

SUPREME COURT OF QUEENSLAND

CITATION: *Lade & Co Pty Ltd & Ors v Black* [2007] QSC 385

PARTIES: **LADE & CO PTY LTD** ACN 010 109 369
(first plaintiff)
ROBERT HAROLD LADE and MAUREEN JOYCE LADE
(second plaintiff)
STEPHEN ROBERT LADE and KAMALA LADE
(third plaintiff)
v
DONALD JOHN BLACK
(defendant)

FILE NO/S: SC No 463 of 2004

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 14 December 2007

DELIVERED AT: Brisbane

HEARING DATE: 17, 18, 19 September 2007

JUDGE: de Jersey CJ

ORDER: **1. The proceeding is dismissed**
2. I invite submissions as to costs

CATCHWORDS: ANIMALS – TRESPASS BY ANIMALS – TRESPASS AND OTHER ACTIONS AT COMMON LAW – DAMAGES – where plaintiffs claim compensatory and exemplary damages for cattle trespass and negligence during periods in 2002 and 2005 – where cattle caused damage to plaintiffs’ sugar cane fields – where defendant neighbour denies cattle belonged to him – where plaintiffs allege trespassing cattle were the defendant’s, and were observed returning to defendant’s property – where other witnesses gave evidence that marauding cattle were not the defendant’s – where defendant’s breach of undertaking to prevent cattle straying onto plaintiffs’ lands previously established in 2005, and penalty imposed – where no compensatory damages claimed in respect of 2005 period – whether cattle trespassing on plaintiffs’ lands were owned or controlled by defendant – whether any damages payable

Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520, cited
Cox v Burbidge (1863) 13 CBNS 430, 438; 143 ER 171, 174, cited

Gray v Motor Accidents Commission (1998) 196 CLR 1,
cited

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118,
cited

XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd
(1985) 155 CLR 448, cited

COUNSEL: G M Egan for the first, second and third plaintiffs
G F Crow for the defendant

SOLICITORS: C J Cooper & Associates for the first, second and third
plaintiffs
Macrossan & Amiet for the defendant

Introduction

- [1] **de JERSEY CJ:** The plaintiffs claim damages for the torts of cattle trespass and negligence. The defendant disputes the existence in Queensland of the tort of cattle trespass.
- [2] The damages claimed include exemplary damages. The defendant disputes their availability, and in any event submits this would not be an appropriate case in which to award them. Because any compensatory damages would be comparatively small in amount, it would only be a substantial award of exemplary damages which could warrant the presence of the proceeding in this court.
- [3] The claim is based on damage caused by cattle straying into the plaintiffs' cane fields. Drought conditions meant the cane was attractive to the cattle. There is no doubt that, at the relevant times, cattle did trespass onto the plaintiffs' land, and cause damage. The issue is whether they were cattle owned by the defendant, an adjoining land owner, or under his control. The defendant says they were not.
- [4] In broad terms, the claim for exemplary damages is based on the defendant's failure to ensure his cattle did not trespass onto the plaintiffs' lands, notwithstanding repeated complaints from the plaintiffs over a long period. The plaintiffs relied on other supporting considerations, but that was the foundation of that part of the claim.
- [5] The trespasses in question occurred over two periods: between 1 October and 21 November 2002, and between 18 and 30 August 2005.
- [6] As to the latter period, the plaintiffs brought contempt of court proceedings against the defendant, for his alleged breach of an undertaking given to the court on 22 August 2005. The undertaking was to prevent cattle straying onto the plaintiffs' land. In that proceeding, in a judgment given on 9 November 2005 (*Lade & Co P/L and Ors v Black* [2005] QSC 325), Cullinane J found the breach established, declaring that the defendant had failed to prevent cattle from straying from his lands onto the plaintiffs' lands, and fined the defendant \$500 and ordered him to pay the plaintiffs' costs. The amount of those costs, which were paid, was approximately \$41,500 (transcript p 244 l 60).

