

SUPREME COURT OF QUEENSLAND

No 1786 of 1992

CIVIL JURISDICTION

SHEPHERDSON J

BRIAN DOUGLAS STAPLES

Plaintiff

and

BRISBANE MARKET TRUST

Defendant

BRISBANE

..DATE 11/11/93

JUDGMENT

HIS HONOUR: These are the orders:

1. I dismiss the action.
2. I give judgment for the defendant against the plaintiff.
3. I order the plaintiff to pay the defendant's costs of and incidental to the action, including reserved costs to be taxed.
4. I dissolve the injunction granted by Mr Justice Moynihan on 1 December 1992.

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IN THE SUPREME COURT OF QUEENSLAND

No. 1786 of 1992

Brisbane

Before Mr Justice Shepherdson

[Staples B.D. & Brisbane Market Trust]

BETWEEN

BRYAN DOUGLAS STAPLES

Plaintiff

and

BRISBANE MARKET TRUST

Defendant

JUDGMENT - SHEPHERDSON J.

Judgment delivered 11 November 1993

**CATCHWORDS:**

Market - right of plaintiff to enter market before open to members of public to offer for sale and to deliver flowers - City of Brisbane Market Act 1960 and By-Laws thereunder considered.

Counsel: Dutney Q.C. for Plaintiff; Cooke Q.C. with Hughes for Defendant.

Solicitors: MacGillivrays for Plaintiff  
Dowling & Dowling for Defendant

Hearing 12, 13 and 14 July 1993

Date:

IN THE SUPREME COURT OF QUEENSLAND

No. 1786 of 1992

BETWEEN

BRYAN DOUGLAS STAPLES

Plaintiff

and

BRISBANE MARKET TRUST

Defendant

JUDGMENT - SHEPHERDSON J.

Delivered the 11th day of November 1993

This case concerns the right of a person who has no connection with the market established by the defendant Brisbane Market Trust at Sherwood Road Rocklea to enter that market at times when the market is not open to the public generally for the purpose of delivering flowers at premises in the market leased by lessees from the defendant for warehousing fruit and vegetables.

The plaintiff resides at Thornlands and trades under the name Bryan Staples and Sons. He describes himself as a grower, a wholesaler and a retailer of flowers. Part of his business is growing flowers and making up and selling orders for bouquets of flowers for supermarkets and other places. The bouquets of flowers for supermarkets are boxed when he delivers them. The plaintiff is, I find, no stranger to the way in which the defendant operated and operates the Brisbane Market at Rocklea. Since about 1980 he has been engaged in businesses concerning flowers. First he traded in the flower market section of Brisbane Market in partnership with his father and mother Douglas Reginald Staples and Catherine Margaret Staples under the name Flower Market. Later Peter Baker and Noela Baker (his wife) bought out the Plaintiff's parents' shares and a business known as Sunburst Flowers began. The partners were Mrs and Mrs Baker and plaintiff and his wife. The plaintiff and his wife and Mr and Mrs Baker were the lessees of premises within the Brisbane Market and remained so until a date (unspecified) in October 1992. These leased premises were in a part of the Brisbane Market designated for sale and storage of flowers, flowering plants and shrubs.

According to the plaintiff, relations with the Bakers soured and in September 1992, after litigation between the Staples and the Bakers, the plaintiff and his wife sold their share in Sunburst Flowers to a company controlled by the Bakers named Bakers Wholesale Flowers Pty Ltd. Thereafter that company became lessee of the premises formerly occupied by Sunburst Flowers in the Brisbane

Market. The leases (exhibits 10 and 11) evince the transactions which I have mentioned.

Before discussing further the plaintiff's transactions involving the defendant, I now set out further findings as to the market established under the City of Brisbane Market Act 1960 (as amended) - that market is known as Brisbane Market (see by-laws of Brisbane Market Trust Brisbane published in Queensland Government Gazette dated 6th February 1982 pp.353-371). The Brisbane Market is at Sherwood Road, Rocklea on land owned by the defendant - the land has an area of about 52 hectares.

The head note to the City of Brisbane Market Act shows that it is "an Act to establish a Public Market in the Area of the City of Brisbane".

By s.5 of that Act a body called the "Brisbane Market Trust" was "established in accordance with this Act". This body is the defendant. The defendant is a body corporate (s.14).

Section 16 of the City of Brisbane Market Act relevantly provides:-

**"16. Trust to establish and maintain public market.**

- (1) The Trust shall establish and maintain a public market in the Area of the City of Brisbane for the sale and storage of fruit and vegetables.
- (2) For the purpose of subsection (1) of this section, or of any Order in Council made under sections 25 or 25A of this Act, or of section 25B of this Act, the Trust may -

.....

(f) Provide for ancillary services and all other matters and things necessary for the convenient use of the public market."

Thus far the public market mentioned in subs. 16(1) was for the sale and storage of fruit and vegetables, but the power existed in subs. 16(2)(f) for the defendant ("Trust" means "Brisbane Market Trust") - to provide for ancillary services and all other matters and things necessary for the convenient use of the public market.

I now mention s.25A (inserted by Act of 1962, II Eliz 2 No 21 s.5) which empowered the Governor in Council from time to time to authorise the defendant to provide in the Brisbane Market accommodation for enabling the carrying on there of the class kind or description of business, trade, calling or other occupation or for the purpose specified in an Order in Council.

Initially the market which is, as I have said, known as Brisbane Market was for the sale and storage of fruit and vegetables. The defendant was required to provide in the Brisbane Market accommodation for wholesalers (s.17). "Wholesaler" was defined in s.4 of the Act as follows:-

"A person whose business, either alone or as part of or in connection with any other business is to sell by wholesale any fruit or vegetables -

- (a) on behalf of producers or other persons on commission or for or in expectation of any fee, gain or reward; or
- (b) on his own behalf;

whether such sale is by auction or otherwise: The term also includes a banana ripener."

Section 25B of the City of Brisbane Market Act, inserted in 1962 contained further provisions relating to the Trust's power to accommodate certain wholesalers at the Brisbane Market. Subsection 25B(2) relevantly reads:-

"It shall be an implied condition of any lease or licence whereby, pursuant to this section, the Trust grants to any person the use or occupation of any accommodation in the public market established under this Act that the

lessee or licensee will use or occupy the accommodation for the purpose of carrying on, on his own behalf, the business of purchasing wholesale any fruit or vegetables for the purpose of the resale thereof by wholesale and for no other purpose whatsoever.

The Trust may forfeit the lease or licence for breach of the condition implied by this subsection

....."

Section 27 of the City of Brisbane Market Act contains the by-law making power. Subsection 27(d)(iv) empowers the defendant Trust, with the approval of the Governor in Council, to make by-laws

"Regulating the conduct of persons using the public market established under this Act, resorting thereto or buying or selling therein"

The defendant has erected a number of buildings at Brisbane Market. Exhibit 10 shows the layout of the buildings on the Brisbane Market's lands.

The main entrance to Brisbane Market is via Sherwood Road through the main gate in ex.10 called "gatehouse".

