

CITATION:

*BJEK Pty Ltd as trustee for the EL & SL  
Fogarty Family Trust v Henbury Cattle  
Co Pty Ltd & Ors* [2019] NTSC 86

PARTIES:

BJEK PTY LTD as trustee for the EL  
AND SL FOGARTY FAMILY TRUST  
(ACN 105 399 675)

v

HENBURY CATTLE CO PTY LTD  
(ACN 169 887 629)

and

CROSS COUNTRY FUELS PTY LTD  
(ACN 080 235 927)

and

ANDERSON, Ashley Robert

and

FAR MANAGEMENT PTY LTD  
(ACN 065 559 613)

and

ROHAN, David

and

ANDERSON, Neville

TITLE OF COURT:

SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 59 of 2016 (21631761)

DELIVERED: 3 December 2019

HEARING DATE: 29, 30 and 31 January, 1 and 2 February,  
9 and 21 March, 29 and 30 August 2018

JUDGMENT OF: Kelly J

CATCHWORDS:

Torts – Conversion – Cattle – No evidence that defendants converted cattle belonging to the plaintiff

Determination of ownership of cattle noted as disputed in supervised drafts – Declarations made as to ownership of various categories of cattle

Equity – Equitable remedies – Injunction – Mandatory injunction seeking mustering of cattle on property – Alleged breach of Deed – Cattle previously mustered in accordance with Deed – Injunction refused

Torts – Conversion – What constitutes conversion generally – Counterclaim – Sale and delivery of two cattle for slaughter – Conduct substantially inconsistent with first defendants’ rights as owner – Plaintiff to account for proceeds of sale of cattle belonging to first defendant

Torts – Conversion – What constitutes conversion generally – Counterclaim – Plaintiff retained 18 retained cattle belonging to the first defendant following a draft – Retention deprived defendant of use of cattle – Retention allowed cattle to contribute to herd of plaintiff rather than herd of defendant – Conduct substantially inconsistent with first defendants’ rights as owner – Plaintiff converted the cattle - Plaintiff to account for proceeds of sale – Alternatively to pay damages of the value of the cattle

Torts – Conversion – What constitutes conversion generally – Counterclaim – Wandering cattle and offspring – Proof on balance of probabilities concerning origin of cattle – General evidence concerning cattle behaviour – Expert evidence concerning natural increase – Factual findings made – Judgment for defendants – Plaintiff to pay damages for conversion of 1,500 cattle

*Evidence (National Uniform Legislation) Act 2011 s 97*

*Penfolds Wines Pty Ltd v Elliott* [1946] HCA 46; 74 CLR 204, applied

*Kuwait Airways v Iraqi Airways* [2002] 2 AC 883, followed

*Johnstone v Kaine* (1928) 23 Tas LR 43, referred to

**REPRESENTATION:**

*Counsel:*

Plaintiff:	A Harris QC with N Floreani
Defendants:	P Franco QC

*Solicitors:*

Plaintiff:	Gardiner & Associates
Defendants:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Kel1915
Number of pages:	95

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*BJEK Pty Ltd as trustee for the EL & SL Fogarty Family Trust v Henbury  
Cattle Co Pty Ltd & Ors* [2019] NTSC 86

No. 59 of 2016 (21631761)

BETWEEN:

**BJEK PTY LTD as trustee for the EL  
AND SL FOGARTY FAMILY TRUST  
(ACN 105 399 675)**  
Plaintiff

AND:

**HENBURY CATTLE CO PTY LTD  
(ACN 169 887 629)**  
First Defendant

AND:

**CROSS COUNTRY FUELS PTY LTD  
(ACN 080 235 927)**  
Second Defendant

AND:

**ASHLEY ROBERT ANDERSON**  
Third Defendant

AND:

**FAR MANAGEMENT PTY LTD  
(ACN 065 559 613)**  
Fourth Defendant

AND:

**DAVID ROHAN**  
Fifth Defendant

AND:

**NEVILLE ANDERSON**  
Sixth Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT  
(Delivered 3 December 2019)

## Introduction

- [1] The plaintiff, BJEK Pty Ltd (“BJEK”) owns and operates Palmer Valley Station (“Palmer Valley”) south of Alice Springs.<sup>1</sup> The directors and shareholders of BJEK are Edward Lloyd Fogarty and Sheri Lynne Fogarty. (BJEK, Edward Fogarty, Sheri Fogarty and their related entities are referred to as “the Fogartys” except where it is necessary to differentiate amongst them.)
- [2] The neighbouring property, Henbury Cattle Station (“Henbury”) is owned by Henbury Holdings Pty Ltd (“Holdings”).<sup>2</sup> The first defendant, Henbury Cattle Co Pty Ltd (“HCC”) conducts a cattle station enterprise on Henbury.<sup>3</sup> The current shareholders of HCC are the second, third and fourth defendants and Roy Anderson. The directors are the third, fifth and sixth defendants.<sup>4</sup> (The defendants are referred to as “the Andersons” except where it is necessary to differentiate amongst them.)
- [3] In 2014 BJEK, together with E and S and K Fogarty as trustee for EL & SL Fogarty Superannuation Fund, Edward and Sheri Fogarty as trustee for Tressa Vale Trust and Edward Fogarty, Sheri Fogarty and Kristy Fogarty

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1 Plaintiff’s amended statement of claim [1]

2 Plaintiff’s amended statement of claim [3]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [3]

3 Plaintiff’s amended statement of claim [2]

4 Defendants’ further amended defence and second further amended counterclaim 24.05.18 [2]

agreed with the second, third and fourth defendants to acquire Henbury.<sup>5</sup> To this end they incorporated Holdings and HCC.

- [4] Palmer Valley is directly south of Henbury. Palmer Valley and Henbury share a boundary. At the time the Fogartys and the Andersons acquired Henbury, the Fogartys also owned and operated Mt Ebenezer Station (“Mt Ebenezer”). The Fogartys sold Mt Ebenezer in January 2015. Before it was sold, during the latter part of 2014, Mt Ebenezer was destocked. Mt Ebenezer is southwest of and shares a boundary with Palmer Valley. It does not share a boundary with Henbury. (Part of a pastoral map of the Northern Territory, published by the Northern Territory Cattlemen’s Association showing the location of the three stations is annexure 1 to this judgment.)
- [5] The Fogartys also own and operate Tressa Vale Station, east of Tamworth in NSW.
- [6] At the time of the acquisition of Henbury by Holdings there were no cattle on Henbury.<sup>6</sup> In order to facilitate the establishment of the cattle herd on Henbury, BJEK sold Palmer Valley and Mt Ebenezer cattle to HCC. The Fogartys also delivered a substantial number of other cattle in the course of stocking Henbury, as their equity share in HCC was obtained through a payment of both cash and cattle. Those cattle came from Palmer Valley and

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5 Plaintiff’s amended statement of claim [5]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [5]

6 Plaintiff’s amended statement of claim [9]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [9]

Mt Ebenezer. (Cattle from Palmer Valley and Mt Ebenezer delivered to Henbury are referred to as “the sale cattle”).<sup>7</sup>

- [7] Stock was also purchased for Henbury from Anningie Station and Lucy Creek Station from third parties. This proceeding concerns a dispute about the ownership of cattle on Henbury which originated from Palmer Valley and Mt Ebenezer; as well as stock said to have wandered from Henbury onto Palmer Valley (and Palmer Valley onto Henbury) which, it is alleged, were not returned.
- [8] There are a number of ways of marking, identifying and tracking cattle. First, each station has a registered brand and cattle are branded with the station brand when they are first mustered. Second, each station has a distinctive pattern of earmarks in which different shapes are cut out of the animal’s ear. This enables the cattle to be identified from a distance when the brand may not be easily visible.
- [9] Third, there is a cattle identification and tracking system operating across Australia, known as the National Livestock Identification System (“NLIS”). It operates by way of electronic reading and storing of information on an electronic identifier called an NLIS device or button. Each station is allocated a Property Identification Code (“PIC”). An NLIS button coded

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<sup>7</sup> Plaintiff’s amended statement of claim [10]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [10]

with the station's PIC is inserted into the animal's ear.<sup>8</sup> A 'read' of an NLIS button is then loaded up in a central database maintained by NLIS. A 'read' of the NLIS button generates various warnings and notifications to relevant PICs. An animal which has been sold may be transferred from one PIC to another on the NLIS system. The NLIS allows extraction of the data in various forms (some of which appears as evidence in this proceeding).

- [10] There is a protocol associated with the NLIS system under which, if a station owner finds wandering stock which belong to a different PIC, they are supposed to insert an orange NLIS button in the animal's ear recording the animal as having been on that station. The owner should then be notified and the animal or animals returned. The purpose of this is to track the movement of the cattle.
- [11] The NLIS system also records when cattle are sold for slaughter and which abattoir they are sent to.
- [12] Fourth, animals may be marked and identified by the insertion of "tags" into their ears. These are chiefly used for station management purposes.
- [13] Cattle delivered to Henbury from Palmer Valley and Mt Ebenezer would have been branded with the Palmer Valley and Mt Ebenezer brands.<sup>9</sup> In order to distinguish between sale cattle and cattle which remained the property of Palmer Valley or Mt Ebenezer, the parties agreed that a red or

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<sup>8</sup> The NLIS button is intended to record the station on which the animal is born and then provide a means of tracing the movement of the animal.

<sup>9</sup> except for previously un-mustered calves and any "cleanskins" which had previously escaped muster



purple floppy plastic ear tag would be inserted in the near side ear of each of the sale cattle before they were trucked to Henbury.<sup>10</sup> (For ease of reference, these will all be referred to as “red” except where there is a need to distinguish between the two colours.) There is a dispute in this proceeding as to how far this protocol was adhered to.

[14] Relations between the Fogartys and the Andersons irretrievably broke down in the later part of 2015, culminating in an incident between Mr Fogarty and Ashley Anderson on 14 August 2015. As a result, the Fogartys and the Andersons decided that they no longer wished to own Henbury together or to conduct a cattle station enterprise on Henbury together,<sup>11</sup> and by Deed of Settlement made on 11 December 2015 (“the Deed”)<sup>12</sup> the Fogarty interests transferred their respective interests in Holdings, Henbury Unit Trust and HCC to the second, third and fourth defendants.<sup>13</sup>

[15] Clause 3.6 of the Deed provides:<sup>14</sup>

3.6 The parties acknowledge and agree that:-

- (a) A muster is likely to commence on Henbury Station in or about March 2016 (but must commence no later than 30 April 2016);

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**10** Plaintiff’s amended statement of claim [11]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [11]

**11** Plaintiff’s amended statement of claim [16]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [16]

**12** See Defendants’ further amended defence and second further amended counterclaim 24.05.18 [17](b) – by separate purchase agreement.

**13** Defendants’ further amended defence and second further amended counterclaim 24.05.18 [17]; cf Plaintiff’s amended statement of claim [17]

**14** Plaintiff’s amended statement of claim [24]; Defendants’ further amended defence and second further amended counterclaim 24.05.18 [24]

- (b) On each occasion prior to processing and drafting commencing on Henbury Station, the Anderson Interests will provide not less than 48 hours prior notification by station two way radio or landline telephone of the drafting to the Fogarty Unit Interests, and the Fogarty Unit Interests may send a representative to Henbury Station (that representative being any person other than Edward Fogarty) to identify and remove any cattle owned by Palmer Valley at its own cost;
- (c) The Anderson Interests will use all reasonable endeavours to transfer from the Palmer Valley PIC (Property Identification Code) to the Henbury Station PIC those cattle owned by Henbury Station by 30 September 2016.

[16] The Andersons undertook four drafts of Henbury Station in the first part of 2016 pursuant to this protocol, which proceeded without incident. Things went awry on the fifth draft in June 2016. The Andersons held a muster and draft on 16 and 17 June 2016 without notifying the Fogartys. The Andersons say that they did so because Mr Fogarty went on to Henbury in contravention of the terms of the Deed. (This was the subject of correspondence between the parties' solicitors.)

[17] The Fogartys found out about the muster and the drafts. They called the local stock agent, Mr Eagleson, who told them that there had been a draft on Henbury Station and that some Palmer Valley cattle had been identified by Mr Eagleson and had been separated off. As a result, Mrs Fogarty went to Henbury Station with an employee, Ken Paige, on 22 June 2016, to ask about what had happened and also get the Palmer Valley cattle back.<sup>15</sup>

[18] Mrs Fogarty asked Ashley Anderson why no notice had been given to the Fogartys about the Palmer Valley cattle in their yard. She was told that

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**15** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [36] and [37]

someone had mustered Middleton Ponds and collected a load of cattle (including Palmer Valley cattle), which had then been moved to Orange Creek Station and picked up from there.<sup>16</sup> Cattle which had been collected from Orange Creek had orange NLIS buttons inserted in their ears in accordance with the protocol described at [10] above.

[19] Mrs Fogarty and Ken Paige then left Henbury to get a truck from Palmer Valley to pick up the Palmer Valley cattle. When she returned later that afternoon, Mrs Fogarty formed the view that someone had tampered with the ear tags on the cattle. (Details of her evidence in relation to this are set out at [36] to [45] below.)

[20] On the basis of the observations she had made, Mrs Fogarty formed the view that the Andersons had:

- (a) failed to notify the Fogartys of the June muster and draft so they could steal some of their cattle;
- (b) secreted a big black bullock she had seen earlier in order to steal it; and
- (c) tried to pass Palmer Valley cattle off as sale cattle by removing the orange NLIS buttons and inserting red floppy tags in the hole in the offside ear. (The agreement for marking sale cattle was for a red or purple floppy tag to be inserted into the near side ear.)<sup>17</sup>

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**16** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [51] to [66]

**17** The near side ear is the beast's left ear (ie the ear on the right if you are facing the animal); the offside ear is the right ear (ie on the left if you are facing the animal).

[21] Mrs Fogarty told Ashley Anderson to stop the draft so that the stock squad could be called to sort it out.<sup>18</sup> They agreed that all the stock would be held on feed and water and arrangements would be made for the Department of Primary Industry and police to be advised.<sup>19</sup> At Mrs Fogarty's request, the cattle were redrafted into three yards, one for Henbury, one for Palmer Valley and one for disputed cattle.<sup>20</sup>

[22] Mrs Fogarty reported her suspicions to the police and arrangements were made for a draft to be conducted in the presence of police and a representative of the Department of Primary Industries ("DPI") on Saturday 25 June.

[23] Mrs Fogarty went back to Henbury on 25 June and a draft was conducted by Greg Crawford from the DPI. He allocated cattle according to brand and separated out those that were disputed. As I understand it, these disputed cattle were arbitrarily allocated to either Henbury or Palmer Valley on an interim basis according to the toss of a coin and records kept of the brand and tags on each animal. (The defendants claim that 18 of the cattle allocated to Palmer Valley on that basis belonged to Henbury.)

[24] Mrs Fogarty called Alice Springs police and provided a statement over the phone.<sup>21</sup> On the basis of the allegations set out in the police statement and

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**18** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [110]

**19** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [111]

**20** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [101]

**21** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [114]

the first affidavit of Mrs Fogarty, the Fogartys instituted these proceedings and applied for and obtained an injunction restraining the Andersons from mustering and drafting cattle off Henbury except in the presence of representatives of the plaintiff (who must not be Mr Fogarty) and, initially, representatives of the police and DPI. (An interim injunction was granted on 12 July 2016 and an interlocutory injunction on 12 August 2016.)<sup>22</sup>

[25] Subsequent drafts proceeded according to this protocol at which cattle were called for Henbury, called for Palmer Valley or noted as “disputed”. The totals over the 2016 and 2017 musters and drafts were:

- (a) 508 head belonging to Palmer Valley which were returned to Palmer Valley;
- (b) 307 head of cattle which were “disputed”,<sup>23</sup> and
- (c) the balance which were called for Henbury.<sup>24</sup>

The disputed cattle have Palmer Valley or Mt Ebenezer brands with red floppy tags in the offside ear, or white floppy tags or no tags in their ears.

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**22** Thereafter the proceeding had a long drawn out history. Pleadings were filed and served and amended many times. The final amended pleading was filed and served on 24 May 2018. Hearings were held in a number of tranches in 2017 and 2018, finishing on 29 August 2018. Directions were given for the filing and service of written submissions. Again, by consent, a number of extensions of time were granted. The final submissions were filed on 10 December 2018.