- [7] His Honour found that the defendant's cattle trespassed onto the plaintiffs' lands over the period from 6.30 pm on 26 August 2005 until 7 am 30 August 2005. At the trial, I ruled that that gave rise to an issue estoppel in respect of that period (p 38 1 50).
- [8] It remains in this proceeding, in respect of the 2005 period, to consider whether the plaintiffs established trespass by the defendant's cattle, or negligence, in relation to the residue of the period, that is 18 August 2005 until 6.30 pm on 26 August 2005. That is not contentious.
- [9] The plaintiffs do not claim compensatory damages in respect of the 2005 intrusions of cattle onto their land. Paragraph 6A of the second further amended statement of claim, which foreshadowed a claim, was deleted by amendment. Therefore the residual significance of any finding of cattle trespass or negligence in 2005 (which must embrace the finding already made by Cullinane J), relates only to the claim for exemplary damages. The defendant disputes the availability of exemplary damages, and alternatively submits that the penalty imposed on 9 November 2005 in the contempt of court proceeding, and the substantial costs paid, militate against an award of exemplary damages.

Findings of fact

- [10] The layout of the plaintiffs' lands, and their relationship to neighbouring lands owned by the defendant and Mr Jochheim in particular, may conveniently be seen from the marked up aerial photograph, Ex 54.
- [11] As mentioned, there was abundant evidence of cattle trespassing onto the plaintiffs' lands during the subject periods. The critical issue is whether, apart from the period covered by the findings of Cullinane J, the plaintiffs have established on the balance of probabilities that the trespassing cattle were cattle owned or controlled by the defendant.
- [12] The principal evidence for the plaintiffs was given by Mr William Lade. He was supported by his brother Mr Robert Lade, and Mr Stephen Lade, who is Robert Lade's son.
- [13] Mr William Lade's emphatic evidence was that the cattle he observed on his property at the relevant times were the defendant's cattle, on most nights numbering 20 to 40 head. He said that he observed the cattle by the lights of his four-wheel drive vehicle. He relied importantly on his video, taken at night-time, converted into DVD form and being Ex 13, and also on his diary notes (extracted in Ex 10), which record frustratingly regular instances of trespass.
- [14] On the other hand, there is evidence from the defendant himself, and other witnesses, especially Mr Robert Holmes (known as Buddy), Mr Allan Lamont, Mr Evan McGhee, Mrs Mandy Jeppesen and Mr Kelvin Jochheim which, in varying ways and to varying strengths, suggests the marauding cattle were not the defendant's.
- [15] Considerable attention was given at the trial to the state of the fencing separating the plaintiffs' lands and the defendant's lands. Exhibit 41 is a video showing sections of the fence in deplorably insecure state, and obviously not cattle proof. Exhibit 11

includes photographs of fence breaks. There was much evidence to the effect that a fence of considerable strength is needed to prevent cattle minded to break through from doing so. Cullinane J found that cattle could enter “in a number of areas adjacent to each plaintiff’s lands” (para 32 reasons for judgment).

- [16] Yet the state of that fencing does not answer the question whose cattle broke through. Neither does the explanation offered by Mr William Lade, that the cattle he videoed (Ex 13) were the defendant’s cattle because “they went back to Mr Black’s property” (p 97 l 29). Tracks in and out of the defendant’s property, while relevant, are not definitive of ownership. (In that regard, see the evidence of Sergeant Harrigan at pp 132-133, and the evidence of Mr Webb at p 144 l 55 – p 145 l 20.)
- [17] The video Ex 41 was filmed in October 2005, so does not evidence the condition of the fencing in October/November 2002. It was uncontested that cattle had trespassed into the plaintiffs’ lands in August 2005, inferentially through this damaged fencing. The defendant’s response was to carry out a clean muster of his paddock adjoining the plaintiffs’ lands, and that solved the problem.
- [18] In all these circumstances, I do not consider the bad state of the fencing in October 2005, evident from Ex 41, particularly helpful to a determination of the position and what happened three years earlier in 2002.