The defendant initially provided accommodation at the Brisbane Market for wholesalers of fruit and vegetables and banana ripeners. The latter are not relevant to the present case but are noted because the defendant's form of lease has been so drawn that it was adaptable for lease where the lessee conducted the business of a selling floor, or where the lessee conducted the business of a banana ripener or where the business conducted was of a warehouse to a selling floor or a banana ripener. I shall later mention leases granted to certain companies but for the present I note that at present there are approximately 52 wholesalers of fruit and vegetables each of whom has been granted a lease from the defendant to carry on business at the Brisbane Market and that in relation to fruit and vegetables wholesalers there are separate designated areas being selling floors and warehouse spaces; that the

wholesaler lessees from the defendant are permitted to receive at and sell fruit and vegetables from the selling floors and are permitted to store only fruit and vegetables at their leased warehouse premises at the Brisbane Market.

By Order in Council dated 11th January 1979 (published in the Government Gazette of 13th January 1979 p.66) (ex.7) and made under the City of Brisbane Market Act the Governor in Council declared that the public market established under and for the purposes of the City of Brisbane Market Act might be used for the sale and storage of flowers, flowering plants and shrubs provided that such commodities should be sold or stored only at such places in the public market as are from time to time designated or set apart by the Trust for such purposes.

By Order in Council gazetted on 21st November 1981 - the copy which I have (ex.8) bears no date - made under the City of Brisbane Market Act the Governor in Council amended the Order in Council dated 11th January 1979 by:-

- (a) adding after the words "flowering plants and shrubs" the words "and associated ancillary items";
- (b) inserting after the word "commodities" the words "and items";
- (c) inserting after the words "for such purposes" the words "and provided further that any such associated ancillary items shall be goods which are listed as exempted goods under the provisions of the Factories and Shops Act 1960-1975".

The Order in Council (ex.7) was provoked by certain fruit and vegetable growers approaching the fruit and vegetable wholesalers at Brisbane Market to market their flowers. At first there were small quantities and the defendant decided to allow the marketing of flowers in a specific part of the Brisbane Market. The Order in Council ex.7 followed.

To that end, the defendant had a building constructed at the Brisbane Market to accommodate flower wholesalers; the defendant intended to keep the flower wholesalers segregated from the fruit and vegetable selling at the market. That building is marked T on ex.10. Ultimately, out of ten applicants, four only became lessees of premises in that building. The flower market in building T proved a success and subsequently the defendant constructed the building marked W on ex.10. The flower market moved into this building and the use of T for the flower market ceased. Later a group of cane growers from North Eaton near Mackay prevailed upon the defendant to erect another building to enable them to enter the flower market. Building U shown on ex.10 was constructed. Both W and U were specifically designed for flowers and flowering shrubs. The area on ex.10 outlined and shaded yellow and including W and U is the area designated by the defendant within the area of the Brisbane Market for the sale and storage of flowers, flowering plants and shrubs.

This area is fenced off and has two gates in the fence. These gates are marked gate 1 and gate 2 on ex.10. Gate 2, when opened, provides internal access to and egress from the flower market area from and to the fruit and vegetables market area of the Brisbane Market. Gate 1, when opened, provides access to and egress from the flower market area from and to Sherwood Road. Exhibit 13 contains a list naming five present lessees from the defendant of six different areas within buildings W and U. One of these lessees is Bakers Wholesale Flowers Pty Ltd (Sunburst Flowers) who has sublet part of its leased premises to a sub-tenant also named in ex.13.

I pause to point out that the plaintiff, who has said that he sues for himself and his wife was, until sometime in October 1992 a joint lessee with the Bakers of premises in building W. Since that time he has ceased to be a tenant or lessee of any part of the Brisbane Market premises. I am satisfied that the flower market within the Brisbane Market began operating in about 1980, that in setting up the



flower market the defendant set aside a separate area of land forming part of the Brisbane Market and erected thereon separate buildings to house wholesalers of flowers, that the flower market is set apart from the fruit and vegetable market and is completely fenced off and operated separately from the fruit and vegetable section which is the main part of the Brisbane Market.

Brisbane Market is not open to members of the public 24 hours each day. The defendant has regulated access to Brisbane Market by various classes of persons. Exhibit 15 contains details of what are called "tenant entry times" for various classes of persons. The defendant had and has a system of passes which it issues to the different types of personnel named in ex.15 and ex.14 is an envelope containing blank examples of those passes.

The gatehouse in Sherwood Road ("the main gate") is manned by a gatekeeper 24 hours a day seven days a week save for certain times when the gatekeeper carries out security checks which require him to patrol the market by vehicle and check the other gates. While he is absent from the main gate the main gate is shut. I am satisfied that when performing this security role, the gatekeeper is absent from the main gate for about ten minutes only and that at all other times when he mans the main gate it is open.

I find that at all material times gate 1 into the flower market section (see ex.10) is open at 6 a.m. and remains open until 3 p.m. each day when it is closed and not reopened until 6 a.m. next day. The effect of this is that between 6 a.m. and 3 p.m. any person can gain access to the flower market direct from Sherwood Road.

I find that gate 2 as shown on ex.10 is opened only when gate 1 is shut. The effect of this is that gate 2 opens at 3 p.m. and remains open until shut at 6 a.m. next day.

I find that when gate 1 is open there is no gatekeeper positioned on gate 1 and that when gate 2 is opened there is no gatekeeper on gate 2. I find also that between 3 p.m. one day and 6 a.m. next day access to the flower market section can be obtained via the main gate and gate 2.

I find also that during evening hours and particularly on Sunday evenings there is heavy activity in the market with the gatekeeper on the main gate being kept very busy. I find that the gatekeeper on the main gate is not required to collect manifests from persons entering through the main gate to deliver flowers, flowering plants and shrubs to the flower market with the result that it is and would be extremely difficult for the gatekeeper on the main gate during the hours from 3 p.m. one day to 6 a.m. the next morning to keep track of any flowers delivered to the Brisbane Market during those hours.

I find that the Brisbane Market opens to the public at 9 a.m. on Mondays and Thursdays of each week and at 10 a.m. on Tuesdays, Wednesdays and Fridays of each week.

I return now to the plaintiff and events which led to the bringing of this action. While plaintiff and his wife were partners with the Bakers and before completion of the sale to the Bakers' company in October 1992, the partnership of which he was a member supplied flowers to warehouses within the Brisbane Market leased by persons trading as fruit and vegetable wholesalers in the Brisbane Market. Those persons included S. & W. Carter & George Spencer Pty Ltd, Simon George & Sons Pty Ltd, and persons trading as Fruit Link and Levy Country Orders.

After a date in October 1992 - I cannot specify the exact date - plaintiff continued to supply flowers to some at least of these persons. He usually did this before 6 a.m. on days of delivery. I find that at all material times plaintiff was aware that the persons to whom or to whose premises he supplied flowers had selling floor leases and warehouse leases in the fruit and vegetable section of the Brisbane Market. I find also that before October 1992

plaintiff was aware that warehouse leases in the fruit and vegetable section of the Brisbane Market contained a prohibition on the lessee storing anything other than fruit and vegetables without the express permission of the defendant.

I further find that after plaintiff ceased in October 1992 to be a tenant of the defendant he did not take up with any warehouse lessee in the fruit and vegetable section to whose premises he was delivering flowers the matter of permission from the defendant for that lessee to receive and store flowers in its warehouse at the Brisbane Market.

