CITATION:	*BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2021] NTCA 1
PARTIES:	BJEK PTY LTD as trustee for the EL & SL FOGARTY FAMILY TRUST v HENBURY CATTLE CO. PTY LTD and CROSS COUNTRY FUELS PTY LTD and ANDERSON, Ashley Robert and FAR MANAGEMENT PTY LTD and ROHAN, David and ANDERSON, Neville
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 11 of 2019 (21631761)
DELIVERED:	23 April 2021
HEARING DATES:	3 & 5 June 2020
JUDGMENT OF:	Grant CJ, Blokland J and Mildren AJ

CATCHWORDS:

APPEAL – Conversion of cattle – Evidence – Relevance – Whether trial Judge erred by excluding evidence suggestive of a lie or breakdown of a business relationship between the parties – Whether tendency evidence – Evidence not relevant to material issue – No error identified.

APPEAL – Conversion of cattle – Error of fact – Whether trial Judge misapprehended appellant's case on process to identify cattle the subject of the claim – No error identified.

APPEAL – Tort – Conversion – Nature of conversion – Strict liability tort – Dealing with goods or chattels inconsistent with or repugnant to the rights of the owner – Requirement of proof of intention to exercise dominion over the goods or chattels.

APPEAL – Whether error in assessment of expert evidence on counterclaim – No error identified.

Supreme Court Act 1979 (NT), s 51

Briginshaw v Briginshaw (1938) 60 CLR 336; *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420; *Gwinnett v Day & Anor* [2012] SASC 43; *La Trobe Capital and Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2010) 190 FCR 299; *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204; *R v Adam* (1999) 106 A Crim R 510; *R v Cook* [2004] NSWCCA 52; *R v Heyde* (1990) 20 NSWLR 234; *R v Lucas (Ruth)* [1981] 1 QB 720, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Harris QC with N Floreani
Respondents:	P Franco QC

Solicitors:

Appellant:	Gardiner & Associates
Respondents:	Ward Keller

Judgment category classification:	B
Number of pages:	71

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

BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors [2021] NTCA 1
No. AP 11 of 2019 (21631761)

BETWEEN:

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

AND:

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

and

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

and

ASHLEY ROBERT ANDERSON
Third respondent

and

FAR MANAGEMENT PTY LTD (ACN 065 559 613)
Fourth respondent

and

DAVID ROHAN
Fifth respondent

and

NEVILLE ANDERSON
Sixth respondent

CORAM: GRANT CJ, BLOKLAND J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 23 April 2021)

THE COURT:

[1] The appellant ("BJEK") and the first respondent ("HCC") own adjoining cattle stations in Central Australia. BJEK's property is Palmer Valley Station ("Palmer Valley"), which is run by Edward Lloyd ("Ted") Fogarty and Sheri Lynne Fogarty ("the Fogartys"). In 2014, the Fogartys and entities associated with the third and sixth respondents ("the Andersons") formed a company to purchase Henbury Station ("Henbury"), which lies to the north of Palmer Valley. For a brief period of time, the Fogartys and the Andersons operated Henbury together, and the boundary fence between the properties was removed in part to allow cattle from each station to cross onto the other station to obtain feed and water. A dispute arose between the parties which led to the termination of those arrangements by a Deed of Settlement dated 11 December 2015 ("the Deed"). The Deed provided for the Fogartys to dispose of their interest in Henbury, for the Andersons to take ownership and operation of Henbury through the vehicle of HCC, and for the mustering of Henbury so as to return cattle belonging to BJEK. BJEK complains that the respondents are in breach of the terms of the Deed, and have converted cattle belonging to it.

The proceedings at first instance

[2] BJEK began proceedings in the Supreme Court seeking damages for breach of the Deed, damages for conversion, delivery up of cattle belonging to it, damages for detention of its cattle and a mandatory injunction requiring the respondents to perform the terms of the Deed relating to the mustering of the cattle on Henbury.

[3] The respondents denied that BJEK was entitled to the relief sought and HCC counterclaimed, seeking an account of two head of cattle belonging to it which were allegedly sold by BJEK to a third party, and damages for the conversion of and loss of the ability to breed from other cattle allegedly converted by BJEK.

[4] Following a trial of the issues, the Supreme Court made declarations concerning the ownership of the disputed cattle which generally favoured the respondents, ordered BJEK to account to HCC for the proceeds of sale of certain cattle belonging to it, dismissed all other claims brought by BJEK, including the application for a mandatory injunction, and found that BJEK had converted 1,500 of HCC's cattle and ordered BJEK to pay damages in respect thereof to HCC. The question of the quantum of damages was by agreement between the parties deferred pending judgment on liability.

The grounds of appeal

[5] BJEK has brought this appeal from the decision of the Supreme Court. In summary form, the grounds of appeal are as follows:

1. The learned trial Judge refused to take into account admissible evidence of an incident which occurred between Ted Fogarty (who is a director of BJEK) and Ashley Anderson (who is a director of HCC), which it is claimed was directly relevant to BJEK's case that the respondents had unlawfully dealt with the BJEK's cattle; and the trial Judge should have used that evidence to draw the inference that the respondents had unlawfully dealt with the BJEK's cattle, which inference was compelling on the evidence.[1]

2. The learned trial Judge misapprehended BJEK's case relating to a process agreed by the parties for identifying cattle transferred from BJEK's properties. It is asserted that the trial Judge focused wrongly on the possibility that cattle had been incorrectly tagged rather than finding that cattle with tags on the off-side ear, and cattle without red or purple floppy tags in the nearside ear, were not and had never been cattle belonging to HCC.[2]

3. There was such a delay between the taking of the evidence and the delivery of judgment that the findings of fact made by the learned trial Judge are unsound and the judgment should be set aside.[3] This ground was abandoned as a "freestanding" ground of appeal at the beginning of

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1 This ground is expounded at length in the Notice of Appeal: Appeal Book ("AB") 3546-3550.

2 AB 3551-3552. Although it is not express in the Notice of Appeal how this is said to have affected the outcome, the inference is that this was an error which affected findings related to the ownership of certain of the cattle.

3 AB 3552-3553.

the hearing of the appeal, but with the suggestion the delay might explain in part the errors asserted in the other grounds of appeal.

4. The learned trial Judge had failed to properly and fairly assess the expert evidence led on the counterclaim, and wrongly failed to accept certain lay evidence on which BJEK's accounting expert had based his opinion. Had she done so properly, she should have found that there was no evidence that there were unaccounted for cattle belonging to HCC on Palmer Valley.[4]

[6] BJEK seeks orders setting aside the orders made by the Supreme Court and in lieu thereof that the respondents' counterclaim be dismissed and judgment be entered for BJEK against the respondents,[5] or alternatively that there be a retrial of BJEK's claim.[6]

The nature of the appeal

[7] An appeal lies to the Court of Appeal from the Supreme Court pursuant to s 51 of the *Supreme Court Act 1979* (NT). Oddly, there is no provision in the Act which states precisely what type of appeal is envisaged. The assumption has always been that the appeal is an appeal by way of rehearing on a question of law or fact or both. The *Supreme Court Act* confers a

4 AB 3554-3556.

5 It is not clear from the Notice of Appeal if the judgment sought is only in relation to the counterclaim or not.

6 Presumably this arises if the appeal against the counterclaim is dismissed.

discretionary power on the Court of Appeal to receive further evidence.[7]

Section 54 provides:

> The Court of Appeal shall have regard to the evidence given in the proceedings out of which the appeal arose, and has the power to draw inferences of fact and, in its discretion, to receive further evidence, which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge or otherwise as the Court of Appeal directs.

[8] In addition, the Court has the power to give such judgment as in all the circumstances it sees fit;[8] and may affirm, reverse or vary the judgment appealed from, in whole or in part;[9] may set aside the judgment and substitute its own judgment;[10] may remit the proceeding;[11] or may order a new trial.[12] The clear statutory implication is that vitiating error by the trial Judge must be established before the Court will interfere. Otherwise, there would be no point to a discretionary power to receive further evidence, or a power of remittal or a power to order a new trial.

Brief summary of the background facts found at first instance

[9] The following is a brief summary of the background facts as found by the learned trial Judge. The relevant facts are set out in more detail in the discussion of the grounds of appeal.

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7 *Supreme Court Act*, s 54.

8 *Supreme Court Act*, s 55(1)(b).

9 *Supreme Court Act*, s 55(2)(a).

10 *Supreme Court Act*, s 55(2)(b)

11 *Supreme Court Act*, s 55 (2)(c)

12 *Supreme Court Act*, s 55(2)(e)

[10] BJEK is the owner of Palmer Valley, which is located south of Alice Springs in the Northern Territory. The Fogartys are the principal directors, shareholders and controlling minds of BJEK.

[11] HCC conducts a cattle station enterprise on Henbury. Henbury is owned by Henbury Holdings Pty Ltd ("Henbury Holdings"), which in turn is variously owned and controlled by the second to sixth defendants (who are the second to sixth respondents to this appeal). Henbury's southern border is adjacent to Palmer Valley's northern border.

[12] Henbury Holdings was formed in 2014 by the Fogartys and their interests ("the Fogarty interests") on the one part, and by the second to sixth respondents ("the Anderson interests") on the other part, to acquire and hold Henbury and to use it as a working cattle station for commercial profit. Henbury Holdings was the trustee of the Henbury Unit Trust.[13] At that time, the Fogartys also owned and operated Mt Ebenezer Station ("Mt Ebenezer"), which is south-west of and shares a boundary with Palmer Valley. Mt Ebenezer does not share a boundary with Henbury. The Fogartys also own and operate Tressa Vale Station, east of Tamworth in New South Wales.

[13] There were no cattle on Henbury at the time of its acquisition by Henbury Holdings. In order to facilitate the establishment of the cattle herd on Henbury, BJEK sold cattle from Palmer Valley and Mt Ebenezer to HCC,

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13 Presumably the Fogarty interests and the Anderson interests were the beneficiaries under this Trust.

and also delivered a substantial number of other cattle to Henbury from Palmer Valley and Mount Ebenezer as part payment for its equity share in HCC (together referred to as "the transfer cattle"). HCC also purchased stock for Henbury from Anningie Station and Lucie Creek Station, which were owned by third parties.

[14] Although not subject to express findings by the trial Judge, it was common ground in the pleadings and evidence that following the acquisition of Henbury by Henbury Holdings, the Fogarty interests, with the agreement and concurrence of the Anderson interests, removed a substantial section of the boundary fence between Palmer Valley and Henbury so that cattle on Henbury could have access to grass and water on Palmer Valley. There were, as well, breaches to the boundary fencing through ordinary wear and tear and damage by animals and natural forces such as fire and flood. As a result, a number of BJEK's cattle, which were not transfer cattle or otherwise Henbury cattle, moved from Palmer Valley onto Henbury.[14]

[15] In the latter part of 2015, relations between the Fogartys and the Andersons broke down, culminating in an incident between Mr Fogarty and Ashley Anderson on 14 August 2015. As a result, the parties decided that they no longer wished to own Henbury together or to conduct a cattle station enterprise on Henbury together. By the Deed, the Fogarty interests

14 See Amended Statement of Claim at AB 2-3, paras [12]-[14]; Further Amended Defence AB 18-21 at paras [12](a) and (b), [13](b) and [14].

transferred their respective interests in Henbury Holdings, the Henbury Unit Trust and HCC to the second, third and fourth respondents.

