LAND COURT,

BRISBANE.

20th June, 1991.

Re:An appeal against a decision of the Commissioner of Water Resources to refuse an application for a bore licence - A90-71.

R.R. & C.L. Kerr
v.
The Commissioner of Water Resources

(Hearing at Monto)

DECISION

On 2nd April, 1990, R.R. and C.L. Kerr applied to the Commissioner of Water Resources for a bore licence on and to supply water to Portion 70, Parish of Tellebang, County of Yarrol, on Splinter Creek, south of Monto. The proposed bore was to be sunk to an estimated depth of 30 metres for the purpose of irrigation of 15 hectares of both summer and winter pasture, in connection with dairying use of the property. The required annual allocation was 100 megalitres.

No objections were received following advertising of the application, but by letter delivered to the applicants on 2nd October, 1990, under the heading "Waterworks Licence Application No.68458", the Regional Engineer advised inter alia that:

"After investigating the application the Commissioner has decided to refuse to grant the application on the grounds that available water supplied in your area of Splinter Creek are fully committed to existing licensees. "

The applicants duly filed in the Land Court Registry a Notice of Appeal against the decision of the Commissioner. Section 4.26(3) of the Water Resources Act of 1989 provides that the notice of appeal must state the grounds upon which the appellant intends to rely and the appellant is not entitled to raise on the appeal a ground not stated in the notice. Section 4.26(4) places the burden of proof of a ground stated in the notice of appeal as lying on the appellant.

In the matter, the Notice of Appeal is in letter form and refers to the perceived discrimination caused by the inability of the appellants to rebut the professional evidence

available to the Commissioner; the need for a reliable supply of irrigation water to stabilise and improve their business of market milk supply; the belief that the appellants have the right to share in the underground water supply if it can be located within their property boundaries.

Mr R.R. Kerr attended the hearing and conducted the appellants' case. Prior to giving his evidence Mr Kerr had been supplied with reports prepared by Mr A.W.A. Bleakley, Assistant Senior Adviser (Hydrology) and Mr J.C. Lloyd, Hydrologist, both employed by the Department of Primary Industries, Water Resources Commission. Mr Kerr said that he had not previously been aware of some of the information contained within those reports and while he could not challenge the factual data as to existing water allocations in the locality of his farm he did not accept that the Commissioner knew how existing allocations were being utilised. He had personal knowledge of one property where he was quite certain the allocation was not fully utilised and he says that other licensees irrigate day and night and in his opinion waste water. He saw it as inequitable that the subject property was the only one within the vicinity that has not been allowed to share in the underground water resource. Mr Kerr was critical of the procedure adopted by the Commissioner in that no approach had been made to him to inspect the property, discuss the application, or advise the possibility of a smaller allocation than that applied for, prior to the decision to refuse the application as it stood. He was aware that inspections had taken place of other properties and discussions held with neighbours shortly before the hearing.

Mr Kerr confirmed that the Port Curtis Co-Operative Dairy Association Ltd was encouraging farmers to increase their level of milk production. He would be able to do this, without acquiring further quota, but not without the availability of irrigation to provide the security of having stock-feed in dry times.

Mr Bleakley was the first witness called by Counsel for the Commissioner. In his tendered report it was explained that irrigation bores in the Splinter Creek area had required licensing since declaration of Monto Shire in 1965. Although initially licences were issued without reference to an allocation of water, since 1975, based on investigation work carried

out by the Water Resources Commission in the nearby Three Moon Creek alluvial system, a yield of 1 megalitre per year per hectare of alluvium had been adopted for Splinter Creek. By 1978 most existing licences had been amended to display an allocation of water able to be used from all irrigation bores. The size of each allocation granted was determined on information provided by the licensee as to existing water use.

