**18/99; [1999] VSC 337**

## SUPREME COURT OF VICTORIA

# *JEFFREY v HONIG*

**Hedigan J**

**27-28 July, 10 September 1999**

**CIVIL PROCEEDING – NUISANCE – DRIVING OF COWS ON UNMADE COUNTRY ROAD – ROAD FENCED OFF TO FACILITATE PASSAGE OF COWS – DRIVING OF COWS DEGRADED ROAD SURFACE AND DAMAGED ROADSIDE DRAINS PARTICULARLY DURING WINTER SEASON – DAMAGE TO DRAINS PREVENTING PASSAGE OF SURFACE WATER TO DAM – DROPPING OF EXCREMENT CREATING SMELLS AND UNPLEASANTNESS – BALANCING CLAIMS OF HOUSEHOLDER AND MEMBERS OF THE PUBLIC – STANDARD OF REASONABLENESS – DETERMINATION THAT DRIVING OF COWS UNREASONABLE – PERMANENT INJUNCTION GRANTED BY MAGISTRATE RESTRAINING DRIVING OF COWS ALONG ROAD - PROPERTY LET TO TENANT – WHETHER DAMAGE TO REVERSIONER – WHETHER TERMS OF INJUNCTION TOO WIDE – WHETHER MAGISTRATE IN ERROR IN GRANTING INJUNCTION - WHETHER SOME FORM OF INJUNCTION APPROPRIATE.**

J. is a dairy farmer who owns a property which abuts an unmade, "quiet, country backwater road" used by a very small group of people. H. owns a property nearby which is leased to a tenant. When J. drove the cows along the road, a temporary electric fence was installed to ensure that the cows did not stray and to avoid posing a risk to motorists using another road nearby. The cows' passage and the fencing off occupied about one hour every third day — that is, 15 minutes in the morning and about 30-45 minutes in the afternoon.

H. complained that the following constituted a nuisance:

- The driving of cows prevented access by H. to their property
- Installation of the electric fence was unreasonable
- The passage of cows particularly in winter made the gravel road impassable
- The damage to the road surface and spoon drains prevented the passage of water to the dam on the property owned by H.
- The smell and slipperiness of the cow excrement and its fly-attracting propensities constituted an unreasonable interference with their enjoyment.

When the matter came on for hearing, the magistrate found that J's conduct amounted to a private nuisance and granted an injunction restraining J. from driving the cows along the road at any time. Upon appeal—

**HELD: Appeal allowed. Magistrate's order substituted with an injunction in a different form.**

**1. The use of roads such as the one in question is not commonly regulated by statute or subordinate legislation. Absent statutory provisions restricting or modifying the use of highways by persons, animals or vehicles, the law is that persons are entitled to drive cattle and horses on the highway.**

***Benalla Corporation v Cherry* [1911] HCA 45; (1911) 12 CLR 642, applied.**

**2. At common law an owner of land adjoining the highway is entitled to access his or her land from the highway and from his or her land to it. That right of access is a private right distinct from the right to use the highway. An unreasonable use of a highway to prevent access is remediable at law and if that interference is also a public nuisance, an owner may be entitled to recover damages. The test of the reasonableness of the exercise of rights lies at the heart of the legal solution, directed to balance those rights.**

**3. In relation to the obstruction of the road caused by the placement of the electric fence, the magistrate's task was to consider the balancing of the rights involved – the right of passage and the right to access. Given that the fence caused a temporary obstruction only and was easily removable the magistrate was in error in finding that the obstruction was not reasonable and thereby created a nuisance.**

**4. The right to complain of a private nuisance belongs exclusively to the actual possessor of the land affected. A reversioner cannot sue unless the nuisance has permanently impaired the useability of the land. In relation to the complaint alleging interference caused to H. by the dropping of excrement creating smells and unpleasantness, the question for the magistrate was whether H. as reversioners, could maintain an action in nuisance given that their property had been leased to a tenant. Whilst**

**the premises were not occupied by H. there was no such nuisance to H. The tenant who would have had a legal right to take action was unconcerned about it. The complaints about the smells of the excrement and the associated flies could not found a claim in nuisance and accordingly, the magistrate was in error in determining otherwise. The damage to the roadway and the spoon drains was not permanent. The damage to the road surface was remediable without too much effort and the spoon drains were easily enough reconstituted. In those circumstances there was no permanent damage to the reversion so as to give H. a right to maintain an action in nuisance.**

**5. In relation to the damage to the road surface and the drains, the magistrate was required to engage in the "balancing out" exercise. Given the relatively sparse visitation by H. to their property balanced against the rights of J. to drive his cows along the highway, it was open to conclude that the times and days of cow movement were reasonable in the whole of the circumstances. A continuing destruction of the drains was bound to compound the degradation of the road surface particularly in winter.**

**6. The magistrate was in error in formulating an injunction which totally prevented J. from using the road at any time to drive his cattle. It was not a reasonable exercise of discretion to impose an injunction of that width. However, some injunctive relief was appropriate in the circumstances of this case and some remedy ought to be granted. Accordingly, it was appropriate to restrain J. from driving his cows along the road so as to cause, create or constitute a nuisance to H.**

**HEDIGAN J:**

1. The legal landscape in many parts of the world is littered with cases concerned with fencing disputes, overhanging trees, parking rights, boundary disputes and quarrels about smells and noise abatement. This proceeding is yet another cautionary tale depicting the difficulties created when neighbours fail to pay appropriate regard to the other person's rights and reasonable convenience, yet insist upon their rights being maintained. Like countless others before it, this dispute has proved to be protracted and costly. I will address the detail of the dispute shortly.