**23** Exhibit P4, affidavit of Sheri Fogarty sworn 02.11.17 [16]. I cannot reconcile this with the numbers of cattle said, in submissions, to be in each disputed category. However, that does not matter since I am considering the claims and counterclaims by category.

**24** These figures have been taken from paragraph 16 of the Fourth Affidavit of Sheri Fogarty sworn on 02.11.17. (The plaintiff’s closing submissions at [28] give the figure for returned stock as 598. This is presumably a misprint.) In the defendants’ closing submissions they say 568 cattle were returned after March 2015 and agree that 508 were returned since the deed on 11 December 2015 (that is to say in the 2016 and 2017 musters).

## **The issues**

[26] In written submissions<sup>25</sup> the plaintiff summarises its claims against the defendants in the following terms:

- (a) damages for breach of Deed;
- (b) damages for conversion;
- (c) delivery up of the Fogartys' cattle;
- (d) damages for detention of the Fogartys' cattle; and
- (e) a mandatory injunction compelling the Andersons to completely muster the cattle on Henbury, which mustering and drafting is to be supervised and overseen by a representative or representative of the Fogartys.

[27] In those submissions, the plaintiff submits that the resolution of this proceeding depends on a consideration of the following identified as "critical issues":

- (a) the incident between Ted and Ashley on 14 August 2015;
- (b) the construction of clause 3.6 of the Deed;
- (c) the protocol adopted for calling for cattle at the first four drafts;
- (d) the ownership of the disputed cattle; and
- (e) the ownership of other cattle present on Henbury.

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**25** Plaintiff's closing submissions [32]

[28] I disagree. The “incident between Ted and Ashley on 14 August 2015” is not relevant to any issue in the proceeding. I refused to admit evidence of it,<sup>26</sup> and I decline to take evidence of this incident into account. The plaintiff contends that one can infer from “the incident” that Ashley Anderson had deliberately knocked down a fence on a previous occasion in order to steal Palmer Valley cattle which are not the subject of this proceeding (though the affidavit contains no direct evidence to this effect);<sup>27</sup> and that one can infer from that, that he is likely to have stolen the cattle the subject of this proceeding. No tendency notice was served pursuant to s 97 of the *Evidence (National Uniform Legislation) Act 2011*, and the plaintiff’s submissions do not make any logically compelling argument for admitting the evidence.

[29] The construction of the Deed is relevant only to the claim for a mandatory injunction and not to the primary issues for determination in the case. (It will be discussed below under the determination of the claim for a mandatory injunction.)

[30] The protocol adopted for calling the cattle at the first four drafts after the entry into the Deed, is a relatively minor evidentiary issue which may assist

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**26** The ruling refusing leave to adduce this evidence can be found in transcript 20.11.17, p 7. This evidence was contained in an affidavit of Edward Fogarty (labelled “Fourth Affidavit”) sworn on 20.11.17. Leave to rely on it on that date was refused. During the next tranche of proceedings, on 29.01.18, that affidavit was tendered without objection, without reference to the earlier ruling, along with a fifth affidavit of Mr Fogarty (also labelled “Fourth Affidavit”, possibly because of the earlier ruling) dated 14.01.18 and Mr Fogarty’s three previous affidavits. (Transcript 29.01.18, p 68)

**27** Even if I were to admit the evidence, it would not assist the plaintiff’s case. The matters it deposes to do not support an inference that Ashley Anderson deliberately knocked down a fence in order to steal cattle.

in the resolution of the ownership of the disputed cattle, as distinct from a central issue in the case.

[31] I agree that a crucial issue in the case is the ownership of the disputed cattle.

[32] I presume that the reference to “the ownership of other cattle present on Henbury” is a reference to the plaintiff’s claim that there were between 800 and 1,500 head of Palmer Valley cattle on Henbury at the time of making the Deed, and that some of those cattle are still present on Henbury (as against the defendants’ estimate that there were, at most, 600 Palmer Valley cattle on Henbury at that time).<sup>28</sup> I agree that that is an issue for determination in the case, although, as explained at [126] to [128] below, this claim was not pursued in the plaintiff’s final submissions.

[33] The categories of cattle which are in contention in these proceedings are as follows.

(a) Cattle claimed by the plaintiff

(1) cattle in “the Orange Creek mob”;

(2) cattle classed as “disputed” in the 2016 and 2017 drafts after 22 June 2016 consisting of:

- 144 cattle with a red floppy tag in the offside ear,

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<sup>28</sup> Defendants’ further amended defence and second further amended counterclaim 24.05.18 [18]



- 110 cattle with a white floppy tag in the nearside ear,
- 12 Mt Ebenezer branded cattle without floppy tags,
- 4 Palmer Valley branded bulls without floppy tags,
- 4 Palmer Valley branded steers with the backs of floppy tags only;

(3) 28 cattle sent to Tongala Abattoir by the defendants in June 2016;

(4) other unidentified un-mustered cattle on Henbury.

(b) Counterclaims by the defendants

(1) 18 cattle arbitrarily allocated to the Fogartys on an interim basis during the draft organised by Mr Crawford on 25 June 2016;

(2) 2 “Lucy Creek” cattle (belonging to the first defendant) sold by the plaintiff;

(3) other unidentified cattle on Palmer Valley consisting of:

- “at least” 50 Henbury cattle which Mr Fogarty admits have wandered onto Palmer Valley, and
- 1,807 cattle said to have wandered onto Palmer valley from Henbury based on expert opinion evidence. (This includes the admitted 50.)

[34] I intend analysing the evidence in the case, and making findings of fact under the headings of the different categories of cattle which are in dispute, in the order listed above, beginning with that category of cattle which led to these proceedings being initiated and the interlocutory injunction being granted, and which were referred to in submissions as “the Orange Creek mob”. These are the cattle referred to in paragraphs [18] and [19] above.

### **Evidence and fact finding (plaintiff’s claims)**

#### **(1) The Orange Creek mob**

[35] The first category of disputed cattle consists of those cattle which Mrs Fogarty says she saw on Henbury on 22 June 2016.

#### Evidence relied on by the plaintiff

[36] The plaintiff relies on the evidence of Mrs Fogarty, who said that when she went to Henbury with her employee Ken Paige on Wednesday 22 June 2016, she saw 40 to 50 animals, most of which had Palmer Valley earmarks and orange NLIS tags.<sup>29</sup> She said that among those cattle she saw one big black bullock and a big fat broken baldy cow both of which had Palmer Valley brands and earmarks and an orange NLIS tag indicating that they were Palmer Valley animals that had strayed off Palmer Valley.<sup>30</sup>

[37] There is no dispute that these animals came from Orange Creek Station. A muster had been conducted on Middleton Ponds Station. A load of cattle

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**29** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [39] and [40]

**30** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [46] and [47]

which did not belong to Middleton Ponds (including some Palmer Valley cattle), was moved to Orange Creek Station and picked up from there by Ashley Anderson. They were given orange buttons as stock that did not belong on Orange Creek in accordance with the NLIS procedure referred to above. No explanation has been given as to why the proprietors of Middleton Ponds did not notify the Fogartys instead of the cattle being moved to Orange Creek and then Henbury. That is of no relevance to any issue in this proceeding, but it appears to have aroused a deep suspicion in Mrs Fogarty that there were dishonest dealings afoot.

[38] After the conversation with Ashley Anderson on 22 June 2016, referred to at [18] above, Mrs Fogarty and Ken Paige left Henbury to get a truck from Palmer Valley to pick up the Palmer Valley cattle. She returned with a truck later that same day to collect the cattle.

[39] Mrs Fogarty swore in her first affidavit that when she first went to Henbury on 22 June 2106:

(a) she saw a yard of mixed cattle and ‘would say there were 40 to 50 animals in there’;<sup>31</sup>

(b) most of these appeared to have Palmer Valley earmarks and orange

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**31** Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [39]

NLIS tags<sup>32</sup> and among these was a big fat broken baldy cow and a big black bullock.<sup>33</sup>

[40] She deposed that when she returned later that afternoon, most of the animals (including the big fat broken baldy cow) appeared to have had the orange NLIS tags removed. They now had no NLIS tag. In their place were red floppy tags. These were in the offside ear.<sup>34</sup> The big black bullock was missing.

[41] In her third affidavit, Mrs Fogarty deposed:

I believed, based on what I had observed, that the orange NLIS buttons had been deliberately ... removed and replaced with red floppy tags.<sup>35</sup>

[42] Mrs Fogarty returned to Henbury on Saturday 25 June 2016 for the draft supervised by Mr Crawford of DPI. On that day, she made a handwritten record noting the numbers of cattle matching certain descriptions. That note records that she saw three animals that met the description of having a Palmer Valley earmark, no orange NLIS button, and a red floppy tag in the offside ear – not 30 to 38 or most of a mob of 40 to 50 animals.<sup>36</sup>

[43] It was pointed out to Mrs Fogarty in cross-examination that her version of events was contradicted by the handwritten record she had made on Saturday

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32 Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [40]

33 Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [46]

34 Exhibit P1, affidavit of Sheri Fogarty sworn 06.07.16 [92] and [93]

35 Exhibit P3, affidavit of Sheri Fogarty sworn 04.07.17 [49.3]

36 Elsewhere in her evidence she refined that estimate to 30 to 38 animals.

25 June.<sup>37</sup> She was asked to explain the discrepancy and she replied, “It’s because these aren’t the same cattle I saw on the Wednesday that I saw on the Saturday.”<sup>38</sup>

[44] I asked Mrs Fogarty, “Were they the same cattle that you saw on the Wednesday?” She replied, “Yes.” However, in subsequent cross-examination she repeated that the cattle were not the same as those she had seen on Wednesday 22 June.

[45] I do not accept Mrs Fogarty’s evidence about what she saw on 22 June or about the Orange Creek mob in general. Her initial claim was that most of the cattle she had seen on Wednesday 22 June<sup>39</sup> had orange buttons and no red tags; that, when she returned later that day, these cattle had no orange buttons, but instead had red floppy tags in their offside ears – and that she returned on Saturday 25 June to participate in a muster of those cattle. There was no suggestion in any of her affidavits that the entire mob of cattle had been switched. Rather, she was complaining that the big black bullock and the broken baldy cow were missing from the mob and that others in the mob had had their ear tags tampered with. It was only when faced with the objective evidence of her handwritten record of the draft on 25 June, which contradicted what she said she saw on 22 June, that she claimed, for the first

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**37** This record is in Exhibit D9, first affidavit of Neville Anderson sworn 30.04.17 at annexure NA9.

**38** See also transcript 20.11.17, p 74

**39** or “most” of a mob of 40 to 50 animals

time, that the cattle that were drafted on 25 June were not the cattle she had seen on 22 June.

[46] Further, photographs taken by Mrs Fogarty at Henbury on the afternoon of 22 June<sup>40</sup> do not support her evidence that most of the mob had red floppy tags in their offside ears at that time.

[47] Counsel for the defendants submitted that it was highly unlikely that Ashley Anderson (or someone else aligned with the Anderson interests) had put dozens of cattle through the head bail, one at a time, and swapped orange buttons for red floppy tags, in full view of many people and knowing that Mrs Fogarty had already seen the cattle and would be returning to collect her cattle later that day. I agree.

[48] The plaintiff has failed to establish the facts underlying its claim that the defendants converted cattle associated with the Orange Creek mob.

[49] For the sake of completeness I should add that I agree with the submission by counsel for the defendants that it would have made no sense at all for Ashley Anderson to have removed orange NLIS buttons and replaced them with red floppy tags. The orange buttons would only have traced the cattle back to Orange Creek where the buttons were inserted. If Ashley Anderson were attempting to pass off Palmer Valley cattle from the Orange Creek mob as sale cattle, the logical thing for him to have done would have been to

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**40** These form part of Exhibit D33.

insert a red floppy tag in the nearside ear without removing the orange NLIS button from the offside ear.

[50] So far as the three beasts Mrs Fogarty recorded on Saturday 25 June as having a Palmer Valley brand, no orange NLIS button and a red floppy tag in the offside ear are concerned, it seems to me that the explanation for the existence of cattle tagged in that manner is the same as for the disputed cattle tagged in that manner (discussed below) and I am satisfied on the balance of probabilities that they are sale cattle.

[51] So far as the big black bullock is concerned, I do not accept on the basis of Mrs Fogarty's evidence alone that this animal had an orange button and no floppy red tag. There is no evidence – other than Mrs Fogarty's assertion to this effect – that it was not one of the sale cattle. Ken Paige thought the animal was a Palmer Valley steer but conceded in cross-examination that it may have been a Mt Ebenezer steer.<sup>41</sup> Mr Paige's evidence is that he took little notice of ear tags.<sup>42</sup> (The defendants contend in written submissions that if the animal had a Mt Ebenezer brand then it matches the description of one of the disputed cattle mustered at the 2017 Harts Camp draft, the Henbury Homestead yards being situated next to Harts Camp paddock. That is not something I need to determine.)

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**41** Transcript 21.11.17, p 140

**42** Exhibit P5, affidavit of Mr Paige sworn 12.01.17 [11]

[52] Mrs Fogarty's evidence is that when she asked Ashley Anderson about the big black bullock, he said it might have jumped out of the yard. The evidence was that the yards were quite low and that cattle had managed to jump out in the past. Ashley Anderson deposed that he did not secrete the animal away and I accept that evidence. For present purposes, it is sufficient for me to find that the plaintiff has not proved on the balance of probabilities that the animal was a Palmer Valley animal and that the defendants converted the animal.

[53] The plaintiff has failed to prove that the defendants converted any cattle associated with the Orange Creek mob.

### **Observations on credit**

[54] Having made this finding in relation to the allegations by the plaintiff that led to these proceedings being instituted and an injunction being granted, this is a convenient place to make some general observations on credit, before moving on to consider the other categories of disputed cattle.

[55] Mrs Fogarty's evidence in relation to the Orange Creek mob led me to conclude:

- (a) that she held unreasonable suspicions about the defendants;
- (b) that she was willing to tailor her evidence to suit her case; and



- (c) that she was unwilling to concede she might be wrong even in the face of incontrovertible evidence.

[56] In closing submissions, the defendants gave a number of examples of contradictions in Mrs Fogarty's evidence.

- (a) Mrs Fogarty deposed that it was impracticable to place tags in the offside ear of cattle at Mt Ebenezer and Palmer Valley because of the way the yards are set up<sup>43</sup>. This was to support the plaintiff's contention that all sale cattle were marked with red tags in their near side ear. However, in cross-examination she agreed that the cattle yards at both Palmer Valley and Mt Ebenezer allow tagging to take place in the near side ear or the off side ear and that they actually do tag in both ears, at both stations.<sup>44</sup> (She added: "You have to put NLIS in the off side.")
- (b) In her second affidavit, at one point she deposed that she had collected cattle in the third draft in 2016 that had Mt Ebenezer brands and no ear tags (and belonged to the plaintiff).<sup>45</sup> At another point she deposed that there were no Mt Ebenezer branded cattle at that draft with no floppy

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<sup>43</sup> Exhibit P3, third affidavit of Sheri Fogarty sworn 04.07.17 [33]

<sup>44</sup> Transcript 21.11.17, p 121

<sup>45</sup> Exhibit P2, second affidavit of Sheri Fogarty sworn 13.06.17 [30.2]

tags; they all had red tags in the near side ear (and so belonged to the first defendant).<sup>46</sup>

- (c) She gave different evidence at different times about whether she had taken photos when she visited Henbury on 22 June 2016. In her statutory declaration Mrs Fogarty said she did take some photos that day.<sup>47</sup> In cross-examination on 21 November 2017, she said she did not. (Ashley Anderson deposed that he saw her taking photos that day.)<sup>48</sup> She later produced photos she took on that date. They did not support the plaintiff's case.<sup>49</sup>

[57] There are other examples in the evidence of Mrs Fogarty holding unreasonable suspicions about the defendants.

- (a) In her third affidavit, Mrs Fogarty deposed, that, at a draft in 2017 at Mt Gloaming, she observed a Lucy Creek/Anningie ear marked cow with a purple tag in the off-side ear as well as an NLIS button. She concluded, "As a result of this observation, I concluded that someone from Henbury was tagging cattle with red or purple ear tags which

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<sup>46</sup> Exhibit P2, second affidavit of Sheri Fogarty sworn 13.06.17 [47.2] and [47.3]

<sup>47</sup> Exhibit P13, [40]

<sup>48</sup> The defendants submitted that this is yet another reason to reject the plaintiff's contention that Ashley Anderson dishonestly switched tags. He would have been mad to do so knowing that Mrs Fogarty had taken photographs of the animals in question.

