

# SUPREME COURT OF QUEENSLAND

CITATION: *Mowburn Nominees & ors v Palfreyman & ors* [2014] QSC 289

PARTIES: **MOWBURN NOMINEES PTY LTD (ACN 008 522 030)**  
**and VANROOK STATION PTY LTD (ACN 128 492 679)**  
**and INKERMAN STATION PTY LTD (ACN 111 342 495)**  
(applicant)  
v  
**RACHEL JANE PALFREYMAN BEING AN INSPECTOR UNDER THE STOCK ACT 1915**  
(first respondent)  
and  
**CHIEF VETERINARY OFFICER, DEPARTMENT OF AGRICULTURE, FISHERIES AND FORESTRY**  
(second respondent)  
and  
**CHIEF EXECUTIVE, DEPARTMENT OF AGRICULTURE, FISHERIES AND FORESTRY**  
(third respondent)

FILE NO/S: 10331 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 28 November 2014

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2014

JUDGE: Carmody CJ

ORDERS:

1. It is declared that the decision to place Quarantine Notice QGCP-01-2014, issued pursuant to s 14(1) of the *Stock Act 1915* on 6 May 2014 as amended at 10.41am on 5 November 2014 by the First Respondent to the first named applicant for a Quarantine Area, namely Lot 893 on CP FK2 and Lot 2457 on PH2043, Lot 2480 on SP254320 and Lot 2322 on SP254319 of Inkerman Station containing paddocks named Cattle Creek Paddock, Buffa Paddock and Gum Hole Paddock, is null and void of no effect.
2. The order of the court is that:
  - a. Leave be granted to amend the Originating Application by adding after “6 May 2014” the words and figures “as amended on 5

**November 2014;**

- b. Time be abridged for service of the Amended Originating Application;**
- c. The respondents pay the applicants' costs of and incidental to the application to be agreed or, if not agreed, assessed.**

**CATCHWORDS:** ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – whether notice issued under s 14(1) of the *Stock Act 1915* (Qld) was validly issued and subsequently amended – whether inspector held requisite state of mind under the section

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – TO GIVE OPERATION AND EFFECT TO ACT – whether a failure to identify a particular strain of stock disease in the *Stock Regulation 1998* (Qld) invalidated notice issued under s 14 of the *Stock Act 1915* (Qld)

*Stock Act 1915* (Qld) s 14  
*Stock Regulation 1998* (Qld)

*Briginshaw v Briginshaw* (1938) 60 CLR 336, cited  
*Calvin v Carr* (1980) AC 574, cited  
*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, cited

**COUNSEL:** C Hughes QC with M Plunkett for the applicants.  
M T Hickey for the respondents.

**SOLICITORS:** Emanate Legal for the applicants.  
Crown Solicitor for the respondents.

- [1] The second and third named applicants are live beef producers and exporters. They run cattle on two properties owned by the first and third named applicants – Vanrook and Inkerman Stations – near Normanton in the Gulf Country.
- [2] The respondents are departmental officials with shared responsibility for administering the *Stock Act 1915* (Qld) (“**the Act**”).
- [3] The applicants initiated these proceedings to resolve a conflict between their right to pursue commercial interests without needless or unauthorised State interference, on the one hand, and the respondents’ statutory duty to eradicate or control the spread of livestock diseases within the State, on the other.
- [4] At issue is the validity of a quarantine notice issued to the applicant on 6 May 2014 (as amended on 5 November 2014) by the first respondent in her capacity as a stock inspector. The notice has the practical effect of confining all the applicants’ stock to Vanrook and Inkerman Stations until the date of release. The acute problem this creates for the applicants is that they stand to incur potential losses of up to one-

quarter of a million dollars if they cannot get a thousand head of cattle to market before the wet season arrives later this month.<sup>1</sup>

