

SUPREME COURT OF QUEENSLAND

CITATION: *Minister for Industrial Development of Queensland v Taubenfeld* [2003] QSC 023

PARTIES: **MINISTER FOR INDUSTRIAL DEVELOPMENT OF QUEENSLAND**
(applicant)
and
ROBIN TAUBENFELD (AS REPRESENTATIVE OF HERSELF AND ALL PROTESTORS IN OCCUPATION OF THE SITE AT 173-193 POTASSIUM STREET, DECEPTION BAY)
(respondent)

FILE NO: S799/03

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 February 2003

DELIVERED AT: Brisbane

HEARING DATE: 5 February 2003

JUDGE: Mackenzie J

ORDER: The application is dismissed with costs to be assessed

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PARTIES – REPRESENTATIVE PARTIES – where applicant owner seeks orders against the respondent requiring the vacation of land and removal of all goods and improvements from the land – where the occupiers of the land are protestors and trespassers - where the application was brought against respondent personally and in a representative capacity –whether it was appropriate to have a representative defendant in the circumstances- whether the respondent was the appropriate representative defendant having regard to the criteria in the UCPR

Supreme Court of Queensland Act 1991 (Qld), s 82
Uniform Civil Procedure Rules, r75, r76

Barker v Allanson (1937) 1 KB 463, cited
Carnie v Esanda Finance Corporation Ltd (1994-1995) 182 CLR 398, considered

Electricity Commission of New South Wales v Arrow,
 unreported, SCNSW- Equity Division 5561 of 1990,
 Hodgson J, 7 December 1990, cited
London Association for Protection of Trade v Greenlands Ltd
 (1916) 2 AC 15, cited

COUNSEL: Mr P Flanagan SC and Mr Quayle for the applicant
 Mr P Applegarth for the respondent
 SOLICITORS: Crown Solicitor for the applicant
 Caxton Legal Centre for the respondent

- [1] **MACKENZIE J:** This is an originating application brought against Robin Taubenfeld as representative of herself and “all protesters in occupation of the site at 173-193 Potassium Street, Deception Bay”. The application arises out of the occupation for a number of months of certain lands of which the applicant is registered proprietor on an industrial estate at Deception Bay in the vicinity of a site where a food irradiation plant is being constructed. The applicant wishes the occupation of the land to cease and has applied for relief set out in the originating application.
- [2] The land is described in the title of the action as 173-193 Potassium Street, Deception Bay. The land of that description is said in the application to comprise “Lot 6 on CP 913021 (“Lot 6”), and Lots 7 and 8 on CP 913022 (“Lot 7” and “Lot 8” respectively). In all other descriptions of the street address the lots are said to comprise 171 to 193 Potassium Street.
- [3] In any event it is not in dispute that Lot 14 on CP 913022 (“Lot 14”), on the other side of Potassium Street and opposite Lot 7 and part of Lot 8, was sold in December 2001 to a company which proposed to build a food irradiation plant. It was also common ground that people claiming to be aggrieved over the proposal occupied Lot 14 in about June 2002 and set up camp on it. After negotiations which involved officers of the Department of State Development (“the Department”), Police and Ms Taubenfeld the camp was moved to Lot 7 where the structures shown in photographs exhibited to affidavits in these proceedings were constructed. There is evidence that at least on occasions the camp spilled over onto Lots 6 and 8.
- [4] On 13 January 2003, officers of the Department, in company with police, attended the campsite to serve notices to quit on those present. Some persons (whose identity is unknown) were given copies. Others (whose identity is also unknown) refused to accept them. The documents were left at their feet. In addition, two signboards upon which the notice to quit and a letter warning that legal proceedings would be commenced if the occupants did not comply with the notice to quit were erected adjacent to the camp. Two similar signboards were erected in front of Lots 6 and 8 respectively. It is common ground that Ms Taubenfeld videoed at least some of the events of the morning.