<sup>49</sup> The photographs were tendered with the defendants' submissions pursuant to an agreement between counsel that missing documents of an uncontroversial nature would be tendered in this way. There were 14 documents tendered in this fashion. They have collectively been labelled Exhibit D33.

made those cattle appear as if they were transfer or sale cattle.”<sup>50</sup>

During cross-examination, she agreed that there has never been any suggestion that a Lucy Creek/Anningie cow formed part of the sale cattle. (They were purchased by Henbury from elsewhere.) It was put to her, “So, it makes no sense to say that someone would tag a Lucy Creek or Anningie cow to make it look as if it was sale cattle, because it never could,” and her answer was, “Only if they didn’t know what the ear marks were.”

(b) In the draft conducted by Mr Crawford from the DPI on Saturday 25 July 2016, Mrs Fogarty disputed some animals that had red floppy tags in their near side ears (the agreed method of marking sale cattle). She was asked in cross-examination why she had done that. She gave a number of non-responsive answers and then gave these explanations.<sup>51</sup>

(i) “Because there was also cattle with red tags in the off-side ear, so they were completely mixed.”

(ii) “Because they weren’t the cattle that I saw on the Wednesday.” (I asked why that would cause her to dispute these animals, and she said, “Because I was completely confused over what cattle they were.”)

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**50** Exhibit P3, third affidavit of Sheri Fogarty sworn 04.07.17 [37]

**51** Transcript 21.11.17, p 110 and 111

(iii) Finally she said, “Okay, well, there was red tags on the off-side ear. That’s the first time I’ve ever seen that, so I knew that these – the ears had been tampered with.”

This made no sense as well as demonstrating Mrs Fogarty’s unreasonable suspicions towards the defendants.

[58] There are other examples of Mrs Fogarty refusing to concede that she might be wrong, despite the evidence. She had a tendency to offer up a series of possible explanations when faced with evidence which did not support the plaintiff’s case, and to give non-responsive or nonsense answers when pinned down.<sup>52</sup>

[59] There were similar problems with Mr Fogarty’s evidence.

(a) He gave inconsistent evidence about the numbers of Henbury cattle on Palmer Valley. (At first he said there were none. At another time he said he didn’t know. At still another time he said he had seen about 50.)<sup>53</sup>

(b) He refused to acknowledge the possibility that cattle from Mt Ebenezer with red tags in the offside ear or without tags in either ear had been

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**52** An example occurs in the transcript of 21.11.17 on pages 113 and 114 where Mrs Fogarty is being cross-examined about a reconciliation of NLIS buttons she performed. Another example occurs at pages 116 and 117 of the same transcript where she is being cross-examined about an NLIS notification of two animals that were sold by Palmer Valley that were on another station’s PIC. Yet another occurs on the transcript for that day pages 125 and 126 where she is being cross-examined about the age of some steers she collected which she described as “two toothys” (ie two years old). There are others.

**53** See [156] below

delivered as part of the sale cattle, despite being shown photographic evidence that this was so.<sup>54</sup>

- (c) He gave detailed evidence as to why the plaintiff never inserts floppy tags in the offside ear (namely that it is not practicable to set the yard up that way and there would be an NLIS button in the offside ear).<sup>55</sup>  
Yet when he was asked what ear the white floppy tags had been put into he said, “I couldn’t actually say if they were in certain ears or not.”<sup>56</sup>
- (d) There were inconsistencies and logical fallacies in Mr Fogarty’s estimates of the numbers of cattle present on Palmer Valley from time to time and his explanations as to how he arrived at those numbers.<sup>57</sup>
- (e) There were occasions when Mr Fogarty’s evidence was contradicted by the objective evidence, yet he refused to acknowledge that he might have been wrong.<sup>58</sup>

[60] In addition, Mr and Mrs Fogarty contradicted each other in parts of their evidence. For example, Mr Fogarty said that the majority of the Mt Ebenezer cattle had white NLIS buttons inserted before the plaintiff did

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**54** Transcript 30.01.18, p 97 to 107

**55** Exhibit P12, third affidavit of Edward Fogarty sworn 04.07.17 [2.5]

**56** Transcript 29.01.18, p 74

**57** For example, at one time he appears to have said that he based his July 2016 estimate of the number of cattle in a particular paddock (in part) on tracks that he saw in that paddock in August 2016.

**58** For example, he said he did not muster the Merini paddock in 2016 because it was empty. (Transcript 30.01.18, p 110 and p 112 to 13) This was contradicted by entries in the station diary referring to bringing in “the last lot of cows from Merini, drafted and processed” but Mr Fogarty refused to admit that paddock had been mustered (Transcript 30.01.18, p 113)

anything to get them ready to sell to Henbury; that this was so for both male and female cattle; and that they dealt with the male cattle and the female cattle in the same way in terms of inserting the NLIS buttons.<sup>59</sup>

Mrs Fogarty's evidence was that male and female cattle were treated differently when it came to inserting NLIS buttons. They did not insert NLIS tags in breeder cattle until they were to leave the property, because if they die on the property, then those tags are on the property somewhere and cannot be recovered. She said that was a common practice.<sup>60</sup>

[61] For all of these reasons, I treat the evidence of both Mr and Mrs Fogarty with a great deal of scepticism.

[62] The plaintiff did not make detailed submissions in relation to credit. The thrust of the closing submissions was simply that I should find Mr and Mrs Fogarty to be honest and reliable witnesses and that Ashley and Neville Anderson were not. For the reasons set out above, I disagree.

[63] In many instances the evidence of Ashley Anderson and Neville Anderson is supported by the objective evidence contained in photographs and contemporaneous station diary entries. That gives me confidence in its accuracy and reliability. Because of that, and the difficulties with the evidence of Mr and Mrs Fogarty, where there is no available objective evidence and the evidence of Mr and/or Mrs Fogarty differs from the

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**59** Transcript 29.01.18, p 75 (At this stage in the cross-examination Mr Fogarty was resisting a suggestion by counsel that most of the sale cattle delivered from Mt Ebenezer did not have NLIS buttons.)

**60** Transcript 21.11.17, p 123

evidence of Ashley Anderson and/or Neville Anderson, I prefer the evidence of Ashley and Neville Anderson.

**Other classes of cattle at issue in the proceeding**

**(2) cattle classed as “disputed” in the 2016 and 2017 drafts after 22 June 2016**

- **Beasts with red or purple floppy tags in the offside ear**

[64] The next (and largest) category of disputed animals comprises 144 cattle with a red floppy tag in the offside ear, which were disputed by the Fogartys at drafts after 22 June 2016.

[65] It is common ground that the agreed method of marking sale cattle was for a red floppy tag to be placed in the animal’s nearside ear.

[66] The plaintiff contends that cattle with red floppy tags in the offside ear are not sale cattle. Although not made explicitly as in the case of the Orange Creek mob, by implication, with this category of disputed cattle also, the allegation is that one or more of the Andersons engaged in deliberately fraudulent conduct to steal those cattle. The inference the plaintiff seeks to draw is that these were Palmer Valley cattle that had wandered onto Henbury, and that someone from the Andersons tried to pass them off as sale cattle by inserting a red floppy tag in the animals’ offside ear after first

removing the NLIS button, which would identify the animal as being on the Palmer Valley PIC.<sup>61</sup>

[67] In addition to the evidence of Mrs Fogarty set out above in relation to the Orange Creek mob, the plaintiff relies on the evidence of Mr Fogarty that all sale cattle were marked by having a red floppy tag placed in their nearside ears before delivery to Henbury in accordance with the agreed protocol. His evidence was that:

- (a) he was present at all drafts at Mt Ebenezer and Palmer Valley when cattle were being selected for Henbury;
- (b) all tagging was done at Palmer Valley or Mt Ebenezer before the cattle were moved off those properties;
- (c) his instruction to those involved in the drafts at Palmer Valley and Mt Ebenezer was to always put the floppy tag in the nearside ear;
- (d) he did not observe floppy tags being inserted in the offside ears at any of the drafts at which he was present;
- (e) the cattle yards at Palmer Valley and Mt Ebenezer are set up such that the only practical means of tagging the cattle is in the nearside ear.  
(The tagging equipment is set up on the nearside of the cattle race and head bail. When an animal is in the head bail a tag is inserted by the person standing on the near side of the animal. It would be impractical

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**61** The NLIS buttons are inserted in the offside ear.



for that person to move to the offside to insert the ear tag. Another reason why it is impractical to insert floppy tags in the offside ear is that the NLIS tag is already in the offside ear.)

#### Evidence relied on by the defendants

[68] The defendants rely on the evidence of Ashley Anderson, Neville Anderson and Chris Wilson; on photographs and videos taken when the sale cattle were being delivered; on photographs of cattle on Henbury in 2014 and on photographs taken during the first four drafts conducted pursuant to the Deed (ie before the fifth draft on 22 June 2016).

#### Photographic evidence

[69] David Rohan took photographs and video footage of sale cattle being delivered to Henbury in October 2014.<sup>62</sup> These show cattle with no red floppy tags in their nearside ears and with what appears to be red tags in their offside ears. This is the only photographic evidence of the sale cattle being delivered.

[70] David Rohan also took photographs of a draft at Henbury in April 2015.<sup>63</sup> These show numerous cattle with red floppy tags in their offside ears.

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**62** David Rohan is the Fifth Defendant, a director of the Second Defendant and the brother-in-law of Neville Anderson: Exhibit D7, first affidavit of David Rohan sworn 16.05.17 [1] and [4]. Exhibit D7, first affidavit of David Rohan sworn 16.05.17 at Annexures DR1 and DR2.

**63** Exhibit D7, first affidavit of David Rohan sworn 16.05.17 at Annexure DR3.

[71] Susan Salidu also took a photograph of cattle on Henbury on 29 December 2014, including one which (when magnified) shows a beast with a red floppy tag in the offside ear.<sup>64</sup>

[72] The ABC took video footage and photographs of the fourth Henbury draft in 2016 for the ABC *Landline* programme showing:

(a) cattle with red floppy tags in the offside ear;<sup>65</sup>

(b) Mt Ebenezer animals with no floppy tag<sup>66</sup> or with a white floppy tag<sup>67</sup> being called for Henbury (ie drafted for sale) without dispute. (The significance of the white floppy tags appears at [88] to [101] below.)

#### Other objective evidence

[73] There is evidence from the Palmer Valley Station diary maintained by the Fogartys that floppy tagging of sale cattle occurred at Henbury on 22 June 2014,<sup>68</sup> contrary to Mr Fogarty's evidence that all of the transfer cattle were tagged at Mt Ebenezer or Palmer Valley. Similar information is contained in the Henbury Station diary maintained by Ashley Anderson for 18, 20 and 22 June 2014 and 15, 16 and 19 September 2014.<sup>69</sup>

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**64** Susan Salidu is the sister-in-law of Neville Anderson: Affidavit of Susan Salidu sworn 02.05.2017 [1]. Exhibit D2, photograph Annexure SS02 of affidavit of Susan Salidu sworn 02.05.17.

**65** Exhibit D10, second affidavit of Neville Anderson sworn 06.10.17 [40], [41], [42.3], [42.5], [43.4], [43.5], [45.2], [45.3], [45.4]

**66** Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [38(d)]

**67** Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [38(e)]

**68** Exhibit D31, extracts from Palmer Valley Rain Diary

**69** The Palmer Valley Station diary records floppy tagging at Henbury on 22 June 2014: Exhibit D31

Evidence of what occurred in the first four drafts in 2016

- [74] Both parties relied upon what had been done in the first four drafts in 2016 (ie the first four after the Deed) to support their contentions about the ownership of the disputed cattle, in particular those with red floppy tags in their offside ears. The defendants' contentions are more logically compelling and a better fit with the other evidence.
- [75] The plaintiff contended that there is an inconsistency between Ashley Anderson's evidence that numerous cattle with either no tags, or with tags in the offside ear were transferred to Henbury, and the protocol which was adopted in the first five drafts in 2016 for identifying sale cattle. The plaintiff contended that Ashley Anderson had acknowledged that cattle with no tags were agreed to be called for Palmer Valley in the first five drafts. However, that is not an accurate or complete statement of his evidence. His evidence was that untagged sale cattle were delivered in December 2014 from Mt Ebenezer,<sup>70</sup> not from Palmer Valley. It was put to Ashley Anderson in cross-examination that, in respect of the first five drafts in 2016, if an animal had Palmer Valley or Mt Ebenezer earmarks and brands and it had no floppy tag in either ear, red or purple; and it had no hole in the nearside ear where a tag might have been; those animals were called for Palmer Valley. His answer was that that was the case for Palmer Valley branded cattle but not for Mt Ebenezer branded cattle.<sup>71</sup> Contrary to the plaintiff's submission,

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**70** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.18], [21.2] and [21.3]

**71** Transcript 02.02.2018, p 333 to 335

this is not inconsistent with his evidence that untagged animals were delivered from Mt Ebenezer.

[76] The defendants' evidence in relation to the first four drafts is considered below in the general discussion of the observations of the witnesses.

#### Observations of the witnesses

[77] The evidence of Ashley Anderson is that:

- (a) he saw Mt Ebenezer cattle delivered to Dead Bullock paddock on Henbury on 2 and 3 October 2014 that had red or purple floppy tags in the offside ear rather than the nearside ear;<sup>72</sup>
- (b) he discussed this with Mr Fogarty at the time and Mr Fogarty explained that the cattle had been tagged by someone who did not know what they were doing;<sup>73</sup>
- (c) he saw 271 adult Mt Ebenezer cattle delivered to Henbury on 4, 5 and 9 December 2014 that had no red floppy tags<sup>74</sup> but instead had white floppy tags in either ear or a combination of white floppy tag in the nearside ear and NLIS button in the offside ear;<sup>75</sup>

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**72** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.18], [21.2] and [21.3]

**73** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.18]

**74** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.11], clarified in Exhibit D17, second affidavit of Ashley Anderson sworn 06.10.17 [41]

**75** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.25]

- (d) further cattle were delivered to Henbury on 21 and 24 September 2014, and although he did not see these delivered, when he later mustered the sector of the station to which these cattle were delivered, he saw some bulls with red floppy tags in their offside ear and some with no tags at all;<sup>76</sup>
- (e) most of the cattle with red floppy tags in the offside ear came from Dead Bullock West paddock;<sup>77</sup>
- (f) a cow with very distinctive ‘dragster’ style horns which was drafted for Henbury (without objection) in 2015 and 2016 was then disputed by the plaintiff at a draft in 2017.<sup>78</sup>

A chart showing the various paddocks on Henbury is annexure 2 to this judgment.

[78] The evidence of Neville Anderson is that:

- (a) cattle that were called for Henbury without objection in the first four drafts of 2016 included Mt Ebenezer cattle without any purple or red floppy tags;<sup>79</sup>

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**76** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.19]

**77** The various sectors of Henbury are set out in the charts at Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 at Annexure AA1; Exhibit D20, fifth affidavit of Ashley Anderson sworn 01.02.18 at Annexure 5AA1; Defendants’ Further Amended Defence and Second Further Amended Counterclaim at Annexure B.

**78** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [145]

**79** Exhibit D9, first affidavit of Neville Anderson sworn 30.04.17 [20]

- (b) one particular animal (which Neville Anderson has dubbed ‘Mabel’)<sup>80</sup> was drafted for Henbury without dispute in 2015 and 2016 (and returned to paddocks on Henbury on each occasion) but was then disputed in 2017;<sup>81</sup>
- (c) another animal (a grey-flecked cow) was similarly drafted for Henbury without dispute in 2016 but then disputed in 2017;<sup>82</sup>
- (d) one of the animals photographed by David Rohan in 2015 with a red floppy tag in its offside ear was called for Henbury without dispute in drafts in 2015 and 2016.<sup>83</sup>

[79] Both Chris Wilson<sup>84</sup> and David Eagleson<sup>85</sup> also gave evidence that cattle with red floppy tags in the offside ear were called for the first defendant without dispute in the first four drafts of 2016. (Chris Wilson worked on the first few drafts at Henbury in 2016. David Eagleson is a stock agent who attended a number of the drafts both before and after the fifth draft in June 2016.)