[16] It was a condition of the Deed (cl 3.6) that there would be a muster on Henbury commencing not later than 30 April 2016; that on each occasion prior to processing and drafting commencing on Henbury, the Anderson interests would provide notice to the Fogarty interests to enable the latter to send a representative to identify and remove any cattle owned by Palmer Valley at their own cost; and that the Anderson interests would use all reasonable endeavours to transfer those cattle owned by Henbury from the Palmer Valley Property Identification Code ("PIC") to the Henbury PIC.

[17] There are a number of different ways of marking, identifying and tracking cattle.

(a) Each station has a registered brand and cattle are branded with the station brand when they are first mustered.

(b) Each station has a distinctive pattern of earmarks in which different shapes are cut out of an animal's ear. This enables cattle to be identified from a distance when the brand might not be easily visible.

(c) A button known as a National Livestock Identification System ("NLIS") button coded with the station's allocated PIC is inserted into an animal's ear. This enables an electronic reading and storage of information on the button to be uploaded to a central database maintained as the NLIS. When an animal is sold it may be transferred

from one PIC to another on the NLIS. This system also allows extraction of the data in various forms.

(d) Animals may be marked and identified by the insertion of "tags" into the ears.

[18] There is an NLIS protocol which requires that if a station finds wandering stock with a different PIC on its property, it will 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(s) returned. The additional purpose of this is to track the movement of cattle between stations. The NLIS system also records when cattle are sold for slaughter and to which abattoir they are sent for that purpose.

[19] The transfer cattle delivered to Henbury from Palmer Valley and Mt Ebenezer were branded with the Palmer Valley and Mt Ebenezer brands, except for unmustered calves and "cleanskins" which had previously escaped muster. In order to distinguish between transfer cattle and cattle which remained the property of Palmer Valley or Mt Ebenezer, the parties agreed that a red or purple floppy plastic tag would be inserted into the nearside (left) ear of each of the transfer cattle before they were trucked to Henbury. There is a dispute about the extent to which the parties adhered to this agreement.

[20] Acting pursuant to the Deed, the Andersons undertook four drafts on Henbury in the first part of 2016 which proceeded without incident. A fifth

draft was conducted on 16 and 17 June 2016 without notification to the Fogartys. This led to the Fogartys making enquiries with a local stock agent, Mr Eagleson, who informed them that there had been some Palmer Valley cattle identified by him and separated off at the time of the draft. Mrs Fogarty then visited Henbury on 22 June 2016 to investigate the matter and retrieve the Palmer Valley cattle.

[21] Before Mrs Fogarty came to Henbury on 22 June 2016, a muster was conducted on Middleton Ponds Station. A load of cattle which did not belong to Middleton Ponds Station (including some Palmer Valley cattle) was moved to Orange Creek Station and picked up from there by Ashley Anderson and taken to Henbury. They were given orange NLIS buttons as stock that did not belong to Orange Creek ("the Orange Creek mob").

[22] Mrs Fogarty gave evidence that when she first saw the Orange Creek mob, most of the cattle appeared to have Palmer Valley earmarks and orange NLIS tags, including a big fat broken baldy cow and a big black bullock. After conversing with Ashley Anderson, she left Henbury to get a truck from Palmer Valley to pick up the Palmer Valley cattle. When she returned, she claimed that most of the animals appeared to have the orange NLIS buttons removed and replaced with red floppy tags in the offside (right) ear, and that the big black bullock was missing. As a consequence, she formed the view that:

(a) someone had tampered with the ear tags;

(b) the Andersons had secreted the big black bullock in order to steal it;

(c) the Andersons had failed to notify the Fogartys of the June muster and draft so that they could steal Palmer Valley cattle; and

(d) the Andersons had tried to pass Palmer Valley cattle off as transfer cattle by removing the orange buttons and inserting red floppy tags in the offside ear.

[23] Mrs Fogarty told Ashley Anderson to stop the draft so that the stock squad could be called to sort it out. She notified 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"). A draft was conducted on 25 June 2016 by Mr Crawford from the DPI. He allocated cattle according to brand and separated out those that were disputed.

[24] BJEK then instituted the proceedings at first instance and applied for and obtained an interim injunction on 12 July 2016, which restrained the Anderson interests from mustering and drafting cattle off Henbury except in the presence of a BJEK representative. An interlocutory injunction in those terms was granted on 12 August 2016. Subsequent drafts proceeded accordingly at which cattle were called for Henbury or Palmer Valley or noted as "disputed". The totals over the 2016 and 2017 drafts were:

(a) 508 head belonging to Palmer Valley which were returned to Palmer Valley;

(b) 307 head which were "disputed";

(c) the balance which were called for Henbury.[15]

[25] 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.

The categories of disputed cattle

[26] The trial Judge noted that the crucial issue in the case was the ownership of the disputed cattle, which were placed in the following categories:

(a) Cattle claimed by BJEK:

(i) The Orange Creek mob.

(ii) Cattle classed as disputed in the 2016 and 2017 drafts after 22 June 2016 consisting of:

- 144 cattle with a red or purple floppy tag in the offside ear;
- 110 cattle with a white floppy tag in the nearside ear;
- 12 Mt Ebenezer branded cattle without floppy tags;
- four Palmer Valley branded bulls without floppy tags;
- four Palmer Valley branded steers with the backs of floppy tags only.

(iii) 28 cattle sent to Tongala Abattoir by the respondents in June 2016.

(iv) Other unidentified unmustered cattle on Henbury.

15 No figure was given for cattle in this category.

(b) Cattle counterclaimed by the respondents:

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

(ii) Two “Lucy Creek” cattle (belonging to the first respondent) sold by BJEK.

(iii) Other unidentified cattle on Palmer Valley consisting of:

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

Findings in relation to the cattle claimed by BJEK

[27] In relation to the Orange Creek mob, the trial Judge made adverse findings as to Mrs Fogarty’s credit as a witness, and did not accept her evidence about what she had seen on 22 June 2016 in particular, or about the Orange Creek mob in general. The Court found that Mrs Fogarty's evidence was inconsistent with her handwritten record of the draft of the same cattle which was conducted on 25 June 2016, in which she recorded that she saw only three animals which met the description of having a Palmer Valley earmark, no Orange NLIS button and a red floppy tag in the offside ear; inconsistent with photographs taken at Henbury on the afternoon of 22 June 2016; and inherently unlikely.

[28] So far as the three beasts with the Palmer Valley earmark, no orange NLIS button and a red floppy tag in the offside ear were concerned, the Court found that they were transfer cattle. So far as the big black bullock was concerned, the trial Judge also rejected the evidence of Mrs Fogarty on this issue, and accepted the evidence of Ashley Anderson that he did not secrete this animal away. Accordingly, the trial Judge found that BJEK had failed to prove that the respondents converted cattle associated with the Orange Creek mob.

[29] In relation to the 144 cattle with red or purple floppy tags in the offside ear, the Court rejected Mr Fogarty's evidence that all transfer cattle were marked by having a red floppy tag placed in their nearside ear at Palmer Valley or Mount Ebenezer before delivery to Henbury, and that none of the cattle had red floppy tags placed in the offside ear because the configuration of the yards at Palmer Valley and Mount Ebenezer did not easily allow tagging in the offside ear. That rejection was made principally on the basis that the objective video and photographic evidence showed otherwise. A number of photographs and videos were tendered by the respondents showing transfer cattle being delivered to Henbury with no red floppy tags in their nearside ears and what were, or appeared to be, red tags in their offside ears. In addition, video footage taken by the Australian Broadcasting Corporation's *Landline* program of the fourth draft conducted at Henbury in 2016 depicted cattle with red floppy tags in the offside ear, and Mount Ebenezer beasts with no floppy tag or a white floppy tag being called as transfer cattle for

Henbury without dispute from the Fogarty interests. That was consistent with the evidence given by Christopher Wilson and David Eagleson who attended and worked on the drafts in 2016.

[30] Contrary to Mr Fogarty's evidence that all of the transfer cattle had been tagged at Mt Ebenezer or Palmer Valley prior to transfer to Henbury, the Palmer Valley Station diary maintained by the Fogartys themselves showed that floppy tagging of transfer cattle occurred at Henbury on 22 June 2014. Similar information was contained in the Henbury Station diary for various dates in June and September 2014. The Court also accepted the evidence of Ashley Anderson and witnesses called by the respondents to the effect that some transfer cattle had red floppy tags in the nearside ear, some transfer cattle had red floppy tags in the offside ear, and some transfer cattle had no tags at all. On the other hand, BJEK failed to call evidence from a staff member and a number of members of the Fogarty family who were involved in tagging the cattle. The trial Judge drew the inference that these witnesses would not have assisted BJEK’s cause, and ultimately found that BJEK had failed to prove that there was any dishonest tampering with tags by the respondents and that the 144 disputed cattle with the red or purple floppy tags in the offside ear were transfer cattle.

[31] In relation to the 110 cattle with white floppy tags, the Court referred to the evidence of Mr Fogarty that some cattle from Mt Ebenezer were marked with white floppy tags for one year only as a management tool, and that there may have been 100 Mt Ebenezer transfer cattle with such tags, but that

as all transfer cattle had red or purple floppy tags in the near side ear, these cattle would have had two tags – one white and one red. Mrs Fogarty's evidence was that none of the transfer cattle had white floppy tags. The trial Judge referred to the *Landline* footage showing Mt Ebenezer animals with no floppy tags or with a white floppy tag being called for Henbury on the fourth draft in 2016. The trial Judge accepted the evidence of Ashley Anderson and David Eagleson that all the disputed cattle with white floppy tags had been observed to have the Henbury brand written on the back of the tags, which must have occurred before the tags were inserted because of the near impossibility of handwriting the brand neatly on the back of a tag already inserted into a live animal.

[32] The trial Judge accepted the evidence that some Palmer Valley branded cattle had white floppy Mt Ebenezer tags. There was also evidence that, at some stage, the parties ran out of red and purple tags and used white tags instead. The evidence as to the numbers of red and purple tags which were available, compared with the numbers of cattle actually transferred, led to the inference, when taken with the other evidence, that there was an overwhelming likelihood that once the red and purple tags ran out transfer cattle from Mt Ebenezer were tagged with white floppy tags endorsed with the Henbury brand. The trial Judge found on that basis that the 110 disputed animals with white floppy tags were transfer cattle.

[33] In relation to the 12 Mt Ebenezer branded cattle without floppy tags disputed in the 2016 and 2017 drafts, there were seven steers, four cows and

one bull. Mr Anderson gave evidence that the seven steers in this group were mustered from an area on Henbury known as Harts Camp and the area around Harts Camp; that he was present when 112 steers and four mickies were delivered to that area; and that these animals were not floppy tagged because they were "stirry" and they were placed in a separate paddock. On that basis, the trial Judge accepted that the seven steers were transfer cattle, but found, in the absence of any evidence that the remainder were transfer cattle, that the four cows and the bull were the property of BJEK.

