, rake and chop method, Mr Lyall, as "head contractor" adopted an unacceptable harvest method, that is, one a reasonable competent silage harvester would not have used. This stance was supported by two independent agricultural contractors. Mr Watson gave evidence that he would not have used a method that involved raking the crop. He would either have used the direct cut front method initially tried by Mr Lyall, or he would have windrowed the crop¹⁰ and then picked it up using a grass front (as Mr Lyall subsequently used) which avoids the intermediate process of raking. Mr Millar gave evidence that the proper way to harvest a whole crop such as this was with a direct cut front, and it would be "quite unusual to mow a whole crop such as this".

[66] However, the reasonableness of the harvest method used in this case has to be assessed in light of the circumstances facing the company and Mr Lyall, where the whole crop front cutter unit broke down on the first day of harvesting. The fact the same problem was experienced with the borrowed whole crop front cutter satisfied me that it was the crop, rather than a fault with Mr Lyall's machinery, which was the cause of the problem. Furthermore, other witnesses, such as Mr Moate, acknowledged they had seen similar problems occur with machinery during harvesting processes.

[67] This problem led to the important decision to change the method by which the crop was harvested. While Mr Millar and Mr Watson, gave evidence that the "proper" or correct way to harvest such a crop was by a front cutter, that is not the issue here. Mr Lyall attempted to use that method and it was unsuccessful. The real issues here are whether it was reasonable to revert to the alternative method and

¹⁰ A windrower is an implement that cuts the crop and lays the harvested material in rows.

whether Mr Lyall, or his sub-contractor, undertook that alternative method with reasonable skill and care.

[68] Mr Lyall says that when the new whole crop front also could not cope with the crop, he called Tony Hughes and discussed the problem with him. He also discussed the proposed solution which was to use another machine to mow the crop, then rake it into rows which could be processed by his machine with a grass front attached. Mr Lyall explained that he would therefore be treating the mowed and raked material “as if it was grass silage. That seemed to be a good ‘work around’, and that’s what we agreed to do”. He says he explained to Tony Hughes that he had personally not used that method before. However, he said Tony Hughes agreed with the proposal and, in any event, Mr Lyall has used that method several times since then with success. He also said that he explained to Tony Hughes that his rake was out of commission and they then discussed engaging Mark Bennett to do the raking.

[69] Tony Hughes acknowledges that Mr Lyall called him to explain that he had trouble getting the crop to travel through the auger because of the pea stalks, and also to say that the borrowed front cutter was also not going to work. He also acknowledged that obtaining another agricultural contractor on short notice might have been difficult. However, he disagrees that there was a broader conversation in which the change to the harvest method was discussed and he agreed to it. Instead he says he was simply told to mow the crop, and knew nothing about the arrangements for raking the crop.

[70] Regrettably, the telephone records produced by Mr Lyall were incomplete and did not reveal what calls he made in the critical period of either late Monday afternoon or on Tuesday morning, which is when Mr Lyall says the alternative harvesting method was discussed with Tony Hughes.

[71] In my view though, it is improbable that Tony Hughes and his brother simply complied with a request to begin mowing the crop without having some discussion about this alternative proposal for the harvesting. This is particularly so when Mr Moate says he “one hundred per cent” advised the Hughes that the crop should be harvested with a front cutter harvester. Given the frequency of communication

there had been on the Monday (four calls between 8.30 am and 2.30 pm from Mr Lyall to Tony Hughes), regarding progress on, and issues with, the harvest, I think it equally likely that Mr Lyall would have talked with Tony Hughes over the proposed alternative harvesting method. Mr Lyall was not in a position to offer any other service. It was up to the Hughes to proceed that way, or to look for an alternative contractor. Given they were already late in harvesting the crop, and knew finding an alternative contractor would be difficult, I consider they agreed to proceed with this option as a fallback despite Mr Lyall's acknowledgment that he had not done it that way before. This was reinforced by Tony Hughes' acknowledgement that "we needed to get the crop in, and I believed that just mowing it and picking it up would have got it in".

[72] The suggestion that the Hughes were not actively involved in this decision is also inconsistent with the level of decision-making and control they exercised over other aspects of the harvest process, including requesting the hire of an additional mower, directing baleage to be made from the cut crop on the slopes and overseeing the compaction of the silage at the pit. I do not consider it plausible that they would simply have followed a direction to start mowing the crop without understanding and agreeing to the "workaround" harvest method.

