IN THE COURT OF APPEAL [1996] QCA 259

SUPREME COURT OF QUEENSLAND Appeal No. 100 of 1995

Brisbane

Before Fitzgerald P.
Pincus J.A.
Thomas J.

[Syntex Australia & anor. v. Ray Teese P/L]

BETWEEN:

SYNTEX AUSTRALIA LIMITED
(First Defendant) First Appellant

AND:

JOHN GREGORY RYAN
(Second Defendant) Second Appellant

AND:

RAY TEESE PTY LIMITED
(Plaintiff) Respondent

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 06/08/1996

The circumstances giving rise to this appeal are set out in the detailed reasons for judgment of Pincus J.A.

While I am conscious of the deference to be accorded to the trial judge's findings, his Honour made a number of mistakes, as has been demonstrated by Pincus J.A. In the circumstances, I feel free to give effect to my view that it was not established that the relevant product, Synovex H, was not reasonably fit for its specified purpose, a growth promotant for heifers, nor did Dr Ryan, the vendor of the product to the respondent, give and breach collateral warranties: cf. J.J.Savage & Sons Pty Ltd v. Blakney (1970) 119 C.L.R. 435. If he otherwise breached a term implied into his contract of sale with the respondent, it was a failure to take reasonable care; in my opinion, the only breach established by the respondent against either appellant was a failure to warn that, infrequently so far as is revealed by the evidence, the product caused abnormal udder development.

Further, I agree with Pincus J.A., and with his Honour's reasons, that the respondent failed to prove that the abnormal udder development to the respondent's animals was permanent or diminished their value or otherwise caused the respondent loss.

I agree with the orders proposed by Thomas J.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 06/08/1996

This appeal challenges a judgment of the District Court giving the respondent judgment in a sum of $48,640 against the appellants in an action concerning the effect of a growth promotant on heifers. The respondent's case was based on the proposition that it used the promotant, Synovex H, on its heifers and that caused abnormal udder development which affected the value of the stock. The first appellant was sued as the Australian distributor of Synovex H and the second appellant as the person who sold the

product to the respondent. I shall call the first appellant "Syntex" and the second appellant "Dr Ryan"; he is a veterinary surgeon.

The principal question raised by counsel for the appellants was the primary judge's treatment of the issue of loss and damage. Both the appellants also challenge the judge's conclusions on the issue of liability.

Liability

Under this heading I shall consider the appellants' complaints about the judge's treatment of the issues other than whether any abnormal udder development, caused by administration of Synovex H, produced loss to the respondent.

The respondent was at relevant times breeding dairy cattle. The judge found that in 1984 Dr Ryan sent the respondent promotional material for Synovex H, telling him that it would be "safe to use in heifers intended as breeders in the future". Mr Ray Teese, who apparently controls the respondent, attended a field day at Kerry in November 1985, an occasion on which Dr Ryan and representatives of Syntex were present. Samples of Synovex H implants were available and they bore a warning which included the information that "udder development" had been "reported in heifers implanted with Synovex H". The judge found that farmers at the field day were very concerned to know of the incidence of side-effects, but the judge found in effect that the Syntex representatives at the field day minimised the importance of the side-effects, as did Dr Ryan. Mr Teese implanted heifers with Synovex H and the judge found that the result was that the animals developed udders prematurely, although this development was not uniform: " **. . .** on any one day there

were several cows with udders and several not", said Mr Teese. He also said, and the judge accepted, that the udders would get "bigger and bigger and tight". The judge was satisfied that the implanted Synovex H caused the abnormal udder development, relying in part on evidence that a similar problem had been experienced in relation to an implanted herd in New South Wales.

The primary judge found that Dr Ryan was a "vendor of a product not fit for its purpose or of merchantable quality in the circumstances". As to Syntex, the judge found that it knew of the risk of consequences to users of the product of the kind which the respondent encountered. There was also a finding that Syntex had been told that investigation of side-effects was inadequate and that Syntex was reckless in minimising the extent of side effects; it should in the judge's view have worried customers that in particular herds in which a side-effect emerged its incidence might be high. His Honour held that Syntex was reckless or at best careless about providing proper informative warnings to potential users of Syntex H. He held that Dr Ryan was liable in tort as well as in contract. It is not absolutely clear from the reasons on what basis Dr Ryan was held liable in tort; that difficulty is referred to below.

