13/11; [2011] VSC 197

SUPREME COURT OF VICTORIA

BROWN v SPECTACULAR VIEWS PTY LTD and ANOR

Macaulay J

17 February, 11 May 2011

CRIMINAL LAW – VIC ROADS OFFICERS ATTENDED BUSINESS PREMISES TO ENQUIRE ABOUT A TOW TRUCK LICENCE – REQUEST MADE FOR 'DOCKETS' ABOUT A TOW-TRUCK OPERATOR ON A CERTAIN OCCASION – OFFICERS TOLD BY DIRECTOR TO 'GET OUT' OF THE BUSINESS PREMISES – VERBAL ALTERCATION ENSUED – SOME DOCUMENTS PRODUCED – CHARGES SUBSEQUENTLY LAID AGAINST DIRECTOR AND HIS COMPANY – FINDING BY MAGISTRATE THAT OFFICERS WERE TRESPASSERS – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR – TRESPASS – REVOCATION OF IMPLIED LICENCE TO ENTER – WHETHER OCCUPIER HAD AUTHORITY TO REVOKE IMPLIED LICENCE – WHETHER LAW ENFORCEMENT OFFICERS ENTITLED TO REMAIN ON PRIVATE PROPERTY DESPITE REVOCATION OF IMPLIED LICENCE TO ENTER – TIMING OF OCCUPIER'S DEMAND FOR LAW ENFORCEMENT OFFICERS TO LEAVE PREMISES: *TRANSPORT ACT* 1983, SS32, 172B AND 225: *ROAD SAFETY ACT* 1986, PART 9, SS 91, 112; *SUMMARY OFFENCES ACT* 1966, 17, 23; *TRANSPORT (TOW TRUCK) REGULATIONS* 2005, RR6, 8.

B. and another (who are officers of the Roads Corporation (Vic Roads)) attended business premises seeking records in relation to a tow truck licence to SVP/L. At the business premises, a verbal altercation took place between the officers and E. a director of SVP/L. B. told E. that he needed all the dockets that a person did on a certain date and who was driving the tow truck. E. told the officers to 'get out' but the officers did not leave. After some verbal haranguing, the officers accused E. of refusing to produce the dockets and E. accused the officers of refusing to produce their identification. Ultimately some documents were produced and the officers left the premises. Subsequently E. was charged with a number of offences under s225 of the *Transport Act* 1983 and under ss17 and 23 of the *Summary Offences Act* 1966. At the hearing, E. (on behalf of SVP/L) pleaded guilty to a charge of contravening reg 8(b)(i) of the *Transport (Tow Truck) Regulations* 2005 but not guilty to all other charges. Apart from finding SVP/L guilty on the charge under Reg 8, the Magistrate dismissed all other charges against SVP/L and E. The Magistrate found that the implied licence of the officers to be on the business premises was revoked by E.; that because the conduct complained of occurred at a time when the officers were trespassers they were not acting in the lawful execution of duty. Upon appeal—

HELD: Appeal dismissed.

1. In the present case the officers had a tacit or implied licence to be on the premises. They were business premises with an unobstructed means of access and with an open door permitting members of the public to enter a front office for a lawful purpose. What was in dispute was whether that implied licence was effectively revoked.

2. The evidence which enabled the Magistrate to form the conclusion that E. (or the companies of which he was an agent) was in possession of the premises were firstly, that he was physically in occupation of the building, and occupied an office within it; secondly, he told the Vic Roads officers that he was 'the boss' and they were to deal with him; thirdly, B. gave evidence that he believed E. to be the boss at the premises; fourthly, the reasons E. gave why the relevant tow truck records were not kept at the Mulgrave premises E. told them and fifthly, the signage on the building contained the names of Ultra Finish, Advanced Towing and Armstrong Towing, all of which were a reference to companies of which E. was either a director or accepted to be in charge.

3. In relation to the question whether E. revoked the officers' implied licence to remain on the premises, it was open to the Magistrate to conclude that the licence was revoked having regard to the use on several occasions of the words 'get out' and the words uttered by E. in the context of the whole exchange between E. and the officers.

***Coco v R* [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270, applied.**

4. In relation to the question whether the officers lawfully made a demand for the 'authority to tow' prior to being asked to leave, it was not clear what demand the officers were making, that is, whether for 'authority to tow' forms or something else. The officers were only protected from being trespassers if they expressed their demand in 'unmistakable and unambiguous language'. There was no evidence to establish that the 'dockets' requested were in fact 'authorities to tow'. Accordingly,

it was open to the Magistrate to conclude that the relevant request had not been made before the demand to leave was made.