[73] In any event, I heard several witnesses give evidence that, while not the preferred method, the mow, rake and chop option is used on occasions to harvest whole crop. These included two of the contractors who appeared as witnesses, Mr Conijn and Mr Mills, but more importantly, this was acknowledged by Mr Millar, the plaintiff's expert contracting witness. I therefore do not consider the assertion that it was an "unacceptable" method of harvest was sustained on the evidence. While not the preferred method, I am satisfied that a reasonably competent silage contractor would propose that method and would use it in the circumstances faced by the parties in this case, where there was a need to harvest the silage in a timely way and little prospect of getting an alternative contractor at short notice. I am also satisfied that the Hughes agreed to this in the knowledge it was a solution proposed as a fallback option, which had not been done by Mr Lyall before, and which had not been recommended by their consultant.

How did so much soil get incorporated into the silage?

[74] There is no dispute that there was a significant quantity of soil incorporated into the silage. On Ms Lewis's analysis of the Hill Laboratories' test results, each tonne of silage comprised 83 per cent crop and 17 per cent soil, which she described as "a very high level of soil contamination". During expert conferencing, Dr Gibbs estimated the silage contained 10 per cent soil, but in cross-examination he assumed an average soil content of about 15 per cent, so in the end, there was not a significant difference between their calculations.

[75] There were two primary contentions for how the soil was incorporated in the silage: either during the process of mowing, or during the process of raking (or a combination of both). There was also evidence that some soil may have been incorporated at the silage pit, although it was not seriously suggested that the quantities of soil reflected in the test samples could have been achieved by simply knocking soil off the edge of the silage pit, or tracking it in from soil on the ground at the front of the silage pit.

[76] The plaintiffs' contention was that the soil was incorporated through the raking process and, as the raking was undertaken by Mr Lyall's sub-contractor, he bore responsibility for this. In support of this contention, Mr Millar gave evidence that raking would have been the most likely cause of soil contamination because the raker would have swept up soil as he raked up the crop. He considered if the crop had been harvested "the proper way", using a whole crop front cutter, there would have been no dirt contamination. Because Mr Lyall adopted a three stage harvesting process, he should have taken steps to avoid contamination of the crop.

[77] Much the same evidence was given by Mr David Watson, another experienced contractor from Methven. He explained that, while raking is an appropriate tool for collecting mowed grass, because the cut grass sits on a carpet of mown grass, whole crops such as this sit directly on the soil. That means that when the harvester collects the row, soil is collected with the crop. In support of this, he related his experience when a client went against his advice and insisted on mowing his own crop to save money. He said it took some time to set up the rake so that it

was adjusted to pick up all the crop, but also not to rake dirt into the row. However, it still proved impossible to avoid sweeping dirt into the row with the rake and, despite their efforts, a large amount of soil was present in the baleage made.

[78] Mr Lyall, on the other hand, considered that the soil could have come from a variety of sources, but that the mowing was the “most likely culprit” for the introduction of significant amounts of soil. To support that, he relied on evidence from Mr Cross and Mr Lyall that Wayne Hughes commented on the amount of dust that he generated when mowing. While Wayne Hughes denies it, the fact that Mr Cross independently recalls this comment being made, leads me to conclude it probably was said.

[79] Mr Lyall says it was also supported by the observation of Mr Cross, that when he went to plant the next crop, it was a somewhat easier job for him because of the lack of stubble left over from the previous crop. That suggested that the mower blades were set too low and they “scalped” the paddock at regular intervals, or at least broke up loose clods that were on the surface of the paddock.

[80] In my view, while the mowing may have caused some dirt to be incorporated in the crop, it was not a significant contributor to the high soil content of the resulting silage. I consider that Mr Cross’s recollection that there was virtually no stubble left after mowing is contradicted by Dr Gibbs’ photographs which show that stubble was present on the paddocks in late July. I also accept Mr Millar’s practical evidence that if a mower had scalped the ground frequently enough to incorporate the high level of soil found in the silage, that would “fry the clutches or the belts, wheel drives”.

[81] While several of the witnesses were questioned about whether there were clods present on the surface of the paddock which could have been hit by the mower even if it was not scalping the ground, I consider this highly unlikely given the evidence that the seed drill used to plant the crop had press wheels designed to smooth the top of the soil and that the paddocks were then rolled with a Cambridge roller after sowing.