In the appellants' outline of submission it is said that the respondent's case below was that the abnormal udder development which the judge found had followed upon administration of Synovex H led to permanent damage; it is contended that there was no sound basis on the evidence for holding that permanent damage came from the use of Synovex H. It has to be conceded in favour of Syntex that the judge appears to have

decided the case on the view that the preparation might perhaps have caused permanent damage; his Honour said:

> "I am unable to find that any settling down that might have come with first lactation would place a cow in the same condition she would have exhibited if never implanted with Synovex H".

It will be noted that his Honour did not find that permanent damage in fact occurred, so that the only point available to Syntex appears to be that the judge should have found positively, in its favour, that there was no permanent damage.

It was not made clear, in argument, in what way this could assist Syntex; none of the judge's ultimate conclusions depended upon the presence or absence of permanent damage. As will appear when I come to discuss damages, the judge's reasoning on that topic seems to have been based on a view that udder malformation was observable at certain stages, not on an assumption as to permanent effects. Counsel for the appellant referred us in the course of argument to the sentence I have quoted above beginning, "I am unable to find **. . .** ", but did not point to any other passage in the reasons in which the judge attached significance to permanent damage. This attack on the judge's reasons fails.

A second complaint made on behalf of Syntex, with respect to its liability, was that the judge was wrong insofar as he relied on failure on the part of Syntex adequately to investigate the side-effects of administration of Synovex H. In my view the criticism is inapposite, because no finding was made against Syntex on this point. What the judge said was that:

> "The first defendant had been told (I infer accurately, for I have seen nothing

to indicate the contrary) that investigation of side-effects was inadequate".

It is true that the amended plaint does not allege any negligence in this respect. Nor did the judge find that there was any; the finding about investigations of side-effects was relevant only as showing the background of knowledge against which Syntex representatives made statements with respect to side-effects. There appears to be nothing in this point.

It was also contended on behalf of the appellant that the judge had erred in dealing with the affidavit of a Mr Schlitz, relied on by Syntex below. That affidavit included evidence which, if accepted, would have assisted Syntex as to the significance of a warning which was printed on a Synovex H label used in the United States. His Honour remarked:

"This affidavit could not be cross-examined upon. I find it unsatisfactory**...**"

There followed criticisms of the content of the affidavit, on which, it appears, his Honour was not prepared to act.

It is common ground that the judge's statement that the affidavit could not be cross-examined upon was incomplete; the fact was that the respondent had waived cross-examination of Mr Schlitz, who was at relevant times in California. The judge was told that it was not "reasonably practicable to secure the attendance of the deponent"; it does not appear that his Honour was informed that the respondent had been asked whether Mr Schlitz' attendance was required and had said it was not. Accepting that the judge's statement about the cross-examination of the deponent was based on a misunderstanding, it does not appear to me that it was one which could significantly have affected the outcome of the trial. In addresses below, there was little reference to the

affidavit by counsel for the appellants; the respondent's counsel did not mention it. Lastly, it should be noted that the judge's criticisms of Mr Schlitz' evidence, set out in his Honour's reasons, related to the incompleteness of the assertions in it, not to matters of credit.

The attack on the judge's conclusion with respect to the liability of Syntex must fail.

There remains to be considered the liability of Dr Ryan. The judge characterised this appellant as "a vendor of a product not fit for its purpose or of merchantable quality in the circumstances". It is common ground that, insofar as his Honour relied upon a finding as to merchantable quality, he was in error; the plaint makes no mention of merchantable quality. Insofar as it raises a case in contract, the plaint pleads breach of collateral warranty (paras. 7 and 19) and breach of a condition of reasonable fitness for a specified purpose (paras. 9 to 12 and 20). I am, however, unable to see that the judge's finding that there was a breach of a warranty that the product sold was of merchantable quality made any difference to the judge's final view about liability.

A further difficulty, as to Dr Ryan's liability, is that mentioned above; the judge did not explain precisely on what basis Dr Ryan was liable in tort. The allegation against him in the plaint was to the effect that his liability in tort was based on bad advice about Synovex H, failure to give proper warnings about the product, and lastly selling it to the respondent when he knew or ought to have known that it caused the side effects discussed above; it does not appear that the judge could have been satisfied that the last allegation

was made out.

