32/05; [2005] VSC 390

SUPREME COURT OF VICTORIA

BOGLARI v BALLARAT STEINER SCHOOL AND KINDERGARTEN

Gillard J

12, 13 September 2005

CIVIL PROCEEDINGS – EASEMENT – INTERFERENCE WITH BY CONSTRUCTION OF A GATE AND FENCE – CLAIM FOR DAMAGES AND AN ORDER FOR REMOVAL OF GATE AND FENCE – CHANGE IN TERMS OF EASEMENT – WHETHER SUBSTANTIAL CHANGE – FINDING BY MAGISTRATE THAT NOT EXCESSIVE CHANGE – CLAIM UPHELD – ORDER BY MAGISTRATE THAT GATE AND FENCE BE REMOVED – ORDER THAT IN DEFAULT AMOUNT OF $875 BE PAID FOR COST OF REMOVAL – COSTS AWARDED ON SCALE D – WHETHER MAGISTRATE IN ERROR.

B. occupied land which was adjacent to land on which the Ballarat Steiner School ('School') was located. Access to B.'s property was via a laneway owned by B. The School landowner enjoys a right of carriageway over the laneway. Between 1996 and 2002 the School used the easement of carriageway for access to a carpark on the School's land. During 2002 and 2003, B. constructed a fence and a gate between the laneway and the car park. This obstructed access to the School's carpark. Subsequently proceedings were issued on behalf of the School alleging that the construction of the fence constituted a nuisance or a trespass and interfered with the rights given by the easement. The School claimed damages and sought an order for the removal of the fence and gate. When the matter came on for hearing, the magistrate upheld the claim, made the order sought as requested, ordered that B. pay the sum of $875 for the cost of removal and costs fixed on Scale D at $5023.10. Upon appeal—

HELD: Appeal dismissed.

1. In *Jelbert v Davis* [1968] 1 All ER 1182; [1968] 1 WLR 589 there had been a change from the use of the land for agricultural purposes to a tourist caravan park. The Court of Appeal held that there had been a change in use of the dominant land which had the effect of increasing the burden on the servient land in comparison to the burden existing at the date of the grant, and hence the change in use was not authorised. The effect of such a principle is that the difference in use is not authorised by the terms of the easement which is to be construed at the date of its creation. In the present case the question of whether the proposed use of the easement was excessive was one of fact and degree. The magistrate was not in error in finding that there had been no excessive change to the terms of the easement.

2. The easement of carriageway is a right annexed to land to use land in the ownership of another in a particular manner. The right only exists as annexed to and for the benefit of land which is called the dominant tenement while the land over which rights are exercised is the servient tenement. Any substantial interference with the enjoyment of an easement of carriageway whereby the person entitled to the enjoyment of the right is adversely affected is a private nuisance which the person entitled to the easement may sue for damages or equitable relief in the form of an injunction. The School being in occupation and entitled to possession of the dominant tenement was entitled to sue in respect of the interference with the easement. The magistrate was satisfied as to the easement right, the obstruction to it, no substantial change to the rights which would preclude its operation as at today, and accordingly granted an injunction requiring the removal of the offending gate and fence. The magistrate was not in error in making that finding.

3. In relation to the order against B. for costs on Scale D, the question of costs was a matter for the magistrate's discretion taking into account a number of factors including the complexity of the proceeding, both factually and in law, and also the value of what was at stake. The magistrate was not in error in selecting costs on Scale D.

GILLARD J:

1. This is an appeal from orders made by the Ballarat Magistrates' Court requiring the appellants to remove a gate on property owned by them, and portion of a fence dividing their property from another property because the gate and fence constituted a nuisance, interfering with the rights of the respondent to an easement of way.

Parties

2. The appellants, Sandor and Suzanna Boglari ("the Appellants") are married and the

owners and occupiers of a property situated at 110 Daylesford Road Ballarat. They have been in occupation of the said property since 1989. Access to their house property is along a laneway approximately 66 metres long and about eight to ten metres wide. They own the laneway.

3. The first appellant, Mr Boglari ("Mr Boglari") is a relief secondary school teacher. In the proceeding in the Magistrates' Court, the appellants were represented by solicitors and a barrister. Mr Boglari instituted the appeal in this Court on 17 February 2005, and has prepared all documents concerning the appeal. He appeared at all hearings in this court on behalf of himself and his wife.

4. The respondent, Ballarat Steiner School and Kindergarten ("the School") is an incorporated association, and the occupier of property at 112 Daylesford Road Ballarat ("the school land"), which is situated adjacent to the land owned and occupied by the appellants.

5. The owner of the property is Ronald Norman Saines who at all relevant times was a magistrate. He formerly practised as a solicitor. He granted the right to the School to conduct a kindergarten on the school land in about 1996, and from about 1999 to 2000 the School conducted both the kindergarten a school. Mr Saines did not seek an occupation fee, but the School was required to meet all outgoings in respect of the property.