2. The original proceeding came on before the Magistrates' Court in Geelong on 19th November 1998. The court adjourned the proceeding virtually at the outset in order to take a View of the relevant road. The proceeding then occupied three days of evidence. The parties were directed to file and serve written submissions to the Magistrates' Court. After that, on 18th December 1998, oral submissions were made and on 9th March 1999 the Magistrate gave his decision. The defendants in the proceeding, having lost before the Magistrate, appealed to this Court pursuant to s109 of the *Magistrates' Court Act* 1989, a Master of this Court formulating questions of law for determination. The parties filed lengthy and detailed affidavits concerning what transpired before the Magistrate, referring not only to the substantial oral evidence which was given but to the 48 exhibits which were tendered in evidence before the Magistrate. Since this was an appeal, no additional evidence was called in this Court, the decision of which is necessarily founded upon the evidence given before the Magistrate, and having regard to his findings of fact and by consideration and application of the correct legal principles.

3. The appellants Malcolm and Olive Jeffrey are farmers who live at and carry on business as dairy farmers on about 110 hectares of steep undulating land situated on Deans Marsh-Lorne Road, Deans Marsh (hereinafter called "Deans Marsh-Lorne Road") in this State. The Jeffreys' home block, on which is situated their house and a dairy, has been owned and farmed by them since 1967. It abuts onto both the Deans Marsh-Lorne Road and what is called the Old Lorne Road. It is the use of the Old Lorne Road that has become the critical issue in this dispute. The Old Lorne Road enters onto the Deans Marsh-Lorne Road at two points, north and south, Deans Marsh-Lorne Road running as a crescent to the west of the Old Lorne Road. The Jeffreys' home block has frontage both to the Old Lorne Road and the Deans Marsh-Lorne Road. The properties abutting to Old Lorne Road are, on the eastern side, part of Jeffreys' home block, the block of the respondents David and Marilyn Honig, and on the western side some other land owned by the Jeffreys, two blocks belonging to Mr Purnell and what was called the Roscoe's block. In October 1997 the Jeffreys purchased Roscoe's block in order to incorporate its use into the operation of their dairy farm, to use it for daily grazing by the cows on a rotational basis with their home block. Old Lorne Road is unmade but the formed part of the gravel road has spoon earthen drains on the east and west down which, according to the evidence, water flowed. It should be said that the Deans Marsh area has a high rainfall in ordinary circumstances. It follows from these events that if cows on the Jeffreys' home block were milked in the morning, they might on a number of days be moved south along the Old Lorne Road to be grazed on the Roscoe block and then moved

back again north along the Old Lorne Road to the dairy on the home block in the afternoon for milking. Later on they were moved to what was called the night block, to which it is not necessary to refer again. Because the Old Lorne Road had been bypassed for decades by the new Deans Marsh-Lorne Road, the gravel road which is Old Lorne Road is not much used by traffic. According to Mr Uren, QC, counsel for the appellants, it is rightly described as a quiet, country backwater road. No one appeared to suggest to the Magistrate, or to me, that there was any significant use of the Old Lorne Road other than by those who lived on it.

4. Essentially these were the Jeffreys and the Honigs, and as will appear, the Honig tenant, Ms Leanne Light. The two Purnell blocks were not much visited by Mr Purnell from 1997. The Jeffreys owned the land to the east (that is at the back) of the Honigs' block so that they might arguably have been able to move cows from their home block to the south, to the east of the Honigs' land, there being apparently, at least in part, a traditional trail used by cows in the past. However, in order for this to be done it was necessary, according to the evidence, for a substantial sum of money to be expended in order that that alternative route (enabling avoidance of the use of the Old Lorne Road) be employed. There was some difference in the opinions of experts about the likely cost, the Jeffreys' evidence suggesting $100,000 but the Magistrate concluding that it might be capable of being effected for $15,000-$20,000. It should also be said that the adoption of that route involved a much longer journey by the cows.

5. When the Jeffreys moved their cows south along Old Lorne Road to the Roscoe's block (it appeared on the evidence that this was on 123 days in the year, that is, about one day in three), Mr Jeffrey placed a temporary electronic fence or tape across Old Lorne Road (at north and south) where it intersected with the Deans Marsh-Lorne Road, in order to prevent the cows from straying out onto the Deans Marsh-Lorne Road. Doubtless this was done not only to avoid injury to the cows but also to avoid posing a risk to motorists using the Deans Marsh-Lorne Road. The same process was undertaken at the south end of the Old Lorne Road near Roscoe's block before putting the cattle on to that block.