[34] In relation to the four Palmer Valley branded bulls with no floppy tags, the trial Judge found that the three bulls which had been mustered at Mt Gloaming formed part of the transfer cattle, but that the bull mustered at Cave Hole/Three Mile was not part of the transfer cattle and belonged to Palmer Valley. In making those findings, the trial Judge essentially accepted the evidence of Ashley Anderson that 21 Palmer Valley bulls had been delivered to Mt Gloaming in September 2014, some of which had no tags. However, there was no evidence to enable a finding that the remaining bull was part of the transfer cattle.

[35] In relation to the four Palmer Valley branded steers with the backs of floppy tags only, Mr Fogarty's evidence was 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. On that basis, the trial Judge found that these four steers were transfer cattle.

[36] In relation to 28 cattle sent to Tongala Abattoir, BJEK claimed that these were Palmer Valley cattle drafted by the Andersons on 16 and 17 June 2016, for which they received the money after they had been trucked to Victoria and slaughtered. The claim was based on the fact that these cattle were allocated to the Palmer Valley PIC on the NLIS, and bore Palmer Valley brands. However, the Court found that this did not mean that the cattle were Palmer Valley cattle as the same description would hold true for transfer cattle. As there was no evidence that these animals did not have floppy tags in their ears, BJEK could not prove that they were not transfer cattle.

[37] BJEK's claim for other unidentified and unmustered cattle on Henbury was based on the assertion that at the time of the making of the Deed there were between 800 and 1,500 head of Palmer Valley cattle on Henbury, whereas it was common ground that during the drafts carried out in 2016 and 2017, only 508 head of Palmer Valley cattle were returned. On the other hand, the respondents contended that there were at most 600 Palmer Valley cattle on Henbury at the time of the drafts. Henbury had been fully mustered by the end of 2017 and any Palmer Valley cattle returned. Presumably for this reason, BJEK did not pursue this claim in its final submissions except in relation to 12 animals which documents subpoenaed from NLIS identified had Palmer Valley NLIS buttons containing "TBAS0075" and "L". Mrs Fogarty's evidence was that these particular devices were manufactured in 2015, whereas all the transfer cattle had been transferred to Henbury before

the end of 2014 and would therefore have had NLIS buttons manufactured exclusively in 2014 or earlier.

[38] Mrs Fogarty's evidence as to when the NLA's buttons were inserted into the transfer cattle was disputed. Ashley Anderson gave evidence that the common practice was not to insert buttons until the animals had been mustered and were to be moved off the station. There was also evidence that BJEK supplied the respondents with white Palmer Valley buttons on more than one occasion in 2015 when Henbury was owned by both parties. Further, these cattle came through the first four drafts in 2016 that were attended by BJEK representatives and were not disputed. The trial Judge found on those bases that BJEK had failed to establish any entitlement to these 12 cattle.

[39] The Court at first instance ultimately concluded that BJEK had established its ownership to the four cows and one bull from Mt Ebenzer and one bull mustered at Cave Hole/Three Mile Bore and made declarations accordingly. The trial Judge found that the remaining disputed cattle belonged to the respondents and made declarations to that effect.

The claim for a mandatory injunction

[40] BJEK also sought a mandatory injunction to compel the respondents to comply with cl 3.6 of the Deed requiring a muster on Henbury commencing not later than 30 April 2016, and damages for breach of this clause. No evidence was led as to any damage suffered. The evidence was that Henbury

was completely mustered by 2017, and had been almost completely mustered in 2016 under the agreed protocols. There was therefore no need for a mandatory injunction to compel the defendants to do what they had already done. This claim for an injunction was dismissed.

Findings in relation to the cattle counterclaimed by the respondents

[41] The learned trial Judge identified four aspects to the counterclaim, the first being a claim for BJEK 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. The trial Judge found that these cattle consisted of one bull which Mrs Fogarty conceded belonged to the respondents; eleven cattle with red floppy tags on the nearside ear, which demonstrated that they were transfer cattle; and six cattle with red floppy tags on the offside ear which were also transfer cattle. Accordingly, the trial Judge ordered that BJEK account to HCC for the 18 cattle from the Crawford muster.

[42] The second aspect of the counterclaim related to two “Lucy Creek” cattle which were purchased for Henbury from a third party. The trial Judge found that BJEK had sold the two Lucy Creek cattle and retained the proceeds of sale. These were slaughtered with Lucy Creek NLIS buttons registered to Henbury. Accordingly, the trial Judge ordered that BJEK account to HCC for the proceeds of the sale of these cattle.

[43] The third aspect of the counterclaim related to “at least” 50 Henbury cattle which Mr Fogarty admitted were on Palmer Valley and which had been separated out between the muster and the draft and released back onto Palmer Valley without informing the respondents. The evidence was that this was contrary to the NLIS protocol which requires that if a station finds wandering stock with a different PIC on its property, it will insert an orange NLIS button in the animal’s ear, notify the owner and arrange for the return of the animal(s). The trial Judge found that the effect of leaving HCC’s cattle in the paddocks at Palmer Valley for several years was to deprive the HCC of the use of the cattle, and to contribute to the natural increases to the herd on Palmer Valley rather than to the herd on Henbury. It was found further that this conduct was substantially inconsistent with HCC’s rights as owner and comprised the tort of conversion.

[44] The final aspect of the counterclaim was based principally on expert evidence that the total number of cattle on, and which had been taken off, Palmer Valley was greater than could be accounted for by natural increases and purchases, and that at least some of that excess came from cattle which had wandered from Henbury onto Palmer Valley over the relevant period, and their off-spring. After analysing the evidence called by both sides, including the expert evidence, the trial Judge found that there were 1,500 cattle which were Henbury cattle that had wandered south from Henbury to Palmer Valley, or the progeny of those cattle. The trial Judge found that HCC was entitled to damages for the conversion of these cattle, which

included the 50 Henbury cattle admitted by Mr Fogarty to be on Palmer Valley. The most significant ground of the present appeal, at least in terms of monetary consequence, is the challenge to the trial Judge's findings in relation to this aspect of the counterclaim, and it will be necessary to deal with the facts in more detail further below in the context of that ground of appeal.

Ground 1: The incident between Ted Fogarty and Ashley Anderson

[45] The first ground of appeal relates to the fourth affidavit sworn by Mr Fogarty on the first day of the trial relating to an incident which occurred in August 2015 when the parties were still engaged together in the operation of Henbury.[16] Counsel for BJEK sought leave to file the affidavit in court and to rely on it at the hearing. The relevance of this incident was explained by counsel for BJEK in opening the case as follows.[17]

[46] After Henbury had been acquired by Henbury Holdings in June 2014, the fencing between adjoining paddocks on the boundary of Henbury and Palmer Valley, called Crow’s Nest and Sister respectively, was deliberately put down so that the cattle could wander one way or the other. By August 2015, Henbury had quite reasonable rain and Palmer Valley had not. There was good feed on Crow’s Nest on the Henbury side, but not so good on Sister on the Palmer Valley side. So, cattle were, by and large, going to be on the Henbury side.

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16 See AB 976-980 for the text of the affidavit.

17 AB 80-82.

[47] Mr Fogarty was driving home from Alice Springs on 13 August 2015. The Stuart Highway passes through Henbury at an area in the northern part of Henbury, known as Terricks Dam, approximately 35 kilometres from the Palmer Valley homestead and at least 15 kilometres from the shared paddocks to the north. It was physically impossible for Palmer Valley cattle to have wandered to Terricks Dam, because to do so they would have had to have found two bridges across the Finke River and another river, travelled across several paddocks and crossed the Stuart Highway. Mr Fogarty observed cattle walking along the fence adjacent to the highway. He stopped and looked at them. He saw that they were Palmer Valley branded and earmarked cattle with no tags in either ear. He concluded that they were Palmer Valley cattle and not Henbury cattle, and that the only way that they could have got there was by human intervention. He also concluded that the cattle must have been moved there by the Andersons. He had not received any notification from anyone at all about the Palmer Valley cattle having been located on Henbury. He decided to contact Ashley Anderson as he intended to take him out to see the cattle for himself and to ask him for an explanation.

[48] After picking up Mr Anderson the following morning, he drove him in the direction of where he had seen the cattle, without telling him what it was all about. As he was driving, Mr Fogarty said to Mr Anderson: “Start talking. I want to know about your cattle movements.” Mr Anderson commenced to describe movements of cattle on Henbury but did not mention the Crow’s

Nest/Sister area until after he had described these other movements. When he said he had moved cattle from Crow's Nest, Mr Fogarty said: "That's what I want to know about." Mr Anderson then said that he wanted Mr Fogarty to stop the car. Mr Fogarty refused and said that there was something he wanted to show him. He kept driving along the highway when Mr Anderson suddenly applied the handbrake, causing the vehicle to skid. A struggle ensued between them, which resulted in Mr Fogarty being charged with assault. He was found not guilty of that charge at a subsequent trial.

[49] When counsel for BJEK was questioned about the relevance of this evidence, it was initially submitted that the proposed evidence was to explain the breakdown of relations between the parties. The trial Judge observed that the fact relations had broken down was "a given".[18] The only submission concerning relevance subsequently made was that the evidence contained in the affidavit demonstrated "consistent conduct with what we also complain about in some of the other aspects of the defendants' conduct, in terms of how they have been dealing with Palmer Valley cattle."[19]

[50] The cattle referred to in the fourth affidavit did not form part of the disputed cattle which were the subject of the proceedings. The Crow's Nest paddock and Terricks Dam area were mustered in March 2016, and 79 cattle belonging to Palmer Valley were returned. Counsel for the respondents objected to the late delivery of the fourth affidavit. The trial Judge held that

18 AB 81.

19 AB 82

the material contained in the affidavit was irrelevant because the cattle referred to were not part of the disputed cattle, and during the course of the opening on 20 November 2017 refused leave to tender the evidence. However, the affidavit was subsequently tendered without objection at the resumption of the hearing on 29 January 2018. Counsel for the respondents said at that time that no objection was taken "in the hopes of speeding things up" and on the basis that the material would be dealt with in submissions, but that the respondents maintained that much of the affidavit was irrelevant.[20]

[51] In the Reasons for Judgment delivered on 3 December 2019, the Court at first instance made the following findings in relation to that evidence (footnotes omitted):[21]

> 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, 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 (although the affidavit contains no direct evidence to this effect) and 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 it.

[52] As counsel for the respondents submits, the trial Judge's statement to the effect that the evidence was not admitted or taken into account must be

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20 AB 254.

21 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [28]; AB 3460.

understood in context. The affidavit was received into evidence, Mr Fogarty was cross-examined about its contents, Ashley Anderson was cross-examined about the incident (described further below), and in closing submissions the respondents submitted that the evidence was "of peripheral relevance only". Against that background, the trial Judge noted in a footnote to the passage extracted above that even if she admitted this evidence, it would not assist the plaintiff's case because the matters it deposed to did not support an inference that Ashley Anderson deliberately knocked down a fence in order to steal cattle.