I find that plaintiff had prepared for his retirement from the partnership with the Bakers by commencing a business at 35 Sherwood Road Rocklea on 21st August 1992 under the registered business name Bryan Staples & Sons. He had here established a warehouse about one kilometre from the entrance to the Brisbane Market. I find that both before October 1992 and since, plaintiff has participated in a flower market, first at 35 Sherwood Road and subsequently at 1 Abercrombie Street Rocklea which market he intended to rival the flower market within the Brisbane Market and I further find that before and since October 1992 plaintiff has intended to trade as a wholesaler in fresh and dried flowers.

I find that in December 1992 the business Bryan Staples & Sons moved to a building at 1 Abercrombie Street Rocklea in which building Bryan Staples & Sons is a lessee.

I should at this stage say that I thought plaintiff rather an evasive witness and a person who was reluctant to put all his cards on the table. He conceded, rather reluctantly I thought, that he "thought" he had, at the date of trial, a partner named Barry Weizman in the dried flower section of his present business. Weizman gave evidence before me, which I accept that he and the plaintiff are partners in the business called Queensland Dried Flowers which trades from 1 Abercrombie Street

Rocklea; that business is concerned only with dried flowers and that the plaintiff's "side" in the business is finance and Weizman's "side" is actually running the business and that the finance side meant that the plaintiff provided some money.

In short, I found that I could not treat plaintiff as a reliable witness.

To help complete the picture of plaintiff's flower trading from 21st August 1992, I am satisfied that plaintiff grew flowers at his Thornlands farm and that from the premises at 35 Sherwood Road and 1 Abercrombie Street he has dealt in fresh flowers. I find he made many of his deliveries of flowers from 35 Sherwood Road and later from 1 Abercrombie Street to the warehouses in the fruit and vegetable section of the Brisbane Markets between 4 and 5 a.m. on each day of delivery. I find that plaintiff knew that at these times he would be allowed through the main gate without question because other growers were making deliveries of flowers to the flower market section at those times. However, I find plaintiff did not deliver these flowers to the flower market section but instead delivered them to fruit and vegetable warehouses within the Brisbane Market. I am satisfied that plaintiff practised or intended to practise some deceit upon the defendant when making some of these flower deliveries after he ceased to be a lessee of the flower market section. I find that during October 1992 plaintiff's father was a fruit and vegetable wholesaler at Brisbane Market - the name of that wholesaler was Staples Lind & Co. - and that through the offices of Staples Lind & Co. plaintiff obtained from the defendant a temporary pass - ostensibly to work in the fruit and vegetable section of Staples Lind & Co. at the Brisbane Market (see ex.23 for the pass). I did not believe plaintiff when he said that he had a pass for a short period of time because he was helping his father on his fruit section. I thought it significant that that temporary pass expired on 13th November 1992 and that it was not until 19th November 1992 that any person from Brisbane

Market Trust spoke to plaintiff about his entering the Brisbane Market and making flower deliveries. I infer that plaintiff had the temporary pass in case, after he ceased to be a tenant of the flower market within the Brisbane Market, he was spoken to by any person in authority at the Brisbane Market about his flower deliveries through the main gate and in that event he intended to rely on the temporary pass to justify his presence within the fruit and vegetable section of the Brisbane Market at those hours.

I reject the plaintiff's evidence that he needed the pass to help his father in the mango season. In my view it is sufficiently notorious for me to take judicial notice of the fact that the mango season at the Brisbane Market extends beyond mid November and through Christmas in each year - particularly in 1992 - the pass (ex.23) expired on 13th November 1992 and was not renewed as I would have expected had plaintiff's stated reason i.e. helping his father in the mango season, been true.

The flower deliveries which are at the heart of this action have been to warehouse premises at the Brisbane Market of a number of persons who are lessees in the fruit and vegetable section of the Brisbane Market.

Of these, the most important is S. & W. Carter & George Spencer Pty Ltd which leases selling floor space and warehouses in the fruit and vegetable section of the Brisbane Market. I say most important because on plaintiff's evidence a large part of his flower selling business within the Brisbane Market, since October 1992, has been concerned with sales to Supermarket Suppliers, a business owned by S. & W. Carter & George Spencer Pty Ltd and conducted under the business name "Supermarket Suppliers".

Exhibits 25 and 26 are photocopies of the leases held by S. & W. Carter & George Spencer Pty Ltd (hereinafter called "Carter & Spencer") of part of buildings M and L respectively at the Brisbane Market. These leases are in

respect of a warehouse to a selling floor lease. The siting of buildings named appears on ex.10.

In each lease there is a covenant by the lessee in effect restricting the nature of the business to be conducted on the leased premises to storage of fruit and vegetables and farm products and the following further covenant:—

"The lessee shall not conduct in or about the demised premises any other type of business either in extension of or in substitution for or in addition to the said business hereinbefore provided unless with the express prior consent and approval in writing of the lessor first had and obtained."

Flowers do not fall within the meanings of "fruit" "vegetables" and "farm products" mentioned in the lease.

Craig George Spencer the chief executive and principal director of Carter & Spencer gave oral evidence. Having heard his evidence I find:—

- (a) Carter & Spencer conduct a business under the business name Supermarket Suppliers.
- (b) Carter & Spencer conduct Supermarket Suppliers exclusively for the owners of Coles Supermarkets.
- (c) That Carter & Spencer and the owners of Coles Supermarkets have a unique relationship which relationship has lasted for more than ten years.
- (d) That in Carter & Spencer's warehouse leased from the defendant at the fruit and vegetable section of the Brisbane Market there is a Coles mainframe computer system which has access to every Coles supermarket in Queensland; that the Coles Supermarket stores through a special system, each day put their orders in to Supermarket Suppliers for their requirements to be delivered by Carter & Spencer the following day; that Carter & Spencer receive a printout of

those requirements each afternoon and these requirements show what each of Coles Supermarkets' 82 stores require next day and then buyers go out and place their orders for the particular product to come into the Carter & Spencer warehouse at Brisbane Market for distribution.

- (e) That the owners of Coles Supermarket have a number of their employees operating at Carter & Spencer offices in the warehouse buildings L & M and these employees include buyers who inspect samples produced by various growers who hope to sell to Supermarket Suppliers.
- (f) That Coles Supermarket employees are present at the Carter & Spencer warehouse at all times when Carter & Spencer are open.
- (g) That as far as flowers are concerned, flower suppliers bring samples for the ensuing week to Carter & Spencer's warehouse in the fruit and vegetable section and put them on display so that a buyer employed by Coles Supermarket can inspect and decide whether or not orders for some or all of the flowers on display are to be placed.
- (h) That orders for flowers chosen by the Coles Supermarket buyers are placed with the flower supplier or grower by Supermarket Suppliers and not by the owners of Coles Supermarkets.
- (i) That orders for flowers placed by Supermarket Suppliers are usually sent by facsimile to the particular flower grower or supplier such orders being placed only after a Coles Supermarket employee has chosen from the samples what is to be ordered for the ensuing week.
- (j) That flowers ordered by Supermarket Suppliers are delivered to the Carter & Spencer warehouse in the fruit and vegetable section of the Brisbane Market

and there inspected by a Coles Supermarket employee who may reject any unsatisfactory flowers.