Proceeding in the Magistrates' Court

6. On 20 January 2004, the firm of Saines & Partners Solicitors issued a complaint on behalf of the School against the appellants in the Ballarat Magistrates' Court. Mr Saines, who not only owns the School land but also land located to its west over the appellants' laneway, enjoys a right of carriageway over the laneway between the two blocks of land. The entrance to the laneway is on Daylesford Road, and as stated, at the end of the laneway is the property owned and occupied by the appellants. The Certificate of Title shows that Mr Saines owns the two blocks of land and has an easement of carriageway over the laneway between his two blocks of land. This is the driveway access to the appellant's property at the end of the laneway and is owned by the appellants.

7. It is clear from the Certificate of Title concerning Mr Saines' two blocks of land, that the property owned by the appellants is subject to a registered easement which was created in 1986. At the hearing in the Magistrates' Court there was no dispute as to that fact. During the period from 1996 to 2002, the School used the easement of carriageway for access to the school land, and in particular, access a carpark on that land. It appears that during 2002 and 2003, the appellants constructed a fence between the laneway and the carpark on the School's land, and a gate was erected. This obstructed access to the carpark.

8. In the particulars of claim, it is alleged that the construction of the fence constituted a nuisance or a trespass, and interfered with the rights given by the easement. The School claimed damages and an order that the appellants remove the fence. At the hearing the School also sought removal of the gate. That was a matter in issue at the hearing.

9. The complaint came on for hearing before a magistrate at Ballarat on 1 November 2004 and was heard over two days. Both the School and the appellants were represented by counsel. The learned Magistrate reserved his decision. On 18 January 2005 he delivered his reasons and found that the appellants had interfered with the easement right in that they had constructed a fence and gate, and that the fence and gate interfered with the School's right to use the lane as a carriageway. It appears from his reasons that the real defence raised by the appellants was that there had been a substantial change in the use of the easement. At the time of the grant of the easement, it was used to access a residence. However, when the School commenced on the property, the laneway was used for educational and commercial purposes, and the parents of the pupils and others, used the laneway to have access to the carpark on the school land.

10. Reference was made to the English Court of Appeal decision of *Jelbert v Davis*.[1] In that case, it was argued that there had been a change in use of the dominant land which had the effect of increasing the burden on the servient land in comparison to the burden existing at the date of the grant, and hence the change in use was not authorised. The Court of Appeal in fact did so hold as there had been a change from the use of the land for agricultural purposes to a tourist caravan park. The effect of such a principle is that the difference in use is not authorised by the terms of the easement which is to be construed at the date of its creation. This was the real issue in this proceeding before the Magistrate.

11. The Magistrate found that the erection of the gate and fence interfered with the School's right to use the lane as a carriageway, and he found that the appellants, by erecting the gate, interfered with the School's right to use the carriageway. He ordered that the gate and a portion of the fence be removed within a specified period, and in the event of the appellants failing to do so, he ordered that they pay an amount of $875 being the cost of removal of the two offending items.

12. I interpolate to observe that the defence filed on behalf of the appellants did not raise any defence of changed use, nor did it raise any issue as to the parents of the pupils of the school obstructing access to the laneway from time to time, thereby impeding the entrance and exit by the appellants. However, it is quite clear that at the hearing these matters were live issues and were ultimately determined by the Magistrate.

13. The order made by the Magistrate on 18 January 2005 was expressed as follows:

14. "Order that the defendants on or before 5 p.m. on 18 January 2005 remove the gate exited at the Daylesford Road end of the property and the fence exited on the other side of the plaintiff's carpark and in default of compliance the defendants to pay the plaintiffs $875 cost of removal."

15. In the course of this appeal, I raised with the parties the effect of the order and what it meant to them. It is clear that the parties understand what part of what fence was to be removed as was apparent from what I was told. I was told that the length of the fence in question is 16.7 metres.

16. The Magistrate also ordered the appellants to pay the School costs fixed at $5023.10. These costs were calculated on Scale D. There has been no formal stay of the orders made, but the appellants have not complied with them, and no attempt has been made by the school to remove the gate and fence. I was told in the course of delivering these reasons that the Magistrate granted a stay on 18 January 2005.

Appeal – Procedure and Grounds

17. In accordance with the new Rules of Court the appellants filed their notice of appeal on 17 February 2005. This instituted the appeal; see Rule 58.07 of the Rules of Court. Mr Boglari was responsible for the drafting of the notice. In support of the appeal he filed an affidavit sworn 25 February 2005. At the time he swore the affidavit, there was no transcript available of the proceeding before the learned Magistrate. It was incumbent upon the appellants to produce evidence of the evidence given before the Magistrate insofar as it was relevant to the grounds of appeal. Mr Boglari's affidavit is argumentative, contains matters that were not before the learned Magistrate, and fails to properly summarise the evidence.