So the case against Dr Ryan rested in essence on bad advice and inadequacy of warning. After setting out particulars of the negligence alleged against Syntex in the plaint, the judge said:

> "The first defendant [Syntex] was in my view, reckless, or at the least careless about providing proper informative warnings to potential users of Synovex H, such as the plaintiff, which would not, in my view, have used the product if properly warned in its stud and commercial herds.
>
> The only variation in the particulars of negligence against the second defendant [Dr Ryan] comes in (d) where the wrongful act complained of was 'selling **. . .** to the plaintiff' ".

This seems to imply, although it does not state, that his Honour was satisfied that Dr. Ryan was negligent in much the same respects as those found against Syntex. A broader survey of the reasons gives some support to that interpretation. At p. 3 of the reasons the judge quotes a note which Dr Ryan sent to Mr Teese with promotional material for Synovex H, which note asserted that the product would be "safe to use in heifers intended as breeders in the future". At p. 7 his Honour quotes evidence given by Mr Teese of a conversation he had with Dr Ryan at the field day mentioned above, when Dr Ryan told Mr Teese, with reference to side-effects:

> "It is no big deal. They have been using it for years in the States".

I think his Honour intended, although unfortunately he did not expressly state, that his finding in tort against Dr Ryan should be based on the view that each of these assertions made by Dr Ryan was negligent.

I note that in cross-examination Dr Ryan admitted that the respondent's use of the product on the dairy cow herd was the first time he had ever heard of its use "in a trial or

test situation". Subsequent answers suggested that what Dr Ryan was relying on, in giving the advice which he gave to the respondent, was the fact that the "company vet", meaning a veterinarian employed by Syntex, had implanted dairy cattle with Synovex H. Dr Ryan remarked:

> "Now, if the company vet was prepared to implant nine dairy cattle then I can't see a reason why the company wouldn't have supported him".

It seems plain that the attitude of the "company vet" could not have justified the advice which Dr Ryan was found to have given to the respondent, especially the advice that the product would be "safe to use in heifers intended as breeders in the future". On the judge's findings the product caused abnormalities in implanted heifers and Dr Ryan was unable to point to any proper basis for the advice which he gave. It is true that as was argued for the appellants, Dr Ryan's duty of care as vendor cannot be equated to that of Syntex, the Australian distributor, and it is also true that the reasons given by the judge with respect to the issue of negligence may be thought to assimilate the negligence of Dr Ryan to that of Syntex. But when one adds to the judge's findings about the side-effects of Synovex H the fact that Dr Ryan had no sufficient basis on which to assert that it was safe to use for the purpose which he knew the respondent had in mind, the finding of negligence against Dr Ryan must stand. It appears to me that Dr Ryan's position, as a veterinarian recommending a veterinary product to the respondent as being safe for use, can usefully be compared with that of a practising physician as analysed in the work by Giesen, "International Medical Malpractice Law", at p. 1154:

> "It is the physician's duty to **. . .** make an educated appraisal of information on comparison and structure of a new medicament as discussed in the scientific literature or as provided by the manufacturer".

Here, on Dr Ryan's evidence, he had very little knowledge of the product and was not in a

position authoritatively to recommend it as safe, or to give an opinion about the severity of likely side-effects.

The outcome is that the lack of definition of the basis of the finding of negligence against Dr Ryan, in the primary judge's reasons, does not produce the result that his Honour's finding must be reversed.

There remains the finding against Dr Ryan as to fitness for purpose. It is complained on behalf of Dr Ryan that there was no finding that the respondent made known to him the intended use of the product in stud cattle. The judge inferred, in the absence of any suggestion to the contrary, that Dr Ryan was aware of the nature of the respondent's business and that inference is consistent with the general tenor of Dr Ryan's evidence. It is further argued on behalf of Dr Ryan that there was no evidence of permanent damage to the heifers caused by implantation of Synovex H; but that does not appear to be of any consequence, for the losses complained of did not include any based on an allegation of permanent damage.

In the result then, I conclude that the primary judge's findings with respect to liability against both appellants should be upheld.

Loss and Damage

More difficult questions arise under this heading. The evidence about the results of administration of the product was not satisfactory, as the judge recognised; one

difficulty was perhaps that the adverse consequences complained of were said to have been experienced about seven years before the witnesses were asked to give evidence about them, and the respondent seems to have had little by way of records to assist in the task of estimating its losses.