- (k) That Supermarket Suppliers pays the grower or supplier for the flowers delivered and accepted.
- (l) That Supermarket Suppliers then bills Coles Supermarket for the flowers at a price fixed by Supermarket Suppliers which price includes a distribution fee.
- (m) That Supermarket Suppliers uses the Coles mainframe computer system at the Carter & Spencer warehouse for what Mr Craig Spencer called automatic billing of the 82 stores.
- (n) That the flowers delivered to Carter & Spencer's warehouse are stored at the warehouse until sorted and sent for distribution to such of the 82 Coles Supermarket stores as require flowers in an area generally ranging from Rockhampton to northern New South Wales and west to Dalby but including as well Townsville.
- (o) That prior to the plaintiff ceasing to be a tenant of the flower market section at the Brisbane Market, Supermarket Suppliers did not buy flowers from any person who was not a tenant of the flower market section at the Brisbane Market.
- (p) That the plaintiff told Mr Craig Spencer probably during October 1992 that he no longer was a tenant of the flower market section of the Brisbane Market.
- (q) That Carter & Spencer as lessees from the defendant have not sought from the defendant consent to receive and store flowers in their warehouse premises leased in the fruit and vegetable section of the Brisbane Market.



- (r) That there have been occasions when Supermarket Suppliers bought flowers from interstate suppliers or growers but on such occasions the cost of the flowers was invoiced to Supermarket Suppliers by a tenant in the flower market section of the Brisbane Market.
- (s) That the business which Supermarket Suppliers has with Coles Supermarket is a good business.
- (t) That when the flower market section of the Brisbane Market began, Craig Spencer was, probably through a company which was not identified in the evidence, one of the original tenants of the flower market section of Brisbane Market and thereafter, while he or his company continued to be a tenant in the flower market section, supplied flowers from the flower market section to what he called "our distribution centre" for distribution to Coles.
- (u) That the distribution centre referred to in (t) was in the warehouse or warehouses in the fruit and vegetable section leased by Carter & Spencer from the defendant.
- (v) That flowers supplied by plaintiff to Supermarket Suppliers since October 1992, have been boxed bouquets of fresh flowers.

On the evidence before me and particularly from the evidence of Mr Cyril Martin Taylor to whom I shall later refer, I am satisfied that from the time the flower market section of the Brisbane Market opened and until about mid November 1992 the defendant was aware of and has tacitly agreed to flowers being supplied from the flower market section of the Brisbane Market to warehouses of Carter & Spencer and certain other wholesaler tenants in the fruit and vegetable section of the Brisbane Market. The defendant has not ever considered that delivery of flowers from the flower market section to a fruit and vegetable wholesaler's warehouse and subsequent storage of those flowers might

constitute a breach of a warehouse lease. I am satisfied that the deliveries of flowers from the flower market section to the fruit and vegetable wholesaling warehouses in the Brisbane Market have been done quite openly - there was nothing clandestine or secretive about them.

The next fruit and vegetable wholesaler to whom plaintiff appears to have delivered flowers is Simon George & Sons Pty Ltd which company is a lessee of warehouse premises and selling floor premises in the fruit and vegetable section of the Brisbane Market. Simon Michael George the principal director of that company gave oral evidence before me. On his evidence I find:-

1. That Simon George & Sons Pty Ltd ("Simon George") purchases flowers for delivery to its customers - mainly hotel and restaurants - and that the sources of such flowers have been a few flower suppliers one whom is the plaintiff.
2. That Simon George ordered flowers from plaintiff by telephone.
3. That plaintiff delivered flowers to Simon George's warehouse in block K at the fruit and vegetable section at the Brisbane Market, (see ex.10 for the site of block k)
4. That Simon George paid plaintiff for the flowers so delivered.
5. That Simon George received into its warehouse at Brisbane Market other goods such as meat, seafood and chocolates which Simon George then delivers by truck, and sometimes by air, along with fruit and vegetables and flowers to clients in and around Brisbane e.g. Kooralbyn Valley Resort but as far afield as Great Keppel Island and Dunk Island Resort.

6. That Simon George's purchases of flowers are not a large part of that company's business.
7. That Simon George on-sells those flowers to customers at a profit.
8. That there have been some occasions when a customer had bought flowers direct from the plaintiff and as a matter of convenience and at no charge to the customer Simon George had permitted the flowers to be delivered to its warehouse premises for subsequent dispatch with other deliveries to the particular customer.
9. That Simon George sends out from its warehouse in the fruit and vegetable section at Brisbane Market about twenty trucks a day to make deliveries to its customers.
10. That Simon Michael George was and is aware that plaintiff had a flower warehouse at Abercrombie Street very close to the Brisbane. Market.
11. That Simon Michael George probably would not be interested in having one of his company's trucks stop at Abercrombie Street to pick up flowers which a customer of Simon George had bought from the plaintiff.
12. That Simon George had not applied to the defendant for consent to receive and store flowers at its warehouse in the fruit and vegetable section of the Brisbane Market.

Of the fruit and vegetable wholesalers at the Brisbane Market to whom plaintiff said he delivered flowers, I heard evidence only from Messrs Spencer and George on behalf of their respective companies. I heard no evidence from other firms mentioned by the plaintiff as fruit and vegetable wholesalers to whom he had supplied flowers in the Brisbane Market but lack of such evidence is unimportant.

Cyril Martin Taylor whom I have already mentioned is the general manager and Chief Executive Officer of the defendant. The position of "Chief Executive Officer" is referred to and defined in the By-Laws of Brisbane Market Trust. Mr Taylor has held these offices since 1991. Prior to that he had been employed by the defendant for some 15 years, the first five of which were as manager of the defendant and the balance of ten years were as operations manager of the defendant. I am satisfied his experience with the defendant is substantial. I thought Mr Taylor an honest witness who was quite frank and did not attempt in any way to hide matters which might be thought harmful to the defendant's case. Having heard Mr Taylor I find:-

1. With reference to what were called "non-market goods" namely the meat, seafoods, chocolates and similar items not sold in the Brisbane Market itself and of which Mr Simon Michael George spoke in his evidence, the defendant has a policy; that policy recognises that there is a number of country order operators in the Brisbane Market and that whilst those operators do not make a profit from the sale of these "non-market goods" there is a need to provide service to the country order customers; the policy recognises that country people will telephone in fruit and vegetable orders and at the same time will request that non-market goods be delivered to the particular wholesaler's warehouse and then placed on a vehicle going to the country; the defendant by its policy recognising that its country order operator tenants do not make any profit from those non-market goods and to assist the tenants to service their country customers, has allowed non-market goods to be brought into the Brisbane Market and delivered to those country order operators at certain times the earliest of which is 9 a.m. on Mondays and Thursdays and 10 a.m. on Tuesdays, Wednesdays and Fridays.