[53] Counsel for the appellant complains that the trial Judge erred in refusing to consider this evidence. It was put that this evidence was an important part of the BJEK's case as evidence of a consciousness of guilt on the part of Ashley Anderson.[22] By refusing to consider the evidence, it was put that this deprived BJEK of evidence which, if considered, would lead to an inference in favour of its case, namely that the respondents had unlawfully dealt with BJEK's cattle. It was put that this inference was relevant to the allegations in the Amended Statement of Claim that HCC had refused to give up possession and wrongfully detained BJEK's cattle. In its written submissions, the appellant's counsel footnoted references to the allegations pleaded in paragraphs [19] and [75] of the Amended Statement of Claim.[23] Those pleadings allege that at the time of the making of the Deed, the

22 Appellant's written submissions at [6].

23 AB 3 and 11.

defendants were in possession of between 800 and 1500 head of the plaintiff's cattle. In paragraph [75.2][24] it alleged that the plaintiff had since recovered 508 cattle leaving a shortfall of between 292 and 992 cattle, in addition to 307 disputed cattle.

[54] As noted by the learned trial Judge, the plaintiff did not pursue this claim, but confined its case to specific cattle, *viz* the 307 disputed cattle from the 2016 and 2017 drafts, plus the further 12 cattle which documents subpoenaed from NLIS identified had Palmer Valley NLIS buttons.[25] It was common ground between the parties that there were hundreds of BJEK's cattle on Henbury in December 2015. The evidence was that following the drafts in 2016 and 2017, 508 cattle belonging to BJEK were returned. It was not surprising that cattle belonging to BJEK had wandered onto Henbury, particularly during the period when the station was being jointly run. The evidence about the altercation, and what inferences could be drawn from it, was irrelevant to the matters which were ultimately at issue in BJEK's claim. The plaintiff's submission that the evidence of Mr Fogarty was relevant to show that Ashley Anderson had a guilty mind in relation to the some 20 or 30 cattle he had seen on Henbury in 2015 also faces two other difficulties.

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24 AB 12.

25 See Plaintiff's Written Closing Submission at [61], [76]: AB 3321, 3325. See also *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [128]: AB 3498.

[55] First, as the trial Judge pointed out, if this evidence is relevant at all, it could only be relevant as tendency evidence in so far as there was a claim made for any other cattle. Although in the context of this appeal counsel for the appellant eschews any submission that the evidence was directed to establishing a tendency on the part of Ashley "to act or think in a particular way", in opening the plaintiff's case counsel expressly sought that an inference be drawn from the proposed evidence about "other aspects" of the defendants' conduct in their dealings with Palmer Valley. No tendency notice had been given as required by s 97 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("the *ENULA*"). Whilst this may not have been fatal given that the evidence was admitted subject to objection as to relevance, the Court was left without the benefit of knowing precisely what tendency BJEK was asserting and without any opportunity to consider whether the evidence had any significant probative value. If the evidence was not relevant, it would not have been admissible as tendency evidence in any event.

[56] Clearly, the evidence was not admissible as credibility evidence in BJEK's case because of s 102 of the *ENULA*, and because it did not fall within any of the exceptions to the general rule that credibility evidence is not admissible. Ashley Anderson could have been cross-examined about it as a matter going to his credit, but it was not put that this was the purpose of the evidence, and, in any event, BJEK could not ordinarily have called evidence

in rebuttal of Mr Anderson's denials. So far as credit issues generally were concerned, the trial Judge found that Mr Anderson was a credible witness.

[57] The second difficulty with the purported reliance on this evidence is that the basis of admissibility and relevance now suggested by counsel for BJEK is that it was evidence of a guilty mind, presumably in the same way as flight is admissible to prove a guilty mind in criminal proceedings as an admission against interest. Admissions, to be admissible, require the Court to find that it is reasonably open that the admission was made by the person concerned.[26] Subject to the satisfaction of that requirement, the evidence of Mr Fogarty would have been admissible in chief to prove the alleged admission. The circumstances under which flight or similar conduct constituting an admission may be used in this way requires a finding that the reason for the flight must, in the first instance, relate to a material issue in the proceedings.[27] Whether or not the 20 or 30 cattle seen by Mr Fogarty in August 2015 were Palmer Valley cattle was not a material issue in this case for the reasons already noted above; and nor did BJEK ultimately pursue the claim that unidentified and unmustered cattle on Henbury had been converted by the Anderson interests.

[58] Even if it was related to a material issue, the "flight" (or analogous conduct in forcing the car to stop) must not be explicable on a basis other than a

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26 *ENULA*, s 88.

27 See, in the criminal context, *R v Cook* [2004] NSWCCA 52 at [22]; citing *R v Heyde* (1990) 20 NSWLR 234 and *R v Lucas (Ruth)* [1981] 1 QB 720.

consciousness of guilt. In civil proceedings, the test is not proof beyond reasonable doubt, but given the seriousness of the allegation, the facts must nevertheless be proved to the civil standard in accordance with the *Briginshaw*[28] test. There was nothing Mr Fogarty's affidavit to indicate that he had told Ashley Anderson to where he was taking him or what the purpose of the car trip was. He was not cross-examined on this material. Ashley Anderson had not raised anything about this incident in the affidavits filed on his behalf.

[59] In cross-examination, Mr Anderson was asked about his diary notes of the events of 13 August 2015. He did not admit to moving any of BJEK's cattle to the area of the station where they were purportedly seen by Mr Fogarty. He did admit to walking three or four cattle from Crow's Nest paddock onto better grass at a paddock in the middle-western area of Henbury. His evidence was that when Mr Fogarty rang him on 13 August 2015 he did not think to tell him about this as there were already a lot of Palmer Valley cattle on Henbury, and he did not think another three or four mattered. He had not been told by Mr Fogarty what he was coming to see him about, either then or when he got into the car. When he got into the car with Mr Fogarty he was not told where they were going. As they were driving along a dirt road towards the Stuart Highway, he was asked about cattle movements on Henbury and he told Mr Fogarty about the cattle he had moved, including cattle from Crow's Nest, some of which were Palmer

28 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-368.

Valley cattle. At this stage Mr Fogarty became agitated and shook his finger at him and said in a raised voice that he was not to move any of his cattle unless he asked him first. Mr Anderson became worried as to where they were going and told Mr Fogarty to stop the car. Mr Fogarty said: "No." At this stage, Mr Anderson reached over and grabbed the handbrake, forcing the car to stop. When the car stopped, Mr Fogarty leaped over the seat, and a struggle ensued. Even at this stage, Mr Anderson did not know where they were going.

[60] Counsel for BJEK submitted that the fact that the cattle were on a part of the property which was remote from the shared boundary with Palmer Valley, and the difficulties due to the terrain and other obstacles which the cattle had to cross in order to get there, would lead necessarily to the inference that Mr Anderson, or someone else on his behalf, had deliberately moved the cattle there without the plaintiff's knowledge or consent. Whether such an inference was available would depend, in the first instance, on an acceptance of Mr Fogarty's evidence that the cattle he had seen were Palmer Valley cattle. On the other hand, as was pointed out by counsel for the respondents, if the intention was to hide the cattle from the plaintiff it would be anomalous to place them in a paddock which was adjacent to the Stuart Highway where they were likely to be noticed.

[61] On the face of the fourth affidavit, the evidence which BJEK sought to call was not properly characterised as evidence of a guilty mind on the part of Mr Anderson. Even taken by itself, the evidence would be deficient or

equivocal in establishing that there was any "flight" or other indicium of a guilty mind on the part of Mr Anderson.[29] That conclusion of deficiency is reinforced by the fact that Mr Anderson did give evidence during the course of the trial in relation to the interaction, and the content of that evidence. It is perhaps unsurprising that Mr Anderson reacted as he did in circumstances where he was being taken to an unknown location for an unknown purpose, and in which Mr Fogarty became visibly agitated and aggressive.

[62] In our opinion, the evidence does not demonstrate a consciousness of guilt on the balance of probabilities, much less amount to the exact proof required to survive the careful scrutiny that Dixon J referred to in *Briginshaw*. The inference that Mr Anderson had a guilty mind cannot be drawn from the circumstances because another not improbable, and in fact more probable, explanation was open.[30]

[63] For these reasons, we would dismiss ground 1.

Ground 2: The process for identifying cattle

[64] This ground asserts that the trial Judge misapprehended BJEK's case relating to the process agreed by the parties for identifying transfer cattle. The argument pressed before us was that the protocol adopted for the calling of cattle at the first four drafts was a central issue in the case, rather than, as the trial Judge found, a relatively minor evidentiary issue. Central to the appellant's argument is that during the first four drafts, any animal with a

29 See, for example, *R v Adam* (1999) 106 A Crim R 510 at 523 [62].

30 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 368.

Mt Ebenezer or Palmer Valley brand or earmark, and with no floppy tag in either ear and no hole in the nearside ear, was called for Palmer Valley. It is said that on and from the fifth draft, the respondents changed their position and began disputing the calling of animals with a tag on the offside ear, even though they had claimed to have been aware since 2 October 2015, prior to the first draft, of transfer cattle being delivered either untagged or with floppy tags in their offside ears.

[65] The appellant's argument in that respect ran as follows:

(a) if the respondents were aware of the existence of transfer cattle on Henbury with floppy tags in the offside ear, it was inherently unlikely that they would permit any animal with a Mt Ebenezer or Palmer Valley brand or earmark, with no floppy tag in either ear and no hole in either the nearside or offside ear to be called for Palmer Valley, because it would be contrary to their belief that such animals could be the property of Henbury and not Palmer Valley;

(b) the necessary inference was that the respondents' change in position was a retrospective attempt to justify the presence of Palmer Valley cattle on Henbury; and

(c) the Court at first instance should have found that the overwhelming majority of transfer cattle were tagged with a red or purple floppy tag in the nearside ear and that any cattle without such tags, irrespective of

the presence of other tags, were not transfer cattle and were the property of BJEK.

[66] The first difficulty with this ground of appeal is that no claim was ultimately pressed by BJEK for the conversion of cattle generally. The appellant's written submissions assert that the trial Judge incorrectly concluded that BJEK had limited its claim to the 12 animals on Henbury Station which Sheri Fogarty had identified as belonging to Palmer Valley. Although the Amended Statement of Claim pleaded that there were between 800 and 1500 cattle owned by BJEK on Henbury in December 2015, it was common ground that 508 of those cattle were returned to BJEK and a further 307 cattle were specifically identified and disputed. As we have already described in the context of the first ground of appeal, by the end of the trial it was clear that BJEK had limited its claim to the 307 disputed cattle from the 2016 and 2017 drafts, plus the further 12 cattle which documents subpoenaed from NLIS identified had Palmer Valley NLIS buttons.[31] There was no claim pressed for the wrongful detention of any further number of unidentified cattle, not least because Henbury had been fully mustered by that time.

