

IN THE SUPREME COURT OF QUEENSLAND

No. 1693 of 1989

CIVIL JURISDICTION

BEFORE MR. JUSTICE MOYNIHAN

BRISBANE, 8 MARCH 1991

BETWEEN:

ELDERS IXL LIMITED trading as ELDERS PASTORAL Plaintiff

-and-

BURDEKIN PLANTATIONS PTY. LTD. Defendant

JUDGMENT

HIS HONOUR: In this case I would dismiss the appeal in respect of the interrogatories and in respect of the remitter. I publish my reasons.

The appellant should pay its cost of the appeal in respect of the interrogatories to be taxed.

I propose making no order in respect of the cost of the remitter matter because that seems to be raised by both parties as an incident to the other proceedings.

IN THE SUPREME COURT OF QUEENSLAND

No. 1693 of 1989

Before Mr. Justice Moynihan

BETWEEN:

ELDERS IXL LIMITED trading as ELDERS PASTORAL Plaintiff

AND:

BURDEKIN PLANTATIONS PTY. LTD. Defendant

By original action

AND:

BURDEKIN PLANTATIONS PTY. LTD. Plaintiff

AND:

ELDERS IXL LIMITED trading as Defendant by
ELDERS PASTORAL Counterclaim

JUDGMENT - MOYNIHAN J.

Delivered the 8th day of March, 1991

Counsel: R.R. Douglas Q.C. with M. Varitimos for the
Applicant

Mr. S. Doyle for the Respondent

Solicitors: Cranston McEachern & Co. as town agent for
Peterson and Lade for the Applicant

Feez Ruthning for the Respondent

Hearing 19th June, 1990

Date:

IN THE SUPREME COURT OF QUEENSLAND

No. 1693 of 1989

BETWEEN:

ELDERS IXL LIMITED trading as ELDERS PASTORAL Plaintiff

AND:

BURDEKIN PLANTATIONS PTY. LTD. Defendant

By original action

AND:

BURDEKIN PLANTATIONS PTY. LTD.

Plaintiff

AND:

ELDERS IXL LIMITED trading as
ELDERS PASTORAL

Defendant by
Counterclaim

JUDGMENT - MOYNIHAN J.

Delivered the day of 1991

By specially endorsed writ issued on 19 May, 1989 the plaintiff (Elders) sued the defendant (Burdekin) for \$45,583.97 as the balance of moneys owing by Burdekin for goods sold and delivered to it by Elders. There was also a claim for interest on that sum.

On about 3 July, 1989 Burdekin delivered a defence and counterclaim. The counterclaim was for \$511,785.00 damages for breach of contract or for contravention of ss. 52 or 53 of the Trade Practices Act 1974 (Commonwealth). Put shortly the counterclaim was founded on a product called Rutec supplied by Elders to Burdekin not having met Burdekin's expectations in respect of its enhancing the productivity of Burdekin's farming operations when used on various crops.

I may say that having regard to the pleadings, particulars and other documents in evidence and to the history of the litigation so far there is much to be said for the view that the case has all the signs of one which could benefit from close supervision to seek to ensure that the parties have exhausted the possibilities of compromise before hearing dates are allocated and, if it cannot be compromised, to ensure that the truly contentious issues are isolated and that the most effective use is made of the trial time. In this context interrogatories would seem to offer the prospect of playing a useful role.

On 23 March, 1990 Elders delivered interrogatories for the examination of Burdekin and these were struck out by a

Master as being vexatious or an abuse of process. This is an appeal from that order and from an order made by a Master on 31 May, 1990 remitting the action to the District Court.

I should mention that Burdekin had delivered substantial interrogatories for the examination of Elders and these had, not been the subject of a similar application to that which Elders interrogatories drew. I said that Burdekin's were substantial interrogatories. They were numbered from 1 to 129 and a number of those interrogatories may well have contemplated multiple answers. I mention this because it was drawn to my attention in the course of argument. The fact that a party delivers interrogatories which, for whatever reason, do not deem an application to strike out, can hardly provide an answer to the delivery by the other party of interrogatories properly characterised as vexatious. The history of Burdekin's interrogatories and their answers however does serve to illustrate the complexity of the issues in the case and the potential usefulness of interrogatories in furthering it.

The interrogatories delivered on Elders' behalf start off somewhat ominously it might be thought with an introduction headed "Definitions and Instructions". The definitions included the definition of "non-Rutec" in terms of being a product other than one bearing a name of or known as or described in the defence and counterclaim as "Rutec". There is a definition of "fertiliser" to mean "fertiliser" and to include "the Rutec products" which are then enumerated. "Crops" is defined to mean the crops which were growing referred to in para. 1(c) of the defence and counterclaim. That subparagraph refers to specified areas of land on which were growing crops specified as watermelons, mini melons, rockmelons, butternuts and cucumbers.