2. The defendant charges for delivering these non-market goods to warehouses within the market the sum of \$3 per vehicle and this charge is to offset to some extent some of the defendant's major costs in pavement restoration in the Brisbane Market.
3. That the Trust policy which I have above set out is and has been well known among tenants of the Brisbane Market.
4. That with respect to flowers, the defendant has not permitted in the Brisbane Market delivery of flowers to warehouse premises leased in the fruit and vegetable section of the Brisbane Market save for permitting flowers to be delivered from flower market tenants to lessees of warehouses in the fruit and vegetable section of the Brisbane Market.
5. That the exceptional concession last referred has operated from sometime since the flower market opened in about 1980 in building T marked on ex.10.
6. That the Brisbane Market Trust has not permitted and does not permit a person coming from outside the Brisbane Market and who was not and is not a tenant in the flower market section of the Markets to deliver flowers to a tenant of a warehouse in the fruit and vegetable section of the Brisbane Market.
7. That on Monday 23rd November 1992 Mr Taylor became aware from a report from the defendant's market supervisors which detailed all deliveries to the Brisbane Market, that at 11.47 p.m. on Thursday 19th November 1992 the plaintiff had made a delivery of flowers to the fruit and vegetable wholesaler lessees Carter & Spencer and that there was a further delivery of flowers by the plaintiff to the same wholesaler lessee on 23rd November 1992.
8. That on 23rd November 1992 Mr Taylor met the plaintiff and told him that he could not deliver

flowers to fruit and vegetable wholesaler lessees of the defendant on the basis that such wholesalers were not permitted to deal in flowers from their leased premises; that he further told the plaintiff that he would raise the matter with members of the defendant at its next meeting which was scheduled for 25th November 1992.

9. At the meeting of the defendant held on 25th November 1992 a resolution, an inexact copy of which appears in ex.9 was passed. The resolution as appearing in ex.9 reads:-

"THAT FRUIT AND VEGETABLE WHOLESALER LESSEES BE GRANTED APPROVAL TO RECEIVE FLOWERS INTO THEIR LEASED WAREHOUSE PREMISES ONLY, PROVIDED THE CONSIGNEES OF THOSE FLOWERS ARE LESSEES OF THE TRUST'S FLOWER MARKET."

Exhibit 9 contains a further resolution passed at the same time -

"THAT THE DELIVERY FROM THE FRUIT AND VEGETABLE WHOLESALER LESSEE'S WAREHOUSE PREMISES BE EFFECTED OUTSIDE THE CONFINES OF THE BRISBANE MARKET."

Although the word "consignees" appears in ex.9 I find that that word should read "consignors" and that there was an error in the typing of ex.9.

10. On 26 November 1992, Mr Taylor spoke to plaintiff and told him the defendant had decided he was no longer to deliver flowers in the Market other than to the flower market tenants.
11. I am satisfied that during this conversation on 26 November 1993 the plaintiff told Mr Taylor that his driver had paid \$3 to the gatekeeper in order to effect delivery and that Mr Taylor replied "Be that as it may"; that plaintiff expressed the view that perhaps the defendant was victimising him and that

Mr Taylor said in effect that he could recall plaintiff coming to him sometime earlier when he was a tenant of the flower market complaining bitterly to the general manager of the defendant about the defendant constructing building U for other flower market personnel and went on to say to the plaintiff "You would be one of the first to complain if you were a tenant in that flower market and we had a grower or a wholesaler effecting delivery direct to one of the tenants inside the marketplace." Mr Taylor did not say that the Trust had to look after its own and he agreed with plaintiff that the defendant could deliver flowers to Carter & Spencer up until the following Friday in order to honour a contractual commitment plaintiff had with Carter & Spencer.

12. That Coles Supermarkets are predominantly the largest buyer of produce at the Brisbane Market.
13. That Coles Supermarket distribution system operating from the Carter & Spencer warehouse works on the basis that all produce to be supplied to Coles Supermarket is delivered to the Brisbane Market for distribution to the various Coles Supermarket outlets.
14. That until the resolution (ex.9) was passed, the defendant has not told its warehouse lessees in the fruit and vegetable section that they are restricted to accepting deliveries from the flower market section of the Brisbane Markets only.
15. That the defendant has never told any fruit and vegetable wholesalers who are lessees of part of the Brisbane Market that the terms of their leases prohibit their receiving and storing flowers and has for a number of years permitted a few fruit and vegetable wholesalers at the Brisbane Market to receive flowers into their warehouses for

distribution. In his amended statement of claim the plaintiff has sought the following declaration:-

"A declaration that the plaintiff be entitled to enter the market established by the Brisbane Market Trust at Sherwood Road Rocklea Brisbane prior to the time of opening the market for the purpose of delivering flowers at the premises for lessees of the Trust in the market."

He has also sought and continues to seek an injunction restraining the defendant from prohibiting the plaintiff from delivering flowers at the premises of lessees of the Trust in the market.

During addresses Mr Dutney Q.C. for the plaintiff sought a declaration in the following terms:-

"That neither the City of Brisbane Market Act 1960 (as amended) nor by-laws made thereunder as presently framed nor the resolution of the defendant passed on 25th November 1992 authorise the defendant to prevent or prohibit the delivery by the plaintiff of orders for flowers placed with him by fruit and vegetable wholesaler lessees from the defendant of premises within the public market area during the hours normally permitted by the defendant for the delivery of flowers."

Mr Dutney argued that the right to be protected by the declarations and injunction is the plaintiff's right to enter a public market. He relied on there being no definition of "public market" within the City of Brisbane Market Act and on that basis submitted that the common law meaning of "public market" is to be applied, subject to the provisions of the City of Brisbane Market Act and its by-laws.

As to the common law meaning of "market" and the public's right to attend such market he relied on Halsbury's Laws of England (4th ed.) Vol. 29 at para 623 where it is said:-.



**"623. Public's right to attend a market.** At all times when a market ought lawfully to be held, every member of the public has, of common right, the liberty to enter and frequent the market-place for the purpose of bringing there and exposing for sale and selling, or of buying, such commodities as are vendible in the market.

However, this common right does not entitle any person to take exclusive occupation of any part of the market-place, such as by erecting a stall, but it does entitle him, on payment of the dues, to fix the conditions on which he will sell his goods."

That paragraph really does not help except to raise the issue of the lawful holding of the market.

Halsbury's Law of England (4th ed.) Vol. 29 shows:-

- (a) **"601. Meaning of "market"**. At common law a market is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given. It is also applied to the same right when conferred by Act of Parliament ..."
- (b) The right to hold a market can be created in a number of ways one of which is by a statute (see para. 609 which refers to 'creation by local acts')

In the present case there is no challenge to what is now known as the Brisbane Market having been created by a local act passed by the legislature of the State of Queensland. This is not the occasion for an historical research into "market". Suffice it to say that the City of Brisbane Market Act is an Act to establish a public market in the Area of the City of Brisbane; an Act which created the defendant as a body corporate and initially imposed upon the defendant the obligation to establish and maintain a public market in the area of the City of Brisbane for the sale and storage of fruit and vegetables (s.16(1)) and set out specific powers to be exercised for the purpose of establishing and maintaining that market including a power

to acquire land and a power to erect buildings (see s.16(2)).

I have already mentioned ss 25, 25A and 25B of the Act and in my view the scheme of the Act is designed to enable the defendant Trust to control and govern the use of the Brisbane Market including regulating the method of selling in the public market the City of Brisbane Market Act.

I return to para. 623 of Halsbury on which Mr Dutney relies and especially the reference to "times when a market ought lawfully to be held" and every member of the public's right to enter at those times. In my view this aspect of lawfulness, when applied to the City of Brisbane Market Act points to finding out what that Act and the by-laws made thereunder have to say about times when the Brisbane Market can lawfully be held.

In my view an important aspect of the Act is the specific provision that the defendant was and is to provide in the public market accommodation for persons to carry on the business as wholesalers (s.17). I do not refer to s.17 in detail but it is not unimportant to note that subs. 17(5) reads:-

"(5) Subject to subsections six and seven of this section, on and from the date when the Trust first makes the public market established under this Act available for use as such, no person shall carry on business as a wholesaler in the Area of the City of Brisbane elsewhere than in such public market."