### The statutory scheme

- [5] The intended objects of the Act are not stated but its implied overall purpose is to protect the biosecurity of the cattle industry in Queensland. The policy goals of the Act are achieved via the *Stock Regulation 1998 (Qld)* (“**the Regulation**”).<sup>2</sup> The Regulation sets out the measures for preventing, controlling and eradicating stock diseases within the State.<sup>3</sup> These measures include monitoring the importation or movement of stock from place to place, isolation of diseased or suspected animals and implementation of disease eradication programs.<sup>4</sup> As Chief Inspector, the third respondent is obliged to take reasonable steps to investigate suspected infections<sup>5</sup> and to take control action in accordance with specified standards and methods.<sup>6</sup>
- [6] Stock inspectors are conferred with limited statutory authority for the purpose of performing their statutory functions. Section 14(1) of the Act gives them express power linked with a mandatory duty to quarantine defined areas “...on being satisfied that ... stock is or is suspected to be infected.” Relevant definitions set out in schedule 2 of the Act include the following:
1. The term “stock” relevantly includes sheep and cattle.
  2. “Cattle” does not include sheep.
  3. “Infected” means infected with a disease.
  4. “Disease” includes a disorder or condition prescribed by regulation.
  5. “Diseased stock” means stock actually suffering from or infected with disease.
  6. “Infected stock” means diseased stock which, in the opinion of an inspector, have been exposed to the risk of infection with disease or the cause of disease within the last three months.
- [7] Johne’s disease is prescribed as a disease for stock in Queensland.<sup>7</sup> Johne’s disease is a gut disorder of herbivores including cattle and sheep as well as other domestic and wild ruminants that is caused by infection with mycobacterium avium paratuberculosis (Mptb) most commonly from ingesting dung when grazing. Mptb is a small, slow growing gram positive, acid fast bacillus characterised by granulomatous inflammation of the intestines and lymph nodes.<sup>8</sup> Once symptomatic in cattle (usually after a long gestation period of up to eight years) the disease causes wasting with diarrhoea and eventually results in death.<sup>9</sup>
- [8] There is a bovine (Bjd) and Ovine (Ojd) strand of Johne’s disease. Strain typing of tissue or faeces culture of the stock in question is the only apparent way of telling for sure whether and with which strain of Mptb stock is infected.<sup>10</sup> Bjd relevantly

<sup>1</sup> Affidavit of B M Pollock sworn 3 November 2014 at 2.

<sup>2</sup> *Stock Act 1915 (Qld)* s 48(1); sch 1.

<sup>3</sup> *Stock Act 1915 (Qld)* ss 30, 48; sch 1.

<sup>4</sup> *Stock Act 1915 (Qld)* schedule 1, ss 2(1), 9A.

<sup>5</sup> *Stock Regulation 1998 (Qld)* reg 43B(4).

<sup>6</sup> *Stock Regulation 1998 (Qld)* reg 43B(2)(a).

<sup>7</sup> *Stock Regulation 1998 (Qld)* Schedule 1.

<sup>8</sup> Exhibits DKR03, DKR04, DKR05 and DKR06 to the affidavit of D K Rendell sworn 29 October 2014.

<sup>9</sup> Affidavit of D K Rendell sworn 29 October 2014 at 2-3.

<sup>10</sup> See affidavit of D K Rendell sworn 29 October 2014 at [12].

affects cattle and is caused by type II – cattle (c) strain. Ojd is occasioned by a distinct type I – sheep (s) strain of the organism.<sup>11</sup> Infection with Bjd is confirmed, usually post mortem, by intestinal lymph node lesions.

- [9] When used in the Regulation Bjd means “the cattle strain of [Mptb]”.<sup>12</sup> There is convincing evidence that Mptb strains are host specific and rarely cross-infect other stock species. Thus separate programs were established for the State in 2004 to eradicate Bjd and Ojd.<sup>13</sup> The programs are carried out under different regimes.<sup>14</sup> Cattle and buffalo are a prescribed species for the risk of Bjd from the interstate transfer of stock.<sup>15</sup>
- [10] Bison (b) strain, a sub-group within type II of the bacteria capable of infecting cattle with a different IS1311 genotype base point distinguishing it from both cattle (c) and sheep (s) strains, was discovered in the US in 2001.<sup>16</sup> Neither the Act nor the Regulation mention bison (b) strain in connection with either Bjd or Ojd.

### The historical context

- [11] Bjd-infected bulls from Rokley Station near Rockhampton have been added to the applicants’ herd since 2000. A quarantine notice was issued to the applicants on 4 December 2012 for Vanrook Station on the basis that stock in that area was suspected of being infected with Bjd. The 2012 quarantine notice was released on 30 April 2014 within 10 weeks of Bjd caused by the bison (b) strain of Mptb being confirmed by laboratory testing of tissue samples from Vanrook Station bulls.<sup>17</sup> On 6 May 2014 (that is, within a week of the first quarantine notice being released) the applicant was issued with another quarantine notice for Vanrook Station and three lots on Inkerman Station by the first respondent
- [12] The applicants commenced and served these proceedings returnable on 6 November 2014 on receipt of the Rendell opinion. The first respondent amended the quarantine notice issued on 6 May 2014 by deleting “bovine Johne’s disease (Bjd)” and inserting “Johne’s disease” on 5 November 2014 (the eve of the hearing).<sup>18</sup> The making of the change is explained via hearsay information on the basis of clarifying confusion about the disease “...the suspicion of infection of which gave rise to the quarantine notice in the first place”.<sup>19</sup>
- [13] The applicants rely the uncontradicted professional opinion<sup>20</sup> of a veterinary consultant (the Rendell affidavit sworn in Victoria on 29 October 2014) to make out the proposition that the issue of the second quarantine notice is unsupported by

<sup>11</sup> Cf. *Stock Regulation 1998* (Qld) reg 19(3)(a).