5. The delegations under the *Transport Act* 1983 and *Road Safety Act* 1986 did not appoint either of the officers as an 'authorised officer' for the purpose of reg 8(d), the critical regulation for present purposes. Accordingly, unless some other source of power existed to authorise the officers to make the demand on E. that he produce the authority to tow forms (even if that is what 'dockets' is taken to mean) then any request they might have made of E. to produce them was not lawful. Thus, by failing to leave when requested to do so by E., the officers became trespassers. Also, there was no evidence to suggest that the officers purported to exercise the power under s112(1)(a) of the *Road Safety Act* 1986 to carry out inspections and searches of heavy vehicles and premises.

6. *Obiter*. In relation to the charge alleging assault by E. on officer B., an assault is any act of one person which directly, and either intentionally or negligently, causes another person to immediately apprehend unlawful contact with his or her person. It is clear that whilst a person must be placed in a reasonable apprehension of imminent unlawful contact, it is not necessary that they anticipate fear, however it is usually the case that they will.

7. The Magistrate did not formulate an inappropriate test for assault. Properly understood, her Honour stated in a shorthand way, that she was not satisfied that either officer apprehended immediate unlawful contact, nor were they in the throes of fear. Her Honour made clear her application of the correct test at law.

MACAULAY J:

Introduction

1. Two officers of the Roads Corporation ('Vic Roads') , one of whom is the appellant (Mr Wayne Brown), attended business premises at Noble Park on 26 September 2009 seeking records relating to a tow truck licensed to Spectacular Views Pty Ltd ('Spectacular Views'), one of the respondents. What eventuated may be described as a verbal altercation between the officers and Mr Nicolas Ectoros, the other respondent and a director of Spectacular Views.

2. In issue in these appeals is whether a magistrate erred on a question of law in dismissing charges of assault, refusal to comply with a statutory request, using threatening words, offensive behaviour, obstructing and hindering officers, and the like, brought by Mr Brown against the respondents.

3. Pursuant to s92 of the *Magistrates' Court Act* 1989 (Vic) Mr Brown has appealed the dismissal of the charges in two proceedings, each relating to a separate respondent. The appeals were heard together as the facts relating to them are the same and the arguments are more or less the same. In my view both appeals should be dismissed for the reasons that follow.

4. Pivotal to the dismissal of the charges was the Magistrate's determination that the officers became trespassers at the premises where the events took place, and that the evidence of what occurred beyond a particular point in time was inadmissible as being tainted by illegality. To understand why that determination was made, it is necessary to set out the facts relating to the reason for the officers' presence at the premises, and the sequence of events and conversations while they were at the premises.

Background

5. On 26 September 2009, Mr Brown and Mr Ian Robertson, officers of Vic Roads, attended 23 McDonald's Lane in Mulgrave ('the Mulgrave premises') seeking information and records relating to a tow truck, registered number TOW-771.

6. Spectacular Views was the holder of the Accident Towing Licence relating to TOW-771. In accordance with s172B of the *Transport Act* 1983 (Vic), Spectacular Views was approved to operate TOW-771 from the authorised depot number 820, at the Mulgrave premises.

7. The officers were told that the information they sought could be obtained from 'Nic' at 391 Princess Hwy in Noble Park ('the Noble Park premises'). Evidence was given by Mr Brown that he knew 'Nic' to be Nicolas Ectoros and that he knew Mr Ectoros to be the 'boss' of Spectacular Views. A later exchange at the Noble Park premises revealed that Mr Robertson and Mr Ectoros also knew one another.

8. Mr Brown and Mr Robertson then attended at the Noble Park premises. Upon arrival the officers entered an office which had a sign on the door bearing the words 'Ultra Finish Accident Repair Centre (Dandenong) Pty Ltd' ('Ultra Finish'). Mr Ectoros was also a director of that company. Upon entering the premises Mr Robertson activated a recording device. A transcript of the conversations that followed was tendered in evidence in the Magistrates' Court proceedings ('audio transcript').[1] Likewise, a CCTV camera operating at the premises captured all that occurred, and a digital recording from that device was also tendered in evidence ('CCTV footage'.)[2]

9. Upon entering the office, Mr Brown approached a female person apparently working there and said: 'How are you going, er we're from Vic Roads what we're after is the details of who was driving that truck'.[3] It appears that Mr Brown showed the woman a piece of paper requesting the identity of the driver for TOW-771 on 24 August 2008.

10. As the woman went about fulfilling the request of Mr Brown, Mr Ectoros entered the office from an adjoining room. He asked Mr Brown: 'Can I help you?'. Mr Brown replied that 'the lady has taken care of it for me', referring to the woman assisting him whom Mr Ectoros later referred to as his secretary.[4]

11. Mr Ectoros then enquired what the officers were doing there and told Mr Brown and Mr Robertson that he was 'the boss'. Mr Brown said that they were trying to ascertain who was driving the tow truck TOW-771 on 24 August 2009. Then followed a discussion concerning the location at which the records relating to TOW-771 ought to be kept in accordance with the applicable regulations.