[82] I acknowledge there was evidence about soil being seen coming out of the chute of the harvester and this was discussed between Tony Hughes and Mr Lyall. Mr Lyall says he observed the soil coming out of the chute when he was near a line of trees and he saw clods on the edge of the paddock in this location which suggested to him the paddock had not been rolled and the clods would have been incorporated in the mowing process. However, given my finding that the paddocks were rolled I consider it is more probable that this was an isolated area where, perhaps because of the presence of overhanging trees, the edge of the paddock had not been rolled in the way the balance of the paddocks had. I do not consider it negates the Hughes' evidence that the paddocks were rolled.

[83] Having eliminated the alleged failure to roll the paddocks and the mowing process as significant contributors to the soil found in the silage, I consider the raking is most likely to have been the primary source of the soil contamination.

[84] I also accept Mr Watson's evidence that, if the method adopted by Mr Lyall was necessary, then a "carpet of crop" should have been left on the ground to ensure that soil was not swept into the cut material. However, that would have risked sacrificing a reasonable portion of the crop. In the present case, Mr Andrews, the employee who operated the rake, confirmed that he was careful to ensure no plant matter was left on the ground, supporting the likelihood that soil was incorporated into the process at this stage.

[85] Accordingly, I conclude that the majority of the soil found in the silage was most likely incorporated through the raking process.

Was Mr Lyall responsible for the raking?

[86] The next disputed issue is whether the raking contractor was a sub-contractor to Mr Lyall, or whether Mr Lyall simply engaged him, on behalf of the company, so that Mr Lyall did not have direct responsibility for the work of that sub-contractor. This is relevant because, if the raking performed under the contract was carried out negligently, then Mr Lyall could be answerable to the company for any damages flowing from that, albeit with rights against Mr Bennett, the raking contractor, as alleged in the third party claim.

[87] The company says it contracted Mr Lyall to co-ordinate the harvest, just as in previous years, and he was tasked with running the operation as head contractor. The company accepts that on this occasion it arranged for Cross Agriculture to undertake the ensiling process on this occasion and therefore Mr Lyall was released from responsibility for that part of the process. However, it still says it relied on Mr Lyall to oversee the rest of the harvesting process, including any sub-contractors engaged. The company also points to the fact that, on previous occasions, Mr Lyall incorporated the costs of the other contractors that were used in his invoice to the company. Furthermore, Tony Hughes says that the engagement of a raking contractor was never discussed with him and he did not know about the rake until he saw one arrive. In the plaintiff's view this supports the conclusion that Mr Lyall was responsible for overseeing the whole harvest process.

[88] Mr Lyall's evidence is that the alternative method of getting the crop in was discussed with Tony Hughes and agreed to by him, which I have accepted. He also says that Mr Bennett was suggested as the raking contractor by Tony Hughes and Mr Lyall was surprised at this because he understood that the Hughes had fallen out with Mr Bennett. Mr Lyall says that he then volunteered to telephone Mr Bennett to engage him to do the raking for the company, because he had Mr Bennett's number programmed into his cell-phone. Thus, the fact he made the call was just a matter of convenience to the Hughes, and was not because he was intending to contract Mr Bennett personally.

[89] Mr Lyall also says that the fact Mr Bennett's invoice was made out to Mr Lyall is an understandable error of little consequence. The fact remains that, as with past contracts, the contractors were all simply being engaged on behalf of the company on an hourly rate and that was all that was billed to the company. The inclusion, in the past, of the other contractors' costs on the one account from Mr Lyall was done at the company's request and as a matter of convenience for it. Mr Bennett's invoice, albeit addressed to Mr Lyall, was passed on to the company for payment, as were the invoices for the two trucking contractors. All invoices were duly paid by the company, which tells against the contract being with Mr Lyall.

[90] Finally, Mr Lyall says that if Mr Bennett had been a sub-contractor, that would lead to the unrealistic situation where Mr Lyall would be assuming responsibility for someone whose charges were intended to be passed on to the company without any margin added for the extra risk or management oversight that would be required if Mr Bennett was his sub-contractor.