[67] The trial Judge's ultimate conclusions as to the ownership of the disputed cattle depended on a number of findings, including findings related to the credit of BJEK's witnesses (which, in the case of Mr and Mrs Fogarty, she

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31 See Plaintiff's Written Closing Submission at [61], [76]: AB 3321, 3325. See also *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [128]: AB 3498.

found should be treated with a good deal of scepticism),[32] as opposed to the credit of the respondents' witnesses (which in the case of Ashley and Neville Anderson she found was supported by objective evidence contained in photographs, video footage and contemporaneous station diary entries, and which gave confidence in the accuracy and reliability of their evidence).

[68] The trial Judge concluded that because of that, and the difficulties with the evidence of Mr and Mrs Fogarty[33] that "where there is no available objective evidence and the evidence of Mr and/or Mrs Fogarty differs from the evidence of Ashley Anderson and/or Neville Anderson, I prefer the evidence of Ashley Anderson and Neville Anderson."[34] Her Honour then dealt with the evidence relating to each category of the disputed cattle, including objective evidence in the form of photographs, video footage, the Henbury station diary, the evidence of Mr and Mrs Fogarty, the evidence of Ashley Anderson and Neville Anderson, and the evidence of Chris Wilson, David Eagleson, Greg Crawford, Geoff Neithe and Geoff Mackenzie. The trial Judge also noted that BJEK failed to call evidence from members of the Fogarty family, Kirsty Fogarty and Ellen Fogarty, and a BJEK staff member, Rick Grocke, who were all involved in tagging the transfer cattle, and drew the inference that their evidence would not have assisted BJEK's case. The

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32 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [61]; AB 3475.

33 The trial Judge dealt with these difficulties at some length: *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [36]-[58] (Mrs Fogarty), and [59]-[60] (Mr Fogarty); AB 3463-3475.

34 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [63]; AB 3475-3476.

trial Judge considered the evidence in detail and arrived at her findings, most of which were favourable to the respondents.

[69] Counsel for the appellant provided a list of references in order to support its case said to be in relation to this ground, which included the lack of references to some matters of importance in the defendants' station diary, which contrasted with the level of detail recorded in relation to matters of minor or no significance, and references to some allegedly contradictory evidence of Mr Anderson. This does not go to the ground raised in the notice of appeal, but rather raises a different issue, namely, whether her Honour ought to have taken a different view on the weight to be given to Ashley and Neville Andersons' evidence in reaching her findings as to the ownership of the transfer cattle. In response, counsel for the respondent referred us to a number of passages in Ashley Anderson's evidence which it was said clarified the matters referred to by counsel for the plaintiff. Even assuming that these matters have any bearing on this ground of appeal, we are not persuaded that her Honour erred in the findings made concerning the ownership of the disputed cattle. In our opinion, the findings were reasonably open on the evidence.

[70] The second difficulty with this ground of appeal is that it is based on a somewhat selective and attenuated analysis of the evidence given by Ashley Anderson. In the Reasons for Judgment delivered on 3 December 2019, the

Court at first instance made the following findings in relation to that evidence (footnotes omitted):[35]

> 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, not 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 tags 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. Contrary to the plaintiff's submission, this is not inconsistent with his evidence that untagged animals were delivered from Mt. Ebenezer.

[71] Those findings were based on a consideration of Ashley Anderson's evidence as a whole. At paragraph [15.11] of his first affidavit made on 30 April 2017, Mr Anderson deposed that red floppy tags were placed in the nearside ear of cattle at transfer drafts which he attended in 2014, but that this did not happen at transfer drafts which he did not attend.[36] Sometimes tags were placed in the offside ear, and in some cases no tags were inserted at all. By way of example, in December 2014 he saw a mob of ex-Mt Ebenezer cattle coming off the delivery truck which were not floppy tagged at all.[37] Similarly, of the cattle delivered by Mr Fogarty in a number of loads

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35 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [75]; AB 3480-3481.

36 AB 1644; confirmed and clarified in cross-examination at AB 528.

37 AB 1644.

in September 2014, some had tags in the nearside ear, some had tags in the offside ear and some had no tags at all. During the course of the fourth draft, the Fogarty interests did not dispute cattle with tags in the offside ear or no tags at all.[38] While Mr Anderson was concerned about the numbers of cattle coming from Mt Ebenezer in poor condition and without tags, he felt obliged to accommodate his business colleagues and agree to those cattle being transferred to Henbury without objection to their lack of floppy tagging.[39]

[72] That evidence appearing in Mr Anderson's affidavit is consistent with evidence he gave during the course of cross-examination. When, in respect of the first five drafts in 2016, he was asked whether cattle with Palmer Valley or Mount Ebenezer earmarks and brands, with no floppy tag in either ear and no hole in the nearside ear where a tag might have been, were called for Palmer Valley, Mr Anderson replied: "For Palmer Valley cattle, yes".[40] That answer was reiterated and clarified later when it was put to Mr Anderson that cattle with no tags, and no holes in their ears where a tag would have been attached, were called for Palmer Valley. Mr Anderson again replied: "For Palmer cattle yes, but not Mount Ebenezer cattle". He twice disagreed with the proposition put subsequently that this was the case for both Palmer Valley and Mt Ebenezer cattle.[41]

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38 AB 1646.

39 AB 1647.

40 AB 578.

41 AB 580.

[73] The passage relied on by counsel for the appellant as giving rise to the purported inconsistency or change in position appears earlier in Mr Anderson's cross-examination.[42] In the course of that cross-examination Mr Anderson was asked whether he had told Mr Eagleson for the purpose of the fifth draft conducted on 18 June 2016, that animals with a Palmer Valley or Mt Ebenezer earmark or brand with no floppy tag in either ear and no hole in the nearside ear were to be called for Palmer Valley. Mr Anderson's response was that he said so only in relation to cattle with Palmer Valley earmarks and brands, but not in relation to cattle with Mt Ebenezer earmarks and brands. There were then some further exchanges in which Mr Anderson apparently agreed that for the purposes of that particular draft he had indicated any animal with no floppy tag in either ear and no hole in the nearside ear should be called for Palmer Valley.

[74] There is no necessary inconsistency between those responses and Mr Anderson's other evidence, for the reasons set out at paragraphs [44] to [49] of the Respondents' Written Submissions. First, on the most natural reading of the exchange, the evidence was that there were no Mount Ebenezer cattle in that draft. That was also consistent with Neville Anderson's evidence. Secondly, the nature and structure of the questions and answers were such that it is by no means clear that Ashley Anderson made express mention of Mt Ebenezer branded cattle to Mr Eagleson at the time of the draft.

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42 AB 555-556.

[75] For these reasons, we would dismiss ground 2.

Ground 3

[76] As noted at the outset of these reasons, this ground was abandoned as a separate ground.

Ground 4

[77] This ground asserts that the Court below failed to properly and fairly assess the expert evidence led on the counterclaim in relation to whether there were unaccounted for cattle belonging to HCC on Palmer Valley.

[78] The appellant complains that the Court gave judgment to HCC for conversion of 1500 cattle plus their progeny.[43] The appellant says that the conclusion was based on the "implicit rejection of the expert evidence of Messrs Newsome and McClaren led by the appellant and an acceptance of the expert evidence of Hall Chadwick". The appellant asserts that in doing so the Court made a number of factual findings that were not open on the evidence, and that had the Court properly assessed the evidence it should have found that there was no basis on which to suggest that there were unaccounted cattle belonging to HCC on Palmer Valley. Further, it was put that the allegation that BJEK had converted the cattle was a serious allegation and that the Court ought not to have accepted the respondents' expert evidence unless satisfied that the facts upon which that opinion was

43 Appellant's Written Submission at [43]. However, the judgment was for 1500 cattle *including* their progeny: see AB 3538 and see the calculations in the schedule in Annexure 3.

based were proven by clear and cogent evidence in accordance with *Briginshaw v Briginshaw*.[44]

[79] The way the Court below reasoned that BJEK had converted HCC cattle did not depend on an initial finding as to the *number* of Henbury cattle found on Palmer Station that had not been returned. The process of reasoning depended upon a finding that the appellant had converted *some* cattle and then making findings as to the *quantum* of the loss. The evidence on which the Court relied in order to find that BJEK had converted HCC cattle may be summarised as follows:[45]

(a) The practice in the industry, including on Mr and Mrs Fogarty's depositions, was for a pastoralist to notify the owners of cattle from neighbouring properties which had wandered onto his or her property so that they could be collected by the owners when the cattle were mustered, drafted and separated from the herd.

(b) Mr Fogarty admitted that he had mustered at least 50 Henbury cattle which he separated out before they were drafted and then released back onto Palmer Valley.

(c) Mrs Fogarty admitted that if Henbury cattle were found in traps on Palmer Valley, they would be placed back in a paddock on Palmer Valley.

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44 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 360-362 per Dixon J.

45 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [148]-[160]; AB 3504-3508.

(d) At no stage did Mr and Mrs Fogarty, or any BJEK agent or employee, advise HCC or the Anderson interests that there were Henbury cattle on Palmer Valley.

(e) BJEK had sold two Lucy Creek branded cattle for slaughter which had been purchased by HCC from a third party for Henbury, and had kept the proceeds of sale without telling the respondents. These cattle had NLIS buttons registered to Henbury so that both the Henbury PIC and the Palmer Valley PIC received an NLIS warning when the buttons were read at the abattoir.

(f) Palmer Valley had not returned any Henbury cattle after 2015, whereas other neighbours had returned 952 cattle to Henbury in the period from 1 January 2015 to the end of 2017.

(g) Cattle kept and not returned would inevitably contribute to the natural increase of the Palmer Valley herd.

[80] The trial Judge concluded that BJEK had converted the Lucy Creek cattle, at least the 50 Henbury cattle which Mr Fogarty admitted were on Palmer Valley and the progeny of those cattle.[46] That finding is not subject to appeal. This ground of appeal relates exclusively to the Court's findings as to the number of additional cattle converted. Although the ground of appeal is limited to the assertion that the trial Judge should have found there were no (other) unaccounted for cattle belonging to Henbury on Palmer Valley,

46 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [161]-[172]; AB 3508 - 3512.

during the hearing of the appeal counsel for the appellant sought to argue in addition that the facts as found did not entitle the trial Judge to conclude that cattle had been converted simply because they had been left to wander onto Palmer Valley's property. Counsel for the respondents raised objection to this additional ground being argued without notice, but went on to deal with that ground in the event the objection did not succeed. We do not think that this additional ground was properly introduced by the appellant given the manner and stage at which it was first raised; however, in our opinion the argument cannot succeed for the reasons which follow.

[81] Counsel for the appellant referred us to *Gwinnett v Day & Anor*[47] in support of the proposition that there could be no claim in conversion made out in circumstances where a defendant is not exercising dominion over the cattle and where, in the particular circumstances of this case, it was said that Mr Fogarty had invited the Andersons to come and retrieve the cattle. That case is distinguishable on its facts. There had been a share farming agreement in place between the plaintiff and the defendants involving mixed breed cattle which was conducted on the plaintiff's property. That agreement was terminated, and in the course of the negotiations concerning the disposition of the cattle 57 head were removed by the defendants from the plaintiff's property and taken to another property. The plaintiff subsequently demanded the return of the cattle, but a veterinary certification provided that the cows were close to calving, and that the cattle should not be transported until they

47 *Gwinnett v Day & Anor* [2012] SASC 43 at [51]-[52].

had finished calving and the calves at foot were capable of being mustered, loaded and transported safely and humanely.