<sup>12</sup> *Stock Regulation 1998* (Qld) Schedule 8.

<sup>13</sup> Affidavit of E M Fletcher sworn 5 November 2014 at [6]; *Stock Regulation 1998* (Qld) reg 43A.

<sup>14</sup> *Stock Regulation 1998* (Qld) reg 43B.

<sup>15</sup> *Stock Regulation 1998* (Qld) reg 19(3)(a).

<sup>16</sup> Exhibit DKR04 to the affidavit of D K Rendell sworn 29 October 2014.

<sup>17</sup> Affidavit of K V O’Neill sworn 29 October 2014 at [18]; Exhibit KVO-6 to the affidavit of K V O’Neill sworn 29 October 2014 at 27.

<sup>18</sup> Exhibit EMF-1 to the affidavit of E M Fletcher sworn 5 November 2014.

<sup>19</sup> Affidavit of E M Fletcher sworn 5 November 2014 at [8]-[9].

<sup>20</sup> Affidavit of D K Rendell sworn 29 October 2014 at [11].

evidence. The expert notes that the strain typing of tissue taken from one animal on the applicants' properties confirmed the presence of Mptb in a lymph node (but not in any intestinal or faecal culture) and that the laboratory analysis identified "bison strain".

### **The rival contentions**

- [14] The applicant argues that because the only "disease" affecting cattle recognised in Schedule 8 of the Regulation is Bjd (for which the generic Johne's disease is an inapt description) the affected bulls could not reasonably be "suspected to be infected" for s 14 purposes because they tested positive to bison (b) strain not the cattle (c) strain of Mptb. On this basis it was not open to the first respondent to reasonably form or hold an opinion on 6 May 2014 that the applicants' stock "is or is suspected to be infected" with a "disease" within the scope of the statutory scheme, that is Bjd. Consequently, a pre-condition to exercising the s 14 power was not met and as a result the quarantine notice is void ab initio and incapable of cure by amendment.<sup>21</sup>
- [15] The applicant's submission is based on the thesis is that if the legislature had intended the amendment to Schedule 8 of the Regulation in 2005 to include the bison (b) strain of Mptb as well as the cattle (c) strain of the organism it could, or should and would have unambiguously said so.
- [16] The respondents argue that, because it is mentioned in Schedule 1 to the Regulation, Johne's disease is a "disease" for the purposes of s 14 specifically and the Act generally. I prefer the respondents' analysis. Obviously, cattle can, as a matter of fact, be infected by both cattle (c) and bison (b) strain of Mptb. Whether this means that they have Bjd is uncertain but, in my opinion, the applicant places too much reliance on what the drafter would (or should) have known and intended when amending Schedule 8 to the Regulation in 2005 and ignores both the clear precautionary policy purposes of the legislation as well as the important preventative role of s 14 in achieving the overall purpose of the Act or Regulation in minimizing the risk of Bjd being introduced or spread in the State.
- [17] Accordingly the quarantine notice (as issued or amended) will be effective if the first respondent honestly and reasonably suspected as at 5 November 2014 that the applicants' stock was infected by a strain of the Mptb capable of infecting cattle with a form of Johne's disease, that is Bjd.

### **The validity of the notice**

- [18] Administrative functions must be performed for legitimate purposes and within the clear limits of the powers conferred. Special care must be taken to avoid the disproportionate use of power when the rights, interests and reasonable expectations of others are at stake.

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<sup>21</sup> *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; *Calvin v Carr* (1980) AC 574.