Mr William Lade: the credibility of his evidence

- [19] A fair-minded observer at the trial would unhesitatingly accept that a serious question arose as to the credibility of Mr William Lade’s evidence. Mr Egan, who appeared for the plaintiffs, submitted I should not be overly critical of Mr Lade’s courtroom demeanour, and that I should see it as his response to being challenged in a “foreign and stressful environment”.
- [20] Mr Lade’s demeanour was often truculent, although the extent of his belligerence does not emerge from a reading of the paper record. He was aggressive when he gave the evidence recorded at, for example, pp 52 l 15, 53 l 30-40, 62, 71 l 33-35, 73-4, 75 l 18-35 and 99 l 1-5. He was unreasonably critical of cross-examining counsel (for example, at pp 95 l 15-20, 99 l 1-5). He was uncooperative, declining to do things reasonably requested of him (p 62 l 30-40). He was from time to time evasive.
- [21] No doubt Mr Lade has an utter conviction that the marauding cattle were the defendant’s. But the very manner in which he gave his evidence warrants one’s approaching that evidence with particular care.
- [22] There is a real question whether in particular respects Mr Lade did not seek deliberately to mislead the court. He was asked, for example, about an incident in late 2002 where he allegedly jumped out of his vehicle, while at the defendant’s property, and aggressively moved towards the defendant’s wife, yelling at her. He gave evidence that he “definitely” did not agree that happened (p 115 l 19). Yet Mrs Black’s contrary evidence was not challenged by the plaintiffs’ counsel (p 299 l 15-20), who went on in court to express a “full apology” on Mr Lade’s behalf. I gather Mr Lade was conceding his earlier denial was wrong. I accept that does not

warrant condemning all Mr Lade's evidence. But it illustrates a level of passion which may have blinded Mr Lade's objective recollection in some critical areas.

- [23] Another instance, although less glaring, concerned the possibility the intruding cattle were owned, not by the defendant, but by Mr Jochheim. The state of fencing between the various properties was, as mentioned, a matter of abiding relevance during the trial. Mr Lade's diary notes record, at entry 13 for 13 November 2002 (Ex 10): "Bud is doing fence on boundary between Black and Jochheim to try to stop cattle going round". When the possibility of Jochheim cattle entering the plaintiffs' land was raised, Mr Lade focused on the southern side of the plaintiffs' land, where, he said, Mr Jochheim's fences were "perfect" (p 21 l 20). See also pp 58 l 10 and 60 l 1-5. But as the diary entry shows, the questionable area was not to the south or the south-east, but to the north-west, as Mr Lade accepted (p 61), where the boundary was unfenced or substantially so. The obvious concern is that Mr Lade would be prepared to stretch and distort in order to advance a theory in which he firmly believed, although not necessarily susceptible of objective justification.
- [24] It is important, obviously, to look carefully to the way Mr Lade said he identified the intruding cattle, as having been the defendant's.
- [25] The plaintiffs' further and better particulars, document five in the bundle presented to me entitled "List of documents for judge", tied the plaintiffs' identification of the cattle to "clearly visible" ear tags. But Mr Lade's evidence was that he identified the cattle as being the defendant's, by reference to something different, namely, ear marks (p 33 l 55). See pp 95-97, where there was cross-examination on that discrepancy. Also, para 1(b) of the particulars refers to a clearly visible brand. Yet Mr Lade's evidence included no identification of the cattle seen in 2002 by reference to brand. It was challenges in this area which led to Mr Lade's statement that they were the defendant's cattle because they went back to the defendant's property (p 97 l 28) – to which I referred earlier. Identification of the marauding cattle is the substantial issue in this case. These features render Mr William Lade's identification evidence dubious.
- [26] The video Ex WL3 to Mr Lade's affidavit Ex 18, was an important piece of evidence. Mr Lade swore it was taken on 19 August 2005. It showed the defendant's cattle on the plaintiffs' land. The cattle are distinguished by the defendant's ear mark and brand, and by their being of a comparatively smaller cross-bred Brahman variety. That video provides an important vehicle for comparison or contrast with the cattle shown in Ex 13. The plaintiffs relied on Ex 13 as evidence of the cattle trespass in October/November 2002.
- [27] The evidence raised issues about Ex 13 (which is the video taken by Mr William Lade transposed to a DVD). Although Mr Lade relied on the exhibit for proof of the occurrence in 2002, he could not say when he filmed it (p 99 l 1-5), beyond reference to October/November 2002 (p 33 l 25). Even though some sixty still photographs were disclosed in November 2004, this video was not. Neither was it referred to in Mr Lade's diary, in which he would write up the events of the night before the following morning (p 19 l 40-60). Allowing for my other expressed reservations as to the evidence of Mr Lade, I am very doubtful whether I should accept as reliable his evidence that Ex 13 depicts events which occurred in 2002.