Penalties are named and ss.6 and 7 deal with exemptions which are not relevant to the present case.

"Wholesaler" relates to persons selling by wholesale any fruit or vegetables - I have already set out the definition of "wholesaler" appearing in the Act.

As already mentioned, under s.25A the Governor in Council may by Order in Council authorise the defendant to provide in the Brisbane Market accommodation for enabling

the carrying on there of businesses as set out in s.25A. This power, if exercised, may operate as an extension of the power to provide accommodation for wholesalers found in s.17. As already noted the Brisbane Market includes an area designated for the sale and storage of flowers, flowering plants, shrubs and associated available items as well as the remaining area which is for wholesaling of fruit and vegetable and farm produce.

In my view, the right of the plaintiff to enter the Brisbane Market premises is governed by the provisions of the City of Brisbane Market Act, the by-laws made thereunder and implementation of those by-laws by the defendant.

I mention s. 25H of the City of Brisbane Market Act inserted by Act No. 20 of 1982 in terms of which the defendant has power in an appropriate case to order that certain persons may be prohibited from entering the Brisbane Market for such time (not exceeding three months) as it thinks fit. Any breach of such a prohibition order can be enforced by removal of the prohibited person from the market by an officer of the defendant.

Part III of the By-laws of Brisbane Market Trust is headed "REGULATION AND GOVERNMENT OF THE MARKET" and it commences with by-law 16 which deal with "selling hours". By-law 16 reads:

"Businesses established for the carrying on of ancillary and other services authorised under sections 25, 25A and 25B of the Act, occupying premises within the Market but beyond the particular confines of the market for the sale of fruit and vegetables and farm products and flowers shall be subject to such laws governing times of operations as may be in force from time to time."

By-law 16 in my view applies to the warehouse leases within the fruit and vegetable section of the market. The warehouse premises are separate from the selling floors. By-law 17 deals with "UNAUTHORISED SELLING OR DELIVERY" and it reads:-

"17(1) Except with the prior approval in writing of the Chief Executive Officer and in accordance with such terms and conditions as may be specified in such approval, any person (not being a lessee of the Trust for the purpose of selling by wholesale in the Market any fruit, vegetables, farm products or flowers) entering upon or using the Market for the purpose of soliciting orders for the sale of, or offering for sale or selling or delivering any fruit, vegetables, farm products or flowers to persons, firms or corporations other than the persons, firms or corporations to whom the Trust has granted by lease or licence the use or occupation of the Market for the purpose of selling fruit, vegetables, farm products or flowers shall be guilty of an offence."

"17(2) No person shall bring into the Market or offer expose for sale therein, any goods other than goods authorised by the Act or approved by the Trust and any person so doing shall be guilty of an offence and shall be liable upon conviction to a penalty not exceeding Fifty dollars (\$50.00) for every such offence."

"17(3) No hawker or stall keeper shall sell any fruit or vegetables prescribed by the Act at any place located within a distance of 500 metres from the Market or any part thereof: Provided, however, that such prohibition shall not extend to any person who sells such prescribed fruit or vegetables on premises owned or leased by him."

By-law 20 reads:-

"20 A wholesaler, his agent or servant, or other person excepting a person delivering fruit, vegetables, farm products or flowers at the premises of any lessee of the Trust in the Market, shall not enter the Market prior to the time of opening the Market for trading except under a permit from the Authorised Officer, Such permit may be limited as to the times of entry and the period of issue and may be withheld, withdrawn or varied at any time by the Trust for good cause shown and if so withdrawn shall be surrendered forthwith to the Authorised Officer."

By-law 24(a) relevantly reads:-

"24(a)(1) Except as the Trust may from time to time determine in terms of section 16 of the Act and save as hereinafter provided a person shall not unload fruit or

vegetables or farm products or flowers in the Market except under and in accordance with the conditions of a permit in writing of an Authorised Officer."

"24(a)(2) The provisions of paragraph (1) of this By-law shall not apply to-

- (i) a person delivering from outside the Market fruit or vegetables or farm products or flowers for disposal in the Market, or any bona fide employee of such persons; or
- (ii) as regards fruit or vegetables or farm products or flowers consigned to a wholesaler who is a lessee of the Trust, such wholesaler or an employee of such wholesaler."

By-law 27 deals with "STORAGE OF PRODUCE" and it relevantly reads:-

"27(1) A person shall not place, stack or store any fruit vegetables, farm products or flowers or other articles of any description in or upon any area within the Market except in an area approved by the Trust for that purpose and subject to such charges and written terms and conditions as the Trust may at any time and from time to time determine

.....

(3) A person who contravenes or fails to comply with this By-law shall be guilty of an offence and liable on conviction to a penalty ..."

It is clear from the evidence before me that, so far as dealings with Supermarket Suppliers is concerned, the plaintiff, if he wishes to sell to Supermarket Suppliers is required by Supermarket Suppliers and Coles Supermarkets to enter the fruit and vegetable section of the markets each time he wishes to display sample flowers and then, if his flowers are selected by a Coles Supermarket employee he is required to enter a second time to deliver the ordered flowers to Supermarket Suppliers.

On the first of these occasions it can fairly be said that plaintiff is then offering the flowers for sale as well as soliciting orders for sale. He may also be fairly said to be exposing the flowers for sale (By-law 17(2)). By-law 24(a) does not apply to such an occasion though By-law 17, which expressly mentions "offering for sale flowers" is capable of applying. By-law 20 applies to prevent plaintiff entering the market to offer flowers for sale prior to the time of opening of the market except under a permit. There is no evidence that plaintiff has such a permit and in my view by-law 20 operates to prevent the plaintiff entering the market at a time other than the times allowed for members of the public to enter the Brisbane Market.

I add that while By-law 20 appears to except from its operation "a person delivering fruit, vegetables, farm products or flowers at the premises of any lessee of the Trust in the Market" that exception does not help plaintiff. In my view "premises of any lessee of the Trust" must be read distributively as meaning the premises of a lessee authorised to receive the fruit, vegetables, farm produce or flowers as the case may be. The evidence discloses that the fruit and vegetable section warehouse lessees are not authorised to accept delivery of flowers from any person other than a lessee of the flower market section of Brisbane Market.

There is no doubt that on the evidence before me would-be sellers of flowers to Supermarket Suppliers must come to Carter & Spencer's warehouse in the fruit and vegetable section to display their wares for Coles Supermarket's ensuing week. If they do not, then Supermarket Suppliers and Coles Supermarkets are not interested in buying their flowers. To this extent it can be fairly said that Coles Supermarkets, through their unique relationship and operation with Carter & Spencer dominate would-be sellers of fresh flowers. Although the times when would-be sellers displayed flowers were not stated I infer that those times were before the Brisbane Market opened to the public generally. If this inference is

not correct one wonders why the primary declaration sought is needed.

As to the second occasion when plaintiff would be required to enter the fruit and vegetable section of Brisbane Market, I find that the times of those occasions have been before the Brisbane Market opens to the public generally.