Before coming to the details, it is desirable to discuss the law as to certainty of proof.

A recent discussion of the extent of certainty of proof which is necessary, in order to justify an award of damages is to be found in the reasons of Mason C.J. and Dawson J. in The Commonwealth v. Amann Aviation Pty Ltd (1991) 174 C.L.R. 64 at 82 et seq. The passage deals with damages for lost profits and the point being made is that in the United States a higher degree of certainty of proof of such a loss is necessary:

> "The burden thus imposed on the party not in breach was more onerous than the balance of probabilities test traditionally applied in Australia and England.
>
> The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a Court from the responsibility of estimating them as best it can . . . indeed in Jones v. Schiffmann (1971) 124 C.L.R. 303 at p. 308 Menzies J. went so far as to say that the 'assessment of damages . . . does sometimes, of necessity involve what is guesswork rather than estimation'. Where precise evidence is not available the Court must do the best it can . . . and uncertainty as to the profits to be derived from a business by reason of contingencies is not a reason for a Court refusing to assess damages . . . " (83)

It does not appear likely that the Court intended it to be understood by these remarks that where a plaintiff is entitled to damages, whether in respect of loss of profits or otherwise, the court must always make an assessment whatever the state of the evidence (see also

pp. 118, 137-8). Such a view would be contrary to the decision of the High Court in Ted Brown Quarries Pty Ltd v. General Quarries (Gilston) Pty Ltd (1977) 16 A.L.R. 23. That concerned a claim for damages in deceit in respect of the sale of a quarry; the Court holding that the proper measure of damages was the difference between the price paid and the fair value. There was evidence before the primary judge as to value, but it was rejected. Barwick C.J., who dissented, pointed out that the value could not be precisely calculated and went on:

> "At best it must be a matter of opinion. If no opinions are offered to the tribunal of fact, perforce it must do the best it can. This is not a case where some estimate by the Court is beyond its competence. The Chief Justice [the trial judge] did not take the view that it was. Certainly the Court cannot be justified in rejecting the claim for damages where undoubtedly a loss has been sustained because it has no material on which a precise calculation or assessment can be made". (27)

Gibbs J. decided the case on the basis that there was not "sufficient evidentiary material to enable the Court" to assess the value, the case not being "one in which the matter had necessarily to be left to the opinion and a judgment of the Court, acting at large **...** It was possible, in the circumstances, to prove, with some degree of certainty and precision, the value of the property purchased, and it was not unreasonable to expect [the claimant] to call acceptable evidence as to the value of the 'resource' " (37). Aickin J. at 38 took a similar view.

Ted Brown Quarries was followed on this point by the New Zealand Court of Appeal in Newark Engineering (N.Z.) Ltd v. Jenkin (1980) 1 N.Z.L.R. 504 at 508, 509. The case was considered in the Appeal Division of the Supreme Court of Victoria in J.L.W. (Vic) Pty Ltd v. Tsiloglou (1994) 1 V.R. 237. Brooking J. reviewed the authorities at pp. 241 et seq; his Honour entertained:

> " . . . no doubt that the general proposition that if damage is proved the Court must regardless of the circumstances make some assessment of the damages cannot be sustained." (245)

The other members of the Court remarked that:

> " . . . when substantial damages are sought by way of compensation for tort, the plaintiff must also identify the loss or damage upon which he relies with such precision as will enable the Court, on the balance of probabilities, to make an award of compensation upon an assessment of his loss." (250)

The judges went on to say in effect that the plaintiffs proved they had lost a significant proportion of their stock, but did not prove what was lost, so were entitled to no damages.

It appears to me that the better view is that what Bowen L.J. said in Ratcliffe v. Evans [1892] 2 Q.B. 524 at 532-533, is still good law; this was that in proof of damages "as much certainty and particularity must be insisted on . . . as is reasonable . . . ": see per Toohey J. in The Commonwealth v. Amann Aviation Pty Ltd at 138.

The competing considerations are that to insist on more certainty of proof than is reasonable may unfairly disadvantage the plaintiff who, perhaps because of mere lack of foresight or incompetence, is unable to give a reliable account of the losses suffered. On the other hand, it would seem unfair to the defendant, at least in some circumstances, to make an assessment of damages which is no more than a guess, where the situation is such that a reasonably accurate estimate of the true amount of the loss could have been made, had the plaintiff taken any trouble about the matter.