- [28] But even if it does, it does not support the plaintiffs' case. That is because it shows larger grey white pure/highbred Brahman cattle, which are unlike the defendant's. In that regard I accepted the evidence of the comparatively independent witness, Mr Evan McGhee (p 225 l 33). That creates a real difficulty for the plaintiffs, who relied substantially on Ex 13 as identifying the trespassing cattle as being the defendant's.
- [29] Mr Crow, who appeared for the defendant, contended that at the point one minute 22 seconds into the playing of the DVD Ex 13, the front beast has an ear tag, rather than an ear mark. If that is so, I am afraid my eyes could not pick it up, and I was told no further magnification or enhancement of the DVD was practicable. Mr McGhee said he noticed the defendant's ear mark was not on that cow (p 225 l 25). I am afraid I would not be confident in relying on that particular piece of Mr McGhee's evidence, but I do rely on Mr McGhee's firm evidence that the cattle shown in Ex 13 were not the defendant's, because of their build and breed. Mr Egan criticized Mr McGhee's evidence about the quality of fencing (see p 230 l 1-50), but that did not cause me to doubt Mr McGhee's overall credibility.

Evidence of Robert and Stephen Lade

- [30] Mr Robert Lade was aware of cattle getting into the Lade lands in late 2002, from near the bottom of the hill (p 191 l 50-60, and the diary entry for 30 October 2002 in Ex 42). That is the area of the unfenced boundary with the Jochheim land. Significantly, Mr Robert Lade conceded that cattle he saw on the Lade lands in October/November 2002 could have belonged to someone other than the defendant (p 194 l 8-18), although his primary evidence was that they were the defendant's cattle. His position seemed to be that if any cattle entered his land from the defendant's, they were the defendant's responsibility – regardless of ownership (p 194 l 15), which is plainly untenable.
- [31] Mr Stephen Lade's observations of the cattle in 2002 were limited to those made on 1 and 20 October that year (p 208 l 30). In his affidavit Ex 44, he identified them as the defendant's cattle. Generally I found Mr Stephen Lade's recollection vague. He had no recollection, independently of his statement, of the events of 2002 (p 209 l 1-8).

The balance of the evidence of identification of the straying cattle

- [32] Apart from the evidence of the defendant himself, to which I will come in due course – deferring my consideration because of his interest in the outcome, evidence bearing on whether the offending cattle were the defendant's, was given by a number of other witnesses, some comparatively independent, whose evidence I accepted.
1. I have already referred to parts of the evidence of Mr Evan McGhee. He worked on the defendant's property until June 2002. The comparatively independent Mr McGhee gave evidence of seeing cattle in the Lade lands on three occasions. He said he "snuck up, had a good look and then the three times I seen them none of them were Don Black's [the defendant's] cattle" (p 224 l 28). Their ear marks and brands were different (p 224 l 30). He described the defendant's cattle, as I have said, distinguishing them from those shown on Ex 13 (p 224 l 52).

2. Mrs Mandy Jeppesen, an agricultural scientist, gave evidence of an inspection of damage to the cane, carried out during the day on 26 March 2003. She then saw a small group of about 10 cattle in the Lade cane area. They were “very commonly seen within that property” (p 140 l 28). Mr William Lade, Mr Robert Lade and Mr Stephen Lade, together with her colleague Mr Bill Gibson, were all then present. There was no evidence identifying them as the defendant’s cattle, and the inference is they were not, especially in circumstances where in para 6 of his affidavit of 22 August 2005 (Ex 16), Mr William Lade swore there was no cattle trespass between November/December 2002 and August 2005. Mr Gibson was not called as a witness.
3. Mr Allan Lamont, a former employee of the defendant, gave evidence of assisting the defendant, in October/November 2002, to push a mob of at least 20-30 (p 284 l 15) cattle in the north-western area of the Lade lands back well into the Jochheim land over the hilly country (pp 283 l 45-55, 284 l 5, 11, 29). Mr Lamont was “not too sure” if they were Jochheim cattle, but they “definitely” were not the defendant’s (p 284 l 8). According to Mr Lamont, that ended the plaintiffs’ complaints about intruding cattle. The inference is that mob of errant cattle, lurking near the hilly country at the Jochheim boundary, was responsible for the incursions, and they were not the defendant’s cattle. There was no substantial boundary fencing separating the Jochheim and Lade lands in that area (p 284 l 38).
4. Mr William Lade gave evidence, which I did accept, that in late 2002, the defendant told him that the cattle getting into the plaintiff’s cane were Mr Jochheim’s cattle (p 64 l 45). Notwithstanding the defendant’s obvious interest in exculpating himself, that the defendant was responsive to Mr William Lade’s allegations in that way, is of some relevance. The significance of this is enhanced by my conclusion, referred to later, that the defendant was a credible witness.
5. Finally, there is the circumstance that the film presented by the plaintiffs, as depicting the cattle offending in October/November 2002, shows cattle which were not the defendant’s, as established by the evidence of Mr McGhee.