- [5] The notice required all occupants to leave Lots 6, 7 and 8 by 8am on Monday 20 January 2003 and not return. They were also required to remove from the land any “improvements, goods or anything else on the land” by the same time. By 15 January, only two signs remained on the land. A further two signs were erected by departmental officers in identical format to those originally erected.
- [6] On 17 January 2003 signs were still standing in front of Lot 6 and Lot 7. Another replacement sign was erected in front of Lot 8 on that day. At about 8.30am on 20 January 2003 a police officer attended the camp and saw about 100 people including Ms Taubenfeld on the site. There was nothing to suggest that any attempt had been made to demolish or remove the camp from the property. According to the same officer he has visited the camp on a number of occasions since 20 January 2003. The number of persons present at the camp on any given day can vary between 4 and 30 and he deposes that the identities of the people varies from day to day. Apart from persons who have been arrested in incidents at the site on previous occasions, he does not know the true identities of the other persons in occupation. He expresses the opinion based on his experience that it would be unlikely that that information could be easily obtained.
- [7] With regard to Ms Taubenfeld certain aspects of her involvement have been referred to so far. She describes herself as a freelance media consultant and a member of what appear to be voluntary organisations named Everyone for a Nuclear Free Future (“ENuFF”) and Stop Food Irradiation Alliance (“SFIA”). She deposed that she became aware of the proposed food irradiation plant in about 1999 when it was first proposed. She attended meetings regularly and made contact with a number of local residents concerned about the proposal. SFIA was active in promoting opposition to the plant. She deposes that she was contacted by a police officer from Deception Bay with a view to coordinating a consultation group between the police and interested community members or organisations to discuss the campaign. She believed she had been selected because of her involvement in the campaign.
- [8] She was present when the camp was set up and following that, she attended as part of the group performing various roles including protesting, acting as a police liaison and gathering video footage of the campaign. In her liaison role she facilitated dialogue between the varying interests within the group of protestors to try to obtain consensus. She played a role in negotiations to shift the camp from Lot 14 to Lot 7.
- [9] On 20 January 2003 she attended the camp and was one of several persons requested by those present to attend a meeting with the police. On 22 January 2003 she was also involved in discussions about the digging of a hole on Lot 7. She said that despite her involvement in the campaign her attendance at the camp had been limited over the period of its existence.
- [10] She says that she has no authority to represent the interests of people occupying the site and is not sure what matters they would wish to raise in defence of their individual positions. She expresses reluctance to be the representative of those at the camp in these proceedings and says that she cannot adequately represent their

interests and objectives which, as far as she is aware, are diverse. In addition, she offered through counsel an undertaking in the following terms:

“I undertake that I shall not enter upon the land described in paragraph 1 and 5 of the Originating Application filed in the Supreme Court of Queensland in S799/2003 on 23 January 2003 without the consent of the Minister for Industrial Development of Queensland or his authorised delegate, or the leave of the court.”

- [11] The undertaking given by Ms Taubenfeld is very limited. It says nothing about counselling, procuring or aiding in connection with occupation of the site by other protestors.
- [12] The picture was painted in submissions of Ms Taubenfeld’s skills being utilized as a liaison person between the people in the camp and the representatives of the Department and the police on a variety of occasions. There is no reason to doubt her statement that despite her involvement in the campaign against food irradiation and the development of the plant, her attendance at the camp was limited over the period of the camp’s existence. However, there are grounds for thinking that that characterisation offered of her role unduly minimises her part in the protest.
- [13] There is evidence that statements attributed to her, as a member of SFIA, were published on the website of the Independent Media Center (*sic*). She is named as the author of articles on the website as well as items publicising meetings, events, protest gatherings and industrial action, including picketing, in connection with opposition to the project. She is shown as the author of articles reporting on incidents at or near the site and warning of and commenting on the expected attempt to close down the camp. One of the articles attributed to her contains a draft letter of protest which people were invited to send to the authorities. She encouraged readers to come to the site and to support those who had been arrested when they appeared in court. She herself was arrested on one occasion and is shown in a photograph with other arrestees on the same website. She is also quoted and described on it as a spokesperson for ENuFF. None of this evidence was controverted. In the circumstances it seems close to disingenuity to minimise her part in the organisation of the protests.
- [14] However, that is not decisive of the issues involved in the matter. In the present case, Ms Taubenfeld has been selected by the applicant to be sued as representative on the basis that she was a person who, to put the matter neutrally, was prominent in and played a proactive part in matters concerning the protest. There is no evidence that there was any process of appointment by those at the camp leading to her performing this role. Such evidence as there is suggests that the numbers of people at the campsite fluctuated according to the circumstances prevailing at the particular time. Those whom Ms Taubenfeld is said to represent cannot be identified by name, except, at least, in a limited number of cases. Whether those who can be identified were at the site at any particular time and, if they were, whether they remain in occupation of the site is not established on the evidence before me.