- [19] Section 14(1) of the Act has the dual purpose. First, it invests stock inspectors with a power and corresponding duty to act protectively of biosecurity interests “on being satisfied” that stock (in this case, cattle) is “suspected to be infected” with a disease (including Johne’s disease or Bjd). The section is plain enough about *what* is to be suspected but obscure as to *who* must hold the suspicion. It is necessary, in my view, for a stock inspector issuing a quarantine notice to merely be satisfied that the suspicion exists. Contrary to the apparent assumption of the parties, there is nothing to indicate that a stock inspector can only act under s 14 if he or she *personally* suspects that the stock is infected.
- [20] I take s 14(1) as requiring a stock inspector to have a defined state of mind (satisfaction of suspicion) as a pre-condition to exercising the s 14 quarantine power. Satisfaction of a suspicion of infection is, therefore, a jurisdictional fact. Thus the decisive question is: Did the first respondent issue the disputed quarantine notice “on being satisfied of a suspected infection of stock”? Satisfaction denotes a degree of persuasion. No degree of proof is specified in the Act or Regulation but in the context of this case, I think it means proof to a reasonable standard by adequate evidence having regard to the overall circumstances including the important statutory role the quarantine notice plays and the likely adverse consequences for the applicants’ of issuing it.<sup>22</sup> Facts sufficient to induce the requisite state of mind in a reasonable person must be apparent.<sup>23</sup> Irrespective of how easy the relevant standard of satisfaction may be to reach, mere speculation could not conceivably be a legitimate basis for issuing a quarantine notice.
- [21] No affidavit of the first respondent was read at the hearing. A Crown Law officer deposes on information and belief that the disputed notice was issued because “...the inspector (the first respondent) was *satisfied, by reference to her knowledge of previous infected cattle that had been identified at the property and the adequacy of testing methods subsequently implemented at that property, that, for the purposes of s 14(1) of the Act, stock in that area was suspected of being infected with Bovine Johne’s (Bjd) caused by [Mptb].*”<sup>24</sup> However, the nature and extent of the first respondent’s knowledge about the previous infection is not elaborated on.
- [22] Other information shows that the quarantine notice issued on 4 December 2012 was released on 30 April 2014 following samples from the Rokley bulls from Vanrook (not Inkerman) Station testing positive for bison (not cattle) strain Bjd in a screening on 13 February 2014.<sup>25</sup> The release was issued under the third respondent’s power on 30 April 2014. The release was served by the first respondent on the applicants at 9:35am on 6 May 2014. At 9:45am on the same day the third respondent issued and served the disputed notice.<sup>26</sup> It is unlikely that the Chief Executive of the Department released the area from quarantine lightly or contrary to the statutory objects. This is a significant probable fact that the first

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<sup>22</sup> Cf. *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

<sup>23</sup> Cf. in a search warrant context *George v Rockett* (1990) 170 CLR 104.

<sup>24</sup> Affidavit of E M Fletcher sworn 5 November 2014 at [8].

<sup>25</sup> *Ibid.*

<sup>26</sup> Affidavit of K V O’Neill sworn 29 October 2014 at [16]-17; Exhibit KVO4 to the affidavit of K V O’Neill sworn 29 October 2014 at 16; Exhibit KVO5 to the affidavit of K V O’Neill sworn 29 October 2014 at 18.

respondent seems to have either totally overlooked or ignored in deciding to issue the second notice.

- [23] It is unclear what is intended to be conveyed by the phrase “the *adequacy* of testing methods subsequently implemented at that property” but it is hard to see how the adequacy or otherwise of testing methods could affect the incidence or increase the risk of the disease being contracted or spread. There is no suggestion that the suspect cattle were showing any Bjd symptoms or had been in contact with infected cattle since the lifting of the 2012 ban. Nor is there is no apparent change in circumstance between the issuance of the notice on 6 May 2014 and its amendment on 5 November 2014 capable of satisfying the first respondent that the applicants’ cattle were suspected of being infected with Bjd.
- [24] The unexplained failure to provide direct evidence of the first respondent’s state of mind and process of reasoning when the quarantine notice was issued left an irreconcilable conflict between, on the one hand, what she is said to have said about what she thought and why, and on the other, the uncontroversial factual context in which the decision to issue the notice was made.
- [25] I find that issuing and amending the quarantine notice to the applicants on 6 May 2014 and 5 November 2014 respectively was an irregular exercise of statutory power and beyond jurisdiction. Neither exercise of statutory power was supported by sufficiently clear or cogent evidence capable of satisfying the first respondent that the applicants’ stock was or could reasonably have been suspected by the first respondent of being infected with either Bjd at the time of issue or Johne’s disease at the time of amendment. The (amended) notice is therefore incurably defective.
- [26] For this reason, it is declared that the decision to place Quarantine Notice QGCP-01-2014, issued pursuant to s 14(1) of the *Stock Act 1915* on 6 May 2014 as amended at 10.41am on 5 November 2014 by the First Respondent to the first named applicant for a Quarantine Area, namely Lot 893 on CP FK2 and Lot 2457 on PH2043, Lot 2480 on SP254320 and Lot 2322 on SP254319 of Inkerman Station containing paddocks named Cattle Creek Paddock, Buffa Paddock and Gum Hole Paddock, is null and void of no effect.
- [27] The order of the court is that:
1. Leave be granted to amend the Originating Application by adding after “6 May 2014” the words and figures “as amended on 5 November 2014”;
  2. Time be abridged for service of the Amended Originating Application;
  3. The respondents pay the applicants’ costs of and incidental to the application to be agreed or, if not agreed, assessed.