18. Mr Boglari also exhibited a number of exhibits to his affidavit which were not before the Magistrate. The barrister appearing at the Magistrates' Court for the School, Mr Gino Pierorazio, swore an affidavit on 9 March 2005 in which he set out in summary form the substance of evidence given on behalf of the parties. According to his affidavit the School called as its first witness, Ms Katrina Polinsky and then Miss Denise Williams. The summary is not a complete summary of the evidence of Miss Williams. The appellants called a Mr Martin Dilg, who was the previous owner of their property. Mr Boglari gave evidence. Mr Pierorazio in his affidavit purports to summarise the evidence, however it is clear that the summary is not complete.

19. Mr Pierorazio stated that certain exhibits to Mr Boglari's affidavit were not tendered at the hearing. I heard argument in relation to the exhibits and I ruled in accordance with the affidavit evidence of Mr Pierorazio, that Exhibits SB3-SB5 (inclusive), SB8, SB14, SB15A and SB20 were not tendered at the hearing and are not before this Court, on the appeal.

20. On 11 March 2005 Master Dowling ordered that the appeal be dismissed. On 8 April 2005, Justice Bongiorno on an appeal from Master Dowling's order, ordered the appellants be given the opportunity to place further material before the Court, and on 22 April 2005 Justice Hansen set aside the order of Master Dowling and reinstated the appeal.

21. On 8 April 2005, Mr Boglari swore another affidavit, however it is purely argumentative

and contains no relevant evidence. In addition, the Exhibit SB23 referred to in the affidavit was not before the Magistrate. Mr Boglari also swore another affidavit on 21 April 2005, but save for Exhibit SB29 there was nothing in the affidavit which was relevant to the appeal. He then filed two further affidavits sworn on 6 and 19 May 2005 respectively, and again there was nothing in either of these affidavits which provided evidence of the proceeding in the Magistrates' Court which was relevant to the present appeal.

22. In relation to Mr Boglari's affidavit of 6 May 2005, I accept the evidence of Mr Pierorazio that Exhibits SB27B, SB35, SB37, SB38 and SB44 were not tendered at the hearing at the Magistrates' Court. In addition during discussion I ruled that other exhibits to the various affidavits were not admissible on the appeal.

23. The following exhibits were not admitted on this appeal: SB3, SB4, SB5, SB8, SB14, SB15, SB15A, SB20, SB23, SB25, SB26, SB27A, SB27B, SB28A, SB31, SB33, SB34, SB35, SB37, SB38, SB42, SB43 and SB44. I did refer to some of these exhibits because Mr Boglari requested me to do so and I noted, for example, SB42 is an extract of a transcript before Justice Hansen and there are also other exhibits of discussions had when the Magistrate published his reasons. This again appears to be a form of transcript and relates to a discussion between the Magistrate and Mr Boglari as to what rights he had to fence and/or erect a gate on the carriageway. SB24 I note, was a VCAT decision, and because the VCAT file was before the magistrate, I was prepared to look at and consider that exhibit.

24. The appellants applied to the Magistrates' Court for the tapes of the hearing before the Court. Some tapes were delivered to Mr Boglari, and it appears that some were missing. A transcript of the recording was prepared but it is difficult to follow, because as the typist stated who typed the transcript, she was unable to provide a transcript that appeared to be in sequence. In addition it's clear from the transcript, that the evidence of Ms Polinsky and Miss Williams was incomplete, and the recording of the evidence called on behalf of the appellants was not available and hence was not transcribed. I also note that Mr Pierorazio swore another affidavit on 15 June 2005, which refers to some of the matters raised at the hearing.

25. The appellants at the Magistrates' Court subpoenaed the file of the Victorian Civil and Administrative Tribunal ("VCAT") relating to two applications made relating to the land and adjoining land and the carriageway. The first application was made by the appellants contesting a permit granted by the Ballarat City Council in respect to the School's use of land on the other side of the lane which was also owned by Mr Saines. VCAT ordered that there be an amendment to the permit but otherwise accepted its validity.

26. The school put in a cross-application seeking declaratory relief pursuant to s149D of the *Planning and Environment Act* 1987. The declaratory relief in effect sought a declaration that the carriageway easement extended to the upper land opposite to the school. VCAT ordered as follows, *inter alia*: "(2) In application P2770/2003 the Tribunal declines to make a declaration, the matter being resolved by the previous order." The previous order in fact varied the decision of the responsible authority and a permit was issued deleting Condition 2. Whilst it appears that reference was made to the file at the Magistrate's hearing, none of the file was tendered in evidence in the proceeding in the Magistrates' Court. Mr Boglari is of the opinion that the orders made by the Magistrate in some way conflicted with the VCAT orders, however for reasons which I will state hereafter, they did not. I considered the orders made by VCAT and I also considered the reasons given by Deputy President Horsfall.