Coles Supermarkets are not interested in collecting flowers from 1 Abercrombie Street or any other place outside the Brisbane Market and the reason for this must be that Supermarket Suppliers and/or the owners of Coles Supermarkets do at the distribution point in the Carter & Spencer fruit and vegetable warehouse sort out, for transport and delivery from the warehouse to such of the 82 Coles Supermarkets as require them, the flowers bought by Supermarket Suppliers. Obviously it is much more convenient and cost effective to do this sorting out at the Supermarket Suppliers' distribution point rather than at 1 Abercrombie Street where the right to inspect and reject may well be lost or at least seriously prejudiced. When would-be flower sellers deal with Supermarket Suppliers and Coles Supermarkets it really is a case of Mohammed coming to the mountain.

As to the second occasion, By-laws 17(1) and (2), 20, 24 and 27 are capable of applying to that occasion.

I should say now that in my opinion the operation of By-law 20 is, on the evidence before me, sufficient to deny plaintiff the declaratory relief which he seeks.

Plaintiff is a member of the public - he has no tenancy rights in the flower market section of the Brisbane Market and the operation of By-law 20 prevents him entering the Brisbane Market prior to the time of opening the market for trading which time I have found is 9 a.m. on Mondays and Thursdays and 10 a.m. on Tuesdays, Wednesdays and Fridays. I note that as a member of the public who

purchases at the Brisbane Market he can buy only the minimum quantities (see By-law 18)

If I should be wrong in my view as to the effect of By-law 20 on the plaintiff's dealings at the Brisbane Market, I turn to By-law 17 which on its face applies to both occasions when plaintiff enters the market before public opening hours in his dealings with Supermarket Suppliers and applies whenever he enters the Brisbane Market before public opening hours to deliver flowers to other fruit and vegetable lessees such as Simon George & Sons Pty Ltd.

Mr Dutney submitted that by-law 17 should be construed on the basis that it is a penal provision and that it prevents outsiders delivering - as in the present case - other than to particular classes inside the Brisbane Market. He argued further that insofar as By-law 17 permitted delivery of flowers only to particular classes inside the Brisbane Market, By-law 17 imposed a limit on the common law right of a member of the public to enter the Brisbane Market. In my view this latter argument fails. As I have already said the right of the public to enter the Brisbane Market must be lawfully exercised and such lawful exercise can only occur at times when the defendant, who is obliged to maintain the market (s.16(1)) and who has power to regulate and govern the market (s.27(d)(x) and Part III of the By-laws) has specified the times when members of the public may lawfully enter the Brisbane Market. I point out by-law 23 which relevantly reads:-

"23. No person shall deliver fruit, vegetables, farm products or flowers at premises of any lessee of the Trust in the Market . . . except during such times as may be determined by the Trust from time to time."

By-law 17 creates an offence. The approach of the court to construing a penal provision is well known. In Beckwith v. R. (1976) 135 C.L.R. 569 at p. 576 Gibbs J. put it this way:-



"The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences . . . The rule is perhaps one of last resort."

If I were to make the declarations sought I would in effect be giving judicial approval to the commission of an offence. The language of By-law 17 is not ambiguous or doubtful.

Leaving aside the exception in the opening words of by-law 17(1) - there is no evidence of its application in this case - the language used shows clearly that By-law 17(1) applies to the plaintiff (who is not a lessee of the defendant for the purpose of selling by wholesale in the Market any flowers), when he enters upon the market for the purpose of offering for sale flowers to any of the lessees of the fruit and vegetable section at the Brisbane Market and when he enters upon the market for the purpose of delivering flowers to any of the lessees of the fruit and vegetable section of the Brisbane Market.

Plaintiff can only be saved from the operation of By-law 17(1) (apart from the exception in the opening words of that By-law) if the person firm or corporation to whom he offers to sell or to whom he delivers is a person firm or corporation to whom the defendant has granted by lease or licence the use or occupation of the market for the purpose of selling flowers.

There is evidence as to the warehouse leases for Carter & Spencer and Simon George and these show quite plainly that the areas to which the plaintiff has delivered and would deliver, are not areas which could lawfully be used for the purpose of selling flowers - nor can they be used for the purpose of selling fruit, vegetables or farm produce. There has been a practice - now recently approved

by a resolution allowing them to receive flowers into the warehouse premises, provided the consignors of those flowers is or are a lessee or lessees of the defendants flower market section - but that practice and resolution do not save plaintiff from the operation of By-law 17(1) against him.

It is unnecessary for me to decide whether or not plaintiff does commit an offence against By-law 17(1) every time he offers for sale or delivers flowers to Supermarket Suppliers. All I need say is that in my view By-law 17(1) does apply to the plaintiff. As to criminal responsibility that is another matter with which I am not here concerned.

In deference to counsel's arguments I mention also By-law 27 paragraph 1 of which I have already set out. There is evidence in the affidavit of Mr Taylor (ex.27) that the defendant does not allow flowers to be delivered to the fruit and vegetable section of the Brisbane Market and that in view of the enormous quantities of fruit and vegetables and other produce delivered to the Market each night, the defendant does not allow persons who do not carry on business from within the Brisbane Market to use the market as a drop off point or place of delivery as this causes a lot of inconvenience and creates problems in the receipt, unloading, sorting, stacking and delivery of fruit vegetables and other produce which is intended for delivery to wholesalers carrying on a business within the Brisbane Market.

The Brisbane Market fruit and vegetable section is operated by persons carrying on business as wholesalers. During limited hours these persons do sell direct to members of the public but are selling as wholesalers; minimum quantities of fruit, vegetables and farm produce are to be sold (By-law 18). Persons whom I shall call retailers of fruit and vegetables and flowers e.g. persons selling fruit and vegetables and flowers at places outside the Brisbane Market may obtain from the defendant a licence to trade in the market during a priority entry period (see

reg. 19 inserted 1/9/1983 - Government Gazette 3/9/1983 p.67). By-law 19 is obviously intended to permit such retailers to enter the Brisbane Market before the public is permitted to enter and there buy fruit vegetables farm produce or flowers as the case may be for the purpose of their retail businesses.

Obviously if the defendant allowed retail selling as well as wholesale selling of fruit and vegetables, farm produce and flowers to occur at the Brisbane Market at the same time chaos will reign. The general scheme of the City of Brisbane Market Act and its By-laws reposes in the defendant the power to regulate and govern the Brisbane Market.

In the plaintiff's case, the By-laws and Act and the times fixed by the defendant prevent him entering any part of the Brisbane Market other than at the times fixed for members of the public to enter.

The defendant has chosen by its resolution of 25/11/1992 (ex.9) to resolve that fruit and vegetable wholesaler lessees be granted approval to receive flowers into their leased warehouse premises only, provided the consignors of those flowers are lessees of the defendant's flower market and that the delivery from the fruit and vegetable wholesaler lessee's warehouse premises be effected outside the confines of the Brisbane Market.

In my view plaintiff does not gain any benefit under this resolution. I do not see the resolution as ultra vires..

I have concluded that the plaintiff is not entitled to either of the declarations he seeks. He is entitled to enter the Brisbane Markets at the same times as other members of the public can lawfully enter but beyond those times his entry is unlawful without an appropriate permit or licence issued in accordance with the relevant By-law.