[82] It was of significance in the determination of the matter that the cattle were co-owned by the plaintiff and one of the defendants, and that co-ownership was acknowledged by the defendants. As Stanley J observed, an owner cannot sue another co-owner in conversion unless the act of the defendant amounts to the destruction of the property or otherwise prevents the plaintiff from exercising his or her rights in relation to the property. Otherwise, each co-owner is equally entitled to the possession and use of the property, and the use of common property in a reasonable way does not amount to conversion. It was in that context that Stanley J found that the defendants were not dealing with the cattle in a manner inconsistent with the rights of co-ownership of the plaintiff, and there was no requirement for the cattle to be delivered up to the plaintiff's property.

[83] As counsel for the respondents in this matter submitted, the question whether a conversion has been made out requires an understanding of the practical and commercial context of the relationship between the parties. Whether the detention and use of the cattle by BJEK was repugnant to HCC's rights of ownership of the cattle fell to be assessed in the context of "the realistic, practical and honest conduct of [the] business" in question.[48] In the present case, that relationship and the business included the following

48 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at [3], [127].

contextual matters found by the trial Judge or otherwise apparent in the evidence. First, there were various acts by the Fogartys which suggested ill intent in relation to HCC cattle, including dealings with a Henbury bull,[49] the conversion of the Lucy Creek cattle and their initial denial of the existence of Henbury cattle on Palmer Valley. Secondly, there was the insistence by the Fogartys of an industry practice by which wandering stock were returned to their rightful owners, and the quite contrary failure to notify the respondents when Henbury cattle were mustered on Palmer Valley.[50] In addition, and despite that insistence, BJEK failed to return a single animal to HCC during a period in which other neighbours returned 952 cattle to HCC, and HCC returned 508 cattle to BJEK. Thirdly, the evidence was plainly that BJEK had more cattle on Palmer Valley than could be explained by natural increase from its own herd, and there was no evidence from the Fogartys that those additional cattle had wandered onto Palmer Valley from other properties.

[84] So far as matters of principle are concerned, there is nothing to show that the trial Judge misapplied the relevant principles of law in determining that BJEK had converted HCC's cattle. Her Honour explicitly recognised that "being in possession of another's goods without authority does not, without more, amount to conversion."[51] Citing *Penfolds Wines Pty Ltd v Elliott*,[52] her

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49 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [145]; AB 3503.

50 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [171]; AB 3511.

51 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [162]; AB 3508.

52 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 229 per Dixon J.

Honour correctly identified that the essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession to the chattel, which may take the form of a disposal of the goods by sale, or the destruction or change of the nature or character of the thing. Clearly this applied to the Lucy Creek cattle.

[85] As to the other cattle, it was put by counsel for the appellant that there was evidence that Mr Fogarty had informed Ashley Anderson "a few times" that there were some of his cattle on Palmer Valley and that he could come over and get them. However, the evidence did not suggest that Ashley Anderson or anyone else on behalf of HCC had been told when and where the draft was to occur so that they could be present. At best, the evidence went no further than that Mr Fogarty had told the Andersons there were an unspecified number of cattle somewhere on Palmer Valley which they could come and get. Having regard to the size of Palmer Valley, this was a disingenuous offer, and clearly not in accordance with the industry practice as described by Mr Fogarty. He gave no explanation as to why he did not follow industry practice. The clear inference is that Mr Fogarty well knew that any such "invitation" was worthless given that the logistical, geographical and situational circumstances were such that HCC could not readily and unilaterally identify and retrieve its cattle in response. It was put by counsel for the appellant that at the least it showed that the appellant had no intention to deprive HCC of its cattle. However, in the context of the animus that existed between the Fogartys and the Andersons it does not

bespeak any such innocence, but is consistent with an intention to deprive HCC of its cattle and their progeny.

[86] As was said by Allsop P in *Bunnings Group Limited v CHEP Australia Limited*,[53] the essential elements, or basic features, of the tort involve an intentional act or dealing with goods inconsistent with or repugnant to the rights of the owner or the person entitled to possession of the goods. The tort is one of strict liability and thus a mental element in knowing that a wrong is being committed is not required. Nevertheless, intention is not irrelevant. The act or dealing in question must be intentional and it must be an intention to exercise such dominion over the chattels as is repugnant to the rights of the owner. The conduct of BJEK in failing to comply with the recognized industry practice, seen in the light of its willingness to sell cattle which clearly did not belong to it, in the circumstances of the animosity which existed between the parties, in our view clearly formed a sufficient basis on which to conclude that the guiding mind(s) of BJEK intended to exercise a dominion over HCC's cattle which was repugnant to the rights of HCC.

[87] Counsel for the appellant urged upon us that BJEK's method of operation was only to draft and muster cattle which came into the traps, and that this meant that at times when the feed was good the cattle would not wander into the traps to find water. We do not think this assists the appellant's case. The

53 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at [124]-[127].

evidence taken from the Palmer Valley Station diary was that Palmer Valley was hot and dry in the early months of 2016, and that herbage did not start to grow until June 2016 after mustering was complete.[54] The trial Judge also accepted the evidence of Mr Niethe that Palmer Valley looked dry when he visited it in mid-2016. Clearly her Honour did not accept Mr Fogarty's evidence that musters were down during 2016 as a result of early rain resulting in standing groundwater and the growth of winter herbage which meant that stock did not congregate around watering points. Although the trial Judge did not specifically refer to the *Briginshaw* test, in our opinion the evidence and the inferences to be drawn from the facts plainly amounted to clear or cogent proof on the balance of probabilities that the appellant had converted HCC's cattle.

[88] There is a dispute between the parties as to whether the principle in *Briginshaw* also has application when determining how many cattle were converted. Counsel for the appellant argues that the Court, in assessing the evidence as to this matter, was obliged to make findings of fact according to that principle. Counsel for the respondents argued that as this assessment was only about quantum, the principles in *Briginshaw* had no role to play. In other words, the cogency of the proof required to establish the objective likelihood that the cattle were converted was the same whether one or 100 or 1000 cattle were converted. Having properly made the finding of conversion, the determination of the numbers converted was a question of

54 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [204](c)(iii); AB 3532.

fact to be determined in the ordinary course. In this respect, counsel for the respondent referred to the decision of the Full Federal Court in *La Trobe Capital and Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd*,[55] where Finkelstein J said:

> Having reached the point that a loss is established, its value must be estimated. That must be done no matter how difficult the task, even if some guesswork is involved: *JLW (Vic) Pty Ltd v Tsilogou* [1994] 1 VR 237 at 241; *Waribay Pty Ltd v Minter Ellison* [1991] 2 VR 391 at 398.

[89] We accept the submission made by counsel for the respondent. If it is accepted, as we have found, that a claim in conversion was made out to the requisite standard, the question which the trial Judge then turned her mind to, in deciding that the appellant had converted 1500 of HCC's cattle, was a question of the quantum of the loss to be determined on the ordinary balance of probabilities. The case on the counterclaim depended on factual inferences which provided the underlying foundation for both the expert opinion called by the respondents and the findings ultimately made by the trial Judge in relation to the number of cattle converted. When seen in that light, the respondents' case on quantum depended largely on circumstantial evidence. It is not unusual that an assessment of quantum is inferential in nature, or that circumstantial evidence may be used to prove a matter on the balance of probabilities – and, in the criminal context, even beyond reasonable doubt.

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55 *La Trobe Capital and Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2010) 190 FCR 299 at [90].

[90] The respondents' case on quantum depended essentially upon proof of the facts that there were approximately 2000 cattle missing from Henbury over the relevant period, that there were approximately 2,000 more cattle on Palmer Valley than could be accounted for by natural increase, and that most of these cattle had wandered from Henbury onto Palmer Valley. Counsel for the appellant attacked the following findings on the basis that there was no clear and cogent evidence to support them:

(a) That because 508 cattle wandered north from Palmer Valley onto Henbury and were returned following the 2016 and 2017 musters and drafts, it was likely that more than that number of cattle wandered south from Henbury to Palmer Valley.

(b) That 1500 of the missing 2000 cattle wandered onto Palmer Valley in circumstances where Palmer Valley and Henbury share boundaries with five neighbours, and there was no evidence that any missing or surplus cattle could not have found their way onto or from one or more of those neighbouring properties.

(c) That approximately 300 cattle wandered from Henbury onto Palmer Valley in each year from 1 July 2014 to 30 June 2017.

(d) That an additional 500 “bush cattle” should be taken into account in estimating the numbers of cattle on Palmer Valley.

(e) That the calving rate was less than the figure of 85% adopted by the appellant’s expert, namely 75%.

(f) That Mr Fogarty's evidence that Palmer Valley achieved only a 50% muster for the year ended 30 June 2015 should be rejected, on the basis that his evidence regarding a 60% muster in the year ended 30 June 2016 was contradictory, when it was in fact confirmatory and was not the subject of cross-examination.

[91] The findings at items (a), (b) and (c) in the immediately preceding paragraph were not pleaded in the Notice of Appeal or identified in the appellant's written submissions. They were raised for the first time in oral submissions at the hearing of the appeal. Counsel for the respondent did not object to these issues being raised on the basis that he was able to deal with them notwithstanding the lack of notice.

[92] There is no real challenge to the evidence that approximately 2,000 cattle were missing from Henbury. The evidence of this initially came from Neville Anderson. In any event, the trial Judge did not take that number as a precise statement of the number of stock missing from Henbury. The trial Judge said, in relation to this:

> 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. ... 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 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.[56]

[93] The way in which the trial Judge ultimately found that 1500 HCC cattle had been converted was to work backwards from Palmer Valley stock numbers, to calculate how many cattle were on Palmer Valley that could not be accounted for, and to make allowances for factors that would affect the calculation, such as calving rates, how many of the cattle were breeders, how many cattle wandered south in an average year, and other contingencies.

[94] The first of those findings which is challenged by the appellant, and the starting point for the trial Judge's calculation, is the finding that it is more likely than not that more than 508 cattle wandered from Henbury to Palmer Valley and were not returned.[57] The finding depended upon the following factors:

(a) There was uncontested evidence that 508 cattle were returned to Palmer Valley from Henbury in 2016 and 2017, meaning that 508 cattle had wandered north from Palmer Valley to Henbury over that two year period.

(b) During 2016 and 2017 no cattle mustered on Palmer Valley had been returned to Henbury.

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56 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [207]; AB 3533-3534.

57 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [208]; AB 3534.

(c) During the period 1 January 2015 to the end of 2017, other neighbours returned 952 cattle to Henbury.

(d) In extensive grazing enterprises there is always some leakage of stock both ways over boundary fences due to fence damage.[58]

(e) At the material time, the herd on Henbury was far larger than the herd on Palmer Valley.[59] As at 30 June 2015, HCC's herd was 12,403 cattle while the closing stock at Palmer Valley for the same date was 2195 cattle.