6. According to the evidence of the respondents Honig, they purchased their property from Mr Purnell (incorrectly called Purcell by the Magistrate in his reasons) in 1989. Mr Roscoe had been leasing what became Honigs' land from Purnell, for growing crops and spelling his dairy cattle. According to the Magistrate, the Old Lorne Road had been by-passed by the new road decades before, and had "fallen into a state of sleepy disrepair", a matter which caused no concern to either Purnell or Roscoe. The Magistrate found, having heard the evidence, that Mr and Mrs Honig had purchased their block from Roscoe as a holiday place with the ultimate aim of retiring there. According to the evidence accepted by the Magistrate, the relevant Council in about 1989 re-made the Old Lorne Road as a properly formed gravel road from the north end of the Old Lorne Road (that is, where it intersected at the north with the Deans Marsh-Lorne Road) southwards to a point somewhere near the southern boundary of the Honigs' property. The Magistrate found that, after that, the road had a relatively smooth and evenly cambered gravel surface with formed earth drains which provided adequate channels for water run-off. The evidence appeared to indicate that there was no entry into the Old Lorne Road by the Jeffreys, by the Honigs, their tenant Ms Light or Mr Purnell involved, other than by accessing it at the northern end of the Deans Marsh-Lorne Road. The southern end of the Old Lorne Road below Honings was in poor condition. It appears that at some time that part of a block owned by the Jeffreys on the western side of the Old Lorne Road was occupied by a tenant, who also entered at the northern end to access the rented property.

7. When the Honigs purchased their block in 1989, it was 24 acres of vacant farmland. The Honigs built a brick veneer house on their block in about 1990. Before they did this, they made an application for a permit to establish a pine plantation on part of it. This application was successfully objected to by the Jeffreys, but on appeal to the Administrative Appeals Tribunal the Honigs succeeded in obtaining the permit, on the condition that a dam be maintained for fire-fighting purposes.

8. It seems likely (and indeed the Magistrate found) that this dispute led to an uneasy relationship between the parties who became less and less amicable. The respondents' house was about 15 metres back from the Old Lorne Road and about half-way down the block. The fledgling pine plantation appears to have been at the northern end, that is on the Jeffreys's side. The evidence

would indicate that the Honigs, who lived in Brighton, used their property on school holidays and did not attend much in winter, sometimes then letting the premises out. The Magistrate appeared to accept that the purchase by the Jeffreys of the Roscoe's block enabled them to increase the size of the cow herd from 105 to 125. The Magistrate found that it was the use by the appellants of the Old Lorne Road "as a cattle track" that has led to this action. He found that the Honigs complained shortly after that practice commenced but that the Jeffreys paid little or no heed to their complaints other than doing some work to improve the road surface in mid-1998, after the Magistrates' Court proceedings had been commenced.

9. The Magistrate did not independently summarize the evidence which was given before him, notwithstanding (or perhaps because of) its amplitude. He made a number of findings of fact but, unhappily, they lack clarity because they were not directly linked to his consideration of evidence and were general in nature. He found that when the appellants wanted to drive cows into the Old Lorne Road from the Deans Marsh-Lorne Road (or out from their property) the cattle were moved along Old Lorne Road with the electric fence to the north in place. He concluded that other road users would be delayed for 15 minutes when the cows were moving south from the dairy to Roscoe's block and about 30 to 40 minutes on the homeward journey. If there were no cows on the roadway the respondents could easily detach and re-attach the electric fence if it was still in place, and could gain clear access to their house.

10. The Magistrate addressed one of the main disputes, both there and here, that is, whether the passage of the cows had so destroyed the road surface and the spoon drains as to inhibit the flow of rainwater off the road surface, and causing the respondents' dam to dry up. There was evidence that the respondents had at some point of time placed a conduit across and under the surface of the gravel road in order to drain off water down to their dam. This had been pulled out from the road surface. Although there was no direct evidence of who did this, the Magistrate inferred that it was the Jeffreys. He accepted the Honigs' evidence that the system had proved adequate in the past to keep the dam full, although he does not appear to have considered carefully the issue of whether or not the drier 1998 climatic conditions impacted upon the dam's reduced capacity.

11. Both parties tendered photographs and called witnesses as to the state of the road. The Honigs' photographs showed, in support of their claim, that the cows had turned the road into a quagmire, showing the road surface in a very degraded condition, at least at the time of the photographs. The Magistrate appeared to accept that the spoon drains formed at the verges of the road had been so trampled that they no longer provided a channel to pick up the run-off from the road surface thereby exacerbating the damage caused by the passage of the cattle, so that at times the road would be virtually impassable. Further, he found that this also reduced the surface water available to the Honigs' dam.

12. The appellants gave evidence, and produced photographs, to show the road in a repaired condition. This appeared to indicate some acceptance of the necessity for repair work to have been done. The Magistrate appears to have concluded that the removal of the conduit, coupled with the damage to the surface and the verges, had prevented the run-off previously available to fill the dam so as to contribute to the damaged surface of the road. He also took the view that the Honigs contributed to the problem of the emptying dam by failing to attempt any maintenance to the earthworks near the dam to promote run-off. The Magistrate also stated that in the last two years the Deans Marsh area had been relatively dry. I note the Magistrate said:

> "It seems reasonable to infer, in the absence of other evidence, that it was the defendant (presumably Mr Jeffrey) who removed the conduit when it became exposed due to the disturbance of the road surface by the cattle."