27. An appeal from a magistrate to this Court pursuant to s109 of the *Magistrates' Court Act* 1989 is an appeal on a question of law. The Court is not concerned with any findings of fact unless it is established that there was an error of law. Further, this Court does not rehear the proceeding. Importantly it is necessary to place material before the Court as to what took place in the Magistrates' Court insofar as the material is relevant to the grounds of appeal. In this day and age the proceeding in a Magistrates' Court is recorded. It is essential that care is taken by those responsible for recording the proceeding, that the recording is made and retained. In the absence of a transcript of the proceeding, it is open to the parties to place before this Court affidavit material of the evidence and matters relevant for the grounds of appeal. Because there is always a risk that if only part of the evidence is placed before this Court, that other evidence may in some

way impact upon the relevant ground of appeal, or in any way qualifies the evidence, it is a wise course to follow to place all evidence before this Court on the appeal. Unfortunately the material is inadequate. The transcript of the evidence is incomplete, and in particular does not reveal the evidence of Mr Boglari and his witness. In addition Mr Boglari's summary in his affidavits is of little assistance. Whilst the summary of Mr Pierorazio is of some assistance, it is apparent from the face of his affidavits that not all the evidence has been fully and properly summarised. I may interpolate to note that Mr Pierorazio was not obliged, nor indeed was the School, to put in any affidavit material of the evidence placed before the Magistrate.

28. In the notice of appeal, Mr Boglari has stated ten questions of law. They are noted, although it is difficult on the face of the material, to understand some of them. He relied upon four grounds of appeal. The grounds are expressed as follows:

> "(1) His Honour erred when he decided to go behind VCAT judgment decision: (P422/2003) (P2770/2003); revisits the file, take part of file material, specifically: carpark, fencing, gatepost and gate and try to make a new issue as "fencing" disregarding VCAT rules which states, 'This decision is final and binding unless it is set aside by the Supreme Court, or the order is corrected, revoked or varied under the provisions of s.119 or 120 of the VCAT Act 1998'. (sic)
>
> (2) Magistrate disregards basic law that the accused should be able to face the accuser, eg. Ronald Saines (now magistrate) - original complainant/owner.
>
> (3) The factual mistakes and personal comment shows partiality although the Magistrate was willing to dismiss himself from the matter.
>
> (4) The proceedings starting from VCAT and now also at the Magistrates' Court level demonstrate that R. Saines and Steiner School and Kindergarten received preferential treatment, witness acceptance, eg. Katrina Polinsky (Saines de facto) hearsay statement as fact. (sic)"

The Appeal

29. Before considering the grounds, it is necessary to briefly state what the School had to prove. The easement of carriageway is a right annexed to land to use land in the ownership of another in a particular manner. The right only exists as annexed to and for the benefit of land which is called the dominant tenement while the land over which rights are exercised is the servient tenement. Any substantial interference with the enjoyment of an easement of carriageway whereby the person entitled to the enjoyment of the right is adversely affected is a private nuisance which the person entitled to the easement may sue for damages or equitable relief in the form of an injunction. The School being in occupation and entitled to possession of the dominant tenement was entitled to sue in respect of the interference with the easement. The Magistrate in his detailed reasons was satisfied as to the easement right, the obstruction to it, no substantial change to the rights which would preclude its operation as at today, and accordingly granted an injunction requiring the removal of the offending gate and fence.

30. The proceeding brought by the School was a common law claim in private nuisance which was established to the satisfaction of the Magistrate.

Ground 1 – going behind VCAT decision

31. There is no mention in the reasons of the learned Magistrate that it was a live issue that he could not find for the school because it would be contrary to the VCAT order. There is a reference in paragraph 4 of the reasons referring to the decision of VCAT where the Magistrate noted that the Tribunal "has ruled that the school may use the laneway to cross from one piece of land to the other". Mr Boglari has noted that on the face of the document sent to him by VCAT on 9 February 2004 there is a box referring to the effect of the VCAT decision. The words inside the box noted that the decision was final and binding unless set aside by the Supreme Court or the order was in some way changed under the VCAT Act 1998. The fact was that in the proceeding before VCAT it declined to make any declaratory orders concerning the rights relating to the carriageway. Nothing decided by VCAT bound the Magistrate. There is no basis for this ground of appeal. It must fail. The learned Magistrate did not err in reaching his decision, and the orders he made did not conflict with the VCAT orders. Perusal of the orders made and the reasons show that VCAT was considering and deciding issues relating to the block of land on the other side of the laneway to the school land. The cross-application was dealing with the carriageway and its use to that land, but as I have stated often and I emphasise yet again, no relief was obtained in

relation to the cross-application. It is very obvious that what VCAT decided was in no way binding on the Magistrate who had certain issues to decide, and decided them. This ground fails.