Mr Bleakley explained that after consideration of the hydrological boundaries of the alluvium in the vicinity, the property of the appellants falls within an area of 400 hectares which is calculated to be capable of providing a sustainable yield of 400 megalitres per year. No additional allocations have been made in this particular area since 1981. One licensee who had sought an increased allocation in connection with a new bore, had been granted permission for the bore but not the increased allocation. Existing allocations amount to 427 megalitres per year, slightly in excess of the estimated safe yield. Existing bores are not metered, but Mr Bleakley held the opinion, based on discussions with licensees that the total allocation of water is fully utilised. (While this may be the case, the state of the evidence indicates that full utilisation of the resource might be occurring only if some licensees were using in excess of their allocations).

Mr Bleakley's report contained information relating to one of the Commission's observation bores located immediately to the south of the management section within which the subject property is located. From the regular recordings taken from the bore, the stress on the aquifer is demonstrated during the dry periods when the availability of water is critical to the existing licensees. Mr Bleakley says that to his knowledge no problems have been experienced by the licensees in this relevant management section, but it is his opinion that the added allocation which was sought within this application would cause difficulties. Indeed he was of the opinion that because of the existing over allocation within the area relevant to the application, any negotiation of even a reduced allocation for the subject property was precluded.

Mr J.C. Lloyd was called to give evidence in support of his opinion as contained in a

tendered report, that no new allocations should be issued for irrigation in the management section of Splinter Creek within which the subject application fell. Mr Lloyd dealt primarily with the estimated "safe" yield of the Splinter Creek area and the allocation principles. His statement is that, for the purpose of analysis, Three Moon Creek (the adjacent catchment to the west) and Splinter Creek were subdivided into ten sections in 1959. Sections 7 to 10 refer to Splinter Creek and the yield for Splinter Creek was determined as 1 megalitre per hectare in 1975 after the extensive study produced a yield of 1.25 megalitres per hectare for the Three Moon Creek alluvium. Mr Lloyd felt the estimated yield for Splinter Creek with its smaller catchment and narrower flats was reasonable based on the Three Moon Creek study and indeed it was possibly optimistic. He said that a review of the level of allocation commitment along Splinter Creek carried out in 1987 indicated that Sections 7 and 8 in the upstream areas were grossly over committed, Section 9 (the location of the subject application) was in balance and Section 10 downstream of the subject property then had an excess of yield over allocation. (Mr Bleakley's evidence was that since 1987 further allocations had been granted in Section 10).

Mr Lloyd agreed with Mr Bleakley's evidence that Section 9 should be viewed as having two distinct hydrological areas, due to severe restrictions to flow caused by narrowing of the alluvium in several locations. The boundaries of the management Sections were "lines on a map" rather than identification of hydrological boundaries. In Section 9 there would be a total yield of about 480 megalitres but the total allocation of 427 megalitres was contained in the area downstream of the flow restrictions in the vicinity of the subject Portion 70.

He said that one of the prime motives for declaration of an area (as Monto Shire had been in 1965) was to allow management of the resource for the protection of existing users. He said that initial allocation was on the basis of existing use and that system precluded "equitable distribution" of water entitlement, resulting in some cases, in over-commitment such as had occurred in Sections 7 and 8 of Splinter Creek. Ideally total allocations should not exceed the safe yield and new licences and allocations are issued only until that situation is reached. He is well aware that the method of allocation is such that, he says unfortunately, not everyone in an area may be able to share in the resource. He says it must be clearly

understood that groundwater allocations are often not easily transportable within a system and an unused allocation at one point may not be physically available at another point. He is concerned that if water levels are critically stressed and reduced to a very low level then the possibility exists for introduction of saltwater with all of the associated salinity problems.

Some discussion took place through questioning by Mr Kerr as to the accuracy of estimation of the sustainable yield, the recharge potential of the Splinter Creek system and comparisons with Three Moon Creek and catchment areas. Mr Lloyd agreed that downstream of Monto, there is a clayey base to Three Moon Creek but as the upstream section was sandy he saw the recharge occurring in that creek as excellent. He agreed that the studies had not been carried out to gauge the influence on the Splinter Creek resource by Tellebang Creek, but it was possible that future studies would do so. Mr Kerr saw this as an omission of some possible consequence, particularly as a bore licence had fairly recently been granted near the junction of Tellebang Creek and Splinter Creek, a short distance upstream of Portion 70. The evidence was however that the granting of this licence related to the Tellebang Creek alluvium rather than that of Splinter Creek.