Access Jochheim land to Lade land

- [33] There was much evidence going to the question whether cattle from the Jochheim lands had a practicable means of access to the Lade lands. If they did, the contention that the offending cattle were Mr Jochheim’s, or cattle (other than the defendant’s) which passed through the Jochheim property, could gain some plausibility.
- [34] A large area in the north-western part of the Lade lands, and into the Jochheim and defendant’s lands, was not fenced, or not substantially fenced. The inference is that was the area where the mob, returned in late 2002, had been camping. Mr McGhee confidently rejected a suggestion the steepness of the terrain in that area would prevent cattle from moving from the Jochheim land over the hill to the Lade lands (p 231 l 11 to p 232, p 235). I accepted Mr McGhee’s evidence to that effect. There was a fence on the other side of the hill on Jochheim land, constructed in

about May 2001 (p 231 l 28). But as Mr McGhee said, it may have served to trap on the other side the cattle rounded upon in late 2002 and inferentially responsible for the night-time onslaughts (p 231 l 36). There were large areas of unfenced land through which cattle owned by Mr Jochheim, or others, or wild cattle for that matter, could have strayed onto the Lade lands.

- [35] As to the evidence of Mr Jochheim, called by the plaintiffs in rebuttal, which primarily concerned the construction of the stock proof fence on his land (see Ex 54), between February and April 2002, it nevertheless remained the position that there was no fencing between point Y (Ex 54) and the dam (near letter D on Ex 54) and no evidence of any fencing to the northern side, between point X and the intersection of the defendant's internal fence and the defendant's property boundary. See also the evidence of Mr McGhee at pp 230-231.

The defendant's evidence

- [36] Mr Egan submitted I would reject the evidence of the defendant who, he submitted, "contradicted himself". But I accepted the defendant's evidence. The defendant's denial of responsibility (which Mr Egan described as "slavish") was in a context where he had been repeatedly, and trenchantly, blamed and called to account by the plaintiffs. It was obviously important to look at his evidence in a calm and measured way, and to put to one side the sometimes passionate challenges levelled at him by the plaintiffs, who no doubt nevertheless firmly believed in their position.
- [37] Mr Egan criticised the defendant's explanation (p 257 l 15-55) for not constructing 'a brand new dividing fence', as expedient. The defendant had sold his property to purchasers who, he said, "don't need fences". I consider that to be a reasonable explanation.
- [38] The defendant's demeanour while giving evidence itself raised no credibility issue, by contrast with the case of Mr William Lade.
- [39] There was no particular improbability or implausibility about the defendant's evidence, and it gained some support from the evidence of the other, comparatively independent, witnesses called for the defence.
- [40] The defendant obviously has a strong interest in the outcome of the case. But it is significant that his denials of their being his cattle gained that degree of independent support. See, for example, the numbered paras 1, 2, 3 and 5 in [32] above.
- [41] Mr Egan described what the defendant said to Sergeant Harrigan on 13 November 2002 (Ex 27, p 2, para 6) as an "admission against interest", but significantly, the defendant made no admission the trespassing cattle were his, and raised other possibilities.
- [42] I did not accept the evidence of Mr William Lade, Mr Robert Lade and Mr Stephen Lade where it conflicted with the evidence of the defendant.

Other witnesses

- [43] I have not mentioned all of the witnesses who gave evidence. I did generally accept the evidence of those other witnesses, subject to the observations made in relation to particular witnesses mentioned above.

