

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Booth v Frippery Pty Ltd and Ors* [2005] QPEC 095

PARTIES: **CAROL JEANETTE BOOTH**  
(Applicant)

-v-

**FRIPPERY PTY LTD (ACN 010 890 007)**  
(First Respondent)

AND

**MERVYN MEYER THOMAS**  
(Second Respondent)

AND

**PAMELA ANN THOMAS**  
(Third Respondent)

FILE NO/S: BD 4658 of 2004

DIVISION: Planning and Environment

PROCEEDING: Application for dismantling of electric grids from  
Respondents fruit farm.

ORIGINATING  
COURT: Planning and Environment Court of Queensland (Townsville)

DELIVERED ON: 22 September 2005

DELIVERED AT: Townsville

HEARING DATE: 5, 6, and 7 September 2005

JUDGE: PACK D.C.J.

**ORDER:** **Application dismissed. I make no order as to costs.**

**CATCHWORDS:** PLANNING AND ENVIRONMENT – Injunction restraining Respondents from electrocuting or from harming and/or injuring flying foxes. Order sought to dismantle electric grid system. Development by Respondents of different versions of grid systems culminating in the Mark VII grid. S.88 of the *Nature Conservation Act 1992* – restriction on taking protected animal and keeping or use of unlawfully taken protected animal. Word “take” defined in the schedule of Act to include “hunt, shoot, wound, kill, skin, poison, net, snare, spear, trap, catch, dredge for, bring ashore or aboard a boat, pursue, lure, injure or harm” an animal. No action taken or pursued by Environmental Protection Authority (EPA).

**COUNSEL:** Mr C J McGRATH for the Applicant  
Mr J R BAULCH for the Respondents

**SOLICITORS:** Environmental Defenders Office QLD Inc for the Applicant  
Roberts Nehmer McKee for the Respondents

- [1] This is an Application pursuant to s 173D(1)(a) of the *Nature Conservation Act*.
- [2] The Applicant she acts “in the public interest to promote the objects” of that Act. She has had a special interest in the welfare of flying foxes over the years. Initially, the Applicant sought an injunction restraining the respondent from electrocuting or shooting black flying foxes. At the outset of the hearing before me, the Applicant sought and was granted leave to amend by adding “harm and/or injure” flying foxes to electrocution and shooting. The amendment broadened the Applicant’s case. This was allowed against objection.
- [3] The relief sought is of three kinds. Firstly, the Applicant seeks an order restraining the Respondents from committing offences against s 88 of the *Nature Conservation Act*. A further order sought is that the Court direct that an electric grid system on the Respondents’ property be dismantled. Finally an order is sought directing the Respondents to pay a sum of money to a bat hospital at Tolga for the purpose of assisting in the rehabilitation and care of injured bats.
- [4] The Court has wide powers to grant relief of the kind sought in the first two orders pursuant to subsections E, F, G and H of s 173 of the *Nature Conservation Act*. Whether the Court has power to grant the relief sought the third order above is in issue.

- [5] A fundamental question is to determine whether the operation of the electric grids on the Respondents' lychee farm constitutes an offence against s 88 of the *Nature Conservation Act*.
- [6] The First Respondent is the registered proprietor of land described as Lot 85 on Crown Plan CWL1576 County of Cardwell Parish of Waterview known as Edenvale Orchards. The address is 376 Volk Road, Mutarnee. It is located approximately 65 kilometres to the north of Townsville. The Second Respondent is a director of the First Respondent company and the Third Respondent is the company secretary.
- [7] The farm area is 33 hectares. Approximately twenty-eight hectares is devoted to lychee farming. Since the property was acquired in 1987 the lychee plantation has grown from the existing 1,000 trees to slightly less than 4,000 trees. The intention is to have 4,000 trees in production.
- [8] When the farm was purchased two electric grids were in place. These grids were in common use at the time. Flying foxes coming into contact with them faced a high probability of electrocution.
- [9] Exhibit 8 is a sketch map of the farm which shows the location of the electrified grids which were in place in December last year when the applicant and a Miss Thiriet entered the first respondent's farm property at Mutarnee.
- [10] Mr Thomas said in evidence that in about 1997 he came to realise that grids which were killing bats were no more effective in protecting the lychee crop than grids which had less power and killed a substantially lesser number of flying foxes. He has modified grids since that time. The modifications have been progressively less lethal to flying foxes.
- [11] The crop matures at slightly different times causing the greater concentration of flying fox numbers to congregate at different parts of the farm at different times. This can explain why a greater number of flying foxes were killed in one area of the farm when compared to other areas. The lethal grids that were previously in place had a capacity to kill up to 30 bats per night. Modifications to the grids reduced the kill gradually as new and different design grids were put in place until finally about three years ago Mr Thomas developed a grid which he refers to as the Mark VII model which he says has not caused any death or injury to his observation to any flying fox. One such grid was in place and operating when the Applicant entered

the orchard last year. She did not inspect that part of the farm where that grid was in place.