There was no direct evidence of this. The absence of evidence that anyone else did it would not provide evidence that the Jeffreys did. As to the Honigs' claim that the excrement left by the then defendants' cows created an offensive smell and a threat to health (through flies), the Magistrate found that the extent of that varied, as did its effects, sometimes unpleasant, sometimes hardly noticeable. I will not develop this aspect further at this point of time for reasons to which I will advert. The Magistrate found that there was no serious risk to health arising from the excrement. Photographs tendered in the Magistrates' Court showed the cow pats on the road surface.

13. The Magistrate concluded that "to the extent that the complaints of the Honigs had been established", they justified a finding that the Jeffreys' conduct amounted to a private nuisance. He was not much specific about the extent to which those complaints had been established but, whatever it was, he found that it amounted to an invasion "of their interest in the beneficial use and enjoyment of their land which was not merely momentary or temporary but which will be recurrent and 'in some cases' continuous." There was, he said, physical discomfort as well as actual damage. He did not explain this. Nor did he explain the detail of the very substantial body of evidence of alleged experts as to the possible utilization of a route to the east to come down to Roscoe's block, if the Jeffreys were prevented from utilizing the Old Lorne Road. Apparently he accepted no view of the evidence "wholly" but found "a course somewhere in between". He found the link road could be constructed and fenced for between $15,000-$20,000. Since he did not identify the evidence, it is not easy to know on what that estimate was based. The Magistrate reached the conclusion that the alternate route would not reduce the milking of the defendant's herd to an uneconomic level but failed to identify the evidence which he accepted and that which he rejected.

14. Similarly, while expressing a view that he was not satisfied that the proposed alternative route was either economically or environmentally impossible, the finding was not linked to any evidence. The Magistrate stated:

> "On the issue of abatement I am satisfied there could be no orders made other than prohibiting the defendant from utilizing the Old Lorne Road which would be effective. Any order which required maintenance to be carried out on the Old Lorne Road by the defendant would require the constant supervision of the court which is extremely undesirable."

The Magistrate then granted an injunction absolutely prohibiting the appellants from utilizing the Old Lorne Road for passage of cattle between the home block and Roscoe's block.

15. The Honigs made a claim for monetary damage which was dismissed because there was no evidence of the value of the cost of construction or repair of any of the damage alleged to have been caused.

16. The Magistrates' Court proceeding had been commenced by the Honigs on 6th April 1998. Initially the claim sought orders seeking removal of the obstructions (which probably referred to the electric fences). However, the claim was amended on 17th August 1998 to claim damages and injunctions prohibiting the Jeffreys from moving the cows along the road at all and from installing any electrified fence across Old Lorne Road. Further, the cause of action was identified as being in nuisance, said to be constituted by

> (a) preventing access to the plaintiffs' property by the Honigs and their friends;
>
> (b) making the unsealed road incapable of being used in winter and thereby preventing access; and relevantly
>
> (c) by excrement left by the cows creating an offensive smell and a threat to health.

There was a claim for tree destruction which the Magistrate rightly concluded fell outside the claims being made.

17. On 2nd October 1998 a further particular of nuisance was added, namely that the passage of the cows "destroyed the spoon drains along, and the culvert across, Old Lorne Road preventing rainwater flowing into the plaintiffs' dam causing it to dry up". I note that that allegation was not that Mr Jeffrey had pulled the conduit out but the cows had destroyed the culvert created by the plastic drain.

18. There appear to have been two significant omissions from the Magistrate's reasons about factual matters, possibly occasioned by the Magistrate's decision not to deal with the detail of the substantial body of evidence. First was the evidence of Mr Purnell who owned the blocks opposite the Honigs. Mr Purnell's attendances at his place on Old Lorne Road were much less frequent from 1997 on. He gave evidence of being held up for about 15 minutes in April 1998 and once or twice since, and delayed a quarter to three-quarters of an hour. He said the smell of the cow

manure and the flies were unpleasant, not just an annoyance but a real nuisance. However, Mr Purnell was not a plaintiff in this proceeding and has never taken any action in nuisance or by any other way. He did not complain to the Jeffreys.

19. The evidence of Mrs Honig was that she had only been held up twice by the passage of cows and she accepted that the road remained passable on most occasions. Mr Roscoe, the vendor to the Honigs, said that he had walked the roads since the Jeffreys commenced moving the cows. It was not too bad in summer and not too good in winter. He disagreed that the table drain along Old Lorne Road was blocked or clogged.

20. More significantly, the Magistrate made no reference to the evidence of Ms Leanne Light. Ms Light had leased the Honigs' property since mid-June 1998. There was some dispute on the affidavits as to whether Ms Light's evidence was that she had a 12 months' lease with an option of a further 12 months or that she only had a 12 months' lease. On balance, although I have no certainty about it as the Magistrate made no reference to the matter at all, it appears (from the Magistrate's notes of evidence) that Ms Light stated that she had leased the Honigs' property since mid-June 1998 on a 12-month lease with one option.

21. Ms Light's evidence, also dealt with in the affidavits filed in support of the appeal, that is, reproducing evidence given before the Magistrate, was to the effect that since she became a tenant she had not experienced any problems north of the Honigs' gates, that it was a pretty good road to the north although not very good to the south. She had no difficulty in simply moving the electric fences herself. She was apparently not concerned about the cow pats.