Further, were I to grant the declarations sought, this Court would effectively be varying the terms of the lease agreements between the defendant and certain fruit and vegetable wholesaler lessees. In so doing, this Court would be over riding the discretion to consent to a variation of the use of the warehouse which discretion is vested in the defendant. As a matter of law I cannot do this (see Kofi Sunkersette Obu v. A. Strauss & Co Ltd (1951) A.C. 243 at 250 which was applied by Windeyer J. in Placer Development v. The Commonwealth ( 121 C.L.R. 353 at p.372)). Were I to grant the primary declaration sought I would also be fettering the future exercise of a discretion by the defendant (Cudgen Rutile (No. 2) v. Chalk (1975) A.C. 520 at 536.

I add that in my view the resolution, ex.9, cannot be construed as an exercise by the defendant of a discretion under certain leases to consent to a variation of the fruit and vegetable warehouse lease entitling the plaintiff to enter the Brisbane Market not only to offer to sell but to deliver flowers. The resolution in Exhibit 9 is limited to a consent to a variation entitling fruit and vegetable lessees (who are not identified) to receive and presumably store flower deliveries only from flower market tenants of the Brisbane Market. It is of general effect as opposed to specific effect only.

I add now that Mr Dutney argued that the defendant is estopped from now denying plaintiff his right to deliver flowers into the fruit and vegetable section of the Brisbane Market prior to the time of opening the market to public access. He argued that the defendant permitted the plaintiff, while the plaintiff was a tenant of the flower market section, to deliver flowers to Supermarket Suppliers and other lessees in the fruit and vegetable section without ever telling him that that right was limited to tenants of the flower market section. He further argued that this course of conduct led plaintiff to believe that when he ceased to be a tenant of the flower market section

he could still deliver flowers to Supermarket Suppliers and other fruit and vegetable lessees without any hindrance.

Essentially Mr Dutney argues for an estoppel by conduct of the defendant. In Waltons Stores (Interstate) Limited v. Maher (1988) 164 C.L.R. 387 the High Court discussed common law estoppel. At p.413 Brennan J. said:-

"The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to. ..."

On page 443 Deane J. spoke of:-

"... perhaps the clearest emanation of estoppel by conduct, namely, the principle which precludes departure from a representation or an induced assumption . . . of existing fact in circumstances where the party estopped has knowingly and silently stood by and watched the other party act to his detriment."

In Grundt v. Great Boulder Pty Gold Mines Ltd (1937) 59 C.L.R. 641 at pp.674-5 Dixon J. in speaking of estoppel in pais has said:-

"One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party

to adhere to the assumption upon which the former acted or abstained from acting."

It is said in the present case that the plaintiff acted to his detriment when he and his wife sold out to Baker's company their shares in Sunburst Flowers partnership one result of which was that plaintiff was then no longer a tenant in the flower market section of the Brisbane Markets. Lack of the tenancy no doubt does react to the plaintiff's detriment because, under the resolution of 25th November 1992 he can no longer deliver flowers to the fruit and vegetable lessees in the Brisbane Market.

There is no evidence from plaintiff that when he and his wife sold to Baker's company he believed that when no longer a flower market tenant he could still deliver flowers to the fruit and vegetable market lessees.

There is evidence that the plaintiff knew, before selling to the Bakers that the defendant allowed flower deliveries from flower market tenants to certain fruit and vegetable market lessees. The plaintiff in evidence was able to instance only one flower wholesaler who, coming from outside Brisbane Market, had delivered flowers to the warehouse premises in Brisbane Market. That wholesaler was Canungra Flowers. The defendant stopped Canungra Flowers from making such deliveries once it found out about them. Exactly when it stopped Canungra Flowers was not stated. According to plaintiff it was not until after he, plaintiff had obtained an interim injunction against the defendant in December 1992, that he found out that Canungra Flowers had been delivering to warehouses in the Brisbane Market. There is evidence that an injunction was obtained in late November but whether it was late November or December (as stated by plaintiff) is immaterial as plaintiff's knowledge of Canungra Flowers was gained after he ceased to be a flower market section tenant. I am well satisfied that plaintiff knew well before he ceased to be a tenant of the defendant's flower market section that the warehouse leases in the fruit and vegetable section of the markets contained a prohibition on storage of anything other than fresh fruit

and vegetables without the express permission of the Trust. Further, I find the plaintiff did not, while he was a lessee from the defendant enquire from any fruit and vegetable warehouse lessee whether the lessee had the defendant's permission to accept and store flowers.

I find that the defendant at no time ever represented to the plaintiff by its conduct that it would permit plaintiff, after he ceased to be a tenant of the defendant's flower market section, to enter the Brisbane Market at other than the times at which it was open to the public, to offer for sale and deliver flowers to a lessee of a warehouse in the fruit and vegetable section of the market. Plaintiff gains no help from knowledge first acquired in November or December 1992, of the Canungra Flower sellers because that was knowledge gained quite some time after he suffered his alleged detriment.

I have already stated my views about plaintiff's credibility. The circumstances of his obtaining the temporary pass through his father's business, such pass to operate apparently before he completed the sale to Baker's company, points to the plaintiff believing that he could still deliver to the fruit and vegetable market tenants but needed a special pass to do so. These circumstances do not indicate any belief in or reliance on what was the practice before he ceased to be a tenant of the flower market namely the practice of flower market tenants delivering flowers to fruit and vegetable market lessees.

As I have already said, there is not on the evidence before me, anything to suggest that the defendant by its officers or agents led plaintiff to believe that once he ceased to be a flower market tenant he could deliver flowers from outside the market to the fruit and vegetable lessees in the Brisbane Market at times when the market was not open to members of the public.

I leave aside plaintiff's attempt to obtain premises within the flower market section since an injunction was granted apparently in November or December last year.

Plaintiff was not a candid witness - his evidence in his affidavit to support the application for the interlocutory injunction in late November 1992 was misleading; he omitted to mention that he was a wholesaler of flowers and described himself as a flower grower and seller. He told me that when he got out of the flower marketing business on the sale to the Baker's company, his initial intention was to wholesale from the farm; in his affidavit he omitted to say that he was forbidden by the defendant only from delivering flowers to the lessees in the fruit and vegetable market. In the same affidavit to support the injunction application, he swore that he would lose \$4,000 worth of business each day and thereby gave the impression that that was \$20,000 for a five day week. In fact his delivery days were three days a week and he conceded in cross examination that the affidavit should possibly have read "each delivery day". On all the evidence I have not been satisfied that the estoppel claim has been made out.

I would add that the circumstances in which plaintiff came to sell to the Bakers were disclosed in a guarded fashion in evidence in chief. It was not until cross-examination had been completed that the full picture emerged and it then appeared that the dissolution of the partnership had indeed been heated with litigation resulting in offer and counter offer until finally a sale to Baker's company resulted. The evidence of the witness Yosef Mishteller a tree feller from Nanango was not helpful. On some occasions he brought flowers and flower arrangements to the Brisbane Market at about 5 am. He was not stopped at the main gate. He did not bring the flowers for sale in the Brisbane market as he had already sold them. He came to the market solely to find a truck driver to carry the flowers to his purchaser. Mishteller knew the plaintiff to whom he had on occasion supplied flowers or flower arrangements.

The claim for damages has not been pursued. I do not intend to make the declarations sought and because I am not



satisfied that there is any right to be protected by the injunction sought, the application for the injunction is also refused.

I dismiss the action. I shall hear from the parties on costs.