- [12] The technology involved was developed by Mr Thomas. Mr Thomas is skilled in electronics. He had assistance in the development of the Mark VII grid from Mr Young whose affidavit is in evidence. The latest model grid remains electrified for one second when a flying fox touches the wire, it is then switched off automatically for four seconds. The grid also counts the number of contacts during the night. Each of the grids on the farm can be converted to this system with a relatively low expenditure and Mr Thomas is well advanced in preparations to convert all grids to the Mark VII grids. After repeating the one second on four seconds of if contact remains the off period increases to ten seconds. Finally, if contact remains the grid will shut down.
- [13] Some areas of the orchard are not protected by a grid system and photographs show the extent to which flying foxes consume the crop in the unprotected areas. Mr Thomas said that he has observed flying foxes avoiding the grids. He also says that he has seen flying foxes come into contact with the Mark VII model grid and observe them to fly away after being in contact with it. The design he says causes a momentary paralysis before release. He says this has been observed.
- [14] Objection was taken to Mr Thomas stating that flying foxes suffered no ill effects from coming into contact with, in particular the Mark VII version of the electric grid. There have been no studies undertaken. What can be said that in contrast to earlier models no dead bodies of flying foxes have been located in the vicinity of the Mark VII grid.
- [15] Dr Spencer points out in his evidence that electrical injuries can take many forms. Injury suffered is not necessarily visible. However, he also indicated without further research no firm conclusions can be reached.
- [16] Section 88 of the *Conservation Act* of 1992 relevantly provided as at 16 & 17 December 2004 (the dates the applicant and her witness entered upon the property) as follows:

*“Division 4    Restrictions on activities relating to protected wildlife*

*88                    Restriction on taking etc protected animals*

(1) *Subject to section 93, a person, other than an authorised person, must not take, use or keep a protected animal, other than under –*

*(a) a conservation plan applicable to the animal; or*

*(b) a licence, permit or other authority issued or given under a regulation; or*

*(c) an exemption under a regulation.*

*Maximum penalty – 3000 penalty units or 2 years imprisonment.*

(2) *Subsection (1) does not apply to the taking of protected animals in a protected area.*

(3) *It is a defence to a charge of taking a protected animal in contravention of subsection (1) to prove that –*

*(a) the taking happened in the course of a lawful activity that was not directed towards the taking; and*

*(b) the taking could not have been reasonably avoided.*

(4) *Subsection (3) does not allow a person to use or keep the animal.”*

[17] The reference to s 93 above assumes no relevance to this application. For subsection (3) the standard of proof is on the balance of probabilities.

[18] The word “take” is defined in the schedule of the Act to include “hunt, shoot, wound, kill, skin, poison, net, snare, spear, trap, catch, dredge for, bring ashore or aboard a boat, pursue, lure, injure or harm” an animal.

[19] “Protected animal” is also materially defined in the schedule of the Act to “mean an animal that is prescribed under this Act as threatened, rare or common wildlife ...”. The related term of “native wildlife” is also defined to mean “... species of wildlife indigenous to Australia”.

- [20] It is common ground the flying foxes involved in this application should be regarded as common wildlife and that the black flying fox is a mammal indigenous to Australia. It is not included in the presumed extinct, endangered, vulnerable or rare mammal section but it is nonetheless a protected animal for the purposes of s.88 of the Act. The Second Respondent possesses with little assistance more than adequate technical skill to deal with the construction of electric grids. I accept Mr Thomas's evidence as to his observations. It was submitted that in light of Dr Spencer's evidence I should disbelieve and reject Mr Thomas's evidence particularly with respect to the observations he says he made with respect to flying fox contact with the Mark VII grid. Dr Spencer said he would find it surprising if no deaths were caused. He said it was clear the Mark VII grid was not designed to kill. I reject the submission that Mr Thomas's observations should be considered untruthful.
- [21] As I have indicated the evidence shows that over a period of years Mr Thomas has continued to modify grids to the present stage. The Environmental Protection Authority had been well aware of his work at material times. That Authority invited the Second Respondent to apply for a permit later requested that he withdraw his application. The Application was made on 5<sup>th</sup> November 2003 and withdrawn on 7<sup>th</sup> January 2004.
- [22] The Applicant has complained to the Environmental Protection Authority (EPA) about the presence of electric grids on the first respondent's orchard. She had made observations at the farm at that time in January 2001 there was no fruit on the trees. Under a freedom of information request she established from the Queensland Parks and Wildlife Service (QPWS) that no permit was issued at the time of that inquiry in 2001. She found two dead flying foxes in November 2003, photos supplied, and reported this to the QPWS. It is because that Authority failed to take any action against the respondents that the Applicant brings these proceedings.
- [23] Mr Thomas was cross-examined at some length. Whilst I thought he became confused at one point in his evidence nothing about his demeanour gave me any cause for concern that his evidence might not be truthful and putting aside the possibility for some confusion I found him to be honest and reliable. Mr Thomas believed that deaths were not caused by electrocution, they were caused by a process he described as flapping. This involves the entanglement of flying fox between wires. This had application he said for grids other than the Mark VII grid. It can be seen that tension in the wires photographed by the Applicant is not such that one wire might not come in contact with another. Thus some entanglement could occur. Whilst this process could explain some deaths and there has been no evidence to establish the cause of deaths, I would find it surprising if all the deaths were attributable to the described process. In so concluding I confess to some speculation.