[91] The resolution of this issue requires me to objectively assess the available evidence to ascertain whether Mr Lyall was acting as agent for the plaintiff, or whether he was engaging Mr Bennett to undertake the raking in his own right. I do not think the evidence points to any established pattern of conduct between the parties which can be relied on to govern the contractual relationships on this job.

[92] While Mr Lyall may subjectively have understood he was engaging Mr Bennett on behalf of the plaintiff, that is denied by the plaintiff. Mr Bennett's understanding is unclear, as he did not give evidence, but there is no evidence that Mr Bennett was expressly told that he was engaged by the plaintiff rather than Mr Lyall. The only evidence to point to his understanding, is the invoice he subsequently rendered, which was addressed to Mr Lyall, not the company or the Hughes brothers. In my view, this suggests that Mr Bennett was not told he was engaged by the plaintiff. Instead, he understood he was engaged by Mr Lyall, and looked to him for payment for the work done on the company's farm. This is in contrast to the invoices from the trucking contractors, Jonathon Bennett and Cross Agriculture, who all billed the company (or the Hughes brothers) directly.

[93] Thus I find that Mr Mark Bennett was, on this occasion, a sub-contractor to Mr Lyall.

Was the crop negligently left on the ground one day before further processing?

[94] The second allegation made by the company is that the crop was left on the ground for one day before further processing. The relevance of this claim is that, by leaving the mown crop on the ground for lengthy periods, it was likely to dry out, lose nutritional value and increase the DM content above the desirable levels.

[95] Ms Lewis gave her evidence based on the understanding that a large part of the crop was left lying on the ground “for between 15 and up to 24 hours”. She said that this risked loss of moisture, leading to an increased DM content and less energy value. Similarly, Mr Millar said that if the crop was left lying on the ground for any length of time, it would rapidly dry out, substantially increasing the DM content. Mr Moate, too, gave evidence that if a crop such as this is cut without being harvested it would dry out and the DM content would increase rapidly as the chopped crop is allowed to wilt.

[96] The defendant could only be liable if the crop was left on the ground in circumstances where a reasonably competent silage contractor, using the cut, rake and chop method, would not have done so. In this case, I am satisfied that every effort was made to pick up the cut crop as soon as practicable after it was mowed. This was shown by the fact that, when Mr Jonathon Bennett was brought in to start mowing on the Tuesday, his services were reconsidered and dispensed with after only two hours, because the mowing was getting ahead of the raking and chopping stages of the process. This demonstrates that the parties were conscious of not allowing too much crop to be mown before it could then be processed into silage, and took steps to avoid this.

[97] There were only two occasions on which I consider the evidence establishes that the cut crop was left on the ground for extended periods of time. These were:

- (a) the crop which was left on steep slopes, and which was subsequently made into baleage because the trucks were having difficulty working on the slopes; and
- (b) the crop left overnight because Mr Lyall’s machine picked up a metal object on the Wednesday night.

[98] However, I do not consider these two incidents demonstrate breaches of the duty owed by Mr Lyall in either contract or in tort. In respect of the first situation, this was a reasonable decision which was made by the plaintiff and was prompted by safety concerns. Furthermore, there was no suggestion that the baleage produced

was problematic as it was subsequently used to feed the plaintiff's herd without reported problems.

[99] In respect of the second incident, the crop was not left out as a consequence of any breach by Mr Lyall, but because of an unavoidable mishap, which was not of his making. Furthermore, this only involved between three and five truck loads out of the 115 truck loads counted by the plaintiff. It was processed promptly the following morning and I do not consider that would have materially altered the quality of the finished silage.

[100] Aside from those two incidents, I am satisfied that reasonable care was taken to ensure that the crop was not left lying on the ground for extended periods of time. I do not consider that this aspect of the claim is made out.

Did the level of soil cause a problem?

[101] While there was no dispute that a significant quantity of soil was incorporated into the silage, there was quite some dispute between the plaintiff's witness, Ms Lewis, and the defendant's witness, Dr Gibbs, as to whether this caused a problem in the silage.

[102] The gist of Dr Gibbs' evidence was that while soil inclusion at higher rates in ensiling can lead to spoilage of the silage stack, this did not occur in this case as was evidenced by the test results of the silage pH and ammonia. Soil inclusion does dilute the energy value of the feed and the digestible component of the feed, and, in this case, reduced the ME content by about 1 MJ/kg DM of the feed. However, that did not represent a danger to the stock consuming it. Furthermore, this was poor quality silage in any event. It could have been fed to the cattle, albeit in slightly larger quantities than otherwise, and supplementary high energy feed, such as palm kernel and molasses, would have been required in any event to boost the energy value of the herd's diet.