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**80** Exhibit D9, first affidavit of Neville Anderson sworn 30.04.17 [73]

**81** Exhibit D10, second affidavit of Neville Anderson sworn 06.10.17 [47] to [50]

**82** Exhibit D10, second affidavit of Neville Anderson sworn 06.10.17 [46]; Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [38](c)

**83** Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [38](b)

**84** Exhibit D25, first affidavit of Christopher Wilson sworn 30.04.17 [8] and [27]

**85** Exhibit D22, first affidavit of David Eagleson sworn 01.05.17 [12]

[80] Chris Wilson deposed that ‘there were quite a few cattle that came through with red floppy tags in the offside ear but were not disputed’.<sup>86</sup> He also deposed that Mr or Mrs Fogarty would ‘double check all the cattle which could have belonged to Palmer Valley’.<sup>87</sup>

#### No evidence of tampering

[81] There was no objective evidence of any floppy tag or ear tampering. Rather, the objective evidence is to the contrary. Evidence was given on this issue by a number of witnesses independent of either the Fogartys or the Andersons:

- (a) Greg Crawford, the Regional Livestock Biosecurity Officer with the Northern Territory Department of Primary Industry & Resources in Alice Springs;<sup>88</sup>
- (b) Geoff Niethe, veterinary consultant engaged by the plaintiff;<sup>89</sup> and
- (c) Geoff Mackenzie, an independent Livestock Buyer acting as a buying agent for Tongala abattoir, Victoria.<sup>90</sup>

These witnesses examined the disputed cattle and found no evidence of tampering.

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<sup>86</sup> Exhibit D25, first affidavit of Christopher Wilson sworn 30.04.17 [27]

<sup>87</sup> Exhibit D25, first affidavit of Christopher Wilson sworn 30.04.17 [10]

<sup>88</sup> Exhibit D24, affidavit of Gregory Crawford sworn 01.05.17 [1], [27] and [28]

<sup>89</sup> Exhibit P19, affidavit of Geoff Niethe sworn 14.01.17; Transcript 31.01.18 [179] and [180]

<sup>90</sup> Exhibit D21, affidavit of Geoff Mackenzie sworn 20.03.17 [2] and [14].

[82] The evidence shows that the red floppy tags were old, rather than new.

Mr Niethe's report<sup>91</sup> states:

The red ear tags were all inscribed with a black marker pen bearing the letters TVX<sup>92</sup> ... The lettering was markedly faint on most of the tags and the plastic tags themselves were generally faded and covered in varying degrees of grime as can be seen in many of the photographs.

...

The read Alflex ear tags were generally very grimy/greasy – the TVX Henbury brand written on the ear tag with a marker pen was generally faint and difficult to discern in some cases.<sup>93</sup>

### Findings

[83] I do not accept the evidence of Mr Fogarty that all sale cattle were tagged with either red or purple floppy tags in their near side ear, principally because the objective photographic evidence shows otherwise. Some sale cattle clearly had the red floppy tags inserted in their offside ears, and some from Mt Ebenezer had white floppy tags in either their nearside or offside ears or no tags at all. I also accept the evidence of Ashley and Neville Anderson, Chris Wilson and David Eagleson that they observed sale cattle tagged in this way.

[84] The plaintiff did not call evidence from Kirsty Fogarty, Ellen Fogarty or Rick Grocke,<sup>94</sup> and there is evidence that all of these were involved in

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**91** Exhibit P19, affidavit of Geoff Niethe sworn 14.04.17 at Annexure GN1, 2

**92** This is the Henbury brand.

**93** Exhibit P19, affidavit of Geoff Niethe sworn 14.04.17 at Annexure GN1, 16

**94** Rick Grocke is a staff member at Palmer Valley: Transcript 29.01.18, p 75 per Mr Fogarty.



tagging the sale cattle.<sup>95</sup> Counsel for the defendants submitted that I could draw an inference that the evidence of these witnesses would not have assisted the plaintiff. I agree. I draw such an inference more readily in light of the objective evidence.

[85] Further, as explained above in relation to the Orange Creek mob, I do not accept the evidence of Mrs Fogarty that she saw cattle with orange buttons in their offside ears on 22 June and that when she returned these had red floppy tags in their offside ears instead.

[86] The defendants point out further that most of the disputed cattle were mustered in 2017, rather than 2016. Counsel for the defendants contended that it beggars belief that, with the full scrutiny of the Court proceedings on foot, the defendants would accelerate the alleged conduct of inserting floppy tags and that they would still be putting the floppy tags in the ‘wrong’ ear and processing them at supervised musters. I agree.

[87] The plaintiff has failed to establish that there was any dishonest tampering with tags by any of the defendants. The objective evidence as well as the observations of the various witnesses establishes clearly that some of the sale cattle were tagged with red floppy tags in the offside ear. I find that the disputed cattle which have red floppy tags in the offside ear are sale cattle.

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95 Evidence of Mr Fogarty in cross-examination 29.01.18, p 75 and 76

- **Cattle with white floppy tags**

[88] The second largest category of cattle comprises 110 cattle with white floppy tags. The bulk of these comprised 90 cows drafted in Dead Bullock West paddock in the second Henbury draft in 2017.

The plaintiff's evidence

[89] The plaintiff relies on the evidence of Mr and Mrs Fogarty.

[90] The evidence of Mr Fogarty was that these white tags were used as a management tool on Mt Ebenezer and were placed on cattle from a particular year only in order to keep track of the year in which particular cattle had been mustered. He was vague as to the year the tags were used in this way.<sup>96</sup>

[91] Mrs Fogarty said that none of the sale cattle had white floppy tags.

Mr Fogarty said that there may have been about 100 Mt Ebenezer sale cattle with white floppy tags but that, as all sale cattle had red or purple floppy tags in their near side ear, these cattle would have had two tags – one white and one red. None of the disputed cattle have both a white and a red tag and there are no photos of any animals tagged in this manner.

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96 Transcript 29.01.18, p 74

### The defendants' evidence

[92] The defendants rely on the observations of Ashley Anderson and Neville Anderson in relation to sale cattle with white tags referred to above and the further evidence of Ashley Anderson set out at [95] below; on photographic evidence of sale cattle with white tags (also referred to above); on evidence that the white tags had the Henbury brand (TVX) written on the back; and on a reconciliation of the number of available red and purple floppy tags against the number of sale cattle delivered.

### Objective evidence

[93] It is not disputed that the white floppy tags belonged to the plaintiff. They came from Mt Ebenezer. There was no suggestion from either of the Fogartys that any of the defendants had access to those tags.

[94] The objective evidence is that, since this issue was raised by the plaintiff on 8 June 2017, all of the disputed cattle with white floppy tags have been observed to have the letters 'TVX' (the Henbury brand) written on the back of the tags, indicating they belonged to Henbury.<sup>97</sup> Further, one of the photographs from the April 2017 draft at Dead Bullock West shows the back of a white floppy tag which is also marked 'TVX'. These letters are quite large, neatly written, and do not appear to be recent.

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<sup>97</sup> Exhibit D17, second affidavit of Ashley Anderson sworn 06.10.17 [84]. See also Exhibit D23, second affidavit of David Eagleson sworn 06.10.17 [11] to [16].

### Further evidence of Ashley Anderson

[95] The evidence of Ashley Anderson in relation to the white floppy tags was:

- (a) that it would be nearly impossible to handwrite TVX neatly on the back of an already inserted floppy ear tag on a live animal, because cattle head movements in a head bail are very jerky and they do not keep still for long;<sup>98</sup>
- (b) he was present when Mr Fogarty delivered three loads of transfer cattle, including 260 cows, to the Kenny's Tanks area in the Dead Bullock West sector on 4, 5 and 9 December 2014;<sup>99</sup>
- (c) these included cows with red floppy tags, white floppy tags and no tags at all.

### Further evidence of Neville Anderson

[96] Neville Anderson deposed that some Palmer Valley branded cattle had white floppy Mt Ebenezer tags.<sup>100</sup> (This is incompatible with the plaintiff's position that the white tags were inserted as a management tool on Mt Ebenezer, and supports the defendants' case that the white tags were used to mark sale cattle after they ran out of red tags.)

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**98** Exhibit D17, second affidavit of Ashley Anderson sworn 06.10.17 [84]

**99** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15.23]

**100** Exhibit D12, fourth Affidavit of Neville Anderson sworn 16.06.18 [120]

## Reconciliation of red and purple floppy tags

[97] The defendants called the following evidence about the number of red and purple floppy tags available to demonstrate that there were more sale cattle than red or purple floppy tags used.

(a) The plaintiff sold 6,295 of its cattle to the first defendant in 2014.

(This was more than double the expected number when the agreement was originally struck – which was about 3,000.)<sup>101</sup>

(b) At some point, the parties ran out of usable old floppy tags and started purchasing new red floppy tags from Territory Rural.<sup>102</sup>

(c) Mrs Fogarty confirmed in cross-examination that they had two boxes of 1,500 old purple floppy tags with a few hundred out of each<sup>103</sup> - that is to say about 2,400 purple floppy tags. This is about the number of cattle that had been transferred to Henbury from the plaintiff's NT properties by mid-July 2014.

(d) 1,600 red floppy tags were purchased from Territory Rural, of which some 101<sup>104</sup> remain unused.

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**101** Transcript 21.11.17 at 130 per Mrs Fogarty; Exhibit D9, first affidavit of Neville Anderson sworn 30.04.17 [10]

**102** Ashley Anderson's evidence is that they had run out of usable old floppy tags by 21 August 2014: Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [18]; Exhibit D17, second affidavit of Ashley Anderson sworn 06.10.17 [9]. Mr Fogarty accepted that at some point they started using new floppy tags purchased from Territory Rural because, as far as he knew, they ran out of the old tags: Transcript 29.01.18, p 71

**103** Transcript 20.11.17, p 40 and 52

**104** Exhibit D10, second affidavit of Neville Anderson sworn 06.10.17 [22.1] and [22.2]

(e) At least 1,912 transfer cattle (not counting calves) were delivered from September 2014 onwards.

[98] The above evidence shows that around 3,900 red and purple floppy tags were used to mark sale cattle, and that around 6,300 sale cattle were delivered. They cannot all have been marked with red or purple floppy tags.

[99] The defendants' submission was more convoluted. They contended that all of the purple floppy tags had been used by July, but that even if one accepted that the new tags were only used from September 2014 onwards, there were not enough red floppy tags for all of the transfer cattle to be tagged with purple or red tags as the plaintiff alleges.

[100] Whichever way one analyses the evidence, I agree that the evidence points to the overwhelming likelihood that, once the red and purple tags ran out, sale cattle were tagged with white floppy tags from Mt Ebenezer endorsed with the Henbury brand (TVX).

[101] I find that the disputed animals tagged with white floppy tags are sale cattle.

- **Mt Ebenezer branded cattle without floppy tags**

[102] Among the cattle classed as "disputed" in the 2016 and 2017 drafts, were 12 Mt Ebenezer cattle with no floppy tags: seven steers, four cows and one bull.

[103] The defendant referred to evidence from Ashley Anderson that:<sup>105</sup>

- (a) the seven steers in this group were mustered from an area of Henbury known as Harts Camp and the area around Harts Camp;
- (b) he was present when 112 steers and four mickies<sup>106</sup> were delivered to that area;
- (c) these animals were not floppy tagged because they were “stirry” and they were placed in a separate paddock.

[104] The defendants submit that it can be inferred that these seven steers were part of that group of sale cattle. Ashley Anderson deposed that he did not believe any Mt Ebenezer cattle had wandered onto Henbury from the plaintiff’s properties.

[105] The defendants also submitted that Mr Fogarty had accepted that any male cattle on Henbury that didn’t have an NLIS button, or a hole where the button would have been in the offside ear, would not be cattle that belonged to the plaintiff. In fact this evidence was given by Mrs Fogarty (not Mr Fogarty), and the admission was made as a consequence of her evidence that “the male cattle are buttoned when they’re weaned, earmarked and branded”.<sup>107</sup> It would not follow that male cattle branded with the Palmer Valley brand which had no buttons or holes where buttons had been did not

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**105** Exhibit D16, first affidavit of Ashley Anderson sworn 13.04.17 [15]

**106** A young bull, usually up to about 18 months of age, which should have been branded and castrated but has been missed in previous musters.

**107** Transcript 29.01.18, p 13

belong to Palmer Valley. It simply means that Mrs Fogarty's evidence that all male Palmer Valley cattle were buttoned when they were branded is not correct. This evidence does not assist the defendants on this issue. (The same evidence was also relied on by the defendants in relation to the category of cattle considered next – namely four Palmer Valley branded bulls. It does not assist the defendants in relation to those cattle either.)

[106] The plaintiff did not make any submissions specifically directed to these animals.

[107] I accept that there is evidence that some Mt Ebenezer branded cattle were delivered to Henbury as part of the sale cattle with no floppy tags.<sup>108</sup>

However, that does not mean that any Mt Ebenezer branded cattle without a floppy tag can be assumed to be sale cattle. In the absence of evidence to suggest that particular Mt Ebenezer branded cattle with no floppy tags are sale cattle, the presumption would be that they were Mt Ebenezer cattle.

[108] I accept that there is evidence (set out at [103] above) which demonstrates, on the balance of probabilities, that the seven steers from the area around Harts Camp are sale cattle. I find that those seven steers are sale cattle.

[109] In the absence of any evidence of a like nature in relation to the other Mt Ebenezer cattle without floppy tags, I find that the remainder of these cattle (four cows and one bull) are not sale cattle, but belong to the plaintiff.

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**108** It should be noted that it was not as important to the parties to mark sale cattle from Mt Ebenezer as it was to mark sale cattle from Palmer Valley, as Mt Ebenezer was being destocked for sale.



- **Palmer Valley branded bulls without floppy tags**

[110] Among the cattle disputed in the 2016 and 2017 drafts were four Palmer Valley branded bulls with no floppy tags. The defendants contend that these bulls were part of a cohort of 35 bulls delivered to Mt Gloaming on Henbury in September 2014, all of which were branded 'TF4' and which had red floppy tags in their near side ear, red floppy tags in their far side ear, or no floppy tags at all.

[111] The defendants rely on the following evidence in relation to these bulls:

- (a) evidence from the plaintiff's spreadsheets annexed to the first affidavit of Ashley Anderson, and Ashley Anderson's diary entry that 21 Palmer Valley bulls were delivered to Mt Gloaming on 17 September 2014 and 14 on 24 September 2014;
- (b) evidence that three of the disputed bulls were mustered at Mt Gloaming in 2016 and one was mustered at Cave Hole/Three Mile on Henbury in 2017;
- (c) evidence from Ashley Anderson that, although he was not present when those bulls were delivered, he later mustered that sector and noticed some cattle without tags; and
- (d) evidence that at another draft from the Harts Camp sector in 2016, bulls with offside tags or no tags were not disputed (ie were accepted by the plaintiff as being Henbury cattle).

[112] The defendants also relied on the evidence of Mrs Fogarty<sup>109</sup> set out at [105] above. For the reasons explained in that paragraph, that evidence does not assist the defendants in relation to these four bulls.

[113] The plaintiff made no submissions in relation to these particular bulls.

[114] I accept that this evidence establishes, on the balance of probabilities, that the three bulls mustered at Mt Gloaming are part of the cohort of 35 bulls delivered, as sale cattle, to Mt Gloaming, some of which had no tags.

[115] I do not accept that that evidence is sufficient to establish on the balance of probabilities that the bull mustered at Cave Hole/Three Mile was part of that cohort. The fact that some bulls from Palmer Valley with no tags formed part of the sale cattle, does not mean that any bulls from Palmer Valley with no tag found on Henbury formed part of the sale cattle. In the absence of evidence to demonstrate otherwise, it should be presumed that a Palmer Valley branded bull with no tag marking it as part of the sale cattle, belongs to Palmer Valley.

[116] I find that the three bulls mustered at Mt Gloaming form part of the sale cattle. I find that the bull mustered at Cave Hole/Three Mile is not part of the sale cattle and belongs to Palmer Valley.

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**109** mistakenly attributed in closing submissions to Mr Fogarty

- **Palmer Valley branded steers with the backs of floppy tags only**

[117] Among the cattle disputed at drafts in 2016 and 2017 were four Palmer Valley branded steers which had the backs of floppy tags in their ears, but not the fronts – these presumably having fallen off.

[118] The parties agreed that in these musters, cattle would be called for Henbury if it had a hole in its near side ear where a floppy tag would have been. I do not know whether these four steers had the backs of floppy tags in their near side or far side ears. However, that doesn't matter. I have found that Palmer Valley branded cattle with red floppy tags in their off side ears were sale cattle.