22. An order was obtained from Master Wheeler on 8th April 1999. Essentially the questions of law as formulated were to this effect:

> (a) whether the Magistrates' Court erred in finding that putting the electronic tapes across the road for 15 minutes and 30 to 40 minutes when cows were being moved created a nuisance;
>
> (b) whether any nuisance was constituted by the cows interfering with the flow of water of the respondents' dam by blocking up drains in Old Lorne Road;
>
> (c) whether the evidence supported a finding that the smell of cow excrement interfered with their enjoyment of their land;
>
> (d) whether there was an error of law in formulating the injunction in the way in which the Magistrates' Court did;
>
> (e) whether the Court's finding that an alternative route was open was reasonable, having regard to its costs and the topography of the land and
>
> (f) whether the Court erred in finding that the Honigs had standing to sue in private nuisance although they had not suffered damage.

23. What the respondents complain of as constituting a nuisance is not difficult to see.

> (1) The driving of cows prevents them entering Old Lorne Road, or leaving it, if they wished to do so at the time the cows are on the road. Delays of 15 minutes and later about 45 minutes will occur.
>
> (2) They claim that they should not have to have to put up with the unreasonable blocking off of the road by the electric fence at all.
> (3) The passage of the cows, at least sometimes in winter, makes the gravel road impassable.
>
> (4) The damage to the road surface and the spoon drains prevents water getting away, with the consequence the dam has not been filled by drain-off, sought to be aided by the putting in by them of the conduit pipe.
>
> (5) The smell and slipperiness of the cow excrement, and its fly-attracting propensities, constitutes an unreasonable interference with their enjoyment.

24. Whilst I am substantially (but not wholly) bound by the Magistrate's findings of fact, it would seem to me very likely that both sides were selective in their approach to the presentation

of photographic evidence. The Magistrate, in respect of some findings of fact which were critical, appears to have preferred the Honigs' evidence to that of the Jeffreys. He appears to have been influenced by what he regarded as the arrogance of the Jeffreys in seeking to turn Old Lorne Road "into a private lane", a conclusion which thus expressed may not correctly express the rights involved. There did not appear to be anything specific to contradict the evidence of the Jeffreys about the number of the days on which the cows were driven annually. The Magistrate made no reference to it but the evidence is there in the affidavits and the Magistrate's notes. It was estimated to be 123 days annually - one day in three. I find it surprising that the magistrate did not specifically refer to this as it is of considerable significance that the cows' passage, and the fencing off, occupies about one hour every third day. I will address the Magistrate's findings as to nuisance as a matter of law shortly, but it seems to me that confining myself to the times at which the road was used and the passage of cows, that is 15 minutes in the morning and say, 30-45 minutes in the afternoon (an hour a day), one day in three could not be described as continuous nor necessarily unreasonable, given the fact that this was (as everyone appears to have agreed) a quiet "backwater" country road being used by a very small group of people.

25. The use of such roads is not commonly regulated by statute or subordinate legislation. The balancing of rights in relation to the use of highways or the exercise of the public right of passage not only lies at the heart of a peaceful society but informs the legal solution to problems occasioned by disagreement about the exercise of rights. Absent statutory provisions restricting or modifying the use of highways by persons, animals or vehicles, the law pronounced by this country's courts as long ago as 1911 is that persons are entitled to drive cattle and horses on the highway. See *Benalla Corporation v Cherry* [1911] HCA 45; (1911) 12 CLR 642 at 651. Anyone living in Australia in country areas or visiting there would find the movement of cattle on roads a commonplace, coped with by sensible management of cattle and patient driving by motorists. The countervailing right asserted by the respondents is a right of access by them to and along the road leading to their property and in their property. There can be no doubt that at common law an owner of land adjoining the highway is entitled to access his or her land from the highway and from his or her land to it. That right of access is a private right quite distinct from the right to use the highway. Once he or she is on the highway they enjoy the right as a member of the public in the ordinary way. *Halsbury* (4th ed) Vol. 21 para 120 puts it in this way:

> "The private right of access is subject to the public right of passage which is the higher right, but the public right of passage is also subject to the private right of access to the highway where the adjoining owner may exercise that right by means which do not amount to a serious obstruction to the right of passage and are therefore not inconsistent with it."

An unreasonable use of a highway to prevent access is remediable at law, as the many cases dealing with access to business premises disturbed while roads are subject to works indicate. Furthermore, if that interference is also a public nuisance, an owner may be entitled to recover in respect of it if he or she can show particular damage. As ever, the test of the reasonableness of the exercise of rights lies at the heart of the legal solution, directed to seeking to balance those rights.

26. In this case, Mr Uren's argument was that given the fact that this was not only a country road in rural Victoria, but a particularly quiet country road used by very few, the use, previously described in these reasons, was not unreasonable bearing in mind the nature of the road and the miniscule number of people likely to use it. He pointed out that the only person complaining about lack of access and the state of the road were two persons who do not live there permanently, are there infrequently, were only interfered with twice during the period of the tenancy to Ms Light (the occupier at the time the case was heard and decided). On the best view of the evidence, he said, they came only every three weeks to slash the grass growing around the young pines, a guess not backed up by detail or evidence from Ms Light. In *Vanderpant v Mayfair Hotel Co* (1930) 1 Ch D 138 at 152; [1930] 1 CLI 138, Luxmoore J stated the law relating to the obstruction of public highways as follows:

> "Speaking generally, the public have the right of free and unobstructed passage over the whole of the public highway. The owner of premises abutting on a public highway is entitled to make a reasonable use of that highway for the purpose of obtaining access to his own premises, and loading and unloading goods at his premises. But the right of the public is a higher right than that of the occupier, and if the user by the occupier, although reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private

> rights of the occupier must yield to the public rights, and the Court will interfere by restraining the continuance of the obstruction. In every case the answer to the question whether the public right has been interfered with must necessarily depend on the extent of the user; in other words,the question is always a question of degree."