Ground 2 – disregard basic law

32. Mr Saines is the owner of the property comprised in the dominant tenement. At the relevant time he was a magistrate. His former firm sent a letter of demand prior to the issue of the proceeding and issued the proceeding in the Magistrates' Court. It appears that he was subpoenaed by the appellants at the Magistrates' Court hearing and it is the view of Mr Boglari that there is some law that entitles the person accused to face his accuser.

33. When this appeal was instituted by Mr Boglari, he joined Mr Saines as a party despite the fact that Mr Saines was never a party to the proceeding. Justice Bongiorno on 8 April 2005 ordered that his name be removed. He is the owner of the dominant tenement, but he did not seek to enforce the easement. Accordingly, he had no part to play in the proceeding. The appellants' counsel accepted at the Magistrates' Court hearing that he would not call Mr Saines. In my view this was a wise course to follow as it was most unlikely that Mr Saines would give any evidence which could help the appellants in any way. This ground is misconceived and is not a proper ground of appeal. The matter was not raised before the Magistrate. The ground fails.

Ground 3 – partiality of magistrate

34. This ground raises the question of perceived bias by the Magistrate. It is necessary to refer to further evidence. After the Magistrate reserved his decision he instructed the Court Coordinator to write to the parties raising the question whether he should disqualify himself from further hearing the matter and hence not deliver his reasons. The letter was sent on 11 November 2004 and was signed by the Court Coordinator, Damien Mullane. In it, the writer stated that the Magistrate had told him that he had completed his written decision, and observed that prior to the case proceeding, he had seen Mr Saines, who was a fellow magistrate, who had advised him that there was a case coming on before the Court involving property he owned but he had no interest in the case. This matter, in fact, was disclosed by the Magistrate at an earlier hearing between the parties when it appeared that a non lawyer sought to appear for the plaintiffs' School and Mr Boglari appeared representing himself and his wife. At that stage neither party objected to the Magistrate hearing the matter.

35. Subsequently lawyers became involved, and the Magistrate did not raise it again, hence the letter. He felt he should raise it. The Magistrate stated that if the parties wished him to disqualify himself he would adjourn the case for hearing by another magistrate and grant a certificate under the *Appeal Costs Act*.

36. Mr Boglari, in a letter received by the Magistrates' Court on 9 December 2004, stated that there were a number of questions he wished to have answered. The upshot was that none of the parties objected to the Magistrate finally determining the case.

37. But in any event, the mere fact that a fellow magistrate owned land which was relevant to a proceeding in which he was not a party would not, in my view, be a basis for disqualification.

38. Accordingly, insofar as this ground relies upon what the Magistrate conveyed to the parties in the letter dated 11 November 2004, the ground cannot succeed, first because, as I have already indicated, in my view it was not a basis for the Magistrate disqualifying himself, and secondly, in any event, the parties waived any alleged perceived bias. But as I have said, the facts hardly demonstrate perceived bias.

39. Hence one must then turn to the way Mr Boglari has sought to support this ground. He submitted that there were certain factual matters found by the Magistrate which were so contrary to the evidence that it showed that the Magistrate did not bring an impartial and objective mind to the decision making process. The difficulty with seeking to establish an error of law based upon perceived bias in these circumstances is that this Court does not have all the material before it to enable it to reach a conclusion that the errors were so numerous and so obvious that the Magistrate must have been biased against the appellants.

40. It would be an error of law to make a finding which is not based on any evidence. This

would be a ground of appeal. But to seek to show perceived bias on the basis of findings of fact contrary to the interests of a party is a near impossible task. It would be necessary to show that findings of fact were perverse and so numerous ultimately leading to the conclusion that the Magistrate had not brought an impartial mind to the decision making process.

41. The first matter identified was what the Magistrate said in paragraph 16 of his reasons. He said –

> "The defendant Sandor Boglari gave evidence that the fence and gate were not obstructions. He said they made conditions safer but he stressed that the most important motive for their erection was that he could not get blocked in. He produced photographs and a video showing vehicles parked on the laneway. Neither the photographs nor the video demonstrated that access was blocked. They did show it would be more difficult to use the laneway because of the presence of the parked cars. It should be kept in mind that the laneway is about 8.86 metres at its narrowest. The defendants did not refer to any specific occasion when their access was blocked."

42. Mr Boglari said that the sentence in that quote, "The laneway is about 8.86 metres at its narrowest" is obviously wrong, and wrong to such a degree that it shows a partial mind. He drew attention to paragraph 6 of the reasons which is in these terms –

> "(6) According to a Title search produced in evidence, the laneway at its northern end is ten metres wide but there is a cut-off on the north-west corner of the Saines property, and after a short distance the laneway narrows slightly. At its southern end the laneway is 8.86 metres wide."

I may say that reference to the Certificate of Title shows that what the Magistrate said was correct.