Here, the judge was plainly satisfied that there was (it appears, fluctuating) abnormal development, but that in itself would not justify an award of damages; knowing

no more than that there was some abnormal udder development, his Honour should not have simply picked a figure "out of the air" as representing the loss. Nor did the judge do so. The damages awarded were made up of three identified components: loss in value of stud heifers; loss in value of commercial heifers; and the abandonment of what was called the Patches family.

The first component is analysed in a schedule at p. 16 of the reasons; with respect to 17 named animals, the schedule sets out what is described as the "unaffected value", being the value fixed by a Mr Traeger in December 1986, and deducts from that the sale price achieved. His Honour further reduced the total ($17,528) to $15,000 by way of "making a further allowance for the vagaries of the market". Only animals whose sale price was less than Traeger's figure by more than 30% were included in the schedule.

The judge referred in his reasons to a submission made on behalf of the defence that the sale prices were not shown to have been affected by use of Synovex H, one of the reasons for that submission being that there were no observable effects. His Honour held that that contention failed:

> "Mr Nutt's evidence tells against it, and I draw an inference against it from the overall circumstances".

The reference to Nutt's evidence was, with respect, an error. The evidence was not about a sale day, but what Nutt described as a "calf day" at the respondent's farm. Nutt did not know what year that was, but saw "fluidy, milky-looking stuff" being stripped from little calves before that calf day.

In the absence of any evidence from Nutt that his observation was made at a relevant time, it is hard to see how it can assist in establishing the proposition which underlies the part of the assessment being considered: that at the date of sale, each animal was in such a condition that its sale price was diminished. But that is not the only difficulty about Nutt's evidence; the respondent's case was that the Synovex H caused malformation of the udders and Nutt did not claim to have observed anything of that sort.

What were the "overall circumstances" which the judge relied on is a matter about which one might speculate. It was contended, on behalf of the respondent, that one could infer that the buyers who paid the prices listed in the schedule I have mentioned bid low because they observed malformation of the animals' udders.

Buyers of calves which had been implanted gave evidence before the Court below as to their observations. One can understand the judge having some reservations about the accuracy of this evidence, in view of the lapse of time between their respective purchases and the date when they gave evidence. But one can hardly avoid attaching significance to what the buyers had to say, in the circumstances of this case; it is not as if the judge had any other independent source of information about the states of the heifers' udders when they were sold.

Taking these purchasers in the order in which their evidence was given, one starts with Mr R H Burton, who bought one of the implanted heifers in May 1987 and said that its udder was "unusually large". But in cross-examination he largely resiled from this, saying that the heifer "seemed fine **. . .** when I purchased it, but it did not perform very well". Mr

G P Nolan bought one of the relevant animals at the same auction as that attended by Mr Burton and had no significant criticism of the udders of the animals he bought. Ms C A Wheatley bought a heifer at the same auction; she noticed nothing abnormal about the udder. Ms D J Schassow bought two heifers in May 1988 and saw nothing abnormal about their udders. Mr S J Cochrane bought at the May 1987 auction and said he noticed no abnormalities in the udder of either animal; he said he would not have bid for an animal with an uneven udder. Mr D J Griffiths bought at the May 1988 auction, paying a good price; he noticed nothing abnormal about the purchased animal's udder. Mr D T Dennis bought a heifer at the May 1987 auction and had no criticism of it.

I pause to note that it is of interest that Mr Dennis and a subsequent witness Mr Wright, were both cross-examined on the basis that "really minute variations in the conformation **. . .** of an animal can make a difference to its sale price". But it was not the respondent's case that the loss of value alleged was due to minute variations; the respondent set out to prove, and the judge it appears accepted, that there was "marked malformation". Mr M A Platell bought two animals at the May 1987 auction and said their udders were "fairly sound". Mr G C French bought in April 1987 and described the udder of the animal purchased as "quite sound".

It is repetitive to say so, but the only specific observation by a purchaser to which his Honour referred was that of Mr Nutt, included no criticism of the conformation of the udder. Further, the judge was wrong in thinking that Mr Nutt was a purchaser on the occasion in question. What his Honour said was:

> "There is direct evidence of a lower price being obtained because of a value-depreciating characteristic of the udder in one case only: Mr Nutt's purchase of Toolamba Oliver Margot".