(f) Cattle have a tendency to wander back to where they came from and the transfer cattle came from Palmer Valley or Mt Ebenezer.[60]

(g) Cattle in the Northern Territory also have a tendency to wander south and Palmer Valley is located south of Henbury.[61]

[95] Counsel for the appellant argued that the evidence was that the boundary fence between Henbury and Palmer Valley had been made "effective if not impervious" from 2015.[62] It was put that the 508 Palmer Valley cattle found on Henbury had wandered north in 2014, or at least some time before the execution of the deed (which was executed on 11 December 2015). It was therefore wrong to assume that more than 508 cattle had wandered south after that time because this overlooked the state of the boundary fencing which had been repaired "on quite a few occasions". It was submitted that

58 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [176](a); AB 3514.

59 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [176](b); AB 3514.

60 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [176](c); AB 3514.

61 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [176](d); AB 3514.

62 Second Trial Affidavit of Ashley Anderson at [29]; AB 1933.

the trial Judge had wrongly assumed that the 508 cattle which wandered north did so in 2016 and 2017, when the inference more readily drawn was that the cattle were already there in those years, and had migrated north in the course of 2014 and/or 2015.

[96] In reply, counsel for the respondents pointed to the following countervailing evidence:

(a) There was evidence from Mr Fogarty that as of August 2015 the fence between Crow's Nest Paddock and Sister Paddock was down and had been down since about June 2014.

(b) There was evidence from Sheri Fogarty that camels had broken down the fences regularly.[63] Mr Fogarty's evidence was to the effect that camels could break the fences in more than one section of the fence.[64] That camels were a continuing problem in relation to the repair of the fences was confirmed in the respondent's station diary on 10 April 2017[65] and on 7 November 2017.[66]

(c) There was evidence that on 22 June 2017 the fence between Palmer Valley and Henbury had been cut and only temporarily repaired.

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63 AB 131.

64 AB 372-373.

65 AB 2869.

66 AB 2982.

(d) There were photographs taken by Mr Fogarty which demonstrated that the fence was not impervious.[67]

[97] It was submitted on the basis of this evidence that even assuming that the fencing had improved considerably since some time in 2015, this did not preclude a finding that cattle had wandered both ways during the relevant period. Counsel for the respondent also submitted that there was evidence that 433 wandering cattle from Palmer Valley were found on Henbury in 2016,[68] and that the majority of these cattle had been present on Henbury for less than 12 months when they were mustered. The evidence for this derives from a table prepared by Ashley Anderson which shows the numbers of cattle called for BJEK in the 2016 musters.[69] The table shows that there were 431 cattle called for the plaintiff and 82 disputed cattle, and the majority of these cattle had been present on Henbury for less than 12 months. Of the disputed cattle, six cattle were found to belong to the plaintiff.[70]

[98] Although we are not able to confirm the evidence from materials in the Appeal Book, the basis for this submission seems to be that Henbury was largely mustered in 2015, except for an area in the north of Henbury which was farthest from Palmer Valley.[71] During the musters conducted in 2015 any wandering cattle were called for BJEK, and representatives of BJEK

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67 AB 955-974.

68 Respondent's Notice of Contention at [1]-[2].

69 AB 2028

70 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [109], [116]; AB 3493-3495.

71 At AB 1390 the affidavit of Neville Anderson at [101] refers to the attachment 4NAE-15, which is relied upon to compare the spreadsheets for 2015 and 2017. This attachment is not contained in the Appeal Book.

were present at those times. HCC had also returned 550 wandering cattle to Palmer Valley between April 2015 and late 2017.[72] These figures rely on conclusions to be drawn from Neville Anderson's evidence. Although the figures are by no means precise, they do support the general proposition that a large number of cattle had wandered from Palmer Valley onto Henbury after 2015, despite the state of the fencing between the two properties.

[99] In our opinion, it was open to the trial Judge to find to the requisite standard that a large number of cattle had wandered onto Henbury from Palmer Valley after March 2015 when BJEK last returned Henbury cattle from Palmer Valley, and that these cattle represented the 508 cattle returned from the 2016 and 2017 drafts. As to whether they had *all* crossed onto Henbury *after* March 2015, on the whole of the evidence the probability is that, if not all, then by far the largest proportion of that number did cross *after* March 2015 given that Palmer Valley cattle were returned during the drafts conducted in 2015.

[100] The next, and related, finding subject to direct challenge by the appellant is the trial Judge's derivative calculation that approximately 300 cattle wandered from Henbury onto Palmer Valley in each year from 1 July 2014 to 30 June 2017. The estimate of 300 cattle per year was based on an assumption that the 508 cattle had wandered from Palmer Valley onto Henbury over a two year period (ie about 250 per annum), and that the

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72 Paragraph [15](b) of the Affidavit of Neville Henderson: AB 1531.

traffic was higher the other way.[73] There is no precise evidence of how many cattle were returned in 2015. Given that a total of 550 cattle were returned during the period between April 2015 and late 2017, and 508 cattle were returned during 2016 and 2017, this would suggest that the number of cattle returned in 2015 amounted to approximately 42 beasts. It can be accepted that an assumption that the 508 cattle returned during 2016 and 2017 were all cattle that wandered onto Henbury in 2016 and 2017 discounts the possibility that some of these cattle wandered onto Henbury after the 2015 draft (ie in the period between the last draft on Henbury in 2015 and before the first draft in 2016), and also the possibility that not all cattle which had wandered onto Henbury had been mustered and included in the 2015 draft.

[101] If that was all that was known, a more conservative assumption would have been that the 550 cattle had wandered from Palmer Valley onto Henbury over a three year period, or about 180 cattle per annum. This would significantly affect the calculation of the numbers of missing cattle which HCC claims. Accepting for the moment the assumption that more cattle wandered south than north, and accepting the trial Judge's assessment that the additional number was 50 cattle per annum, the number of cattle wandering south onto Palmer Valley would have been in the vicinity of 220 cattle per annum over a three year period. Adopting the same factors as the trial Judge did in her calculations, the result would be a figure of about 1189

73 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at Annexure 3, paragraph 1 and footnote 180; AB 3541.

cattle which would be rounded down to, say, 1100 cattle to allow for mortality and other contingencies; as opposed to the 1614 calculated by the trial Judge rounded down to 1500.

[102] However, there were other factors to be taken into account. If Palmer Valley was exceptionally dry in 2015 to mid-2016, it is less likely that cattle would move there from Henbury looking for feed and water than at times when there was good feed on Henbury; whilst the reverse would be true of cattle wandering onto Henbury if the feed there was better. According to Mr Fogarty, as at August 2015 Henbury had about 75 millilitres of rain whereas Palmer Valley had had only three millilitres.[74] However, up until then Henbury had been quite dry. This lent support to a finding that 508 cattle had wandered onto Henbury in 2016 and 2017, particularly as Palmer Valley had conducted mustering operations in 2015 and in early 2016.

[103] Alternatively, there was other evidence to suggest that most of the cattle which had wandered north onto Henbury had done so *before* 2016.[75] Even if that evidence was accepted, it still warranted a finding that over 500 cattle had wandered north from Palmer Valley to Henbury in two years, ie an average of 250 cattle per annum; and did not preclude a finding that 300 had wandered south from Henbury to Palmer Valley in each year after 2014.

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74 AB 978; Ashley Anderson accepted this at AB 597-598.

75 Paragraph [59] of the Affidavit of Neville Anderson: AB 1328.

[104] As already noted, the finding that more than 508 cattle wandered from Henbury to Palmer Valley during the relevant period was also based on the evidence and findings that there is always leakage of stock over boundaries between extensive grazing properties due to fence damage; that at all times the herd on Henbury was far larger than the herd on Palmer Valley; that 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; and cattle in the Northern Territory have a tendency to wander south and Palmer Valley is located south of Henbury.[76]

[105] These contextual findings were not subject to challenge in the appellant's written submissions. In oral submissions, counsel for the appellant contended that these conclusions could not be drawn because of the evidence about the boundary fencing. We have already dealt with that issue. The second matter put was that cattle movement between the properties would depend on the numbers of cattle on the boundary at the relevant time. The evidence in that respect was that during 2016 and 2017 Henbury had about 4000 cattle next to the boundary, whilst Palmer Valley had no more than 2000.[77] This also suggests the likelihood that more Henbury cattle would wander south than Palmer Valley cattle would wander north over the relevant period. The third point made by counsel for the appellant was that the evidence was that both properties were in drought in 2015, whereas by

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76 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [176]-[177]: AB 3514-3515. According to the Pastoral map which is at Annexure 1 of her Honour's reasons Mt. Ebenezer is south and west of Palmer Valley: AB 3539.

77 At paragraph 15(d) and (e) of the Affidavit of Neville Anderson: AB 1531.

August 2015 Henbury had good rain whilst Palmer Valley had none. This was said to support a finding that cattle wandered north chasing feed, but not a finding that cattle moved south. The feed situation was neutral prior to August 2015, and while there may have been an increased movement from north to south at the time of the first rains in August 2015, it does not follow that when Palmer Valley had good rains in 2016 cattle would not and did not venture south.

[106] Given that the calculation of the loss involved findings based on inferences drawn from circumstantial evidence, and involved estimates and assumptions, we do not think that it has been demonstrated that the trial Judge's estimate of the numbers of cattle which moved south is so plainly wrong that we should draw other inferences or interfere with it.

[107] The next finding subject to direct challenge by the appellant was that 1500 of the missing 2000 cattle wandered onto Palmer Valley in circumstances where Palmer Valley and Henbury share boundaries with five neighbours. Counsel for the appellant submitted that even if there were cattle missing on Henbury, and a greater number of cattle on Palmer Valley than could be accounted for by natural increase, there was no evidence that cattle could not have been accounted for as coming from or going to one or more of these properties. It was put that without an analysis of the accounts of the neighbouring pastoral enterprises, no inference could be drawn as to the numbers which had wandered south onto Palmer Valley.

[108] The evidence was about half of Henbury's cattle were located in areas adjoining neighbours other than Palmer Valley, and that most of Henbury's neighbours did not have substantial numbers of their cattle on the Henbury boundary:

> Middleton Ponds and Tempe Downs to the west are essentially destocked. The National Park to the north carries no cattle. Orange Creek to the north has cattle on the boundary and are the biggest recipients of returns from Henbury. Maryvale to the east has limited cattle on the boundary. Idracowra to the south-east has limited cattle on the boundary.[78]

[109] The trial Judge found that during the period 1 January 2015 to the end of 2017, 952 cattle were returned to Henbury from neighbours other than Palmer Valley, which returned none at all. Based on the passage of evidence extracted immediately above, most of the returned cattle from Henbury went back to Orange Creek, which is to the north of Henbury. That pattern of movement provides some support for the general proposition that cattle tend to move south. Apart from Idracowra, the other properties were to the north east and west. We were not referred to any evidence of returns from Henbury to other properties other than to Palmer Valley.