[119] The evidence is that floppy tags were not used for management purposes on Palmer Valley and that none of the Palmer Valley cattle had floppy tags inserted in their ears until they were processed for sale to Henbury.<sup>110</sup>

[120] I find that these four steers were sale cattle.

### **(3) 28 cattle sent to Tongala Abattoir**

[121] The plaintiff contends that among the cattle drafted by the Andersons on 16 and 17 June 2016 and trucked to Tongala Abattoir in Victoria and slaughtered, there were 28 Palmer Valley cattle. The plaintiff claims the money the defendants received for these cattle.

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**110** Transcript 29.01.18, p 77 per Mr Fogarty

[122] The plaintiff's claim in relation to these cattle is not based on any observed discrepancies with their ear tags, but on the fact that these cattle were listed on the NLIS Palmer Valley PIC and bore Palmer Valley brands.

[123] This in itself is not evidence that the cattle were Palmer Valley cattle, as that same description would hold true for sale cattle.<sup>111</sup> In the absence of evidence that these 28 animals did not have red floppy tags in their near side or offside ears, the plaintiff has no evidence that they were not sale cattle.

[124] The plaintiff has adduced no such evidence. In fact, Mrs Fogarty conceded that she does not know whether or not these 28 cattle belonged to the plaintiff.

[125] The plaintiff's claim in relation to these cattle must fail.

#### **(4) Other un-mustered cattle on Henbury**

[126] The Fogartys claim that at the time of the making of the Deed (11 December 2015) there were between 800 to 1,500 head of Palmer Valley cattle on Henbury. It is common ground that during the drafts carried out in 2016 and 2017, 508 head of Palmer Valley cattle were returned to Palmer Valley. The Fogartys claim, in the pleadings, to be entitled to the return of the balance of the Palmer Valley cattle on Henbury.

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**111** This is acknowledged in the Deed, in clause 3.6(c), set out at [15] above. One of the complaints made by the plaintiff in the context of these proceedings is that the Andersons have not transferred all of the sale cattle off the Palmer Valley PIC within the time frame agreed to in the Deed.

[127] The Andersons contend there were at most 600 Palmer Valley cattle on Henbury at that time.

[128] The Fogartys did not pursue this claim in their final submissions other than to contend that Mrs Fogarty had identified, through the NLIS subpoenaed documents, an additional 12 animals on Henbury which belong to Palmer Valley. (In any case the evidence is that, by the end of 2017, Henbury had been fully mustered, so that any Palmer Valley cattle which had been on Henbury would have been returned under the agreed protocols at the supervised musters.)

[129] The basis of the plaintiff's claim to these 12 animals is that they had Palmer Valley NLIS buttons containing 'TBAS0075' and 'L'. Mrs Fogarty's evidence was that these devices were manufactured in 2015; it was the practice on Palmer Valley during 2015 (as in other years) to insert the NLIS device into the ear of the animal at the time of earmarking and branding; and that all sale cattle were transferred to Henbury before the end of 2014 and would therefore have had NLIS buttons manufactured in 2014 or earlier.<sup>112</sup>

[130] Mrs Fogarty's evidence as to when NLIS buttons were inserted into the cattle was disputed. Ashley Anderson gave evidence that it was common practice not to insert NLIS buttons until the animals were to be moved off the station. The effect of that evidence is that once cattle were mustered, any that were to be retained on the station would not have a button inserted.

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**112** Exhibit P9, fifth affidavit of Sheri Fogarty sworn 12.12.17 [16]

Those cattle had buttons inserted later, when they were to be moved off the station.<sup>113</sup>

[131] There is further evidence that the plaintiff provided the defendants with white Palmer Valley buttons on more than one occasion in early 2015 (when both sides owned Henbury) for use in cattle sold from Henbury.<sup>114</sup> (Neville Anderson gave detailed evidence about buttons from particular batches of buttons supplied by the Fogartys being inserted into cattle about to be moved off the station following the muster of particular areas on the station, which it is not necessary to set out in full.) The defendants also placed in evidence an invoice from the plaintiff to the first defendant for the cost of 271 of these buttons.

[132] It is therefore not true to say that any cattle on Henbury with NLIS buttons manufactured in 2015 must, *ipso facto*, belong to the plaintiff.

[133] The defendants also point to the fact that the 12 animals in question came through the first four drafts in 2016 – that were attended by representatives of the plaintiff - and were not disputed.<sup>115</sup>

[134] The plaintiff has failed to establish any entitlement to these 12 cattle.

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**113** This is supported by Mrs Fogarty's evidence, given in a different context, that male cattle were buttoned when they were weaned and branded because they would be moved off the property within the next two years. The breeders, however, were not buttoned until they were to leave the property because they're there for breeding purposes and buttons do fall out, or cattle can die out in the paddocks so you would never be able to keep control of your buttons. (Transcript 29.01.18)

**114** See Exhibit D17, second affidavit of Ashley Anderson sworn 06.10.17 [21]; Exhibit D18, third affidavit of Ashley Anderson sworn 16.11.17 [5]; Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [13]; Exhibit D12, fourth affidavit of Neville Anderson sworn 16.01.18 [24].

**115** Exhibit D18, third affidavit of Ashley Anderson sworn 16.11.17 [7]; Exhibit D12, fourth affidavit of Neville Anderson sworn 16.01.18 [42]

### Conclusion re the plaintiff's claims

[135] The plaintiff has established its claim to ownership of the following disputed cattle only:

- (a) four cows and one bull from the 12 Mt Ebenezer cattle with no floppy tags cattle classed as "disputed" in the 2016 and 2017 drafts; and
- (b) one bull mustered at Cave Hole/Three Mile from the four Palmer Valley branded bulls with no floppy tags disputed in the 2016 and 2017 drafts.

There will be judgment for the plaintiff in relation to these animals.

[136] There will be judgment for the defendants in relation to the balance of the plaintiff's claims.

### **The plaintiff's claim to a mandatory injunction**

[137] The plaintiff seeks a mandatory injunction be compelling the Andersons to completely muster the cattle on Henbury and which mustering and drafting is to be supervised and overseen by a representative or representative of the Fogartys.

[138] The asserted basis of this was the defendant's alleged failure to comply with clause 3.6(c) of the Deed which provides:

The Anderson Interests will use all reasonable endeavours to transfer from the Palmer Valley PIC (Property Identification Code) to the Henbury Station PIC those cattle owned by Henbury Station by 30 September 2016.

[139] The plaintiff also claims, in the pleadings, damages for breach of this clause. The parties made competing submissions as to the construction of this clause which it is unnecessary to go into.

[140] While it is not disputed that there were still sale cattle on Henbury that had not been moved off the Palmer Valley PIC as at 30 September 2016, the plaintiff called no evidence of any damage suffered by it as a result (assuming that to have been a breach of the clause).

[141] The evidence is that Henbury was completely mustered in 2017 (and almost completely mustered in 2016) under the protocols agreed for supervised musters and drafts. The consequences of this are two-fold.

- (a) There is no need for a mandatory injunction to compel the defendants to do what they have already done.<sup>116</sup>
- (b) The practical consequence is that, in all likelihood, there are no Palmer Valley cattle on Henbury – and no sale cattle that remain on the Palmer Valley PIC.<sup>117</sup>

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**116** Mrs Fogarty swore an affidavit on 13 January 2017 that she was concerned that there were around 1,800 animals on Henbury that were on the Palmer Valley PIC, but should have been on the Henbury PIC. There was evidence that the Anderson interests and abattoirs had together transferred about 2,200 animals off the Palmer Valley PIC onto the Henbury PIC since the date of that affidavit. On questioning by me, Mrs Fogarty agreed that that would cure the problem.

**117** It is possible that, after the 2017 muster, there may have been a small number of sale cattle which were still on the Palmer Valley PIC among the few cattle that are inevitably missed even in a complete muster, but there is nothing the defendants can do about that and a mandatory injunction would not assist. It is also possible that there may be one or more wandering Palmer Valley cattle among those few un-mustered cattle, but, again, an injunction would not assist in locating them. If there were any animals in either category, then presumably, they would have been (or will be) identified and either transferred off the Palmer Valley PIC (or returned in accordance with industry practice as the case may be) in musters in the following years.



[142] The plaintiff's claim to a mandatory injunction is refused.

### **The defendants' counterclaim**

[143] There are four aspects to the defendants' counterclaim.

- (a) a claim for the plaintiff to account for 18 cattle which were arbitrarily allocated to the Fogartys on an interim basis during the draft organised by Mr Crawford on 25 June 2016;
- (b) a claim that the plaintiff account to the first defendant for the proceeds of sale of two "Lucy Creek" cattle (belonging to the first defendant) sold by the plaintiff;
- (c) a claim for conversion of "at least" 50 Henbury cattle which Mr Fogarty admits have wandered onto Palmer Valley and not notified or returned (plus their progeny); and
- (d) a claim for conversion of 1,807 cattle said to have wandered onto Palmer valley from Henbury based on expert opinion evidence. (This includes the admitted 50.)

### **Evidence and fact finding (defendants' counterclaims)**

#### **(1) The 18 disputed cattle from the Crawford draft**

[144] Greg Crawford undertook a draft at Henbury on 25 June 2016 at which cattle were split on a 50/50 basis based on a coin toss. This was an interim

solution which could not determine ultimate ownership of the animals and was not intended to do so.<sup>118</sup>

[145] It is not contentious that, as a result of this process, the plaintiff took possession of:

- (a) one Henbury bull, which Mrs Fogarty conceded belonged to the first defendant and said would be returned when found;<sup>119</sup>
- (b) eleven cattle with red floppy tags in the nearside ear, which is the agreed method for determining ownership of the transfer cattle which belonged to the first defendant; and
- (c) six cattle with red floppy tags in the offside ear.

[146] I have determined that cattle with red floppy tags in the offside ear are sale cattle. Each of these animals therefore belongs to the first defendant.

[147] This part of the defendants' counterclaim must succeed. There will be an order that the plaintiff account to the first defendant for the bull and seventeen other cattle from the Crawford muster.

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**118** Exhibit D24, affidavit of Greg Crawford sworn 01.05.17 [29]

**119** Mr Crawford's evidence is that Mrs Fogarty agreed to return the bull if he belonged to Henbury Station. He performed a search of the PIC which identified the bull as belonging to Henbury but the bull was not returned. Rather than wait the short time it took for the search to be performed, the Fogartys released the animal onto Palmer Valley and have not produced it following any of the subsequent musters.

## **(2) The two “Lucy Creek” cattle**

[148] Lucy Creek branded cattle belonged to the first defendant. They were purchased for Henbury from a third party, not from the plaintiff.

[149] There is evidence that, without telling the defendants, the plaintiff sold two Lucy Creek cattle and retained the proceeds of sale.<sup>120</sup> These were slaughtered with Lucy Creek NLIS buttons registered to Henbury so that both the Henbury PIC and Palmer Valley PIC received an NLIS warning when the buttons were read at the abattoir.

[150] In her second affidavit, Mrs Fogarty stated:<sup>121</sup>

I believe [these animals] to be the animals returned to Palmer Valley at the direction of Greg Crawford ...

Regardless of the state of the NLIS register I say those animals properly belong to Palmer Valley. There is some notation of an interest belonging to Lucy Creek which might suggest otherwise.

[151] However, in cross-examination, Mrs Fogarty accepted that these cattle were on the Henbury PIC and that the plaintiff sold the animals and retained the proceeds of sale.<sup>122</sup>

She was asked: “You accept that they were not only on Henbury’s PIC but owned by Henbury?”

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**120** Exhibit D9, first affidavit of Neville Anderson sworn 30.04.17 [76]

**121** Transcript 21.11.17, p 120

**122** Transcript 21.11.17, p 120

She answered: “There were two disputed cattle with Geoff Niethe because they were jumping<sup>123</sup> out of the yards, came back and we sold them. They were not disputed.”

She was then asked: “You’ve retained the proceeds of them?”

She answered: “Yes, that's the solicitor, yep.”<sup>124</sup>

[152] I agree with the defendants’ submission that Mrs Fogarty’s evidence in relation to these two animals offers no legal (or rational) justification for the plaintiff’s conduct. These were clear acts of conversion and demonstrated a willingness, on the part of the plaintiff, to convert the first defendants’ cattle. Further, both the conduct and the attempted (but failed) rationalisation for it, reflect badly on Mrs Fogarty’s credit.

[153] The defendants’ counterclaim in relation to these two animals must succeed. There will be an order that the plaintiff account to the first defendant for the proceeds of sale of the two Lucy Creek cattle sold by the plaintiff.

### **(3) The claim to approximately 1,800 wandering cattle**

- **The “at least 50” Henbury cattle admitted by Mr Fogarty to be on Palmer Valley**

[154] The defendants rely on the following evidence of Mr and Mrs Fogarty in support of the counterclaim.

- (a) Mr Fogarty deposed, ‘It is always the case that the owner of stock which has wandered onto a neighbour’s property should be notified

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**123** The transcript says “dumping” but I believe the word used by Mrs Fogarty was “jumping”. Similarly, the transcript spell’s Mr Niethe’s name as “Neither” and I have corrected it.

**124** Transcript 21.11.17, p 120

by the neighbour that they have been located.’<sup>125</sup>

(b) Mrs Fogarty deposed, ‘Industry practice is, if you find someone else’s stock on your land you should notify them directly.’<sup>126</sup>

(c) Mrs Fogarty deposed (in relation to Palmer Valley cattle in the Orange Creek mob), ‘Henbury should have told us about having Palmer Valley cattle as soon as they got them.’<sup>127</sup>

(d) Mr Fogarty gave evidence that he had mustered ‘at least 50’ of the first defendant’s cattle,<sup>128</sup> and that these 50 cattle had ‘been there all the time’.<sup>129</sup>

(e) Mr Fogarty said he did not draft these cattle, that is to say, they were separated out between the muster and the draft and released back onto Palmer Valley.<sup>130</sup>

(f) Mrs Fogarty said, ‘If they [i.e. Henbury cattle found on Palmer Valley] came into traps we’ll put them in a paddock.’<sup>131</sup>

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**125** Exhibit P13, fourth affidavit of Edward Fogarty sworn 20.11.17 [33]

**126** Exhibit P1, first affidavit of Sheri Fogarty sworn 06.07.17 [66a]

**127** Exhibit P1, first affidavit of Sheri Fogarty sworn 06.07.17 [66f]

**128** Transcript 30.08.18, p 121: ‘There would be at least 50’; ‘Yeah, we’ve mustered them’.

**129** Transcript 30.08.18, p 121: ‘How long have they been there?---They’ve been there all the time.’. Mrs Fogarty denied that there were any Henbury cattle on Palmer Valley.

**130** Transcript 30.08.18, p 121: ‘... we didn’t draft them. We just left them there’.

**131** Transcript 29.01.18, p 49

[155] It should be noted that Mrs Fogarty positively denied the existence of any of the first defendants' cattle on Palmer Valley.<sup>132</sup>

[156] Mr Fogarty initially said, 'At the moment? ... Should be none.'<sup>133</sup> Later he agreed that there were wandering Henbury cattle on Palmer Valley but he did not know how many.<sup>134</sup> Later still he said he had seen at least 50 cattle that had been there "all the time".

[157] It is common ground that the Fogartys did not tell the Andersons that there were Henbury cattle on Palmer Valley.

[158] Ashley Anderson gave evidence that the Andersons have not returned any wandering cattle drafted on Henbury back to the paddocks on Henbury; they arrange for their return to the appropriate stations.<sup>135</sup> He also deposed that all Henbury's other neighbours report and account regularly for wandering cattle from Henbury, but the plaintiff does not.<sup>136</sup> Since 1 January 2015, other neighbours returned 952 cattle to Henbury.<sup>137</sup>

[159] The defendants contended that the effect of deliberately leaving the first defendants' cattle in the paddocks at Palmer Valley for several years has been:

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**132** Transcript 21.11.17, p 109 – 'Is it correct to say that you haven't notified Henbury of any wandering cattle since March 2015?---That's correct. Why is that?---Because we haven't had any. Not a single wandering Henbury cattle?---No.'