See too *Marshall v Blackpool Corporation* (1935) AC 16 at 22; [1934] All ER 437 and *Grand Central Car Park Pty Ltd v Tivoli Freeholders* [1969] VicRp 9; [1969] VR 62, 70-72; (1968) 18 LGRA 140 where McInerney J, when considering whether what might constitute an obstruction of the highway or was a necessary consequence of carrying on a lawful activity, thought that the real question was whether the conduct of the relevant person amounted to an excessive or an unreasonable exercise of his own rights. Citing from then 2nd edition of *Halsbury*, he said:

> "Every person is required by law to exercise his rights, whether over his own or public property, with due regard to the co-existing rights of others, and an unreasonable, excessive or extravagant exercise of his rights to the damage of others constitutes a nuisance in law."

In that case defendants using land as an open-air car-park in the vicinity of a multi-storey car-park were held not to be causing nuisance in operating it. Finally, in *Trevett v Lee* (1955) 1 All ER 406; (1955) 1 WLR 113, when balancing on standards of reasonableness the claims of a householder on the one hand and members of the public on the other concerning the laying of a pipe across a highway the court concluded in the circumstances there existing that the conduct did not constitute a nuisance. With respect to that aspect of the case relating to the blocking off the road with the electric fence, the Magistrate's task, and mine here, is to consider the balancing of the rights involved, the right of passage and the right to access. I do not doubt that the Magistrate well understood the legal principle involved. However, he did not much address it in detail other than the "private lane" reference, which itself has to be weighed in the context that he accepted that the Honigs could without difficulty open the fence, drive their car and then close it if the cows were not passing at the time. Indeed Ms Light's own evidence is that that is exactly what she did virtually every day. It is a human enough reaction for a property owner on a small quiet road not to want to have access to and egress from it blocked off at all. But this must be balanced against the right of the farmer to drive his cattle on such a road, so long as it does not constitute an unreasonable interference with the right of the other landholder to move into and from his property, and enjoy the rights of occupancy.

27. The evidence is not absolutely clear as to the extent to which the so-called electric fences were semi-permanent or temporary, that is, whether they were only put up when cattle movement is on or whether they are in a semi-permanent position, easily removable on, say, every second and third day on average when cattle are not being driven. The first question of law formulated by the Master (not objected to here) seemed to suggest it was a temporary closure only, on each occasion. The Magistrate did not clarify his finding on this issue. My own judgment would be that there would not be a nuisance created by the use of an electric fence only at the times that the cattle have come outside their paddocks and are being driven down the road. It may even be that, if the fence were there more often, that it is not an unreasonable obstruction although it would be less capable of support depending on a closer examination of the circumstances, eg. how long it is there, ease of removal and other similar matters. The respondents were perhaps not complaining too much about this aspect partly because their visitations were infrequent and they are not put to too much trouble by the fence, a minute or so to detach it. Mrs Honig's evidence was that passability was not the real issue. What they did not like is what they perceived as the unneighbourly arrogance of the appellants in not consulting and declining to make some clear arrangements with them. If the evidence of the Honigs concerning Mr Jeffrey's statements is correct, his behaviour was deplorable. Doubtless some of these aspects were fuelled by the early falling out by virtue of the Jeffreys' opposition to the pine plantation (which was going up close to the southern boundary of the Jeffreys' home paddock).

28. The grant of injunction is, of course, a discretionary remedy. But there can be no basis for the exercise of the injunctive power here unless nuisance had been established. The question whether the obstruction of Old Lorne Road could be justified as a legitimate one ancillary to the enjoyment of the rights of one of the parties or whether it was unreasonable in the whole of the circumstances is a question of both fact and law. Whilst I am conscious that I am not here to review nor, even if I were so inclined, to seek to substitute my own findings of fact for those of the Magistrate, a problem has been created by the failure of the Magistrate to identify and tease

out the findings of fact, in connection with the legal principles. Clearly enough, he found that the Old Lorne Road was closed off during two periods totalling something close to three-quarters of an hour to an hour on the days on which the cows were driven to and from the Roscoe block. He also found that the electric gate was easy to open and close.

29. Unfortunately, when the Magistrate turned to the questions of law, he did not articulate the specific principles which he was applying, other than to say that he had been referred to cases, that he believed he had applied the law from those cases but thought it would be improper for him to include references to them in his reasons. All this is laudable enough but does not generate confidence in me that the Magistrate applied the appropriate principles that prevailed in respect of each nuisance complained of. I see nothing in the Magistrate's reasons to suggest that he understood that the farmer did have a right to drive his cows on the road. He did not say so. He simply said that the complaints of the then plaintiffs, to the extent that they have been established and when taken together (whatever that may mean) justified a finding that the defendants' conduct amounted to a private nuisance, presumably because it amounted to an invasion of the plaintiffs' interest in the beneficial use of their land. I see no evidence that any balancing exercise took place and in my view, given his finding of fact in relation to the fencing off of the road, it would hardly seem to me to have been open to him to conclude that that was so unreasonable that it required an absolute injunction upon ever driving any cows along the road.