Against this background the interrogatories delivered on Elders' behalf are numbered from 1 to 87. Individual

interrogatories contain on many occasions 10 or more sub questions each of which must be answered on a number of occasions. Thus a number of the interrogatories must be answered in respect of each of the five crops identified in para. 1 (c) of the defence and counterclaim. Other interrogatories are to be answered in respect of each crop growing on each of the separate areas designated on a plan as is required by interrogatory one.

It is deposed that the individual interrogatories, including sub questions and allowing for the fact that answers are required in respect of separate crops and designated areas, number 2,842. Although I have not attempted to calculate the figure myself this is not as improbable as might at first appear when matters such as those to which I have adverted are borne in mind.

At this stage it is useful to take one or two of the interrogatories to exemplify the characteristics of which Burdekin complains. Interrogatory 10 asked, in respect of each designated area, whether soil tests were performed before planting and if they were as to:-

- "(a) When;
- (b) By whom;
- (c) What the test results were;
- (d) Whether recommendations were made as a result of the tests and what the recommendations were;
- (e) Whether the defendant took any steps in response to the test results or recommendations saying what steps were taken."

The questions are replicated in respect of each designated area for tests after planting as well as before it.

Interrogatory 12 refers to:-

"Each of the six successive financial years ending on the 30th day of June, 1989."

It asks whether watermelons were produced on the properties and then requires the following information with respect to each of those years so far as the crop of watermelons is concerned:-

- "(a) How many crops are produced;
- (b) What area of land was planted to produce each crop;
- (c) What number of tonnes was produced;
- (d) What number of tonnes was sold'
- (e) What were the gross proceeds of sale;
- (f) What was the total of commission and costs identifying which items the defendant includes as costs;
- (g) What was the amount of packaging costs;
- (h) What was the amount of harvesting costs;
- (i) What items are included in the packaging costs;
- (j) What items are included in the harvesting costs;
- (k) What was the net surplus."

Subsequent interrogatories replicate interrogatory 12 in respect of the other categories of crop which I have identified.

Interrogatory 17(a) requires the "practical or academic qualifications of the person who expected, estimated or calculated" the expected gross profit specified in a schedule to the counterclaim. Interrogatory 17(d) is to the effect that if the expected or estimated or calculated figures of expected gross profit are based "on

projections based on facts and figures" the facts and figures are to be set out and an explanation given as to how the projections are arrived at. Interrogatory 18 inquires as to the "academic or practical experience" of a specified servant of Burdekin in the growing of the crops dealt with by the defence and counterclaim as at the time when the crops were planted.

Interrogatory 63 asks whether, in 1989 in the period approximately corresponding with the period when the crops were growing in 1988, whether the defendant grew crops with any of the categories to which I have referred and if so asks with respect to each of the type of crops for a comparison with the respective crops grown in 1988. There are then some 13 separate items to be considered and the deponent to the answers to interrogatories is asked to compare such features as "actual production", "gross proceeds" and so on with respect to the crops.

Finally in this exercise to illustrate the nature of the interrogatories para. 9(b) of the defence and counterclaim is to the effect that the product supplied by Elders was more concentrated than "foliar nutrient in solutions usually recommended" for crops of the kind in issue particularly, it is said, in respect of the concentration of certain chemicals. It is also said the pH content was "too low". In this context interrogatory 65 asks the deponent answering the interrogatories to address these allegations and say with respect to the "cucumber crop":-

- "(a) What foliar nutrients solutions were usually recommended for it;
- (b) In what respect would the concentrations recommended by Kier (he was I interpolate Elders' representative) for this crop differ from the concentrations usually recommended and quantify the differences;

- (c) What were the phosphorous concentrations of those solutions usually recommended for this crop and in what form does the phosphorous exist in each;
- (d) What was the phosphorous concentration of the Rutech products in the concentration recommended by Kier for this crop;
- (e) What was the chloride concentration of the solution usually recommended for this crop and what is the source of this chloride;
- (f) What was the chloride concentration of the Rutech products at the concentration recommended by Kier for this crop;
- (g) What was the pH level of the solution usually recommended for this crop;
- (h) What was the pH level of the Rutech products at the concentration recommended by Kier for this crop;"

There were comparable questions in respect of the other categories of crops.