**133** Transcript 30.01.18, p 92

**134** Transcript 30.01.18, p 128

**135** Exhibit D16, first affidavit of Ashley Anderson sworn 30.04.17 [131]

**136** Exhibit D16, first affidavit of Ashley Anderson sworn 30.04.17 [141]

**137** Exhibit D11, third affidavit of Neville Anderson sworn 17.11.17 [52], [58] and Annexure NA8

- (a) to deprive the first defendant of the use of these cattle; and
- (b) to allow the cattle to contribute, by way of natural increases, to the herd at Palmer Valley rather than the herd at Henbury.

[160] The defendants contend further that this conduct is substantially inconsistent with the first defendants' rights as owner and comprises the tort of conversion. I agree.

### Principles

[161] In *Penfolds Wines Pty Ltd v Elliott*,<sup>138</sup> Dixon J defined conversion in the following terms:

The essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel. It may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title. But damage to the chattel is not conversion, nor is use, nor is a transfer of possession otherwise than for the purpose of affecting the immediate right to possession, nor is it always conversion to lose the goods beyond hope of recovery. An intent to do that which would deprive "the true owner" of his immediate right to possession or impair it may be said to form the essential ground of the tort.

[162] Being in possession of another's goods without authority does not, without more, amount to conversion. In order for withholding possession of another's goods to amount to conversion, it must be in some way repugnant to, or in defiance of, the rights of the true owner. Often this is demonstrated

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138 [1946] HCA 46; 74 CLR 204 at 229

by evidence that the owner demanded the chattel and that the defendant refused to comply with the demand. However, prior demand is not always required. In *Kuwait Airways v Iraqi Airways*,<sup>139</sup> keeping another airline's aircraft with the intention of incorporating it into one's own fleet was held to be conversion without any necessity for demand and refusal.<sup>140</sup>

[163] The House of Lords in *Kuwait Airways*<sup>141</sup> quoted with approval the following passage from Clerk & Lindsell on Torts, 17<sup>th</sup> Edition (1995):

Conversion is an act of dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it.

[164] They said, further:<sup>142</sup>

Every person is guilty of a conversion who, without lawful justification, detains a chattel adversely to him who is entitled to it.

They emphasised that, *prima facie*, the measure of damages is the full value of the thing detained.<sup>143</sup>

[165] In the counterclaim, the defendants claim that the plaintiff:

- (a) sold two Lucy Creek cattle belonging to the defendants to an abattoir for slaughter and retained the proceeds of sale;

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**139** [2002] 2 AC 883; See also *Johnstone v Kaine* (1928) 23 Tas LR 43.

**140** Iraqi Airways repainted the aircraft and moved them from city to city but the act of conversion was a resolution of its board that all aircraft belonging to the (dissolved) Kuwait Airways be registered in the name of Iraqi Airways consequent upon an Iraqi Government resolution following the invasion of Kuwait.

**141** at [427]

**142** at [429] quoting with approval from Salmond: "Conversion by Detention"

**143** at [430]



(a) retained 18 cattle belonging to the defendant from the 25 June draft;  
and

(b) retained large numbers of stock which had wandered from Henbury to Palmer Valley and the offspring of such wandering stock.

[166] It is clear that sale and delivery of the two Lucy Creek cattle amounted to conversion, especially as this was followed by their destruction (or, perhaps more accurately, change of character from animals to meat).

[167] There is no direct evidence concerning what happened to the 18 animals from the 25 June draft or the wandering stock and how many of them (if any) were sold to abattoirs.

[168] If any of the animals that were so detained were on the Henbury PIC and were sold, this would have generated a warning to both Henbury and Palmer Valley and there is no evidence that that occurred. However, there is evidence from Mrs Fogarty that many of the sale cattle were not transferred off the Palmer Valley PIC. If those animals were sold to slaughter (or if animals that did not have NLIS buttons were so sold),<sup>144</sup> it would not generate a warning through the NLIS system.

[169] There is evidence that breeders are generally sold after a given number of years, so it is possible that at least some of the retained cattle would have been sold for slaughter. However, as explained below, it is not necessary

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**144** These would have Palmer Valley NLIS buttons inserted prior to being trucked off the station.

for this to be the case for the retention of those cattle to amount to conversion.

[170] The evidence of Mr and Mrs Fogarty (referred to at [154] above) is that when Henbury cattle were mustered on Palmer Valley, they were released elsewhere on Palmer Valley rather than kept in the yard to be drafted and returned. In this way, they would inevitably contribute to the natural increase of the Palmer Valley herd.<sup>145</sup>

[171] The defendants have pointed to letters from the defendants' solicitors expressing concern about wandering stock and stating that the defendants expect that the plaintiff "will conduct its musters and drafts in accordance with standard practice, ensuring that it notifies and accounts to [the defendants] of and for any Henbury wandering cattle". They submit these amount to a demand for return of the cattle. It does not matter whether these letters can be construed as demands or not. Nor is it necessary for the defendants to point to specific acts (such as sale and delivery) in relation to specific animals. The plaintiff's overall conduct in relation to the Henbury stock on Palmer Valley in:

- (a) not notifying the defendants when the Henbury cattle were mustered;
  - (b) instead, letting such animals go back into paddocks on Palmer Valley;
- and

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**145** All unbranded calves, from whatever source, would have been branded with the Palmer Valley brand when mustered.

(c) allowing those stock to contribute to the natural increase of the Palmer Valley herd;

amounted to conversion of the stock so detained. The plaintiff has intentionally detained the first defendant's cattle and incorporated them into its own herd. This amounted to intentional dealing with wandering Henbury stock in a manner inconsistent with the first defendant's right and it has deprived the first defendant of the use and possession of those cattle.

[172] The defendants' counterclaim must therefore succeed at least in relation to the 50 Henbury cattle which Mr Fogarty admits are on Palmer Valley and their progeny. (The calculation of the expected number of progeny is best left until the total number of wandering cattle converted has been determined.) The same principles and analysis apply to the defendants' claim in relation to any other wandering Henbury cattle which have been detained on Palmer Valley. It remains to determine whether the defendants have established that there are such other cattle and, if so, how many there are.

- **Other Henbury cattle said to be on Palmer Valley on the basis of expert evidence**

[173] For this aspect of the counterclaim to succeed, the defendants must prove, on the balance of probabilities that:

- (a) more cattle are on (and/or have been taken off) Palmer Valley than can be accounted for by natural increases and purchases (and, if so, how many more); and
- (b) at least some of those excess cattle came from cattle which wandered onto Palmer Valley from Henbury, and their offspring (and, if so, how many).

[174] In addition to general evidence about the behaviour of cattle in that part of the Northern Territory, numbers of wandering stock returned to their owners from various stations, and matters of that nature, the first question involves consideration of expert evidence concerning the expected natural increase of stock on Palmer Valley in order to determine whether there are excess cattle on Palmer Valley. The second question also involves a consideration of evidence from Neville Anderson concerning expected natural increase of cattle on Henbury to determine whether there is a shortfall of cattle on that station.

#### General evidence

[175] It is not disputed that over the 2016 and 2017 musters and drafts 508 cattle mustered and drafted on Henbury were identified as Palmer Valley cattle and were returned to Palmer Valley. During this time no cattle mustered on Palmer Valley have been returned to Henbury. Other neighbours returned 952 cattle to Henbury in the period from 1 January 2015 to the end of 2017.

[176] The defendants contend that it is highly unlikely that only 50 of the first defendant's cattle wandered south onto Palmer Valley, while more than ten times this number wandered north from Palmer Valley to Henbury. They rely on the following evidence which suggests that it is likely that more cattle would have wandered from Henbury to Palmer Valley than the other way around.

- (a) Mr Niethe's report states that 'in extensive grazing enterprises there is always some leakage of stock both ways over boundary fences due to fence damage'.<sup>146</sup>
- (b) At all times since March 2015 (when cattle were last returned to Henbury) the herd on Henbury has been far larger than the herd on Palmer Valley.
- (c) Cattle have a tendency to wander back to where they came from and the sale cattle on Henbury came from Palmer Valley or Mt Ebenezer.
- (d) Cattle in the Northern Territory also have a tendency to wander south and Palmer Valley is located to the south of Henbury.<sup>147</sup>

[177] On the basis of this evidence alone, I consider it more likely than not that more than 508 cattle wandered from Henbury to Palmer Valley between March 2105 and the end of 2107 and were not returned by the plaintiff. The question is, how many more.

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**146** Exhibit P19, Affidavit of Geoff Niethe sworn 14.01.19 Annexure GN1 at 2 under the heading 'Background'

**147** See Transcript 21.11.17, p 137 per Ken Paige

### Expert Evidence

[178] The plaintiff obtained an expert report from Mr Michael McClaren, an accountant and valuer. The defendants obtained an expert report from Brendan Vaughan and Andrew Perkins from Hall Chadwick (referred to jointly as “Hall Chadwick”), both accountants and economists with relevant expertise and experience in livestock and property matters. I directed that the experts confer and produce a joint report which they did.

[179] All the experts were appropriately qualified; all agreed (essentially) on the methodology to be adopted in assessing the expected natural increase in cattle on Palmer Valley over the relevant period and comparing that to closing stock numbers. They disagreed on whether there was surplus stock on Palmer Valley. The major reason for the disagreement lay in the assumptions which Mr McClaren was instructed to make based on information provided by Mr Fogarty.

### Analysis of the expert evidence

[180] The defendants adduced expert evidence from Hall Chadwick for the purpose of demonstrating that there were more cattle on Palmer Valley as at 30 June 2017 than could be accounted for by a combination of purchases of cattle and natural increase of the herd, given the opening numbers of cattle on the station at the beginning of each of the financial years 2014/15, 2015/16 and 2016/17, and the numbers of cattle moved off the station in those years.

[181] In their report of 18 May 2018, Hall Chadwick calculated the numbers of cattle moved off Palmer Valley and Mt Ebenezer in the financial years 2014/15, 2015/16 and 2016/17 from the applicable National Vendor Declarations<sup>148</sup> and the Northern Territory Waybills.<sup>149</sup> This included movements off Palmer Valley and Mt Ebenezer to the Fogartys' property at Tressa Vale in New South Wales. Hall Chadwick did not have information about sales of cattle from Tressa Vale, but that is irrelevant for present purposes.

[182] The figures so calculated for actual stock movements off Palmer Valley and Mt Ebenezer in those three financial years are:

2014/15	8,723
2015/16	3,474
2016/17	<u>1,552</u>
TOTAL	13,749

[183] Hall Chadwick then examined the plaintiff's financial accounts to ascertain the opening and closing stock numbers for each of the three financial years, as well as the number of purchases (which were relatively few), recorded deaths (also relatively few) and sales.

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**148** Producers that are Livestock Production Assurance (LPA) accredited complete a National Vendor Declaration when stock are moved or sold. The declaration includes details such as property origin and destination information; description and numbers of animals; whether the animals have been fed certain ingredients; whether the animals have been treated with hormones; and whether any animals are still within a withholding period following treatment with drugs or chemicals. See also Transcript 02.02.18, p 314 and 315.

**149** A waybill is a form that must be completed under the *Livestock Act 2008* (NT) and *Livestock Regulations 2009* (NT) when undertaking certain stock movements. The waybill includes information such as property origin and destination information, including address and Property Identification Code; description and numbers of animals; and whether or not the animals have NLIS devices. The waybill travels with the animals and is handed to the destination owner or representative upon arrival. See also Transcript 02.02.18, p 314 and 315.

[184] Those figures from the financial accounts were as follows:<sup>150</sup>

	2014/15	2015/16	2016/17
<b>Opening stock</b>	10,805	3,674	4,293
ADD			
Purchases	10	1	3
Natural increases	?	?	? <sup>151</sup>
LESS			
Sales	7,297	2,390	4,062
Deaths	39	—	—
<b>Closing stock</b>	3,674	4,293	6,947

[185] The total sales recorded in the plaintiff's financial accounts over the three financial years was the same as the figure calculated by Hall Chadwick using the National Vendor Declarations and the Northern Territory Waybills (13,749). The breakdown year by year is different, but this can presumably be accounted for by what was referred to as "delayed sales" – that is to say cattle that were moved off the stations in one financial year, but not paid for until the next, and accounted for in the year in which they were paid for.<sup>152</sup>

[186] It was not possible for Hall Chadwick to obtain any information about the actual natural increase of the herd from the financial accounts as the

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**150** Hall Chadwick report Table 8, p 31

**151** Figures were inserted in the plaintiff's financial accounts for natural increases, but I have left them out for the reason set out at [186]. The total number for "natural increase" over the three financial years in question recorded in the accounts was 12,986.

**152** The Hall Chadwick report notes at [35](e) that there is a mismatch in the accounting for delayed sales in that they are not accounted for in sales for the year that they are delivered and are not accounted for in stock in hand. This does not matter for the purposes of the present exercise as it has not affected the accounting for the number of cattle actually moved off the stations.



plaintiff did not record actual figures (or an estimate of actual figures) in the financial accounts. The figures inserted in the financial accounts for “natural increases” did not reflect a count of calves branded<sup>153</sup> (or a reasoned estimate of the actual natural increase); they were simply balancing figures calculated as follows: closing stock + deaths + sales – purchases – opening stock.<sup>154</sup> In his report dated 5 July 2018, prepared on the instructions of the plaintiff, Mr McClaren, also a chartered accountant with relevant experience and qualifications, agreed that this was the case. He made the point that this is a common practice in preparing accounts in the pastoral industry and is not indicative of any technical or accounting deficiency. I do not understand Hall Chadwick to be suggesting otherwise – simply that the figures in the accounts did not reflect the actual natural increase which needed to be calculated in a different way.

[187] The experts conferred and produced a joint report dated 3 August 2018.

Mr McClaren agreed that it was necessary to calculate the expected natural increase and the experts also agreed on the appropriate method to perform that calculation. However, they differed in the results of those calculations as a result of adopting different starting assumptions. These are dealt with in more detail below.

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**153** Hall Chadwick report, [68]

**154** Hall Chadwick report, [66]. As noted by Hall Chadwick in para 32(c) of their report, the fact that the figures for “natural increase” recorded in the financial accounts are merely balancing figures is reflected in the significant variation in the natural increase figures from year to year. For example, “natural increase” in 2014/15 is recorded as 195 from an opening stock figure of 10,805 head and the “natural increase” in 2016/17 is recorded as 6,713 from an opening number of 4,293 head. These figures cannot reflect the actual natural increase (or a reasonable estimate of the actual natural increase) in those years.

[188] In their report dated 18 May 2018, Hall Chadwick provided information about a number of usual financial management/accounting practices for cattle enterprises of the scale operated by the plaintiff.

(a) They stated that the figure for closing stock in the financial accounts should include an estimate of un-mustered cattle and unbranded calves to get a realistic estimate of the cattle on hand at the end of the financial year.<sup>155</sup>

(b) Also, when estimating the actual natural increase, in addition to branded calves counted, the figure should include a conservative estimate of the un-branded calves expected to be on the property at the end of the financial year.<sup>156</sup>

[189] They also gave evidence of calving and weaning rates in the region.<sup>157</sup>

(a) They noted a number of factors that can affect both calving and weaning rates.<sup>158</sup>

(b) They stated that, depending on such factors as management, season and pasture availability (all of which can affect the health of the breeder

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**155** at [30]

**156** at [31]

**157** The calving rate is the number of calves born as a percentage of breeders. The weaning rate is the number of branded weaner calves as a percentage of breeders. It will be expected to be somewhat lower than the calving rate to take account of deaths and un-mustered weaners. However, the two terms have been used interchangeably in the reports so, presumably, the difference is not considered significant and the dead calves are included in the overall mortality rate of the herd.

**158** at [42] and [45]

herd) the expected calving rate would range from 65% to 85%.<sup>159</sup>

(c) For budgeting purposes for their own clients who breed cattle in NT and Central Australian pastoral enterprises, they use an expected calving rate of 75%.<sup>160</sup>

(d) The *Northern Beef Report: 2013 Situation Analysis*<sup>161</sup> published findings for long term average reproductive and overall herd mortality rates for (inter alia) the Northern Territory over the period 2001 to 2012 which showed an average reproductive rate of 65% in the Alice Springs region (and a mortality rate of 4.7%).<sup>162</sup>

[190] They performed an analysis of the herd during the relevant period (broken down into calves, bulls, steers, heifers and unidentified) taken from information supplied by Mrs Fogarty to Suncorp, and to the plaintiff's accountants, following musters.<sup>163</sup>

[191] Using the breeder numbers calculated from that analysis, they then performed a calculation of what a reasonable natural increase rate would have been based on two assumed natural increase rates, 85% and 75%.<sup>164</sup>

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**159** [42]

**160** [41] and [42]

**161** This is a publication jointly funded by Meat and Livestock Australia and the Northern Territory, Queensland and Western Australian Governments. [Hall Chadwick report [43](a)]

**162** Hall Chadwick report Table 7. These figures were based on 28 of the 49 properties identified as making up the Alice Springs Region. [Hall Chadwick report [43](b)]

**163** Table 10 and Appendix 4

**164** [75], Tables 12 and 13 (85% increase rate) and Table 14 (75% increase rate)

Hall Chadwick explained that they adopted the two alternative rates for these reasons.