43. In order to make good this submission, Mr Boglari referred to Exhibit SB21. This contained a check survey. It is noted that the Title width of the carriageway easement is six metres. It is also noted on the plan that the minimum width is 5.51 metres. However, there is a difference between the Title width of the carriageway and what the Certificate of Title reveals is the width of the easement carriageway. What the Magistrate said in paragraph 6 accords with the Certificate of Title. It is also noted the statement made in paragraph 16 in my view is correct. He is not talking about the width of the easement, but is talking about what he had observed on the Title. He notes in paragraph 6 that the laneway narrowed slightly. That is obvious in my view, from the Certificate of Title. In his statement in paragraph 16, he said that the laneway "is about 8.86 metres at its narrowest". It is noted that the Magistrate was talking in terms of approximation.

44. I am not persuaded the Magistrate made any error, indeed if he did, it does not seem to me to be of any great relevance to this proceeding. In any event if he did make an error, it seems to me that his reasoning was based upon the Certificate of Title which supported his finding. However because of the incomplete transcript and summaries of evidence, it is not possible to say that there was no evidence to support what the Magistrate stated. This alleged ground for perceived bias has no substance.

45. The next ground of alleged perceived bias is based upon paragraph 7 of the reasons. The learned Magistrate said:

> "(7) At the time the school applied to use the land as a kindergarten, the Ballarat City Council when granting a permit stipulated that the north-west corner of the first piece of the Saines property be designated for carparking. The defendants were aware of the conditions for the permit and did not oppose them. The School complied with the permit and designated the area as a carpark and used it accordingly. The carpark was rectangular in shape. The narrow side faced Daylesford Road and the longest side faced the laneway. Cars would enter from the laneway and park parallel to Daylesford Road."

46. Mr Boglari submitted that the Magistrate was wrong when he said, "The school complied with the permit and designated the area as a carpark and used it accordingly". The evidence concerning the permit was not before this Court on appeal. It appears that some of the exhibits with Mr Boglari annexed to his affidavits on this appeal, may have revealed this, however I ruled that I am not permitted to look at the material. He then referred to Exhibit GP1 being a rough draft plan submitted in evidence, and also referred back to the checked survey being Exhibit SB21. There is no evidence before this Court to enable an inference to be drawn that the statement is clearly wrong and contrary to the evidence before the Magistrate. Mr Boglari also stated the last

sentence was factually wrong, but again nothing was placed before this Court on the appeal, which would enable the Court to so infer. This contention also fails.

47. The next ground relied upon is found in paragraph 10 of the reasons. Paragraph 10 reads–

> "(10) Originally the parties had a good relationship, however at some time prior to August 2002 (when the Boglaris commenced to construct the fence) relationships soured. There are conflicting reasons given for the deterioration".

48. Mr Boglari attempted to submit that when the Magistrate said that there were conflicting reasons given for the deterioration, he was wrong, but again he was unable to refer me to any evidence to ground such an inference. In submissions he made reference to paragraphs 12 and 13 and drew attention to the fact that the School had failed to recover aggravated damages. There was nothing in either of these paragraphs which he demonstrated was wrong. He then referred to what was said in paragraph 15 and asserted that it was hearsay. Paragraph 15 reads –

> "(15) Because of the gate at times being padlocked, suppliers of goods and services were unable to access the rear of the first piece of land. It was said specifically that on one occasion delivery of wood could not be made, and on another a carpet cleaner could not gain access. At best Mr Boglari's evidence as to whether there was a padlock on the gate and if there were a padlock on the gate, whether it was locked or unlocked was evasive".

49. Mr Boglari has failed to demonstrate to me that this finding was based on any hearsay evidence, but in any event, if evidence was admitted before the Magistrate and if it was hearsay and not objected to, then it was open to the Magistrate to place such weight as he thought appropriate on the evidence. However, as appeared in discussion this morning, Mr Boglari accepted that he misunderstood what "hearsay" meant.

50. Because of the circumstances and in particular the incomplete evidence before this Court, I am unable to make any finding in relation to this allegation.

51. Mr Boglari then referred back to paragraph 16 and again criticised findings made, but again, I am unable to make any finding in relation to these somewhat vague criticisms.

52. It is extremely difficult to prove perceived bias in a judicial officer based upon finding of facts and his or her conclusions. If a judicial officer makes a finding of fact which is relevant to the decision and made without evidence, then one would expect the ground of appeal would be that the finding was made without evidence. Mr Boglari referred to a number of paragraphs in the Magistrate's reasons submitting they were factually incorrect. On some occasions he misunderstood what the Magistrate had written, however on all occasions he has failed to demonstrate by reference to any of the evidence before the Magistrate, that the Magistrate made findings of fact which were clearly contrary to the evidence. It follows that Ground 3 fails.

