39/99; [1999] VSC 200

SUPREME COURT OF VICTORIA

CASSAR CONSTRUCTIONS PTY LTD v BUTERA

O'Bryan J

28 May, 3 June 1999

CIVIL PROCEEDINGS – DAMAGE CAUSED TO MASONRY WALL DURING DEMOLITION OF SHED – WALL SUBSEQUENTLY RE-BUILT BY PERSON CAUSING DAMAGE – TREES DAMAGED BY SPRAY DRIFT – CLAIM FOR REPLACEMENT COST OF TREES UPHELD – CLAIM FOR EXEMPLARY DAMAGES FOR DAMAGE TO WALL UPHELD – EXEMPLARY DAMAGES – MEANING OF – WHETHER MAGISTRATE IN ERROR.

During the demolition of a shed belonging to CCP/L, a masonry wall belonging to B. collapsed. Subsequently, CCP/L re-built the wall at no cost to B. As a result of spray drift from CCP/L's premises, B. claimed that trees on his property were damaged. Subsequently, B. claimed from CCP/L the cost of replacing the trees and exemplary damages in the sum of $5000. The magistrate upheld the claim and also made an order for exemplary damages due to the treatment of B. in demolishing the shed without consultation and the high-handed conduct and disregard for the trees. Upon appeal—

HELD: Appeal dismissed in relation to the claim for the damage to the trees. Appeal allowed in relation to the order for exemplary damages and varied by deleting the award for exemplary damages.
1. In relation to the order for damages in respect of the trees, there was no basis on which to disturb the magistrate's findings in relation to the claim for the cost of removing and replacing the trees.

2. Exemplary damages are additional damages awarded for some wrong-doing. No damages could be claimed on account of the demolition of the shed and/or the masonry wall because B. did not suffer any damage, general or special. No exemplary damages could be awarded for the spraying incident unless the spraying was done deliberately to damage the trees or showed a contumelious disregard for B's rights. Accordingly, the magistrate was in error in awarding exemplary damages to B.

O'BRYAN J:

1. This is an appeal from an order made in the Magistrates' Court at Melbourne on 16 December 1998. The court ordered that the appellant pay the respondents on a civil claim for damages for tort $16,500, exemplary damages of $5,000 and costs of $5,828.

2. On 19 February 1999 Master Wheeler made an order that the following questions of law are to be decided on the appeal.

> (i) "Having regard to the whole of the evidence, and particularly that of the respondents' expert (the tree damage alleged if caused by the appellant's actions would have been exhibited within about four days of the relevant spraying whereas the respondents' lay evidence was that no damage was observed for six months) could a reasonable magistrate properly instructed have found for the respondent."
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> (ii) "Was there any evidence to support the magistrate's finding that the appellant's action amounted to high handed conduct and disregard of the (respondents') concern for the trees such as to entitle them to exemplary damages".

3. In the court below the respondents were the plaintiffs and the appellant was the defendant.

4. The facts may be briefly summarised so as to identify the issues. The respondents resided on a suburban block of land upon which they had planted a row of 12 conifer trees across the southern boundary and a row of conifer trees on the eastern boundary. The trees were designed to give them privacy and the respondents cared for their trees. The evidence did not reveal when the trees were planted but they were not fully mature. The width of the land from went to east was 110 feet.

5. Immediately to the south of the trees and on the respondents' land was a solid masonry wall about 8 feet in height.

6. Further south is a piece of land upon which a new development of residential units was taking place early in 1997.

7. The respondents were very concerned about the proposed demolition of a garage to the south of their boundary and possible damage to their masonry wall. Their fears were well founded for during demolition of the garage and removal of its roof the masonry wall collapsed. The appellant accepted legal responsibility for causing damage to the masonry wall in September 1996 and replaced it at no cost to the respondent in November. However, the respondents were also concerned because roots of the conifer trees growing along the southern boundary were exposed when the garage floor was broken up and, in the opinion of the respondents, needed to be carefully treated lest the trees were damaged.