This was not what Mr Nutt said; his evidence was that he bought, at the May 1987 auction, the animal mentioned by the judge and that its udder was quite satisfactory on that day. The criticism which Mr Nutt made, which was quoted by his Honour, related to a photograph of a malformed udder; he did not suggest that the animal he bought was in the depicted condition, at any stage.

The curiosity of the case, then, is that the respondent has obtained an assessment of damages on the foundation that sale prices were depressed by malformation of the udders of the animals sold, when not a single purchaser gave evidence that any malformation was observed. The account of these sales, given by persons who presumably had no interest in the outcome of the case, is sought to be met by the respondent's argument in various ways which it is not necessary to deal with comprehensively; but some examples should be given. It is contended on behalf of the respondent that "Nolan purchased seeing the tell-tale signs of udder problems because of the cheap price"; reference to the transcript of Mr Nolan's evidence discloses that this is not an accurate summary of what he said. Mr Cochrane is argued to have said that he purchased "at prices which reflected the comparatively low quality of . . . udder development". But this is a rather slanted account of what he actually said; his statement in chief, that he noticed no udder abnormalities, was not departed from. Then the respondent relies on Mr Nutt's evidence; it is unnecessary to say more on that subject. Evidence given by Mr Teese to the effect that people at an auction laughed at

one of his animals was relied on, but there is nothing in the reasons to suggest that the judge treated this as a matter of significance. Lastly, the theory was advanced that perhaps the prices were depressed on account of udder malformation, because people who attended at the auction and noticed the malformation did not bid. There is no evidence that any buyer or potential buyer noticed any malformation, nor did the judge rely on the theory I have mentioned.

In summary, what the judge has done is to treat instances in which there was a substantial difference between the valuation relied on and the price achieved as due to udder abnormalities, subject to a reduction (from $17,528 to $15,000). In my respectful opinion this approach might have been defensible despite the arbitrariness of the cut-off point (a 30% discrepancy), treated as indicative of udder malformation affecting the price and the arbitrariness of the subsequent adjustment to allow for "vagaries of the market", if there were any substantial independent evidence that the calves presented for sale exhibited udder malformation. The judge thought there was such evidence consisting in Mr Nutt's account, but that is not so. It should be added that I have treated the assessment as based on a finding that the relevant animals had observable udder malformation; but that is not clear. At one point, the judge's reasons say:

> " **. . .** it is necessary to find, as I do, not only that Synovex H was the cause of what I will call abnormalities in implanted heifers, but that those abnormalities were observable at (or at least affected adversely some of the prices obtainable at) the time of sale."

We were given no explanation of the way in which unobservable abnormalities might have depressed prices.

In these circumstances the assessment appears to be, with respect, a speculative one, for there was no evidence upon which the Court could make a finding as to the extent to which the discrepancy between the valuer's opinion about the animals and the prices achieved was due to udder malformation, if in fact that factor operated on any of the prices paid.

In my opinion this first branch of the assessment cannot stand.

The second sum assessed related to a sale of commercial heifers; since what is said about it in the reasons is quite short, I quote it in full:

> "The next claim pursued by the plaintiff was in respect of the commercial heifers. A loss of $10,440 is claimed on the basis of 24 animals valued at an average of $735 being sold for $7,200, that is, an average of $300. In any rural pursuit, things can go awry - so that I think some allowance has to be made for contingencies; given the element of averaging in Mr Traeger's valuation I propose an allowance of $75 per heifer, producing $8,640 under this head."

The initial difficulty is that there is no explanation of the basis of the (implicit) finding that the price achieved for the commercial heifers was affected by something done or left undone by the appellants. Reading the reasons in their context, one would tend to assume that the award of $8,640 was based on the view that the commercial heifers sold at low prices because their udders were abnormal; that was a subject extensively discussed in the preceding pages of the reasons. But the respondent did not seek to defend this part of the award on that basis; we are asked to uphold it as being founded on a view that the respondent sold the stock in question cheaply because he feared that they might develop mastitis. It is true that Mr Teese gave evidence that he feared for his reputation if

stock sold developed mastitis; but he gave no explanation as to why his reputation would be less affected by one sort of sale rather than another.