- (a) The 85% calculation was performed because Mr Tom Newsome, an expert engaged by the plaintiff, adopted the figure of 85% based on instructions from Mr Fogarty that this was the rate achieved by the plaintiff.<sup>165</sup>
- (b) The 75% calculation was performed because, although the Northern Beef Report showed average weaning rates of 65%, as set out in [189](d) above, they took into account Mr Fogarty's claim that the Bos Taurus cattle run by the plaintiff would have a higher weaning rate than Bos Indicus cattle in the same region and therefore, presumably, higher than the 65% average given in that report. (Hall Chadwick were of the view that 75% was a more realistic rate than 85%.)

[192] Mr McClaren adopted a figure of 85% for the expected calving rate based solely on Mr Fogarty's instruction to him that this was the rate achieved on Palmer Valley.<sup>166</sup> Mr Fogarty also gave evidence to this effect. Because the plaintiff's accounts did not attempt to calculate the actual natural increase, but simply adopted the expedient of using "natural increase" as a balancing item in preparing the accounts, it was not possible to test Mr Fogarty's evidence about the historical calving rates on Palmer Valley and

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**165** The plaintiff did not ultimately rely on this report.

**166** McClaren report [5.1](f)

Mt Ebenezer. No other objective evidence was adduced to substantiate his evidence of an 85% calving rate. (Further, Mr Fogarty's evidence on this point was inconsistent. At one point, he said that he had a 90% calving rate.)<sup>167</sup>

[193] The task Hall Chadwick undertook was to calculate the expected natural increase in the herd given the opening stock values each year (based on those two alternative expected calving rates) and to compare that to the figures for "natural increase" which the plaintiff inserted into the accounts to balance the opening and the closing stock figures. If the expected natural increase figures were less than those in the accounts, this would mean that the closing stock figures were greater than could be accounted for by the actual natural increase in the herd over the opening stock figures. (For the purpose of this exercise the relatively insignificant figures for purchases and deaths could be ignored.) In carrying out this exercise, Hall Chadwick made the following assumptions.

- (a) They assumed the accuracy of the opening stock figure recorded in the plaintiff's financial accounts for 2014/15 (10,805) and the closing stock figure for 2016/17 (6,974).<sup>168</sup> (The closing stock numbers for the 2016/17 year were confirmed in an email from Mrs Fogarty to Suncorp dated 16 September 2017 noting that there were 6,947 head of cattle on

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**167** Transcript 30.01.18, p 94

**168** Each year the opening stock figure given in the accounts is the same as the closing stock figure for the year before, as would be expected.

hand.<sup>169</sup> The opening number of 4,293 for that same year was confirmed in an email from Mrs Fogarty dated 4 August 2016.<sup>170</sup> These were reproduced in Appendix 4 of the Hall Chadwick report.)

- (b) They assumed that the closing stock figures did include an estimate of un-mustered cattle and unbranded calves to get a realistic estimate of the cattle on hand at the end of the financial year in accordance with the sound financial management/accounting practice referred to in para 30 of their report. (See [188](a) above.)

[194] Both of these assumptions were disputed by Mr McClaren based on instructions from Mr Fogarty. Mr Fogarty instructed Mr McClaren that the closing stock numbers for each year (and hence the opening stock numbers for the following year) were understated in the accounts for a range of reasons.

- (a) In his report, Mr McClaren noted that Mr Fogarty instructed him that the plaintiff did not include an estimate of un-mustered stock in the livestock numbers it included in preparing its financial accounts.<sup>171</sup>
- (b) Mr Fogarty also instructed that for various reasons there were no “full musters” during the three year period. (It was common ground that no muster is ever 100% complete.) Mr Fogarty instructed that for the year

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**169** This is referred to in the Hall Chadwick report [21](e)

**170** Hall Chadwick report [67](b)

**171** McClaren report [4.7]

ended 30 June 2014 there had been a 98% muster; for the year ended 30 June 2015 there had been only a 50% muster; for the year ended 30 June 2016 there had been a 60% muster; and for the year ended 30 June 2017 there had been a 95% muster. (If true, this would have the effect of explaining the high closing numbers at the end of the 2016/17 year and accounting for why the calculated expected natural increase based on the figures in the financial accounts might be an underestimate.)

- (c) Mr Fogarty instructed that because of the different seasons, he estimated that there had been 300 deaths in 2014/15, 300 in 2015/6 and as few as 20 in 2016/17. (This would have a similar effect on explaining the high closing numbers in 2016/17 and accounting for why there may have been a higher natural increase in the other two years that might appear based on the low closing numbers for those years.) Mr Fogarty instructed that about two animals a month are used as “killers” or “rations”.
- (d) Mr McClaren assumed (presumably on instructions from Mr Fogarty) that the closing stock figures did not take into account the 508 cattle returned from Henbury to Palmer Valley after supervised musters and made an additional allowance for those.
- (e) Mr Fogarty further instructed that, in addition to “un-mustered” cattle, there were, at any given time, a further 500 “bush cattle” on Palmer

Valley which should be added to the opening stock numbers each year. He did not explain why these were a different category of cattle from other un-mustered cattle. (Hall Chadwick did not accept that these 500 “bush cattle” were a separate category and contended that to count them separately was double counting.)

[195] Another complication is that calving numbers will depend on the timing of sales during the year. Therefore, rather than adopt the opening number of breeders (or the closing number), Hall Chadwick used an average of the opening and closing numbers each year,<sup>172</sup> while providing in Table 12 alternative calculations based on opening and closing breeder numbers. (Mr McClaren agreed that adopting the average of opening and closing breeder numbers for the purpose of his calculation was appropriate.) Using this average number, Hall Chadwick calculated the expected natural increase in the Palmer Valley/Mt Ebenezer herd as follows:

Calculation using an assumption of 85% calving rate

	2014/15	2015/16	2016/17
Breeders	2,066	1,710	2,499
Natural increase (85%)	1,756	1,454	2,124

The total expected natural increase over the three financial years using the

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172 Hall Chadwick report [77]



average number of breeders during the year was therefore 5,334.<sup>173</sup>

Calculation using an assumption of 75% calving rate

	2014/15	2015/16	2016/17
Breeders	2,066	1,710	2,499
Natural increase (85%)	1,550	1,283	1,874

The total expected natural increase over the three financial years using the average number of breeders during the year was therefore 4,707.<sup>174</sup>

[196] Based on the assumptions they made, in their report of 18 May 2018, Hall Chadwick calculated that there were 4,583 additional livestock on Palmer Valley than could be accounted for by expected natural increase (assuming an 85% calving rate), and 5,210 more cattle on the station than could be accounted for by expected natural increase (assuming a 75% calving rate).<sup>175</sup> For the reasons set out above, they expressed the view that an expected calving rate of 75% was more realistic.

[197] Based on the instructions given by Mr Fogarty, in his initial report, Mr McClaren concluded that it could not be established that there were

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**173** The report gives the figure as 5,333. This is presumably a misprint. It has no practical impact on the results. If opening breeder numbers are used instead of an average of opening and closing numbers, the calculated expected natural increase does not vary greatly. (The difference is less than 200 cattle whether opening, closing or average breeder numbers are used for the calculation. See Table 12.) If one uses the opening stock figures (instead of the average of opening and closing figures), the calculated expected natural increase is slightly lower – ie 5,170. If one uses the closing figures, the calculated expected natural increase is slightly higher – ie 5,497. This is to be expected if Hall Chadwick’s conclusion that the closing numbers reflect additions to the herd that cannot be accounted for by expected natural increase is correct.

**174** Hall Chadwick report Table 15

**175** These figures appear conservative. If the raw figures for “estimated natural increase” and “natural increase inserted as balancing items” over the three financial years in question are compared, the excess is 8,279 (ie 12,986 less 4,707). Given that the experts agreed on the appropriate method of calculating the expected natural increase and the excess stock (if any), I have not speculated about the significance of the raw figures. I have based my assessment of the numbers of cattle converted by the plaintiff on the figures given by Hall Chadwick, which were calculated in accordance with that agreed method.

4,500 to 5,000 “unaccounted for” stock on Palmer Valley as at 30 June 2017 and that his calculations did not support there being any material number of Henbury cattle on Palmer Valley. Using average breeder numbers calculated in accordance with Mr Fogarty’s instructions, Mr McClaren calculated the cumulative expected natural increase over the three years in question at 9,646.<sup>176</sup> This is a difference of 4,312 from the figure for expected natural increase calculated by Hall Chadwick on the basis of an assumed 85% calving rate, and a difference of 4,939 from the figure for expected natural increase calculated by Hall Chadwick on the basis of an assumed 75% calving rate.

[198] Given that their differences in calculation are attributable in part to different assumptions as to opening and closing stock numbers, it is not possible to directly compare the figures for “unexplained excess” numbers of cattle, but one can readily see that if the figures for expected natural increase in the McClaren report are accepted, that would account for all or most of the 4,500 to 5,000 stock on Palmer Valley calculated by Hall Chadwick to be unaccounted for as at 30 June 2017.

[199] The experts conferred, and in their joint report of 3 August 2018, they agreed on a number of things.

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**176** This is 3,340 less than the “balancing” figures for natural increase in the plaintiff’s financial accounts (set out in Table 8 of the Hall Chadwick report). However, Mr McClaren assumed (on the basis of instructions from Mr Fogarty) that the opening figures were mis-stated in the accounts and so did not place any significance on this. (In fact both experts ended up agreeing that the plaintiff’s accounts could not be relied upon. See [199](d) below.)

- (a) They agreed that the correct method of accounting for livestock was as follows:

<b>Livestock to be accounted for</b>	<b>Accounting for Livestock</b>
Opening stock at 01/07	Sales
Add purchases	Add deaths
Add natural increase	Add rations (ie killers)
Add other transfers in	Add other transfers out
	<u>Add closing stock</u>

*The totals for “Livestock to be accounted for” and “Accounting for livestock” will be equal.*

- (b) They agreed on the mathematics of the calculations performed using this method on the basis of various assumptions, but did not agree on some of the assumptions. (See details below.)
- (c) They agreed that it was appropriate to calculate the expected natural increase using the average between the opening and closing stock values for the relevant year.
- (d) They agreed that the numbers provided by Mrs Fogarty to Suncorp and to the accountants (reproduced in Appendix 4 to the Hall Chadwick report), which formed the basis of the figures in the financial accounts, were inaccurate and that, therefore (at least in certain respects), those financial accounts could not be relied upon. (This caused Hall Chadwick to revise their initial calculations.)

[200] They noted differences in methodology between the two initial reports. Hall Chadwick isolated the information available about the Northern Territory properties (Palmer Valley and Mt Ebenezer before it was de-stocked and sold); Mr McClaren looked at the total BJEK operation which included the New South Wales property of Tressa Vale because, he said, transfers between properties could then be ignored as they would cancel out on consolidation. That does not appear to have resulted in any significant difference of opinion between the two experts. Assuming that all (or almost all) the cattle transferred from the Northern Territory properties to Tressa Vale were subsequently sold, the transfers would indeed be cancelled out by the sales.

[201] In the joint report, Hall Chadwick gave reasons for disagreeing with some of the assumptions made by Mr McClaren based on Mr Fogarty's instructions. They also accepted that some adjustments were necessary where additional objectively verifiable information was provided, and performed a recalculation of the expected natural increase based on that additional information. It is not necessary to set out the detail of all such agreements and disagreements. The recalculation is set out following paragraph 19 of the joint report and the agreements and disagreements are set out at paragraphs 1 to 9 following.

[202] Significant areas of disagreement included the accuracy of Mr Fogarty's instructions regarding opening stock numbers, completeness of mustering in different years, and calving rates.

[203] Adjusting their calculations for the matters which were agreed, Hall

Chadwick recalculated the expected natural increase in the Palmer Valley herd over the relevant period using a 75% calving rate, having previously given reasons why they believed this to be the appropriate rate. (See [189] and [196] above.) The figure they arrived at was 7,957 (3,271 more than their original estimate of 4,704 based on a 75% calving rate). That has the result of decreasing their estimate of the number of unexplained cattle on Palmer Valley from 5,210 (assuming a 75% calving rate) to 1,939.

[204] The differences between the two experts narrowed during the consultation period. In the end the principal differences were these.

(a) Mr McClaren based his calculations on the assumption that

Mr Fogarty's instruction that there were an additional 500 cattle on the property at any given time which were in addition to the percentage of "un-mustered" cattle taken into account (and that these would contribute to natural increase) whereas Hall Chadwick insisted that this amounted to "double counting". I agree with Hall Chadwick on this issue. Un-mustered cattle are un-mustered cattle. When one refers, for example, to a 95% muster, that must mean that one has estimated that approximately 95% of the cattle on the station have been mustered. There is no logical reason for adding an additional category of un-mustered cattle.

- (b) Mr McClaren adopted the figure given by Mr Fogarty of an 85% calving/weaning rate for Palmer Valley, whereas Hall Chadwick contended that a 75% figure was more reasonable. Again I agree with Hall Chadwick on this issue. The *Northern Beef Report* referred to at [189](d) above gives an historical calving rate of 65% for the Alice Springs area. Mr Vaughan of Hall Chadwick gave his opinion that 75% was sustainable. Mr Niethe, an expert engaged by the plaintiff, and the only expert who actually saw Palmer Valley and its cattle, expressed the view, during cross-examination that a calving rate of 60% would be reasonable.<sup>177</sup>
- (c) Mr McClaren accepted Mr Fogarty's instructions that Palmer Valley had achieved only a 50% muster for the year ended 30 June 2015, and a 60% muster for the year ended 30 June 2016. Hall Chadwick did not. Again, I agree with Hall Chadwick.
- (i) Mr Fogarty was cross-examined about his claim that there had been only a 50% muster. He was unable to explain how the 50% figure was arrived at. Nor was he able to identify those areas of Palmer Valley that were not mustered in the second round muster in that year. Further, Mr Fogarty only said that there was a 50% muster in the year ended 2015 after the defendants' counterclaim alleged that there were unaccounted for cattle on Palmer Valley

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177 Transcript 31.01.18, p 181

(which happened quite late in the proceeding). He did not mention it in any of his earlier affidavits when he was asserting that there were stock missing from Palmer Valley.

(ii) Mrs Fogarty's evidence did not support the assertion that there had been only a 50% muster in that year. She said, "We started in April and, yeah, we virtually got all the weaners off and then we actually destocked about a third of our breeders."<sup>178</sup>

(iii) Mr Fogarty said that the 60% muster rate for the following year (ended 30 June 2016) was a result of early rain resulting in standing groundwater and the growth of winter herbage which meant that the stock did not congregate around watering points. This evidence is contradicted by the Palmer Valley station diary which shows that Palmer Valley was hot and dry in the early months of 2016; that there was no mustering after the rain which fell in March and May 2016; that trapping resumed on 15 May; and records "herbage starting to grow" on 4 June after mustering was complete. Also, Mr Niethé gave evidence that Palmer Valley looked dry when he visited in mid-2016.<sup>179</sup>

[205] I therefore conclude, on the basis of the expert evidence provided by Hall Chadwick, that there were approximately 2,000 more cattle on Palmer

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**178** Transcript 29.01.18, p 35

**179** Transcript 31.01.18, p 181

Valley as at 30 June 2017 than could be accounted for by expected natural increase and that, as there was no suggestion that there was any other potential source of unaccounted for cattle, these are the result of cattle which have wandered onto Palmer Valley from neighbouring properties during the relevant period and their progeny.

[206] That does not mean that the defendants have proved that all of these cattle are the result of cattle wandering from Henbury. Palmer Valley has other neighbours. There is no evidence before the Court as to whether the Fogartys were in the habit of not notifying other neighbours of wandering stock – simply that they did not notify Henbury. Nevertheless, as the onus is on the defendants to establish both the facts supporting liability in respect of their counterclaim and its quantum, I consider that some allowance should be made for the possibility that some of these excess cattle may have come from properties other than Henbury.