- [24] Dr Spencer said in his evidence that he does not consider that Mark VII electric grid is non-lethal for flying foxes “as suggested by Mr Thomas; however it certainly uses much lower electrical current than could be used if the electric grid were intended to operate lethally.” I conclude that if the Mark VII fence was lethal to flying foxes, dead flying foxes would be found in the vicinity of that fence. Accordingly I conclude Dr Spencer is mistaken in his assessment of the lethal capacity of that fence.
- [25] Dr Spencer says that he has developed a prototype for non-lethal electric-fence based “aerial grid” driver at the request of the Queensland Environmental Protection Agency. He said it has not been tested for “ethical” reasons. I am not at all clear in my mind as to what is meant by “ethical” in this context.
- [26] Material exhibited to the affidavit of Ann-Maree Tucker emanating from the Environmental Protection Agency appears to acknowledge, the capacity to issue permits for electric type grids subject to compliance with an Australian Standard with which both Mr Thomas and Mr Young on behalf of the respondents say it is inappropriate to apply to the electric grid. It applies to safety in the household. Thus it appears on the evidence from witnesses in this case the Australian Standard cannot be complied with. However if as it appears, safety of users is a concern, one would have thought a qualified electrician could provide a safety certificate.
- [27] The Applicant’s case is founded on the fact that dead flying foxes were found on the 16<sup>th</sup> and 17<sup>th</sup> of December 2004. When the applicant and Ms Thiriet entered the first respondent’s property, they made use of a video camera and photographed a number of dead flying foxes. As mentioned earlier, they did not enter that part of the orchard where Mark VII fence was erected and in operation. Mr Thomas is suspicious that the same flying fox or a remnant part of a flying fox has been photographed on more than one occasion with the effect that the numbers have been inflated. His suspicion has been enlivened by the coincidence of a flying fox and/or a remnant being photographed sequentially. I am not persuaded that any false accounting has taken place. I accept the Applicant and Ms Thiriet are truthful as to their observations. As to the observed flying foxes it is not possible to date when it was that they died except to say that some appeared to be relatively fresh with others much older. Broadly speaking the number of dead flying foxes observed is consistent with what might be expected having regard to the content of Mr Thomas’ evidence. They also found shotgun cartridges. I accept Mr Thomas’s evidence he used a shotgun to remove dead flying foxes from wires after rigor mortis had set in.
- [28] The lawfulness of the observed activity on the 16<sup>th</sup> and 17<sup>th</sup> of December 2004, need to be assessed. In the context of S.88 (3)(b), it is necessary to consider alternative means of control. The applicant submits that netting would afford an appropriate

protection for the crop without the loss of any flying foxes. There is no evidence electric grids are any more favourable than those on the farm to the safety of flying foxes that were designed or available as at December 2004. A Graham Minifie provided an affidavit and gave evidence on behalf of the applicant. He is a director of a company which provides protective cover by the use of netting for orchards. Based on the area of the first respondent's orchard he said that netting could be installed at a cost of \$700,000 plus GST of \$70,000. The assessment was for a farm in the Townsville region and it was accepted that that related to a farm on level ground. The First Respondent's orchard is divided by road and a creek, some of the land is not level. Accordingly it is not difficult to conclude that the cost of netting the First Respondent's orchard would be somewhat higher than the figure advanced by Mr Minifie.