Finally Mr C.A. Gordon, the District Engineer employed by the Commission at Mundubbera was called to advise the position regarding monitoring of yield in Splinter Creek. He said that application had been made for funding for more observation bores on Splinter Creek to allow further assessment of the aquifer, although even if funding was made available, he was unable to predict the time required for adequate reassessment. It would seem that even if investigation proved a sustainable yield in excess of that currently estimated, the system would require the appellants to make fresh application.

Under Section 4.18(1)(b) of the Water Resources Act of 1989, upon an application relating to underground water, the Commissioner must cause inquiry to be made into:

"(i)the availability and sufficiency of water to satisfy the requirements of

~

(A)licensees;
and
(B) the applicant.

(ii)the effect that the granting of the application will have or is likely to have on the requirements of owners of neighbouring land and licensees. "

and to any other matters or things he thinks fit.

Section 4.18(2) then goes on to provide:
"Upon the inquiry, the Commissioner subject to this section -

(a)may grant the application -

(i) absolutely
or
(ii)subject to any modifications or variations determined by the Commissioner in a particular case;
or

(b)may refuse the application."

It is clear that the procedure required of the Commissioner with regard to the inquiry has been followed. The professional evidence before me is that:

(1)Based on the best information currently available, the sustainable yield in the relevant vicinity of the subject property is estimated as 400 megalitres per year.

The estimation is a matter of opinion, but has been based on professional studies and comparisons the results of which, whilst challenged by the appellants, have not been disturbed.

(2)Existing allocations in the relevant vicinity amount to 427 megalitres per year which provides the potential for the availability of water being insufficient under stress conditions to meet demand.

(3)The inquiry indicates that full utilisation of allocation is being made.

It appears, however, that full utilisation could only be occurring if use is excess of allocation is practised by one or more of three licensees.

There is strong evidence, which I accept as factual, that one licensee is, and has consistently been, under-utilising the available allocation.

It would be wrong if, where additional bona fide demand exists, to assist both an individual operation and an industry deficiency, and the available resource is insufficient to meet that demand, the beneficiaries of the "first in best dressed" principle of distribution are seen to be abusing that privilege by over, or indeed, under utilisation of the resource.

There would seem to be a strong case here for consideration of metering the use of allocation rather than the loose "user supplied" criteria on which reliance of some significance is placed in the present resource management process.

If there was proved wastage of the available resource on one hand or alternatively under-

utilisation of that resource, then the appellants' case to share at least on a reduced allocation basis, would improve proportionately.

Through the hearing, it was the submission of the appellants that if the full allocation sought was unavailable, then a reduced allocation would have been acceptable.

One of the complaints of the appellants is that in matters such as this where technical data requires professional investigation and interpretation, then they are disadvantaged. This is not an unusual complaint, but the opportunity would have been available to the appellants (at their cost) to seek and be guided by private professional advice. Obviously, the economics of obtaining such assistance is very relevant and directly related to the benefits which might attach to such expenditure.

In the end result, while there may be inequity in the manner in which utilisation of the resource in the vicinity of the subject property actually occurs, the Commissioner does have an obligation to protect the rights and allocations of existing licensees. On the state of the evidence as to sustainable yield and existing allocations, there is no basis to disturb the Commissioner's decision, not to grant the application even with a reduced allocation.

As a consequence I confirm the decision of the Commissioner to refuse to grant the application on the grounds that available water supplies in the applicants' area of Splinter Creek are fully committed to existing licensees.

The appeal is dismissed accordingly.

(R.E. Wenck)

Member of the Land Court.