There are other difficulties about the respondent's contention concerning the basis of the $8,640 award. There was no evidence, other than a suggestion from the respondent, that mastitis was a likely consequence of the use of Synovex H. This omission is particularly striking, since the Court had before it expert evidence, both oral and written, relating to the effect of the use of Synovex H. Mr Teese said in effect that everyone thought mastitis would ensue, but none of the other witnesses called said so. In brief, assuming that the judge should be taken to have made a finding about mastitis (his Honour has not) along the lines put forward by the respondent in argument before us, such a finding would not have been a proper one on the evidence. This part of the award plainly, in my respectful opinion, cannot be supported.

The last element in the assessment is a sum of $5,000, assessed globally in respect of damage to what was described as the Patches family. The discussion of this is to be found at pp. 18 and 19 of the reasons. His Honour commences by setting out claims (d) and (e) as being claims which "may be dealt with together". Of these, the first related to the Patches family and the second did not. The $5,000 was given only for "damage to the Patches family along the lines particularised", so that the initial intention of dealing also with claim (e) seems not to have been fulfilled.

The explanations given by the respondent of the Patches claim are lengthy and not always easy to follow, but the central complaint is clear: the respondent abandoned a plan which it had to use the relevant stock in a certain way because of the udder malformation and sold most of the Patches stock.. The judge awarded about half the amount claimed. The claim was one based on lost opportunity; the respondent sold animals which had been intended to be used to establish a continuing genetic line. Mr Amerena, in oral argument for the respondent, conceded that this part of the award had to be defended as relating solely to the Patches family (claim (d)), despite the mention of claim (e) in the primary judge's reasons. He argued that the relevant animals were sold because they had "somewhat uneven udders, and everybody saw them", relying upon Teese's evidence. The foundation of the award as explained by Mr Amerena was that the respondent would not be adequately compensated, for the loss in value of the Patches heifers due to their udder malformation, by an award under the first heading discussed above. There was an additional element, loss of opportunity to establish a good genetic line. It was suggested to Mr Amerena in the course of argument that since there were other families in his herd he could succeed on this claim only if there were evidence that the respondent was forced to reduce the scope of its enterprise by selling the Patches animals. Mr Amerina was unable to point to any evidence that this was so. One would approach the matter, unless there were evidence suggesting otherwise, on the basis that the respondent was attempting to maximise its profits from the various aspects of its business and that if one family was largely sold and an opportunity thereby lost, effort would be concentrated on other families, or on the remains of the Patches family. But, in my opinion, there was no sufficient evidence on which to make a finding that there was any

additional loss, peculiar to the Patches family cattle, and certainly not any such evidence as to enable a rational estimate to be made of the amount of such loss.

Conclusion

Leaving aside the possibility, and it is no more than that, that part of the award was based upon a fear in Mr Teese that implanted cattle might develop mastitis, the judge's award was principally founded on the proposition that malformation of udders caused a loss on the sale of cattle. There was, in my respectful opinion, not such evidence adduced as to make the judge's conclusions, that there was such a loss and that a money sum could be ascribed to it, other than speculative. I would allow the appeal with costs and set aside the orders made below. I have noted and agree with the view of Thomas J as to the proper order to be made in Dr Ryan's case. The orders will therefore be:

1. Appeal allowed with costs.
2. Orders made below set aside.
3. Judgment for the respondent Ray Teese Pty Ltd against the second appellant John Gregory Ryan in the nominal sum of $1.00.
4. Otherwise respondent's action dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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AND:

JOHN GREGORY RYAN
(Second Defendant) Second Appellant

AND:

RAY TEESE PTY LTD
(Plaintiff) Respondent

REASONS FOR JUDGMENT - THOMAS J

Judgment delivered 6 August 1996

I agree with the reasons of Pincus JA. One consequence of those reasons is that the plaintiff/respondent proved a breach of contract on the part of the second defendant/second appellant, but failed to prove any damage in respect of it. Although it is probably devoid of practical significance, the appropriate order with respect to that cause of action should be judgment for the plaintiff for nominal damages. However I would not attach any consequence to this by way of costs (Anglo-Cyprian Agencies v. Paphos Industries [1951] 1 All E.R. 873, 874; compare MacGreggor on Damages, 15th ed. paras 396-397, 402-405).

I would therefore allow the appeal with costs, set aside the orders made below and replace them with judgment for the plaintiff for one dollar against the defendant Ryan for breach of contract, and judgment for the defendants on all other claims with costs.