53. I should add that there is no basis for saying that the Magistrate did not approach this proceeding and consider and determine the issues, in anything other than a proper, careful and judicial manner. He approached his task impartially and in accordance with the law.

Ground 4 – preferential treatment

54. It is difficult to understand what this ground means. Mr Pierorazio submitted that it appears the complaint was that the School's witnesses were believed ahead of Mr Boglari and his witness. It appears from what Mr Boglari said on this appeal, that this was a cause of concern to him. There is no doubt the Magistrate did make some adverse findings concerning his credibility. That was a matter for the Magistrate. He saw, observed and heard the witnesses and insofar as there were conflicts of evidence, he had to make the decision.

55. Mr Boglari asserts in that ground a reference to hearsay, but as I have already stated, he accepted this morning that he misunderstood what hearsay evidence was. I accept the submission of Mr Pierorazio that the Magistrate had to make findings of fact, that he did so, that he resolved the conflicts and there was no error of law demonstrated. This ground fails.

Other Possible Grounds

56. It was pointed out to Mr Boglari a number of times during this appeal, that he was confined in his submissions to the grounds of appeal. Despite this, his submissions travelled far and wide without any real attempt to bring the submissions under a ground of appeal. I informed him that I did have power to amend the grounds of appeal, and I would give him the opportunity to refer to anything that the Magistrate stated which may show any error of law and that if there was any merit in any of his submissions, I would give consideration to an application to amend the grounds of appeal – see Rule 58.08(3) of the Rules of Court.

57. Accordingly, I heard Mr Boglari in relation to a number of criticisms made of the Magistrate. In the end I did not invite Mr Boglari to make any application because none of the points of complaint had any substance or merit. I made that clear to him in the course of his submissions.

58. His first general complaint concerned what the Magistrate said in paragraph 4 of his reasons. The Magistrate said –

> "(4) There is a carriageway and drainage easement over the laneway in favour of the first piece of Saines property. The Victorian Civil and Administrative Tribunal has ruled that the School may use the laneway to cross from one piece of land to the other. It is common ground that when the easement was created, the first piece of Saines land was used for residential purposes, and the second piece was vacant."

59. By looking at the context, it is clear from the earlier paragraphs what the Magistrate was referring to. What Mr Boglari said was that the Magistrate was wrong when he said that when the easement was first created the first piece of Saines land was used for residential purposes, and the second vacant. The argument proceeded on the basis that when the easement was created in 1986 Mr Saines did not own the land. I must say I have enormous difficulty understanding the logic of this submission. It clearly fails to take into account what the Magistrate said in the preceding paragraphs which made it quite clear what he was saying, but more importantly, on the evidence that I have looked at on this appeal, it is clear that in 1986 the school land was used for residential purposes, and the other piece of land on the other side of the laneway, was vacant. This ground has no substance.

60. Mr Boglari's next complaint referred to paragraph 15 which dealt with evidence relating to the blocking of land by Mr Boglari and his interference with delivery vans. He said it was hearsay. It is clear, as I have already stated, that Mr Boglari had some difficulty with the concept of hearsay evidence, but in any event I am not able to say whether the evidence was or was not hearsay. As I have already observed, it was admitted in evidence and if it was hearsay, then the Magistrate was to accord what weight he thought appropriate in the circumstances.

61. His next complaint concerned what had happened at VCAT. I did at his invitation look at the VCAT file and in particular the orders made, and the reasons for the decision. Mr Boglari revisited his earlier submissions. Again, I reiterated to him that what was before VCAT was different to the issues in the Magistrates' Court, and that nothing decided by VCAT in any way bound the Magistrate.

62. He next referred to paragraphs 17 and 18 of the reasons, which refer to the High Court case of *Gallagher v Rainbow*.[2] The Magistrate considered that case in light of the issue that there had been a substantial change in the use of a property. This was not a ground of appeal, however as I have stated, it was an issue which was decided by the Magistrate. Indeed, yesterday I understood from what Mr Boglari said, that he was not criticising that decision. As I said it was a matter that was clearly raised before the Magistrate, the Magistrate considered it and found that there had not been such a substantial change in the use of the carriageway, which, when compared with when it was granted, would preclude the use made of the carriageway later.

63. Mr Boglari referred to the English Court of Appeal decision of *Jelbert v Davis* and as I have said, that did deal with the question of excessive change.

64. But as pointed out by the Court of Appeal in that case, the question of whether the proposed use was excessive was one of fact and degree. This case was referred to the Magistrate. However, in my view it is unnecessary to refer to it. The Magistrate stated the correct principle.

The issue was one of fact. It was a matter of degree, and he came to the conclusion contrary to the submissions of the appellants. This was a factual matter. The Magistrate heard the evidence, he made the decision, and there is nothing in his reasons to suggest error let alone error of law.