[110] The trial Judge noted that there was no evidence as to whether or not BJEK was in the habit of not notifying other neighbours when their stock wandered onto Palmer Valley. No adverse inference was drawn against BJEK for not calling this evidence. The pastoral map indicates that Palmer Valley shared boundaries with Angas Downs to the west, Mt Ebenezer to the

78 Paragraph [59] of the Affidavit of Neville Anderson: AB 1328.

south, Erldunda to the south, and Indracowra to the south and east. None of the experts thought fit to draw any inference that the cattle numbers on Palmer Valley could be explained by cattle wandering onto Palmer Valley from any of these properties. If cattle tend to wander south, and to their place of origin, this might explain why. It might also be the case that in order to draw the inference that some of the excess numbers on Palmer Valley had wandered from other properties, it would follow that BJEK had included stock which did not belong to Palmer Valley in its stock numbers after mustering despite the fact that cattle from neighbouring properties would not be branded with the Palmer Valley brand.

[111] Despite those matters, the trial Judge made some allowance for the possibility that some of the excess cattle on Palmer Valley may have come from properties other than Henbury.[79] A final figure of 2000 excess cattle on Palmer Valley which was found proved.[80] The inference is that the figure of approximately 2000 included the allowance for the possibility that some of the excess cattle came from other properties. However, that figure operated only as one of the contextual pieces of evidence taken into account in determining how many wandering stock had been converted by BJEK, and did not form the basis of the trial Judge's calculations. The figure of 1,614 was calculated on the basis of 300 wandering stock per year plus the natural increase, which was rounded down to 1500. As counsel for the respondent

79 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [206].

80 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [205].

submitted, although the trial Judge closely canvassed the expert evidence, the ultimate findings concerning the number of cattle converted largely reflected the lay evidence. We do not consider that there was any appellable error in taking this approach.

[112] The next finding subject to direct challenge is the appellant's contention that an additional 500 "bush cattle" should have been taken into account in the assessment of the numbers of cattle on Palmer Valley, and the extent to which there were excess numbers over natural increase. The trial Judge found that there was no logical reason for any additional "bush cattle" to be taken into account in addition to the percentage of un-mustered cattle which had already been allowed.[81]

[113] Counsel for the appellant submitted that allowance should have been made for the contribution of bush cattle to natural increase given that Mr Fogarty's evidence concerning the bush cattle was not challenged. However, as counsel for the respondent pointed out, Mr Fogarty did not explain why this particular category of un-mustered cattle would not have been included in the estimates of un-mustered cattle provided by BJEK to its accountants.[82] Mr Fogarty's evidence was that he did not know because he left "all that accounting stuff" to his wife.[83] However, in the affidavit material Mr Fogarty had explained that his understanding of "bush cattle" was a term

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81 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [204](a): AB 3530.

82 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [194](e): AB 3524-3525.

83 AB 370.

used to describe cattle which have not been mustered.[84] Mrs Fogarty did not give evidence as to whether or not the figures she gave to the accountants for un-mustered cattle excluded "bush cattle." As counsel for the respondent submitted, the result was that BJEK failed to establish that its own records of un-mustered cattle did not mean what they said.

[114] Mr Vaughan, the expert from Hall Chadwick, gave evidence that industry terminology was such that an 85% muster would mean that the total of all un-mustered cattle was 15%, rather than all un-mustered cattle other than "bush cattle".[85] It was submitted by counsel for the appellant that the trial Judge failed to take into account evidence on this topic given by Mr Newsome, an expert called by BJEK. The evidence of Mr Newsome was that there were always a number of cattle missing – often the same cattle – and some of them are very difficult to get into the yard or trap. These animals may never actually go into a facility where they can be captured. He contrasted that with "missing animals", which he categorised as the cattle which would normally be mustered but are missing in any given year. So, in his view, there were two classes of un-mustered cattle: those which are always missing and those which are only missing seasonally. The fact that there are missing cattle of the first type does not mean that they will not reproduce.[86] However, when questioned further by the trial Judge as to whether it was general industry practice to include an estimate of un-

84 Paragraph [2] of the Affidavit of Edward Lloyd Fogarty: AB 3208.

85 AB 705-706.

86 AB 704-705.

mustered cattle in the financials for closing stock figures, he responded that he was not an accountant and could not answer the question.[87] The evidence of Mr McClaren was that "over the years my clients would have included a number for un-mustered cattle but not the extras."[88] The "extras", he agreed, were that category of cattle described as always missing.

[115] On the basis of this evidence it was perfectly open for the trial Judge to find that BJEK's financial documents meant what they said, and that the "bush cattle" should not be taken into account in the calculations.

[116] The next finding subject to direct challenge was that the trial Judge adopted a calving rate of 75% for the purpose of calculating expected natural increase, which was less than the figure of 85% adopted by BJEK's expert. It was submitted by counsel for the appellant that the trial Judge had found that BJEK's experts had adopted the 85% calving rate based only on instructions from the Fogartys, which wrongly ignored the fact that Mr Newsome had arrived at that percentage on the basis of his own experience and expertise. The evidence to which we were directed by counsel for the appellant does not support that assertion.

[117] The appellant's expert, Mr McClaren, did in fact adopt the 85% figure on the basis of Mr Fogarty's instructions. He stated that he had no expertise in this area.[89] Mr Newsome's evidence did not support a finding of a calving

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87 AB 706-707.

88 AB 707-708.

89 AB 669

rate of 85%. No such figure is given in his expert report[90] nor in his oral evidence.[91] He did accept a weaning rate of 75% for cattle in central Australia and accepted Mr Anderson's "breeding rate" of 75% as reasonable. As we understand Mr Newsome's evidence there is a difference between a calving rate and a weaning rate, accounted for by the fact that not all calves born are still alive when they are weaned. He suggested a calf loss of 4.3%. Whether or not expected calf loss is included in the number of dead animals in the calculations is not apparent. No argument was addressed to us that this made any difference. The only expert who had seen the cattle at Palmer Valley was Mr Niethe, an expert called by BJEK, who nominated a figure of 60%.[92]

[118] There is no substance to this complaint. The figure for calving rates adopted by the trial Judge was reasonable and supported by the evidence.

[119] Finally, the appellant challenged the trial Judge's rejection of Mr Fogarty's evidence that 50% of the cattle were missed in the 2015 muster, and that there was only a 60% muster in 2016. The rejection of this evidence presumably affected the opening and closing stock numbers, although we were not told exactly how that affected the end result. Ultimately, however, the evidence, and this challenge to the trial Judge's rejection of the

90 AB 3173-3190.

91 AB 669-673.

92 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [204](b): AB 3531.

evidence, was directed in support of BJEK's case that there were no unexplained stock on Palmer Valley, or at least not in the numbers found.

[120] The trial Judge rejected this evidence (which had been adopted by Mr McClaren and incorporated into his expert opinion) for a number of sound reasons. They included:

(a) that Mr Fogarty was unable to explain how he arrived at this figure;

(b) that he was unable to identify which areas of Palmer Valley had not been mustered in the second round muster for 2015;

(c) that his instructions about the matter were given late in the proceedings and were not mentioned in earlier affidavits when he was asserting that there were stock missing from Palmer Valley, rather than trying to rebut subsequently served expert evidence to the effect that BJEK had thousands more cattle than it ought to have had;

(d) that his evidence in that respect was inconsistent with the evidence of Mrs Fogarty; and

(e) that the evidence about the 60% muster rate for the following year was contradicted by the Palmer Valley station diary and by the evidence of Mr Niethe.

[121] Counsel for the appellant submitted that the trial Judge failed to consider Mr Fogarty's evidence that only 50% of cattle could be mustered in 2015 because the property was so dry. It was submitted that the trial Judge instead "relied on an obscure passage of evidence of Sheri Fogarty … which was not

directed to the extent of the 2015 muster." The evidence of Mrs Fogarty in this respect was that virtually all the weaners were taken off the property in 2015, which, as counsel for the respondent pointed out, clearly implies that the station had been completely mustered, whether the property was dry or not. It would not have been possible to remove all of the weaners unless there had been a complete muster.

[122] In addition, Mrs Fogarty's evidence was that they de-stocked about a third of their breeders,[93] and that she estimated they had somewhere in the vicinity of 2000 head of cattle on Palmer Valley. That evidence was consistent with the closing stock figure of 2195 cattle at Palmer Valley for the year ending 30 June 2015, and inconsistent with Mr Fogarty's subsequent assertions that the figure was understated because half the cattle were missed in the muster for that year. Further, Mr Fogarty gave evidence at an earlier point in time that the low point of the total herd on Palmer Valley in 2015 was about 2200 cattle, and that he had tried to sell all of his weaners that year.[94] Similarly, there was evidence which contradicted Mr Fogarty's evidence relating to the alleged 60% muster for the year ended 30 June 2016, which is referred to in the reasons for judgment.[95] Having regard to this evidence, we do not consider that this criticism of her Honour's reasoning is made out.

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93 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [204]: Reasons AB 3532.

94 AB 338.

95 *BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors* [2019] NTSC 86 at [204](c)(iii): AB 3532.

[123] For these reasons, we would also dismiss ground 4 of the appeal.

The respondent's Notice of Contention

[124] By Notice of Contention dated 5 June 2020 the respondents sought further formal findings in addition to the recorded findings of fact made by the learned trial Judge. However, the respondents' primary position is that the trial Judge's ultimate conclusions were justifiable without the necessity to make further findings. For the reasons we have given, we agree that further findings are not necessary in order to dispose of the appeal, but we would make a number of general observations concerning the findings sought.

[125] Paragraphs [1] and [2] of the Notice of Contention seek a finding that most of the 433 wandering cattle which were identified in drafts on Henbury in 2016, aside from 130 branded and returned via drafts in 2016 and 2017, were present on Henbury for less than 12 months.[96] We agree there was evidence from which an inference could be drawn that some of BJEK's cattle may have been present on Henbury for less than 12 months at the time they were mustered,[97] however we are unable to confirm that was the case for the reasons given in paragraphs [97] and [98] above. Even accepting that there were BJEK cattle which had been present on Henbury for less than 12 months at the material time, we are unable to make any finding in relation to specific numbers.

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96 Notice of Contention [1] and [2].

97 Affidavit of Neville Anderson at [101], AB 1309; Cross-examination of Neville Anderson, AB 462; Affidavit of Ashley Anderson at [30], [18], [25], AB 1933, AB 1649, 1652; Affidavit of Neville Anderson at [15](b)) [15(h)], [31], AB 1531, AB 1634.

[126] The findings sought in paragraphs [3] to [6] of the Notice of Contention are that the first respondent had many more cattle adjacent to the Henbury/Palmer Valley border than the appellant; that Palmer Valley received average rainfall in 2016 and 2017; that cattle have a tendency to chase storms; and that Palmer Valley and Henbury were both relatively green in 2016. These findings would not be particularly probative in any ultimate conclusion which can be properly drawn by this Court. In our view these are facts on the periphery of the fact-finding task, and it is unnecessary to attempt any further determination of circumstantial evidence beyond that which has been already described.

Conclusions

[127] As none of the grounds of appeal have been made out, we order that the appeal be dismissed. We will hear the parties as to costs if need be.