12. Up to this point the conversation had been amicable. Mr Ectoros then objected to Mr Brown talking to the woman. Mr Ectoros said: 'Hang on a minute, hang on a minute, you talking to me or you talk to my secretary. Ask me, I'll give you anything you want.' Mr Brown said he needed '...all the dockets that this man [evidently referring to the driver of TOW-771] did on 24th of August.' Mr Ectoros asked the officers to move into the adjoining room with him, however, the three men remained in the office area.[5]

13. The interaction between the parties then deteriorated into a verbal slanging match with accusation and counter accusation. Then followed this exchange:[6]

> Ectoros: 'Just get out of it. Make an appointment. Get out.'
> Brown: 'No.'
> Ectoros: 'Get out fuck (indistinct)'
> Brown: 'You refuse to give me the docket?'
> Ectoros: 'Get out.'

14. The officers did not leave. Mr Ectoros then made several requests to see Mr Brown's identification. Mr Brown refused saying that he would give it to Mr Ectoros when he left. During the exchange, Mr Brown wore plain clothes with an identification card attached to a lanyard which was placed in his top pocket. The CCTV footage (Exhibit O) shows that Mr Brown did not remove the identification card from his top pocket despite the requests made. Mr Robertson, however, did wear a Vic Roads uniform and was known to Mr Ectoros.

15. Verbal haranguing persisted for some time. Each accused the other of making threats and assaults in what was later aptly described by the Magistrate as a 'heated and childish exchange'.[7] The officers accused Mr Ectoros of refusing to produce the dockets. Mr Ectoros accused them of refusing to produce their identification. Ultimately, it seems, some documents were produced, although it is not clear what they were, and the officers left.

16. Mr Ectoros was charged with a number of offences under s225 of the *Transport Act* 1983 (Vic)[8] and under ss17 and 23 of the *Summary Offences Act* 1966 (Vic)[9]. The prosecution withdrew an indecent language charge at the hearing in the Magistrates' Court.

17. Under reg 8 of the *Transport (Tow Truck) Regulations* 2005 (Vic) ('the Regulations') the licence holder must keep all records stipulated at the authorised depot; in the case of TOW-771 that was the Mulgrave premises. Regulation 6(2) prohibits the licence holder from changing the address of the authorised depot without applying to Vic Roads for a variation of the tow truck licence. It

is not in dispute that the relevant records for TOW-771 were not being stored at the authorised depot. Spectacular Views pleaded guilty to a charge of contravening reg 8(b)(i) in relation to that issue.

18. In addition to the charge under reg 8 of the Regulations, Spectacular Views was also charged with a number of offences through the actions of Mr Ectoros under s225 of the *Transport Act*.

19. The proceedings against Mr Ectoros and Spectacular Views were heard together in the Magistrates' Court before her Honour Magistrate Cure on 21 April 2009, the learned Magistrate reserving her decision until 1 May 2009. Apart from finding Spectacular Views guilty on the charge under reg 8, her Honour dismissed all other charges against Spectacular Views, and all charges against Mr Ectoros.

20. The critical reasons for her Honour dismissing the charges may be summarised in this way:

> (a) Her Honour found that the implied licence of the officers to be on the business premises at Noble Park was revoked by Mr Ectoros before the occurrence of the conduct alleged to constitute the various offences;[10]
>
> (b) Because the conduct complained of occurred at a time when the officers were trespassers, they were not then acting in the lawful execution of duty and her Honour exercised her discretion to exclude the evidence of that conduct as being tainted by illegality;[11]
>
> (c) In any event, her Honour made the 'observation' that, even if the evidence of the conduct had been admissible she would have dismissed the assault charges because the statements alleged to constitute the threat 'could not in [her] view amount to a threat taken seriously'.[12]

Appeal on a question of law

21. An appeal under s92 of the *Magistrates' Court Act* is limited to an appeal on a question of law. The question of law must be one that was involved in the making of the order, and must be the subject of the appeal.[13]

22. In such an appeal the appellant cannot invite this court to substitute its own view of the facts for those of the Magistrate. However, as was stated by Phillips JA in *S v Crimes Compensation Tribunal*:[14]

> It cannot be said as a matter of legal principle that a determination of fact can never give rise to an error of law, but ordinarily it will not be so unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it. In so referring to a "finding" I use the term not only to include a finding of a fact derived from the acceptance of direct evidence to that effect; I include also an inference of fact drawn by the tribunal from other facts found by it. If the finding (be it a finding on direct evidence or inference) was not open to the tribunal, that may bespeak a relevant error of law.[15]

23. A finding of fact will not be open to a tribunal of fact if there was no evidence upon which the finding could have been made.