A set of interrogatories as a whole may amount to an abuse of process and be oppressive because of the combination of the number of questions addressed, their trespass into the realms of irrelevance and evidence and the extravagant costs of the provision of detail compared to the potential benefit which the interrogator may derive in respect of questions which are technically permissible; White & Co. v. Credit Association (1905) 1 K.B. 653, Lilydale Pastoral Co. Ptv. Ltd. & Anor. v. Deutschbank (Asia) A.G. Writ No. 3805 of 1987 (unreported Derrington J. 28 September, 1990) and American Flange and Manufacturing Co. Inc. v. Rheem (Aust) Ptv. Ltd. No. 2 (1965) N.S.W.L.R. 193. Such cases and others are also authority for the proposition that for the interrogated party and the court to be required to go through the interrogatories and pick out from a large number those which are acceptable and

those which are not in itself capable of constituting oppression in the technical sense. The case last cited and Maryiott v. Chamberlain (1886) 17 Q.B.D. 154 are useful authorities of the proposition that interrogatories directed to mere evidence of the facts in dispute not forming part of the facts themselves are impermissible.

I have already given some indication of the sheer volume of answers to interrogatories in issue in these proceedings would require. It is not difficult to be persuaded that in respect of some of the detail required the cost of providing it would far outweigh any advantage to be had from the answer. Some of the information sought is in the Elders' provenance rather than Burdekin's. Some of the interrogatories seem to be directed simply to evidence in the sense referred to above. Other interrogatories appear to be irrelevant. What is perhaps an example of all these things is provided by interrogatory 65 directed to para. 9(b) of the defence and counterclaim to which I have referred above. It should be borne in mind that, other considerations aside, Burdekin's case arising on that aspect of the pleadings does not necessarily depend on proving any particular chloride concentration but rather on the fact that the crop was adversely affected by the concentration in the substance applied and which was thereby demonstrated to be excessive. Moreover interrogatory 65(d) seems to me to be an extraordinary requirement to impose on the party to whom the interrogating party was providing the product in question.

I have, I think, said sufficient to provide some understanding of the basis for my conclusion that the interrogatories, as a set, are rightly characterised as oppressive.

It is deposed in support of the interrogatories that Elders' solicitors have obtained an expert agricultural consultant and that in order for him to compile a report he will need information of the kind which the interrogatories seek. That seems to me however to beg the question.

So far as the remitter of the matter to the District Court is concerned there is no doubt that Elders' claim is within the jurisdiction of the District Court. The perceived difficulty is in respect of the counterclaim. Section 77(1) of the District Courts Act 1967-1989 ("the Act") provides to the effect that, (consent to the District Court's jurisdiction aside), a case which might have been brought in a District Court as within its jurisdiction or proceedings pending in the Supreme Court but which might have been brought within the jurisdiction of the District Court as a consequence of an increase in that jurisdiction may be remitted to a District Court by the Supreme Court or a judge thereof. The remitter here was the consequence of the increase of the jurisdiction of the District Court in 1989 which increase led to Supreme Court Practice Direction No. 28 of 1989.

Section 86 of the Act deals with a District Court's jurisdiction in respect of the counterclaim beyond the jurisdiction of a District Court. It relevantly provides:-

- "(1) Where, in any action now or hereafter pending in a District Court, any counterclaim, or set off and counterclaim which involves matters beyond the jurisdiction of the District Court has been filed by any defendant any party to the action may, within 14 days after the filing of the counterclaim or set off and counterclaim, apply to a judge of the Supreme Court for an order that the whole proceedings, or the proceedings on the said counterclaim or set off and counterclaim be transferred to the Supreme Court.
- (2) On any such application the judge of the Supreme Court may, as he thinks fit, order either -
 - (a) that the whole proceedings be transferred to the Supreme Court, or
 - (b) that the whole proceedings be heard and determined in the District Court; or

(c) that the proceedings on the counterclaim or set off and counterclaim be transferred to the Supreme Court and that the proceedings on the plaintiff's behalf and the defence thereto other than the set off (if any) be heard and determined in a District Court."

After a proviso which is of no immediate concern and the subsection providing for the transmission of the order to the Registrar of the District Court in question subs. 4 provides:-

"If no application is made under this section within the time prescribed, or if on such an application it is ordered that the whole proceedings be heard and determined in a District Court, the District Court shall have jurisdiction to hear and determine the whole proceedings, notwithstanding any enactment to the contrary."

Once remitted the action is pending in a District Court. That court has jurisdiction to hear and determine the whole proceedings in terms of s. 86(4), including the counterclaim, subject to the result of any application pursuant to s. 86(2). In Kliner Constructions Pty. Ltd. v. Falconer (1965) Q.W.N. 20 there was an application to have an action, the claim which was in the jurisdiction of the District Court but the counterclaim in which it was not, removed into the Supreme Court. It was held that it had not been shown that the counterclaim could not be conveniently disposed of in the District Court and there the proceedings remained. The amount of the claim alone was not sufficient to found removal.

Bearing in mind the context in which the remitter occurred but mindful of R.S.C. 86(8) I would leave the remitter stand.

The appellant should pay the costs of the appeal in respect of the interrogatories to be taxed.