65. The next reference was to paragraph 19 of the reasons which related to the question of the appellants being obstructed by the parents of students at the kindergarten and school. On a proper reading of what the Magistrate said, there is no basis for any complaint. Again it is a factual matter. There is also a complaint made about paragraph 20 which related to delivery vehicles, and again it was a factual matter and there was nothing on the face of the reasons or any other evidence showing the Magistrate was wrong.

66. The next point made by Mr Boglari was concerning the question of what had to be removed to avoid the obstruction of the easement. He complained about what the Magistrate said in paragraph 21. Mr Boglari said that the Magistrate required him to remove a gate and a section of the fence, however, the Magistrate did not require him to remove the gatepost. In some bizarre form of reasoning, Mr Boglari suggested that it meant that if he was not required to move the gatepost, then he should not have to remove the gate. Indeed, this issue was in fact taken up by the Magistrate as can be seen in paragraph 22 of his reasons.

67. The order reveals that 16.7 metres of fence had to be removed. This was accepted by the parties on this appeal. The Magistrate carefully considered the question of the gateposts and the gate, and found against the appellants. Again this was a matter for him to resolve. He did resolve it, and found against the appellants. There is no error demonstrated.

68. The next point made was that the Magistrate handed down his reasons on 18 January 2005 and made orders that day, one of which required the appellants to remove the gate and fence by 5 p.m. Mr Boglari complains that this was insufficient time to enable him to remove the gate and fence.

69. I indicated to him that in the event of the Court refusing his appeal, this Court still had power to stay the operation of the Magistrates' Court order for a further period of time to enable him to take steps to remove both the gate and the fence. This would overcome his objection to insufficient time. The Court invited Mr Boglari to suggest a period, but it was left to the Court, and I suggested seven days and neither party demurred from that suggestion. I was later informed that on 19 January 2005 the Magistrate granted a stay.

70. The next matter raised by Mr Boglari concerned what the Magistrate said to him on the day when he handed down his reasons. Discussion evidently took place as to what Mr Boglari could do in relation to fencing and/or putting a gate along the carriageway.

71. Evidently the Magistrate made some observations about what he thought could be done; Mr Boglari was not satisfied with what he had said. In my view what the Magistrate said is irrelevant to this appeal. We start with the terms of the order. The appellants are bound by it. What the appellant can do hereafter depends upon the effect of the orders made. Mr Boglari would be well advised to obtain legal advice from an experienced real property lawyer. Hopefully the parties could have some discussion to determine where it would be appropriate for him to erect a gate at another point down the lane which would not in any way interfere with the easement, and which would be satisfactory to the parties.

72. Finally, Mr Boglari complained about the fact that the Magistrate ordered costs on Scale D. The question of costs was a matter for his discretion. He had made an order in the form of a mandatory injunction. He reasoned that since the cost of removal would be of the order of $875 that Scale D was appropriate. It was for the Magistrate to determine the scale, taking into account a number of factors including the complexity of the proceeding, both factually and in law, and also the value of what was at stake. He selected Scale D, which is not the highest scale, which in his opinion was appropriate in the circumstances. In my view no error has been demonstrated.

73. It follows that none of the complaints of Mr Boglari have any merit, and accordingly the Court did not invite him to amend his grounds to raise an alleged error of law.

Conclusion

74. In my opinion the appellants have failed to establish any error of law on the part of the Magistrate. None of the grounds of appeal have been established and none of the complaints made by Mr Boglari demonstrate any error of law on the part of the learned Magistrate. Indeed the learned Magistrate carefully considered the issues, and it is clear from his reasons that he gave anxious thought and consideration to the issues and ultimately found against the appellants. It must follow that the appeal is dismissed.

75. It is apparent that this is a classic case of a dispute between neighbours with all the usual emotion that such a dispute can engender. I recommend to the parties that they have some discussions hereafter in an attempt to resolve their areas of disagreement. No doubt the appellants feel aggrieved by the orders made, and in particular want to erect a gate at some point along the carriageway to mark the boundary of their property, and provide some security, consistent with their obligations under the easement. I make the suggestion that efforts be made by the profession in Ballarat to provide on a *pro bono* basis a lawyer for each of the parties to explore their points of difference and hopefully reach a compromise which will satisfy the parties and protect their interests.

76. I propose to make the following orders:

1. That the appeal instituted by the notice of appeal on 17 February 2005 be dismissed;
2. That the operation of the orders made in this proceeding in the Ballarat Magistrates' Court on 18 January 2005 be stayed until 5 p.m. on 20 September 2005.

---

[1] [1968] 1 All ER 1182; [1968] 1 WLR 589.
[2] [1994] HCA 24; (1994) 179 CLR 624; (1994) 121 ALR 129; (1994) 68 ALJR 512.

APPEARANCES: The appellant Boglari appeared in person. For the respondent Ballarat Steiner School and Kindergarten: Mr G Pierorazio, counsel. Saines & Partners, solicitors.