- [15] *UCPR 75* provides that a proceeding may be started and continued against one or more persons who have the same interest in the subject matter of the proceeding, as representing all of the persons who could have been parties in the proceeding. *UCPR 76* provides that at any stage of a proceeding brought against a number of persons who have the same interest under *UCPR 75* the court may appoint one or more of the parties or another person to represent, for the proceeding, the persons having the same interest.
- [16] The predecessor of *UCPR 75* in the repealed Rules of the Supreme Court was O 3 r 3.10. It provided that when there were numerous persons having the same interest in the subject matter of a proceeding, the court was empowered to authorise one or more of such persons to be sued, or to direct that one or more of such persons defend on behalf of or for the benefit of all persons interested. *UCPR 75* does not require the court to authorise a person to be a representative defendant. Standing alone it permits proceedings to be started and continued against one or more of the persons who have the same interest in the subject matter of the proceeding as all such persons who could have been parties to the proceeding.
- [17] It was submitted that, nevertheless, authority of the court should have been obtained. The applicant did not do so before commencing the proceedings. The applicant resisted this submission on the basis that *UCPR 76* was concerned with a separate situation, that where a proceeding has been brought against a number of named persons an order for a representative defendant may be made. On a proper construction of *UCPR 75* and *76*, I do not think that approval of the court for appointment of a representative defendant is now required. Whether this result has been reached advisedly is not easy to discern. *UCPR 75* follows the wording of s 82, *Supreme Court of Queensland Act 1991*, which does not refer to leave being required to have a representative defendant appointed, but does not, in my view, preclude a rule so requiring. But in any event, if an issue is raised as to the appropriateness of having a representative defendant at all, or whether a particular person selected by an applicant to be a representative defendant is an appropriate person having regard to the relevant criteria, it will plainly be convenient to resolve that issue at the earliest possible opportunity. Both of those issues arise in this matter.
- [18] Both because Ms Taubenfeld had proffered the undertaking and on wider grounds it was submitted that she did not have the same interest in the subject matter as those described as “all protesters in occupation of the site” It was submitted that the description of those said to have the necessary common interest was ill-defined and diverse rather than adequately describing persons with the same interest. Subsidiary arguments addressed were that she did not control the others and did not purport to represent them and that, so far as the obligation sought to be imposed with respect to the removal of improvements and goods from the land was concerned, none were hers.
- [19] The structure of the orders sought, in paraphrase, is as follows:
1. that by a specified time the respondent leave Lots 6, 7 and 8;

2. that the respondent remove all improvements and goods placed on the land by the respondent and anything else of the respondent's that is on the land at that time;
3. that any improvements and goods placed on the land by the respondent and anything else of the respondent after the specified time be forfeited to the applicant;
(this relief was not pursued at the hearing)
4. that the respondent be restrained from entering or being on the land after the time specified in paragraph 1;
5. that the respondent be restrained from entering or being on other lands in the same vicinity belonging to the Minister;
6. that leave be granted under *UCPR 77* to enforce any orders made against "the respondent including those not named";
7. an order enabling service to be effected by personal service on Ms Taubenfeld and by the applicant causing two copies of the orders to be posted on the land.