24. The amended notice of appeal identified the questions of law upon which the appeal was based as (1) whether it was open to the Magistrate to find that the officers' implied licence to be on the premises had been revoked so as to make the officers trespassers; (2) whether the Magistrate erred in law in exercising her discretion to exclude the evidence of the relevant conduct; and (3) whether, in any event, the officers were acting in lawful execution of their duty by remaining on the premises pursuant to their delegated authority, the Transport Act or the Regulations thereto, Part 9 of the *Road Safety Act* 1986 (Vic) or otherwise at law.

25. The appellant did not persist with the ground relating to the exercise of the discretion to exclude evidence. I will deal with each of the remaining questions in turn.

The finding that the implied licence had been revoked

26. In *Plenty v Dillon*[16] the High Court approved what had been said by Brennan J in *Halliday v Nevill*[17] in respect of the principle that every invasion of private property is a trespass, namely:

The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorised or excused by law.[18]

27. However, while the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact:

> ...there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked.[19]

28. Commonly a licence will be implied from the means of access to premises, for example where there is an unobstructed driveway or path leading to an entrance to private premises, without any notice forbidding entry. In those circumstances the law implies a licence to any member of the public to go to the entrance for any lawful purpose. But:

> ...[s]uch an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it.[20]

29. In the present case it is not disputed that the officers had a tacit or implied licence to be on the premises. They were business premises with an unobstructed means of access and with an open door permitting members of the public to enter a front office for a lawful purpose.

30. What is in dispute is whether that implied licence was effectively revoked. The appellant's argument has two limbs. The first is that there was no evidence from which it could be found that Mr Ectoros had the legal right to revoke the implied licence. The second is that, even if Mr Ectoros did have such a right, it was not open to the Magistrate on the whole of the evidence to find that he did revoke the implied licence.

Did Mr Ectoros have authority to revoke the officers' implied licence?

31. The first limb gives rise to the question whether Mr Ectoros, or any of the companies of which he was a director,[21] was the occupier of the premises at Noble Park with sufficient right to demand that the officers leave the premises so as to revoke any implied licence they may have had to be there.

32. The appellant argued that no evidence, direct or otherwise, was given by the respondents to prove the right of Mr Ectoros to expel the officers from the property. The appellant argued that the only evidence that bore upon the issue was that Mr Ectoros was the director of Spectacular Views and Ultra Finish. It was pointed out, however, that those companies had their registered offices at premises other than the Noble Park premises. No-one, said the appellant, gave any express evidence that Mr Ectoros, or the companies of which he was a director, were in possession of the Noble Park premises.

33. The respondents argued that the issue of possession is a question of fact which was (or, implicitly, must have been) found by the Magistrate and, unless it was not open to a magistrate acting reasonably to come to that view on the evidence, this Court could not interfere.

34. The evidence which the respondents said enabled the Magistrate to form the conclusion that Mr Ectoros (or the companies of which he was an agent) was in possession of the premises were: first, he was physically in occupation of the building, and occupied an office within it; secondly, he told the Vic Roads officers that he was 'the boss' and they were to deal with him; thirdly, Mr Brown gave evidence that he believed Mr Ectoros to be the boss at the premises; fourthly, when explaining to the officers why the relevant tow truck records were not kept at the Mulgrave premises Mr Ectoros told them:

> We put another depot here 810 [a reference to Armstrong Towing's licensed depot] and we call this ..head office can't have two because I own both (sic);[22]

and fifthly, the signage on the building contained the names of Ultra Finish, Advanced Towing and Armstrong Towing, all of which were a reference to companies of which Mr Ectoros was either a director or accepted to be in charge.[23]]

35. Neither counsel referred me to specific authority on the question of what are the relevant characteristics of a person with authority to revoke an implied licence. Both referred generally to occupation or possession of the premises. In *Coco v The Queen*[24] the High Court referred to persons 'in possession or entitled to be in possession' of the premises as those with the right to exclude others.[25] Evidence of the requisite degree of possession may include evidence of legal title but, at least for the purposes of establishing a claim for the tort of trespass, without such title the person wishing to establish the right to exclude others must show both factual possession (ie an appropriate degree of physical control) and an intention to possess (ie an intention to exclude the world at large).[26]

36. It is not fatal for the respondents that there was no express evidence that neither Mr Ectoros or the various companies of which he was a director or in charge, was in possession of the premises. The relevant fact can be inferred from other facts.

37. It seems to me that there was evidence from which the Magistrate could properly have inferred that Mr Ectoros, or one or more of the companies I have mentioned, had factual possession of, and displayed an intention to possess, the Noble Park premises. That evidence includes the factors relied upon by the respondent as outlined above. Particularly significant, in conjunction with the other evidence, were the photographs in Exhibit Q depicting the premises emblazoned with signage advertising 'Armstrong Towing' and 'Advanced Towing', having substantial security fencing and having the entrance door on which were prominently painted the words, 'Office' and 'Ultra Finish Accident Repair Centre (Dandenong) Pty Ltd'.