8. At some stage the appellant cut the roots of the conifer trees back to the southern boundary fence line of the respondents' land before re-building the masonry wall.

9. It was not seriously disputed by counsel for the respondents that the owner of the land upon which the roots had intruded was permitted by law to cut the roots back to his boundary line. That is the common law. Also, it was not seriously disputed in the court below that in cutting the roots the 12 conifer trees were "stressed".

10. The main dispute between the parties focused on an incident which occurred on 18 March 1997. On that day, when walls of two of the new units were being washed by means of a spray, the female respondent became aware that her conifers also were being sprayed. The spray was a mix of water and hydrochloric acid. The respondent remonstrated with the person carrying out the spraying, there was heated argument, police were called and the dispute was very unfriendly. Some months later the 12 conifer trees were removed on account of damage allegedly caused to the trees by the acid spray. The trees were replaced by new conifer trees at considerable cost. The claim below was for the cost of removal and replacement of the trees together with exemplary damages for the allegedly high-handed conduct of the appellant.

11. According to the affidavit filed in support of the appeal evidence was given in the court below by the female respondent of an earlier incident which caused mist to come on to her property over the eastern boundary whilst the appellant was spraying a unit or units. Apparently this incident was not a cause of the damage subsequently seen following the March incident.

12. The appellant's affidavit also said that the female respondent said in evidence she saw the foliage of the conifers on the southern boundary starting to turn yellow six months after the March spraying. She said her husband alerted her to the yellowing and later the foliage died off completely and became brown and remained on the tree. The male respondent allegedly said in evidence that yellowing on the conifers commenced in August or September 1997 and that in September he brought the yellowing to his wife's attention.

13. This evidence of the yellowing not commencing until August or September is disputed by the respondents in an answering affidavit sworn by the male respondent on 27 April 1999. The male respondent said in paragraph 15: "She explained (in the court below) that the yellowing had probably started earlier because, after closer examination some of the trees had gone brown in parts where permanent damage had occurred". In paragraph 25 of the affidavit the male respondent said: "I told the court that I first noticed the yellowing in about July/August 1997. I explained that the 12 trees were close together and against a new wall. The discolouring had started much earlier but I had not noticed when it started."

14. This difference in the evidence given in the court below about the date when yellowing was first noticed by the respondents was important to the main submission of Mr McEachern of counsel who appeared for the appellant in this court and in the court below. The submission was based upon yellowing of foliage first occurring in August or September.

15. The thrust of Mr McEachern's argument was that the learned magistrate should have found that yellowing of the trees did not occur until August and that die-back of the trees could not have been caused by acid spraying in March. The argument begs the question: If acid spraying did not cause yellowing and die-back what caused 12 healthy conifers to die-back? The respondents'

expert looked for other causes but could find none. The argument is sterile if yellowing may have occurred in April but went unnoticed by the respondents as a phenomenon until about August.

16. An expert arborist was called by each party in the court below. The expert called for the appellant was rejected by the learned magistrate as an unreliable witness and no attack was made by Mr McEachern upon that finding in this court.

17. It was common ground in the court below that the spray used on 18 March 1997 contained 10% or 12% mix of hydrochloric acid and water.

18. The expert called for the respondents had visited the *locus in quo* on 7 February 1998, almost 12 months after the acid spraying incident. All the trees displayed die-back from the lowest branches to a height of about 3.5 metres. He opined that the primary cause in the decline of the trees was the acid spray. He also opined that the exposure of the root system would have had a detrimental effect on the trees but was not the cause of the yellowing. He could find no other cause.

19. In the appellant's main affidavit (para. 75) the deponent said that the expert said he would expect to see the corrosive effect of the acid within one month, that the leaves would yellow within a few days after the spraying but then the foliage would become totally brown and dead three to four weeks after the spraying with acid.