[103] While accepting that the cows may have initially found the silage unpalatable, that was able to be overcome by simply persisting with feeding it.

Dr Gibbs said that if ruminants are repeatedly exposed to a new feed which they do not initially like, they will, in about seven days, adapt to it and eat it happily.

[104] Ms Lewis, on the other hand, said that avoiding soil contamination of crops to be ensiled is a key factor in best practice silage making. The inclusion of the soil meant there was an increased risk of stock health issues arising from listeria, mycotoxins, iron toxicity and induced trace mineral deficiencies, reduced performance as a result of lower nutritional value of the silage, and a likely reduction in feed intake, or possibly even complete refusal of the stock food.

[105] She also expressed the view that stock feed with an ME value of only 7.7 was not suitable for dairy cows and its low energy value could not be compensated for by simply feeding more of it. This was because there was a practical limit to the amount they could ingest. She acknowledged, however, that cows would eat feed, such as turnips, that is contaminated with soil, and that the ingestion of such soil was not, itself, necessarily a problem.

[106] I consider Ms Lewis' practical experience as a ruminant nutritionist gave credibility to her assertion that low ME silage could not be compensated for by simply feeding more silage to the stock. Thus, the inclusion of the soil did reduce its value as stock feed considerably. However, I also consider that the silage would have been inadequate as the sole source of food for lactating dairy cows even if it had been made without incorporating such a significant level of soil into it. During conferencing, Ms Lewis estimated that the ME of the silage would have been 9.3 to 9.4 if there had been no soil contamination, while Dr Gibbs estimated it would have been 8.5 to 8.6, which is consistent with his view that the soil would not have reduced the ME of the silage by more than 1 MJ/kg DM, and where the average tested ME level was 7.7 MJ/kg DM.

[107] Mr O'Neill, a dairy farm consultant, considered that at 8.0 to 9.0 ME he would consider it poor quality silage, and this is confirmed by the descriptors used by Hill Laboratories in its reports, where silage with ME values of 8.0 – 9.5 is described as poor. Mr O'Neill said, and I accept, that if the silage was intended for feeding milking dairy cows, it would need to have ME levels of 10 or more.

[108] Thus, whether or not this silage was contaminated with soil, I am satisfied it would not have been adequate as a complete food source for lactating dairy cows and the company would have needed to supplement it with a higher energy food such as palm kernel. Thus, regardless of how the crop was harvested and ensiled, the company would have had to incur additional cost to feed its herd over winter. This would have a bearing on the damages the plaintiff is entitled to even if it could establish the pleaded breaches against the defendant.

[109] I accept that the silage was not particularly palatable due to the high levels of soil, and that the soil levels also increased the risk of stock health issues arising from listeria, mycotoxins, iron toxicity and induced trace mineral deficiencies. However, in this case, there was no indication of salmonella or listeria being present. There is no evidence to confirm that the illness suffered by one of the cows was related to the silage. While the cow's illness did play a material role in the plaintiff deciding the silage was unsuitable for use, I consider the plaintiff's concerns were overstated and, indeed, if there had been genuine concerns about the safety of the silage, I do not believe the plaintiff would have on-sold it for use as stock feed.

[110] Both Ms Lewis and Dr Gibbs accepted that there were no indicators in the analysis of pH, ammonia levels and butyric acid of the silage, to suggest the silage was unpalatable or spoiled in any way. Rather, the uncontradicted evidence was that it was properly ensiled and, in Dr Gibbs view, was "well-made silage" which could have been fed to lactating dairy cows. This view was supported by reference to research which supported the conclusion that consuming soil in reasonably significant quantities was not detrimental to cows. That said, I accept the observations of the Hughes that the silage was unpalatable to their herd.

[111] On balance, I accept that the soil contamination reduced its utility as stock feed, as it diluted its energy value and made it less palatable. However, this silage would never have been good quality silage suitable as a complete food for dairy cows over winter. At most, the soil contamination reduced this from being poor quality silage to very poor quality silage.

Did Mr Lyall fail to use the skill expected of a reasonably competent silage contractor?