38. Accordingly, the appellant has failed to establish that it was not open for the Magistrate to treat Mr Ectoros has having the requisite authority to revoke the implied licence.

Did Mr Ectoros in fact revoke the officers' implied licence?

39. The second limb of this particular argument raised by the appellant was whether it was open to the Magistrate to conclude that Mr Ectoros in fact revoked the officers' licence to remain on the premises.

40. The appellant contends that the Magistrate failed to take into account the whole of the conversations[27] which took place between the parties and only focused on the words 'get out'.[28] The appellant argues that the remainder of the conversation, and the CCTV footage, demonstrates that there was far more equivocation by Mr Ectoros with regards to whether the officers had to leave. That is, he appeared at some stage to be saying they had to leave, at other times that they should come in and wait in his office, and still at other times they should show him their identification.

41. Again it was the respondent's submission that this was purely a question of fact and one which was open to the Magistrate to decide as she did. It was pointed out that Mr Ectoros demanded that the officers 'get out' no less than four times quite emphatically.[29] It was argued that, whatever happened afterwards, simply did not persuade the Magistrate that the demand to 'get out' was not a serious or effective one.

42. There is no doubt that Mr Ectoros uttered the words 'get out', did so on several occasions, and did so most emphatically. It is not suggested he was joking or being insincere when he did so. That he thereafter should revert to other ploys when the officers did not leave does not, of itself, impeach the sincerity or seriousness of his initial demand. But whether they did so or not, it was quintessentially a matter of fact for the Magistrate to decide.

43. The Magistrate heard all of the evidence, read the audio transcript and viewed the CCTV footage. It was a relatively short exchange – only a matter of minutes. There is no reason to doubt that she assessed the words uttered by Mr Ectoros in the context of the whole exchange. Indeed, having read the audio transcript and viewed the CCTV footage myself, I consider it is hard to do otherwise.

44. In those circumstances I am not persuaded by the appellant that it was not open to the Magistrate to reach the conclusion that she did or that she made an error of law in reaching that conclusion.

Officers authorised to remain despite revocation of licence?

45. The second principal argument raised by the appellant was that, even if the words 'get out', in context, were capable of revoking the licence, nonetheless the Vic Roads officers were authorised by statute to remain on the premises. That is because, so it was argued, the officers had first made a lawful demand in the exercise of their law enforcement powers for 'authority to tow' documents before any demand was made for them to leave the premises. They were then entitled to lawfully remain upon the premises until that demand was either complied with or they were satisfied it had been refused.

46. The relevant principle was stated in *Coco v The Queen*:

> Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct [Citations omitted] But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v. Dillon* ((4) (1991) 171 CLR at 654.):
>
> > "(I)nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights".[30]

47. An example of this principle being employed is to be found in *Pringle v Everingham*.[31] There, the statute authorised police officers to require a driver of a motor vehicle to furnish a breath sample, the place in question being a private hotel car park. The hotel licensee ordered the police off the premises but not until after the police had already requested the sample from the driver (a hotel patron). The New South Wales Court of Appeal held the officers were permitted to remain until the lawful request was complied with.

48. Her Honour simply assumed, for the purposes of argument, that the officers did have the power to enter the premises and lawfully make the request.[32]

49. In my view, it was open to her Honour to conclude, as she must have done, that the officers' implied licence was revoked before any lawful demand was made which might have enabled the officers to remain on the principle in *Coco*. But it is also my view that the officers did not have the authority to make the demand they purported to make. My reasons for these views follow.

Timing of demand to leave premises

50. In relation to the sequence of demands, the appellant seems to rely on the statement made by Mr Brown: 'I need all the dockets that this man, did on 24th of August'.[33] This request was made to Mr Ectoros before he first said 'get out'. The appellant also tentatively relied upon the request for information made to the female person at the premises: 'What we're after is the details of who was driving that truck'.[34]

51. The critical question is whether or not the officers lawfully made a demand for the 'authority to tow' prior to being asked to leave so that they were entitled to remain on the premises even after Mr Ectoros told them to get out.

52. It is not at all clear what demand the officers were making (ie whether for 'authority to tow' forms or something else). If law enforcement officers are to rely upon some coercive power such as contained in reg 8(d) of the Regulations they must make it quite clear what it is that they are demanding.[35] Insofar as the officers relied on their power under reg 8(d) to be on the premises at all, they were only protected from being trespassers if they expressed their demand in 'unmistakable and unambiguous language.'[36]

53. It may be said that the use of the expression 'dockets' was well understood by Mr Ectoros, and that he was under no doubt what was being requested. For example, it appears ultimately that some documents were provided[37] without the need for any clarification of what they were. Although the appellant argued there is really no other plausible conclusion that could be reached, [38] there is no evidence to establish that those 'dockets' were in fact 'authorities to tow'.