- [29] Whilst the structural support for the netting might be expected to have considerable durability the netting itself requires periodic replacement. It was suggested that this might be done rotationally after the first several years of use. A further factor when netting is installed involves pruning of trees so that the trees would remain under the height of netting. Mr Thomas also raises a concern that delay might be caused in the crop maturing causing some income loss because the crop would not be ready at optimum market dates. He also says oils in some pesticides could be expected to be sprayed onto netting increasing the fire risk. He raised the prospect of cyclonic conditions damaging netting. The extreme cost of netting the orchard strongly mitigates against that suggestion being seen as reasonable or practical.
- [30] Mr Thomas gave evidence that he considers the sum of \$150,000 would represent the financial outlay to protect the crop by use of grids which would adopt the Mark VII grid technology. This is a very significant cost saving compared to netting.
- [31] Mr Thomas says the electric grid system tends to have a life of 25 years. The \$150,000 cost estimated above is to provide a Mark fence for every four rows of the orchard.
- [32] From information supplied by the Second Respondent over the last six seasons, two seasons were totally non-productive in commercial terms. There is a total loss of crop because of too much rain one year and three years later no crop because of drought conditions. Last season was the best in terms of production but the preceding two years did not produce a crop.
- [33] The grid system does not provide total protection where grids are installed and as noted earlier some of the orchard is not protected at all.

- [34] The use of non-lethal grids, even if not efficient in providing full protection for the crop, is clearly desirable as a management strategy in view of the cost and the potential for loss of production for reasons quite unconnected with the presence of flying foxes.
- [35] About ten years ago the First Respondent company had installed a lighting system over a five acre area with a view to deterring flying foxes. This was not successful but the system was changed in 2004 again without success. The second respondent proposes to continue attempting to alleviate the flying fox problem by use of these methods in the coming season but the results to date are he says disappointing and contrary to outcomes experienced by farmers in the south.
- [36] The EPA issue permits to shoot 30 flying foxes a month. They are not issued on the basis of the size of the orchard. They are not issued for a farm where there is a grid system, irrespective of whether or not a small or larger part of an orchard is unprotected. Shooting flying foxes is obviously an unsuitable and inadequate control measure for the Respondents.
- [37] At no time have the respondents held a Damage Mitigation permit. The provisions of S.112 of the Nature Conservation Regulation 1994 indicate the Respondent would have a reasonable expectation that any application for a Damage Mitigation permit would be granted, but for a requirement to meet Australian Standards. With or without a permit the EPA have the capacity to inspect the orchard. Under the guidelines lethal grids are not permitted.
- [38] By reference to section 88(3) the Applicant submits the defence is not made out for the following reasons:-
- (1) The taking did not happen in the course of a lawful activity.
  - (2) The activity was objectively directed towards the taking and
  - (3) The Respondents have not established the taking could not reasonably be avoided.
- [39] It is submitted the orders should include dismantling because it would be relatively simple to change the grids back to being "lethal". In my opinion there is no such risk when the orchard is controlled by the Second Respondent. It is a little like saying electricity or water should not be supplied to a house because the meters can be bypassed

- [40] In support of the first reason advanced as to why it is said the defence does not apply the Applicant draws my attention to s.51 of the Animal Care and Protection Act of 2001. That section provides that a person must not use an animal for a scientific purpose or allow an animal to be used for a scientific purpose unless the person is:-
- (a) registered,
  - (b) an individual retained by a registered person acting in the course of an individual retainer, or
  - (c) a student at a college, institute, school or university or other institution that is registered and acting in the course of the person's study with that institution.
- [41] The submission progresses to point out that flying foxes fall within the definition of animal in s.11 of the Animal Care and Protection Act. I was then referred to s.48(1)(a) which refers to the definition of "scientific purposes" including a statement in subsection (a) that field trials are scientific purposes.
- [42] What is suggested is that based on Mr Thomas's evidence that he had been developing his "non-lethal grid system" around lethal grid systems since 1997 for the purpose of protecting his farm, was engaged in electronic research or field trials. It is also suggested he was pursuing agricultural science.
- [43] To my mind the purpose of trialling electric grids known as non-lethal fences could not be viewed as an experiment with animals. The purpose was clearly to seek to protect the lychee crop. To my mind the effect on some flying foxes was incidental to that purpose.
- [44] As to the second submission I think that the use of the grids was objectively directed to protecting the lychee crop.
- [45] As to the third submission I am satisfied that there were no steps reasonably open to the Respondents in all the circumstances other than to make use of the grids they had in place at that time.
- [46] The Respondents have satisfied me that any "taking" was a lawful activity. The activity was not objectively directed toward the taking and that in all the circumstances taking could not reasonably have been avoided.
- [47] In these circumstances the application must be dismissed.

[48] I would add that if the “taking” had been found to be unlawful I would not have exercised my discretion to grant the relief sought by the Applicant, particularly because the conversion of the remaining grids to Mark VII models, with any additional grids to be made to the same specification would not justify any order being made.

[49] I make no order as to costs.