Conclusion

- [44] In the result, I am not satisfied, on the balance of probabilities, that the cattle which trespassed onto and damaged the plaintiffs' lands and crops in the year 2002 were cattle owned or controlled by the defendant.
- [45] As to the position in 2005, for the period 18 August 2005 to 26 August 2005, I am however satisfied that the defendant's cattle strayed onto the plaintiffs' land. The evidence of that is contained in the affidavits Ex 15, 16 and 18. On 19 August, 20 of the defendant's cattle strayed onto the first plaintiff's land; on 20 August, eight cattle; on 21 August, ten; on 22 August, two; and an indefinite number onto all of the plaintiffs' lands on 23, 24 and 26 August. It is the video Ex WL3 to Ex 18, taken on 19 August 2005, clearly showing the defendant's cattle, which warrants these findings, by contrast with the position in relation to 2002. There was no particular issue about this.

Matters of law

- [46] It is unnecessary for me to express conclusions on the disputed matters of law. But I will do so briefly in case the matter goes further.
1. I would proceed on the basis cattle trespass did, at these relevant times, exist as an independent tort in the State of Queensland. It involves liability in damages for loss caused by one's cattle straying, of their own volition, onto the land of another. See Fleming's Law of Torts 9th ed (1998), pp 395-6; Trindade, Cane, Lunney: Law of Torts in Australia 4th ed, (2007) p 649; Balkin and Davis: Law of Torts 3rd ed, (2004) para 15.1; *Cox v Burbidge* (1863) 13 CBNS 430, 438 (143 ER 171, 174); and the New South Wales Law Reform Commission Report on Civil Liability for Animals (report 8, 1970), paras 23-25. The tort may not survive further consideration post *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. But that depends on the view of an appellate, not trial, court or division.
 2. An award of exemplary damages could only be justified by a finding of "conscious wrong-doing in contumelious disregard of the plaintiff's rights" (*Gray v Motor Accidents Commission* (1998) 196 CLR 1, 9), which is plainly not established here. See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 461 and *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 136-143.

Provisional calculation of any compensatory damages

- [47] This is not a case where I need, or indeed could, provide a calculation of the damages I would have awarded, had I concluded that the alleged 2002 trespass of cattle of the defendant did occur.
- [48] The reason for that is uncertainty as to the alternative findings of fact which could be made. If, for argument's sake, some of the defendant's cattle were found to have entered the plaintiffs' lands in 2002, then most probably cattle belonging to others did as well. There would need to be a finding of the proportion of the marauding cattle owned by the defendant, as to which I could on that basis only speculate.

[49] Evidence going to the calculation of damages came from agronomists Mr Agnew and Mr Webb. I mention some problems attending that evidence, should the matter warrant further consideration in the event my findings of fact are disturbed.

1. Mr Agnew's report assumes it was only cattle of the defendant which damaged the plaintiffs' cane. Yet on the evidence of the defendant, Mr Lamont, Mr Holmes and Mrs Jeppesen, which I accepted, cattle not owned by the defendant were present from time to time. As mentioned, how would one determine the extent of the defendant's responsibility?
2. Mr Agnew's report is based on information given to him by the plaintiffs. But I am concerned that the plaintiffs did not in their evidence sufficiently verify that information. I would not regard the defendant as having waived an objection to the admissibility of the report in those circumstances.
3. There is discrepancy between the areas of damage on which Mr Agnew relied, which were estimates given to him by the plaintiffs, and areas actually measured, by reference to maps etc, by Mr Webb. The measured areas were less in extent than those estimated, so that reductions would be necessary.
4. There would also need be a deduction to allow for goods and services taxes.
5. The averaging process employed by Mr Agnew, in relation to production levels over the years 2001 to 2004, apparently did not take into account a number of variables which may have borne on the actual production in 2003, including rainfall, the availability of irrigation water, the impact of pests, management and record keeping. These were apparently not addressed, and Mr Agnew's approach is susceptible of criticism on the basis it is too broad and general.

Result

[50] The plaintiffs' claim in respect of the year 2002 is not established.

[51] As to 2005, no damages were alleged or claimed, so that the claims in both cattle trespass and negligence cannot succeed, in respect of any compensatory award. In light of my findings as to the events in 2002, with no liability attaching to the defendant, there could realistically be no arguable basis for an award of exemplary damages in respect of the cattle trespass in the year 2005. In any event, I would accept the defendant's submission that the fine imposed and costs ordered by Cullinane J on 9 November 2005, in the contempt of court proceeding militate against any separate award of exemplary damages. I note also that, the problem having arisen, the defendant quickly put a stop to it by the clean muster of the adjoining paddock.

[52] The proceeding is therefore dismissed. I invite submissions as to costs.