54. It was a question of fact whether or not they had made the relevant request before the demand that they leave was made. Her Honour evidently thought they had not done so.

55. In my view it was reasonably open for the Magistrate to make this conclusion and I do not interfere with it.

Extent of officers' authority

56. The appellant ran the argument that each of Mr Brown and Mr Robertson were approved by the licensing authority to demand the 'authority to tow' forms, which is what they were lawfully doing at the premises on the relevant date.

57. I have already referred to the lack of clear evidence that the officers did demand the authority to tow forms.

58. But in my view the most significant problem for the appellant was that neither Mr Brown nor Mr Robertson could prove they were approved by the licensing authority to request authorities to tow at all.

59. The primary source of authority upon which the appellant relied was that contained in reg 8(a)(ii) of the Regulations in force at the relevant time. By that Regulation a licence holder must keep, in relation to the tow truck to which the licence holder's tow truck licence relates, (ii) in chronological order, every authority to tow form which has been completed or partially completed.

60. Subparagraph (d) of the same Regulation then requires a licence holder to:

> (d) Make the records referred to in paragraph (a) available for inspection on demand by a member of the police force, the licensing authority or a person approved by the licensing authority.[39]

61. It was (correctly, in my view) accepted that the expression 'licensing authority' in that regulation is now a reference to Vic Roads.[40]

62. I am prepared to assume for present purposes that the particular statutory power in reg 8(d) carried a 'clear implication' that an authority to remain on private property was intended to prevent the statutory provision from becoming inoperative or meaningless.[41]

63. The respondent argued that the officers' powers derive from individual delegations made to them pursuant to s32 of the *Transport Act* or s91 of the *Road Safety Act* which were tendered in the proceeding below.[42]

64. Section 91 of the *Road Safety Act* provides:

> The Corporation may by instrument under its official seal—
> (a) delegate to an officer of the Corporation any power of the Corporation under this Act or the regulations, including this power of delegation;

65. Section 32 of the *Transport Act* is in similar but not identical terms. It provides:

> (2) The Corporation may delegate any power or duty of the Corporation under this Act or any other Act or the regulations, other than this power of delegation, to
> (a) an officer of the Corporation either by name or by reference to the officer's office only (and where the reference is to the office only the holder for the time being of the office shall be the delegate);

66. The delegations, headed 'Transport Act 1983 and Road Safety Act 1986', are styled as 'appointment of authorised officer', and a date and the official seal of the Roads Corporation, and are affixed with signatures of the chief executive and the authorised officer. They are quite formal instruments. In both cases they set out as follows:

> The Roads Corporation hereby authorises the officer of the Roads Corporation named in Part 1 of Schedule A to this instrument, generally under section 229 of the *Transport Act* 1983 and s77(2)(d) of the *Road Safety Act* 1986, to prosecute offences under those Acts and the Regulations under those Acts.
>
> The Roads Corporation further appoints the officer named in Part 1 of Schedule A as an authorised

> officer (and in the case of the Road Rules as authorised person) for the purposes of the provisions of the Acts and Regulations set out in Part 2 of Schedule A to this supplementary instrument.

67. Schedule A Part 1 of the instruments for each officer named the relevant officer therein. In each case Part 2 of Schedule A listed numerous statutory provisions, for which purposes the named officers were appointed, but in neither case did Part 2 list the *Transport (Tow Truck) Regulations* 2005. Thus the delegations did not appoint either Mr Brown or Mr Robertson as an 'authorised officer' for the purpose of reg 8(d), the critical regulation for present purposes.

68. Accordingly, unless some other source of power existed to authorise Mr Brown and Mr Robertson to make the demand on Mr Ectoros that he produce the authority to tow forms (even if that is what 'dockets' is taken to mean) then any request they might have made of Mr Ectoros to produce them was not lawful. Thus, by failing to leave when requested to do so by Mr Ectoros, the officers became trespassers.

69. The appellant had no direct answer to the problem that the officers lacked authority under reg 8(d). Instead, he had what might be called an indirect argument. That argument took two forms.

70. The first answer was to the effect that because the first paragraph of the delegation gave each officer an authority to 'prosecute' offences, that concept embraced powers to investigate such as to make demands for the authorities to tow as was done in this case.