[112] As I have already concluded, Mr Lyall did not have an implied contractual obligation to advise generally on the harvest process, nor to ensure that the end product had a particular nutritional value or other quality. That was not practicable in circumstances where he was only engaged to carry out a particular role in the silage making process, and, more importantly, when that role had to be revisited, as a consequence of difficulties with using the front cutter to harvest the crop in one pass.

[113] Instead, the extent of his obligations must be considered in the context of the circumstances which prompted the change to the harvest process. These included the inability to harvest the crop in the method intended, the acknowledged fact that the crop needed to be harvested and the acknowledgement that alternative contractors would have been difficult to find at short notice.

[114] I have found that Mr Lyall discussed the alternative process with Tony Hughes and told him he had not done it before. In such circumstances, it cannot be suggested that Mr Lyall had any particular expertise in the risks of adopting the mow, rake and chop method. He simply had to carry it out, and ensure his subcontractor carried it out, as a reasonably competent silage contractor would. However, he was not required to avoid difficulties that even experienced contractors could not avoid.

[115] As I have said, the most likely cause of the soil contamination was the raking. This conclusion relies particularly on the evidence of Mr Watson who said that, when he assisted a farmer who chose to mow and rake his crop, he set up the rake “as best we could” so it would not leave any crop behind but also not rake any dirt into the row. However, when the farmer fed the baleage out of winter, he saw there was still a large amount of soil present in the crop. Clearly even an experienced contractor, who is aware of the risks of raking, will either have to sacrifice a reasonable part of the crop or expect soil contamination.

[116] This aligns with the evidence of the employee who actually carried out the raking work, Mr Andrews. He explained the care he took to adjust the rakes tines so

that they did not hit the ground, but also to ensure that he picked up all the crop rather than leaving crop behind. He clearly turned his mind to the requirements of the job but, based on Mr Watson's evidence, he could only have avoided significant soil contamination by sacrificing part of the crop.

[117] None of this evidence was challenged and I am satisfied that even a reasonably competent agricultural contractor would be unlikely to avoid including soil in the raking stage of the process. That soil, combined with the lesser amounts of soil introduced through mowing and at the face of the silage pit, accounted for the high soil levels found in the silage.

[118] The only alternatives suggested in evidence to the three stage process was to cut the crop with a windrower, which would avoid the raking process, or to leave significant quantities of the crop behind in the raking process so that significantly less silage was made. The first of these options, which was to leave the crop until an alternative contractor with a windrower was found, was not an option any of the parties seemed aware of at the time, nor did it seem feasible when, as I have found, the crop was already beyond the ideal time for harvest and the Hughes brothers wanted to get it in. I do not consider Mr Lyall had a positive obligation to suggest that as an option in these circumstances.

[119] In my view, despite Mr Lyall and his contractor using the skills expected of reasonably competent silage contractors to implement the fallback option of cut, rake and chop which the Hughes brothers agreed to, soil was still incorporated in the silage by this process, resulting in a loss of silage quality.

[120] I do not think, therefore, that Mr Lyall breached either his implied contractual duties or a general duty of care. The outcome of poorer quality silage, was simply the consequence of adopting an option agreed to by the parties to address the exigencies of the circumstances.

[121] It follows that the plaintiffs' claims are not made out and Mr Lyall, and his sub-contractor, are not liable to the company in damages.

The damages claim

[122] Despite the above finding, it is worth making some observations on the claim for damages. While I have found that the majority of the soil was most likely introduced during the raking process, I do not discount some soil being introduced during the mowing or at the silage pit. Even if I had found Mr Lyall liable on what was essentially a claim in negligence, I accept that the circumstances were such that the Court is able to reduce the damages recoverable to the defendant to the extent that I consider just and equitable as a consequence of the Contributory Negligence Act 1947.