30. The opinions that I have formed with respect to this are also to some extent affected by the knowledge that at the time of the Magistrates' Court hearing the respondents had leased their property, that they came no more than once every three weeks in the period of letting, and that the occupier (Ms Light) was the person most affected by access but did not object nor feel any sense that the road had been unreasonably used.

31. This leads me to the second matter which I address, namely the complaints founded upon the disturbance of the road surface and the dropping of excrement creating smells and unpleasantness, said to constitute a nuisance.

32. This raises immediately the issue of the general absence of the Honigs from their property by reason of the letting of it to Ms Light. The parties seemed to accept that the property has been let at least until November 1999, although it would seem to me that on the material before the Magistrate there is an option in the tenant for a further term, probably 6-12 months. The Magistrate made no reference to this at all and, notwithstanding his statement that he had read the very ample written submissions provided to him, he appears to have totally ignored a written submission made to him on behalf of the appellants here that no claim in nuisance could be sustained by the absentee owner in respect of the matters complained of. It would seem likely to me that he did not address the legal issue here involved.

33. The issue of whether the reversioners, the respondents, can maintain an action in nuisance in respect of interference with the enjoyment of, or access to, the property arises directly in this proceeding. The matter is expressed in the 9th edition of *Fleming on Torts* at 474 as follows:

> "The right to complain of private nuisance, as of trespass, belongs exclusively to the actual possessor of the land affected. A reversioner cannot sue, unless the nuisance has permanently impaired the usability of the land and thereby damaged his proprietary interest. Thus he may complain of a building obstructing his ancient lights or of vibrations causing structural damage to his house, because the injury would be such as will continue indefinitely unless something is done to remove it, but he has no remedy for noise, smoke or other invasions of a temporary nature, apparently even if it drives his tenants away or reduces the letting value of the property."

Authorities are cited for these propositions. Thus a tenant for a term who is in possession may maintain an action for a continuing nuisance. It is to be noted in this case that Ms Light (nor Mr Purnell, nor apparently the Jeffreys' tenants), took no action about the Jeffreys' conduct.

34. In *Cooper v Crabtree* (1881) 19 Ch D 193 the plaintiff owned a cottage, the next door neighbour to which erected a hoarding blocking out light to a window in the cottage. However the cottage was in the occupation of a weekly tenant who was not a party to the action. Evidence was given that the poles (and hoarding) did cause a nuisance to the tenant and his family. But there was no evidence of any diminution in the value or other injury to the reversion. In that case Fry J held that the poles and hoarding were not a structure of such a permanent character

as necessary to injure the reversioner and, since that was a requirement, the plaintiff failed. He concluded that the plaintiff had not shown any actual damage to his reversion, nor were the poles or hoarding of a permanent nature so as to be necessarily injurious to it. This decision was upheld by a strong Court of Appeal, Jessel MR describing the action as a "most trumpery action". See also *Mott v Shoolbred* (1875) LR 20 Eq 22; *Shelfer v City of London Electric Lighting Co, Meux's Brewery Company v City of London Lighting Electric Company* [1895] 1 Ch 287. In that case the nuisance (continuing vibration) was viewed as being a permanent nuisance with the risk of permanent damage to the reversion. The members of the court did not all agree as to whether or not damages or an injunction was appropriate. Lindley LJ at 317 stated:

> "It is true that in *Jones v Chappell* (1875) LR 20 Eq 53 an injunction sought by a reversioner to restrain noise and vibration was refused; but it was refused because they might cease before the reversion came into possession. Bur in this case it is idle to suppose that the vibration, which is the real cause of the continuing injury, will cease."

35. Mr Nash QC for the respondents argued that the electric fence and the knocking around of the roadway and the drains constituted a permanent injury to the reversion because it made the Honig property either more difficult to sell or more difficult to let, even though the Honigs were not resident in it. This assumes permanence. However the damage to the road surface is self-evidently remediable without too much effort (indeed, the evidence shows that at one point of time the Jeffreys did that), just as the simple spoon drains are easily enough reconstituted. In my judgment there is no permanent damage to the reversion. The real argument advanced to the contrary was that it was only the house and some ill-defined part of the property which had been let to Ms Light. It was argued that the Honigs were still coming down every three weeks or so, exercising some rights by slashing the grass at the foot of the baby pines. I am not attracted to this as a matter of exercise of rights and the evidence did not seem to establish that that was so. They had no need to access their property for that purpose, and if they did so it would be in my view as a licensee. However the evidence in this aspect was generally unsatisfactory so much so that counsel were prone to tell me from the Bar table what the position was rather than point to what the evidence said. I take the view that their visits were not as of right.

36. The cases to which I have referred make it self-evident that the complaints of the respondents about the smells from cow excrement, and associated flies, are incapable of founding a claim in nuisance whilst the premises are not occupied by the Honigs. There is no such nuisance to them, and Ms Light, who would have a legal right to take action, is unconcerned by it. This in itself is some evidence that the claimed interference with enjoyment is not well-grounded. Mr Nash in effect abandoned any attempt to argue this point. If the letting of the block defeases nuisance based on smells and flies, because of absence, one might ask - how strong is the case based on the fence and state of the road?