71. In my view that is an untenable argument.

72. The second answer was that the officers were entitled to be on and remain at the premises, despite Mr Ectoros' demand that they leave, because of their powers to search the premises found under s112 of the *Road Safety Act*. Section 112(1)(a) of the *Road Safety Act* gives relevantly authorised officers the power to carry out inspections and searches of heavy vehicles and premises that are permitted by Part 9 of that Act. Subsection (2) provides:

> (2) In authorising a person under this section, the Corporation or Secretary must give the person an identity card—
> (a) that identifies the person by name as an inspector under this Part; and
>
> (b) that specifies, in the case of a person who is authorised to carry out inspections under subsections (1)(a) and (1)(b), what inspections and searches the person has been authorised to conduct; and
>
> (c) that contains a photograph of the person.

73. The appellant argued that the officers were authorised to carry out inspections and searches of heavy vehicles and premises under s112(1)(a). Therefore, he argued, because the relevant tow truck was a heavy vehicle (which I am satisfied that it was for the purposes of this section), that gave them the source of statutory power to remain on the premises.

74. I reject this argument, primarily on the basis that there is not a shred of evidence to suggest that the officers purported to exercise this power.

75. However, the appellant's problem runs deeper than that. It is not at all clear that either officer possessed the power to conduct a search of premises under s112(1)(a).

76. The appellant says that the officers had such power because of the provisions of s112(2) and the fact that each of the officers' identification card, produced at the premises[43] said as follows:

The Officer whose name and photograph appears hereon is:

> • an officer of the Roads Corporation;
> • an inspector under Part 9 of the *Road Safety Act* 1986;
> • an inspector for the purposes of the *Interstate Road Transport Act* 1985 (Cth); and
> • appointed by the Roads Corporation as an authorised officer for the purposes of the *Road Management Act* 2004.

> The Officer is authorised to carry out any inspections and searches of the heavy vehicles and premises that are permitted by Part 9 of the *Road Safety Act* 1986.
>
> Complaints about the exercise of power by a Vic Roads officers can be made to the Manager Regional Services Support, 60 Denmark Street, Kew, Victoria, 3001.

77. Those words appeared on the reverse of the identification card of each officer, bearing their respective photographs, contained within a small leather wallet which also had a Vic Roads badge, not unlike a police officer's identification badge.

78. The appellant argued that s112(2) is itself the authorising provision under the Road Safety Act, so that if the relevant identification card specifies what inspections and searches the person has been authorised to conduct, they are so authorised by the combined effect of s112(2)(b) and the words which appear on the relevant identification card.

79. Against this, the respondents contend that s112(2), properly construed, merely requires the Corporation to give an officer who has elsewhere been authorised to carry out inspections and searches, to give the relevant officer an identification card which accurately specifies what inspections and searches that person has been authorised to so conduct. And the 'elsewhere' source of that authorisation is, so the respondents contend, the delegation which the Roads Corporation makes to its officers under either s91 of the *Road Safety Act* or s32 of the *Transport Act* to which reference has already been made.

80. Although, if necessary, I would be inclined to accept the respondents' argument, in the end I do not consider it necessary for me to finally determine this matter. It is enough to have concluded that neither officer was authorised under the reg 8(d) of the Regulations to demand the authority to tow dockets, nor did either of them purport to exercise any search powers which may have been conferred upon them under s112 of the *Road Safety Act*.

Alternative finding

81. The appellant pressed an argument based upon the learned Magistrate's observation, in the alternative,[44] that even if the evidence of Mr Ectoros' conduct was admissible, it did not amount to an assault.

82. It is not strictly necessary to deal with this contention and it is highly doubtful whether it arises on the amended notice of appeal. Nevertheless, lest I am wrong, I will express my view briefly.

83. In her published reasons her Honour held:

> I make further observation that the words relied upon to constitute the threats would not amount to an assault even if I had found the evidence admissible. They [sic] alleged threats are mere words in a heated and childish exchange and the CCTV footage shows no discernible response to demonstrate apprehension on the part of the Officers on both occasions relied upon. The statements could not in my view amount to a threat taken seriously.[45]

84. However, when delivering her oral ruling on 1 May 2009 the learned Magistrate said 'the threat sought to be relied upon were not supported by any fear or apprehension…' (emphasis added). The appellant latches on to the reference to fear, citing *Brady v Schatzel*[46] where Chubb J said:

> In my opinion, it is not material that the person assaulted should be put in fear…if that were so, it would make an assault not dependent on the intention of the assailant, but upon the question of whether he party assaulted was a courageous or timid person.[47]

85. An assault is any act of one person which directly, and either intentionally or negligently, causes another person to immediately apprehend unlawful contact with his or her person.[48]

86. It is clear that whilst a person must be placed in a reasonable apprehension of imminent unlawful contact, it is not necessary that they anticipate fear, however it is usually the case that they will.[49]

87. In my view, the Magistrate did not formulate an inappropriate test for assault. Properly understood, her Honour stated in a shorthand way, that she was not satisfied that either officer apprehended immediate unlawful contact, nor were they in the throes of fear. Her Honour made clear her application of the correct test at law.