[123] The definition of “fault” in that Act includes “any act or omission which gives rise to a liability in tort”.¹¹ This broad definition allows an apportionment of damages whenever the fault at issue could allow for an action in tort. Where the duty of care which has been breached is identical in tort, contract or equity generally, and where the basis of duty are concurrent, the Act applies.¹² Thus, in *Mouat v Clark Boyce*, Cooke P stated, albeit obiter, that the Act applies whatever the source of a duty of care, including a contractual claim, where negligence is an essential ingredient of the plaintiff’s cause of action.¹³

[124] In this case, I consider that the defendant’s contractual duties were the same as his duty of care under the tort claim. Under both claims, the plaintiff seeks the cost of purchasing stock feed to replace the silage “damaged” by the defendant’s alleged negligence. However, to the extent the plaintiff is at fault and contributed to that damage and loss, I would have reduced the defendant’s liability. In this case I would only have apportioned 80 per cent of the ensuing damages to the defendant for losses flowing from the inclusion of soil, because I consider some of the soil was incorporated in the mowing and ensiling process, which the plaintiff was responsible for.

[125] The next issue is that any award of damages in contract would only have been required to place the plaintiff in the position it would have been in had the

¹¹ Section 2.

¹² *Fletcher v National Mutual Life Nominees Ltd* [1990] 1 NZLR 97.

¹³ *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 564-565.

contract been performed correctly. This raises a number of further considerations. First, I am not satisfied that the plaintiff has established that the silage produced would have been sufficient to feed its entire herd over the winter period as claimed. This period is described first, by Tony Hughes, as “an eight-ten week period in June – August each year and is to feed around 800 head of cattle”, which he says requires approximately 800,000 kg DM. Wayne Hughes says, however, that it was intended to feed their stock “from the end of May to the end of July”, during which period the company was feeding 860 cows.

[126] If I accept the plaintiff’s evidence, then a little over a 1,000 wet tonnes of silage would have been made from this crop. According to Mr Butcher’s evidence, this equates to approximately 400,000 kg DM. It is difficult to see that this would have been sufficient to feed 800-860 cows for an eight to ten week period. Given Mr Butcher’s evidence that 14 kg DM per cow per day was required, the assessment of 700,000 tonnes of DM being required for that period is reasonable. In those circumstances, even if the silage had been top quality, it would only have provided a little over half of the herd’s energy needs during the defined eight to ten week winter period.

[127] That calculation is also consistent with Mr Butcher’s evidence that replacing the allegedly faulty silage should have only have cost around \$130,000,¹⁴ not the amount of over \$300,000 which is claimed by the plaintiff.

[128] I also note that several of the accounts are for food purchased in late July and August, which would appear to be for periods beyond the 8-10 week winter period in which the plaintiff said the silage would be used. For these reasons, I consider the plaintiff’s claim for over \$300,000 in feed to be overstated as, even if the silage had been top quality, it would only have met just over half of the herd’s winter feed needs and other feed would have had to have been brought in.

[129] In any event, I have already found that the silage would have been of inadequate quality because the crop was over-mature. For that reason, too, the plaintiffs would have incurred the cost of acquiring supplementary high energy feed,

¹⁴ It is not clear whether this is GST inclusive or exclusive.

and the damages awarded would be reduced to reflect that. Furthermore, because the over-maturity of the crop meant it could not be harvested in the usual way and it was necessary to get the crop in, the only method of avoiding soil contamination would have been to sacrifice some of the crop. That, too, would have reduced the damages claim.

[130] I would also not have allowed the claim for loss in value of the cows which they were going to winter milk. That claim is not adequately explained and, even without soil contamination, the silage would never have been of a quality to sustain lactating dairy cows on its own, for the reasons explained above.

[131] Finally, all the claims were expressed as GST inclusive claims. It is reasonable to infer that the company was registered for GST purposes and, when it paid for replacement feed, it would have been able to deduct the GST charged as an input tax.¹⁵ Thus, to the extent that any damages were awarded, they would have been for the GST exclusive sum only.

Outcome

[132] The plaintiff has not succeeded in its claim for damages arising from the pleaded breaches of implied terms of contract and in negligence. Consequently, there is no liability in respect of either the plaintiff or the third party.

Costs

[133] As the defendant has been successful in resisting the plaintiffs' claim, it is entitled to costs, which in the usual course would be calculated on a 2B basis. However, that presumption may be displaced by issues such as whether offers were made to settle the proceedings on a "without prejudice as to costs" basis.

[134] Should costs not be able to be agreed, then memoranda in relation to costs may be filed at two week intervals.

¹⁵ *Gunton and Aviation Classics Ltd* [2004] 3 NZLR 836.

[135] If no application for costs is filed by the defendant within 25 working days of the date of this decision, then costs will be presumed to be resolved and the order of the Court is that there is no order as to costs.

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