[207] Neville Anderson estimated that Henbury was missing approximately 2,000 cattle over the same three year period, given opening stock numbers, plus estimated natural increase (calculated on the basis of a 75% weaning rate) less sales. In closing submissions, the plaintiff expressed numerous objections to reliance on these calculations – beginning with the fact that Mr Anderson was not an expert qualified to express such an opinion. I do not allow the plaintiff's objection to the evidence. It is not expert opinion. It is no more than a simple calculation using the figures for opening and closing stock numbers in the first defendant's records and the same basic



method as that used by the experts in calculating the estimated natural increase for Palmer Valley. However, I am placing no great reliance on the estimate of missing stock. I simply note that the figures supplied by Mr Anderson suggest that some stock has gone missing from Henbury.

[208] The starting point is the finding (at [177] above) that it is more likely than not that more than 508 cattle wandered from Henbury to Palmer Valley and were not returned by the plaintiff (and Mr Fogarty has admitted to seeing at least 50 of them). The evidence is that 508 cattle were returned to Palmer Valley from Henbury in 2016 and 2017 (ie after the Deed was signed in December 2015), and that Henbury was fully mustered in 2017, meaning that 508 cattle wandered from Palmer Valley to Henbury over a two year period.

[209] A finding needs to be made on the basis of the available evidence (including the evidence that there are approximately 2,000 unaccounted for cattle on Palmer Valley) as to how many wandering stock and offspring of wandering stock from Henbury have been converted by the plaintiff.

[210] On the basis of the available evidence I find that 1,500 of the 2,000 unaccounted for cattle on Palmer Valley during the three year period 1 July 2014 to 30 June 2017 were cattle which wandered South from Henbury to Palmer Valley, plus their progeny. I have set out my calculations in the attached Schedule 3, along with a fuller explanation of the assumptions

made in performing the calculation. In summary this assessment is made on the basis of the following evidence and assumptions.

- (a) I have assumed that approximately 300 cattle per year wandered South from Henbury to Palmer Valley. This is based on the evidence that in the two year period 2016 to 2017 approximately 500 cattle (ie 250 a year) wandered North from Palmer Valley to Henbury and the evidence that, for a range of reasons, more cattle are likely to have wandered in the opposite direction. It also seems to me to be consistent with the evidence that over an approximately two and a half year period, over 900 cattle were returned to Henbury from other neighbours, and that, unlike Palmer Valley those neighbours are not directly South of Henbury.
- (b) I have assumed, based on the analysis of the Palmer Valley herd in the Hall Chadwick report, that approximately 50% of those wandering cattle would have been breeders.
- (c) I have assumed a 75% calving rate among the breeders and that female calves born in year one would have become breeders in year three.
- (d) I have rounded down the figure arrived at (from 1,614 to 1,500) for contingencies including mortality.

[211] On the counterclaim, there will be judgment for the first defendant in relation to:

- (a) its claim for the plaintiff to account for 18 cattle which were arbitrarily allocated to the Fogartys during the draft organised by Mr Crawford on 25 June 2016;

- (b) its claim that the plaintiff account to the first defendant for the proceeds of sale of two “Lucy Creek” cattle (belonging to the first defendant) sold by the plaintiff; and
- (c) damages for conversion of 1,500 cattle being cattle that wandered onto Palmer Valley from Henbury plus their progeny.

[212] The parties have agreed that consideration of the quantum of the claims on which each of the parties has succeeded should be deferred until after judgment has been delivered on the questions of liability.

#### The injunction

[213] The defendants seek an order that the interlocutory injunction granted on 12 August 2016 be dissolved. As I have found that the alleged facts on the basis of which the injunction was granted have not been made out, the injunction will be dissolved.

#### [214] ORDERS:

1. There will be declarations that, of the disputed cattle identified in the musters since June 2016:
  - (a) all cattle with a red or purple floppy tag in the offside ear belong to the first defendant;
  - (b) all cattle with a white floppy tag in either ear belong to the first defendant;

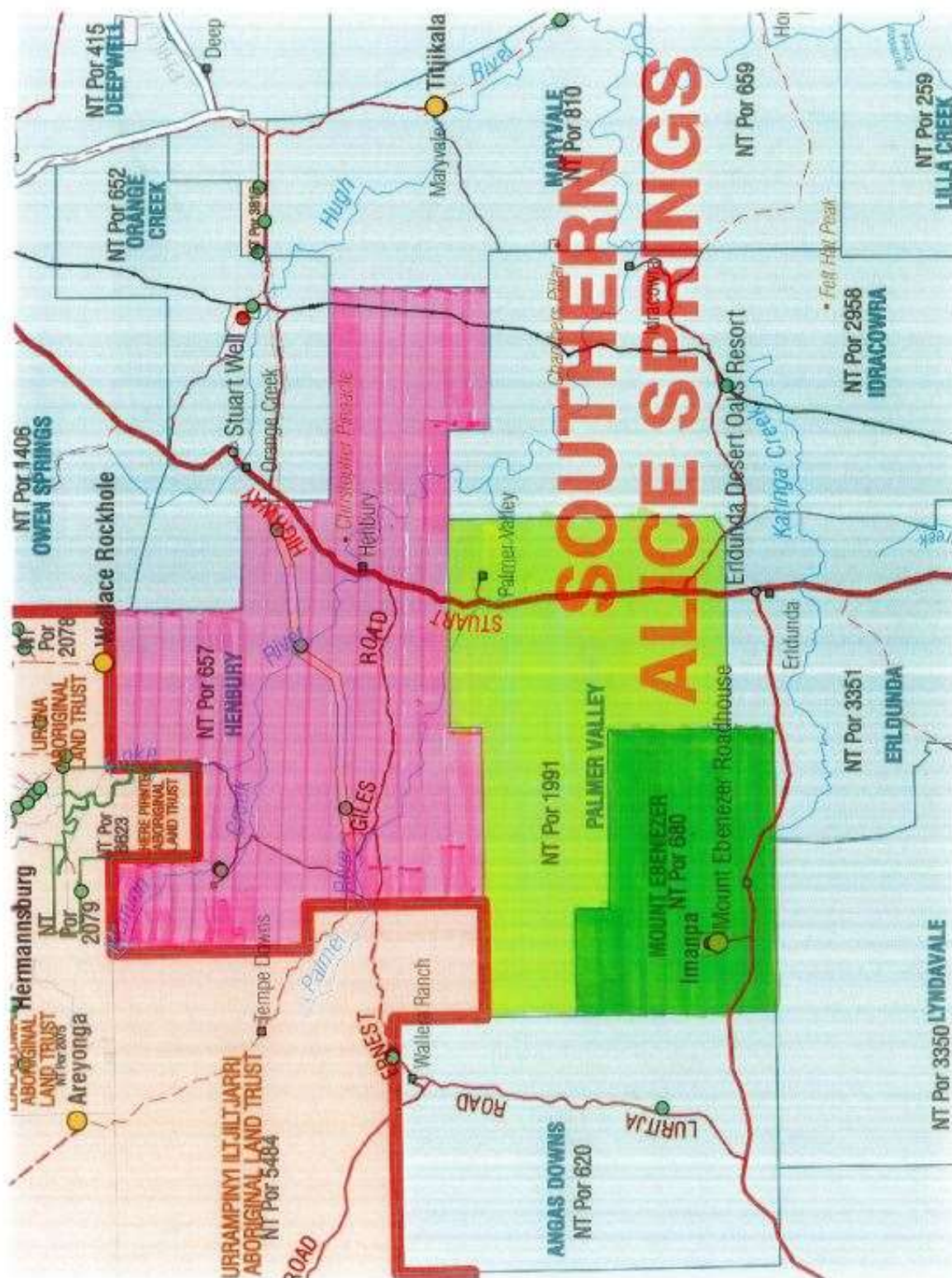
- (c) the four Palmer Valley branded steers with the backs of floppy tags only belong to the first defendant;
  - (d) of the 12 Mt Ebenezer branded cattle without floppy tags:
    - (i) the seven steers mustered from the area around Harts Camp belong to the first defendant;
    - (ii) the remaining cattle (four cows and one bull) belong to the plaintiff;
  - (e) of the four Palmer Valley branded bulls without floppy tags:
    - (i) the three bulls mustered at Mt Gloaming belong to the first defendant;
    - (ii) the bull mustered at Cave Hole/Three Mile belongs to the plaintiff;
2. All of the other claims by the plaintiff (including the claim for a mandatory injunction) are dismissed.
3. In relation to the 18 cattle which the plaintiff took possession of following the 25 June 2016 muster by Mr Crawford:
- (a) the plaintiff is to account to the first defendant for the proceeds of sale of such cattle;

(b) alternatively, the plaintiff is to pay the first defendant damages of the full value of such cattle for conversion of the cattle.

4. The plaintiff is to account to the first defendant for the proceeds of sale of the two “Lucy Creek” cattle which the plaintiff sold to an abattoir.
5. The plaintiff is to pay damages to the first defendant of the full value of 1,500 cattle (being wandering stock and the offspring of wandering stock) for conversion of those cattle.
6. The interlocutory injunction granted on 12 August 2016 is dissolved.

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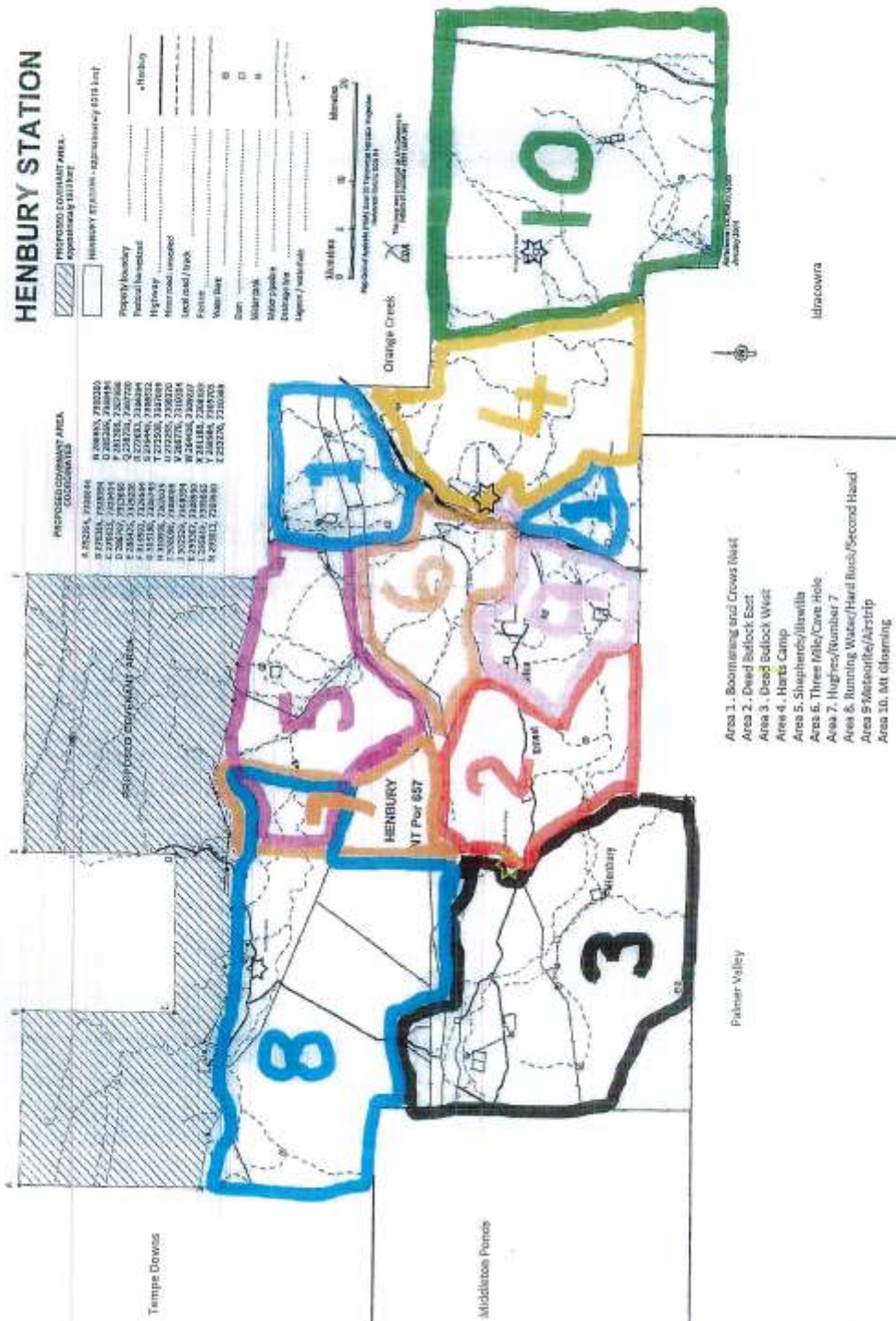
## 91





# Annexure 2

Henbury at BUEK - Defence - Annexure C - map - filing copy 151116  
2016 Muster Areas



## Annexure 3

### **SCHEDULE**

#### **Rough calculation of numbers of cattle converted by plaintiff**

##### **Assumptions made:**

1. 300 cattle a year wandered from Henbury onto Palmer Valley<sup>180</sup> over a three year period (ie the financial years 2014/15, 2015/16 and 2016/17) and were not returned.<sup>181</sup>
2. Half of the wandering cattle were breeders.<sup>182</sup>
3. The female calves born in one year became breeders in the second year following.<sup>183</sup>
4. There was a 75% calving rate among the breeders during each of those three years.

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<sup>180</sup> The basis for this assumption is that 508 wandering cattle were returned from Henbury to Palmer Valley in the two year period from 11 December 2015 (the date of the Deed) to the end of 2017 (when Henbury was completely mustered) – ie about 250 cattle a year. The evidence is that it is likely that more cattle would have wandered South from Henbury to Palmer Valley. I have made what I consider to be a conservative assumption in light of that evidence that approximately 50 more cattle per year would have wandered South than North.

<sup>181</sup> This is the period addressed in the expert reports by Hall Chadwick and Mr McClaren – the period over which I have made the finding that there were approximately 2,000 unaccounted for cattle on Palmer Valley (ie 2,000 more than could be accounted for by expected natural increase over that three year period).

<sup>182</sup> I have adopted this figure because the analysis of the breakdown of the plaintiff's herd in Table 10 of the Hall Chadwick report reveals that in each year analysed breeders constituted between 51% and 53% of the total herd. I have adopted a conservative figure of 50%.

<sup>183</sup> This calculation assumes that all of the female calves born in the first year were retained to become breeders (and that none of the breeders who wandered onto Palmer Valley were sold). I consider this a reasonable method of calculating the loss to the defendants because they have lost the wandering cattle and their potential progeny. Further, if the plaintiff did sell some of the calves and/or breeders, they would have had the use of the proceeds in lieu of the cattle.



### **Calculation:**

#### **Year 1 (2014/15)**

Wandering stock	300	(No. of breeders =150)
ADD		
Calves (75% x 150)	<u>112</u>	(No. becoming breeders in year 3 = 56)
<b><u>Total</u></b>	<b>412</b>	

#### **Year 2 (2015/16)**

Opening stock	412	
ADD		
Wandering stock	<u>300</u>	(No. of breeders = 150)
	<u>712</u>	
ADD		
Calves from year 1 breeders	112	
Calves from year 2 breeders	<u>112</u>	
	<u>224</u>	
<b><u>Total</u></b>	<b><u>936</u></b>	

### **Year 3 (2016/17)**

Opening stock	936
ADD	
Wandering stock	<u>300</u> (No. of breeders = 150)
-	<u>1,236</u>
ADD	
Calves from year 1 breeders	112
Calves from year 2 breeders	112
Calves from year 3 breeders	112
Calves from year 1 calves (56 x 75%)	<u>42</u>
	<u>378</u>
<b><u>Total</u></b>	<b><u>1,614 (rounded down to 1,500)</u></b>

### **NOTES:**

- The calculation is a rough one. The 75% calving rate has been applied to opening numbers of breeders. (No attempt has been made to calculate the opening and closing average.) No allowance has been made for mortality on a yearly basis.
- Therefore I have rounded down the number so calculated to **1,500** to make a global allowance for these matters.