[20] The description of the class which Ms Taubenfeld is said to represent is "all protestors in occupation" of land at a specified address although the apparent misdescription in the title of the application has already been noted. The intention is to include Lots 6, 7 and 8, according to the evidence. In my view there is a fundamental difficulty about this description for the purpose of defining a class. The criteria bringing a person within the description are that the person is, firstly, a protestor and, secondly, in occupation of the site. There is evidence in the applicant's material that the "protest group often changes in number and consistency", and that it is impossible to identify by name each of the protestors "who have from time to time and do now occupy the land". It may be added that, if the context of the class is to be determined by reference to the time of institution of proceedings on the time of the making of orders, or any other time, there is nothing to suggest that short of admissions being made by individuals, it will be possible to establish who is subject to the orders. This degree of fluidity illustrates the difficulty about defining a class of which an individual can be made representative.

[21] Even where there is some form of structure in an unincorporated body, as, for example, was the case with the protest group in *Electricity Commission of New South Wales v Arrow*, (unreported, SCNSW – Equity Division 5561 of 1990, Hodgson J, 7 December 1990), the difficulty in establishing the necessary identity of interest of all persons against whom the order was sought and of eliminating the possibility of different defences is apparent. The problem where the content of a class changes, although a much larger time frame was involved, is illustrated by *Barker v Allanson* (1937) 1 KB 463.

[22] It is, in my view, easy enough to infer from the available evidence that persons on the land at the time of service of the notice to quit and the posting of the notices to like effect would be aware that their right to remain had been revoked from the time stated and it is probable that persons entering onto the land subsequently could hardly claim credibly that they were not aware that permission for persons to be on the land had been revoked. In those circumstances any such persons would be

trespassers and liable to lawful removal (see, for example, s 277 *Criminal Code* (Qld); any other available sanctions could also be invoked).

- [23] Reliance was placed by the applicant on statements in *Carnie v Esanda Finance Corporation Ltd* (1994-1995) 182 CLR 398, 404, 408, 421 and 427 as to the requirements under a rule like *UCPR 75*. It is not necessary for me to reach a final conclusion as to the degree of involvement with a group of people that would be sufficient to enable a person to be made a representative defendant. The reason for this is that I am not persuaded that on the state of the evidence, the circumstances permitting appointment of a representative defendant have been met.
- [24] The point is made in *Carnie* by Toohey and Gaudron JJ at 422 that the onus on an applicant is not to identify every member of the class; rather it is to identify the class with sufficient particularity. However, I am not persuaded that the applicant has sufficiently established the criteria under which Ms Taubenfeld may be appointed representative defendant. When proceedings against a representative defendant are commenced, the class which is said to have the same interest in the subject matter of proceedings must be defined by the applicant. In the present case, it crystallised as those persons who were occupiers of the relevant land at the time the proceedings were commenced. (*London Association for Protection of Trade v Greenlands Ltd* (1916) 2 AC 15, 39; *Barker v Allanson* (supra)).
- [25] It may readily be accepted that there were people fitting the description of “protesters in occupation” of the land at that time. However, there is no evidence suggesting that there is any means of identifying whether any particular person was a member of the group at that time. It is not merely inability to establish the identity of someone who is known to be there. It is an inability to establish, by any identifying characteristic, that a particular person was a member of the group.
- [26] The need to establish those who are said to have the same interest in the outcome of the proceedings is fundamental. In my view, the applicant has failed, on the available evidence, to do so.
- [27] Even leaving that fundamental difficulty aside, attempting to employ the device of a representative defendant in proceedings of this kind seems wholly unsuitable. On the evidence, if the purpose is to induce all protesters to leave the land to avoid being in contempt of an order of this Court, it would be an exercise in futility. Only those who were “protesters in occupation” of the land at the time proceedings commenced would be subject to the order. Others who entered subsequently may be trespassers, but would not be subject to the Court’s order.
- [28] For the reasons given, the application is dismissed with costs to be assessed.