Conclusion

88. For the reasons I have given, I dismiss Mr Brown's appeals. I will hear the parties on appropriate final orders.

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[1] Exhibit K. (Note: The exhibits in the Magistrates' Court were exhibited to Mr Brown's affidavit in this court sworn 14 March 2010, and references to exhibits in these reasons are references to the exhibits to that affidavit.)
[2] Exhibit O.
[3] Exhibit K p 1.
[4] Exhibit K p 1.
[5] Exhibit K p 4.
[6] Exhibit K p 5-6.
[7] Exhibit R (*Brown v Spectacular Views Pty Ltd and Ectoras* (unreported, Magistrates' Court of Victoria, Magistrate Cure, 1 May 2010) hereafter referred to as 'Reasons'. [33].
[8] Assault an officer (s225(2)); Refuse to comply with a request (s225(3)); Obstruct direction of an officer (s225(3)(a)); Hinder lawful request (s225(3)(a)); Inciting another to refuse to comply (s225(3)(b)).
[9] Using threatening words (s17(1)(c)); Unlawful assault (s 23); Offensive behaviour (s17(1)(d)).
[10] Reasons [27].
[11] Reasons [28]
[12] Reasons [33]
[13] *Wong v Carter* [2000] VSCA 53.
[14] [1998] 1 VR 83.
[15] Ibid 90.
[16] [1991] HCA 5; (1991) 171 CLR 635, 639; (1991) 98 ALR 353; 65 ALJR 231; [1991] Aust Torts Reports 81-084.
[17] [1984] HCA 80; (1984) 155 CLR 1; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 59 ALJR 124; (1984) 2 MVR 161; [1984] Aust Torts Reports 80-315.
[18] *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1, 10; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 59 ALJR 124; (1984) 2 MVR 161; [1984] Aust Torts Reports 80-315.
[19] Ibid 7.
[20] Ibid.
[21] There was evidence, Exhibit G, that Mr Ectoros was a director a number of companies including Spectacular Views, Ultra Finish, and Advanced Towing Pty Ltd.
[22] Exhibit K p 2.
[23] ASIC records, Exhibit G. In respect of Armstrong Towing, no ASIC record was produced, but it had been opened by the prosecution in the Magistrates' Court that Mr Ectoros had been a 'principal director' of that company: Magistrates' Court transcript, Exhibit C p 3. One of the photographs in Exhibit Q indicates that 'Armstrong Towing' may have been a trading name for Terasof Pty Ltd.
[24] [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[25] Ibid 435.
[26] *Powell v McFarlane & Ors* (1979) P. & C.R. 452; see also Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 134; Anthony Dugdale and Michael Jones (eds), *Clerk & Lindsell on Torts*, (Sweet and Maxwell, 19th ed, 2006) 1117.
[27] The appellants relied on *Gilham v Breidenbach* [1982] RTR 328 and *Snook v Mannion* [1982] RTR 321 in for the proposition that the Magistrate should have taken account of the whole of the conversations.
[28] Exhibit K p5. Also as set out in [13] above.
[29] Exhibit K p5-6.
[30] *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 436; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[31] *Pringle and Ors v Everingham* [2006] NSWCA 195.
[32] Reasons [8].
[33] Exhibit K p4.
[34] Exhibit K p1.
[35] See generally *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 where Southwell J concluded that proof of a demand by a precise recital of the words of an Act was is not required. Rather, the question was whether the person eventually charged was given reasonably sufficient information to know what was required of him and why.
[36] See [46] above.
[37] Exhibit K p11.
[38] Exhibit C p147.

[39] Underlining added.
[40] See the definition in the *Transport Act* 2005 first of 'licensing authority', then of 'Director', and then the Victoria *Government Gazette* No S210 4 September 2007 by which the Director of Public Transport was renamed the Chief Executive, Roads Corporation.
[41] See [46] above.
[42] Exhibits H (Robertson) and N (Brown).
[43] This was contentious.
[44] See paragraph 20(c) above
[45] Reasons [8].
[46] [1911] St R Qd 206; 5 QJPR 155.
[47] Ibid 208.
[48] See R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 4th ed, 2009) 41 [3.15]; Carolyn Sappideen and Prue Vines, *Fleming's The Law of Torts* (Thomson Reuters, 10th ed, 2011) 34 [2.70]; Trindade, Cane and Lunney, above n 26, 48 [2.2.2].
[49] See Trindade, Cane and Lunney, above n 26, 48 [2.2.2].

APPEARANCES: For the appellant Brown: Mr PJ Billings, counsel. Vic Roads. For the respondents Spectacular Views Pty Ltd and Ectoros: Mr AP Lewis, counsel. Wood Fussell, solicitors.