20. The importance of this evidence is obvious if one were to find that yellowing was not observed by either respondent until August 1997. However, the answering affidavit of the male respondent (in para. 28) says that his expert also told the court that although damage to the trees would occur quickly, a lay person would not notice the damage for some time.

21. The parties are, therefore, in conflict about critical evidence in the court below. Resolution of a dispute such as this may be achieved by following the arbitrary rule "that where there is a material conflict between the parties' affidavits as to the evidence or other proceedings in the court of petty sessions the version which supports the decision of the court of petty sessions should be accepted in the absence of any fair and practicable method of resolving the conflict". Newton J, *Buzatu v Vournazos* [1970] VicRp 63; (1970) VR 476 at 478.

22. The rule there referred to is based upon common sense and is appropriate in the present case to resolve the conflict.

23. I take into account that in the court below counsel did not ask the respondents' expert whether his opinion would be the same if the yellowing did not occur until August. I also take into account that the learned magistrate did not address the point most strenuously argued by Mr McEachern in this court but did comment that she accepted the female respondent's evidence that some small plants were <u>immediately damaged</u> by the spray. [Underlining is for emphasis.]
24. I infer that the point relied upon by Mr McEachern in this court was not argued vigorously below.

25. Without the benefit of the "delay in yellowing" argument there is no basis to disturb the findings made in the court below or the claim for the cost of removing and replacing the damaged conifers. I agree with Mr Lovell's submission that the decision in the court below cannot be disturbed unless, on no reasonable view of the evidence most favourable to the respondents, the decision cannot be supported. Cf *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; (1956) VLR 38 at 41; [1956] ALR 301; *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1; (1972) 30 LGRA 19.

26. In my opinion the first question of law should be decided in the affirmative.

27. The second question of law raises a problem for the respondents in that the learned magistrate said in her reasons for decision:

> "I further make an order in relation to exemplary damages. There was flagrant treatment of the (respondents) by the (appellant) in demolishing the shed without consultation with (the respondent). This was high handed conduct in disregard for the (respondents) concern for the trees".

28. In the particulars of claim the respondents claim exemplary damages by reason of the conduct of the appellant particularised in paragraphs 7, 11 and 16. Paragraph 7 related to the damage and demolition of the masonry wall on or about 19 September 1996. Paragraph 11 related to the appellant wrongfully and negligently damaging or cutting the roots of the trees. Paragraph 16 related to the spraying of chemicals on the trees.

29. The decision to award exemplary damages was limited by the learned magistrate to the demolition of the shed. Possibly, the damage to the masonry wall could be included. The damages of a punitive nature did not include the acts of cutting the roots or spraying the trees with acid.

30. The decision to award exemplary damages was wrong in law, in my opinion for exemplary damages are additional damages awarded for some wrong-doing. No damages could be claimed on account of demolishing the shed and/or of the masonry wall because the respondents did not suffer any damage, general or special. No damage could be awarded for cutting the roots for the appellant was allowed to cut the roots back to the fence line without permission from the respondents. No exemplary damages could be awarded for the spraying incident on 18 March. The evidence did not admit a finding, and no finding was made, that the spraying was done deliberately to damage the conifers. The cause of action lay in negligence or trespass.

31. The award of exemplary damages must be set aside either, because it was not open to the learned magistrate to award exemplary damages for the masonry wall damage or, because the evidence in relation to the spraying did not show a contumelious disregard for the respondents' rights. 32. The second question of law should be answered in the negative.

33. The appeal is successful on the second ground and the order of the court below must be varied by deleting from the order the words "exemplary damages of $5,000". Otherwise the order stands. 34. I shall hear the parties on the question of costs.

APPEARANCES: For the appellant Cassar Constructions Pty Ltd: Mr IR McEachern, counsel. Doyle & Kerr, solicitors. For the respondent: Mr PG Lovell, counsel. Peter Randles & Co, solicitors.