37. The final, and more troublesome, issue relates to the claimed interference with the flow of water into the respondents' dam by the trampling down or blocking-up of the drains on Old Lorne Road, that is the spoon drains at the side of the formed gravel road and the accumulation of that water on the gravel road surface. The evidence presented some differences in the recollection of witnesses as to the extent to which the passage of the cows had destroyed the drains and damaged the surface of the road, so as to prevent rainwater flowing off the road surface and, arguably as a consequence, causing the respondents' dam to dry up. The Magistrate appears to have found that the dam was fed by run-off from the road, channelled from the sides of the made surface, aided by the three-inch pipe laid under the road by the Honigs to carry water from the drain on the west side of the road to the east, and hence to the dam. The Magistrate accepted the evidence of the Honigs that in August 1977 the system provided adequate water to keep the dam full. He appears also to have accepted that its markedly reduced fillage was due to the damage by the cows to the drains at the road verge. He concluded that since the water did not get away it pooled in greater depressions, thus accelerating the deterioration of the road in bad weather conditions.

38. The Magistrate appears to have placed considerable weight on the removal of the respondents' conduit pipe laid under the road. I have already expressed reservations about the claimed reasonableness of the inference that it was Mr Jeffrey who removed the conduit pipe. His Worship said in respect of that inference that it seemed reasonable to infer, in the absence of other evidence. That is, in the absence of evidence that some other person did it, it must have been the plaintiff. It is not clear to me why the Jeffreys had any motive to leave the pine plantation

without a fire fighting dam since it was virtually on the boundary of their property. I am more troubled by the tacit intellectual process that the male appellant had to prove that he did not remove the conduit. I am mindful that findings of fact by way of inference should only be set aside if no reasonable view of the evidence would lead to it. See *Gunes v Pearson* (1996) 89 A Crim R 297; *Roads Corporation v Dacakis* [1995] VicRp 70; (1995) 2 VR 508 at 520 (Batt J) and earlier, *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301 and *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392.

39. The Magistrate claimed to be aware that the last two years had been very dry. But he said nothing to indicate that he had taken that into account in relation to the decline in the quantity of water in the dam. However the Magistrate does appear to have found that the damage to the road surface and the drop in the dam level were associated, notwithstanding that the Honigs themselves had done little at the dam site to aid water ingress.

40. One difficulty conceivably associated with this, as a matter of law, is the doubt that the respondents were entitled to the surface water that had been on Old Lorne Road and, according to the respondents' case, would have been capable of being diverted down to their dam. At common law the position has not, I think, been absolutely clear about this, that is, as to the right of any person to remove surface water from roads or, for that matter, public land. Perhaps they are at liberty to do so but their liberty to do so may be impinged upon by someone else with an equal liberty. *Gartner v Kidman* [1962] HCA 27; (1962) 108 CLR 12; [1962] ALR 620; (1962) 36 ALJR 43 was a case concerning the blocking of a drain dug to permit the drainage of water from a swamp to a sandpit when the swamp overflowed. It was also concerned with what amounted to a natural water course at common law. In that way the case is concerned with the rights of upper and lower owners as to the transmission of water, the plaintiff (the respondent on the appeal) alleging that the banks erected by the defendant constituted a nuisance, additionally defined as being constituted by an unlawful interference of the person's use or enjoyment of land, or some right over or in connection with it. No doubt under the common law a proprietor of land upon the banks of a stream is not only entitled to have, but is obliged to accept, the flow of water past his land, he thus being not permitted to dam the stream at common law. However the position of an artificial water course as a water channel constructed by man as distinct from a natural stream is different. The owner of land through which it passes may block or divert it at his will unless an easement has been acquired: see Windeyer J CLR 23 to 24.

41. His Honour drew a distinction between watercourses and the occasional flooding by surface water into depressions without being a watercourse. Resorting to an American monograph of the *Law of Waters*, his Honour drew a distinction between defined watercourses and water appearing on the surface in a diffused state, with no permanent source of supply of a regular course, and which disappeared by percolation or evaporation. Ordinary rights do not attach to water known as surface water. There is no right in a landowner to drain surface water from his land over that of his neighbour without the latter's consent. His Honour referred [38] to the amount of, and course of, waters coming onto a particular piece of land which may be affected by man's operations, including making roads and gutters. He went on to say, with respect to the case at hand and significantly for my purpose:

> "The complaint is of an alleged private nuisance. It is in aid of the legal rights thus arising that the equitable remedy of injunction is sought. And in considering whether there has been an actionable interference with the beneficial enjoyment of land, it is necessary, in every case, to know whether some particular right in or in relation to that land is said to have been invaded, and if so to ascertain the limits of that right. But the glib use, in some discussions of this topic, of the word 'right' in the sense of liberty, and the erroneous assumption of a corresponding duty has led to the misconceptions referred to by Professor Derham in his comprehensive and helpful article *Interference with Surface Waters by Lower Landholders* (1958) 74 LQR 361."

That case was, of course, concerned with the reception of water between private land owners; and in relation to surface water, Windeyer J stated that no case had been found in England where the proprietor above had recovered when mere surface water had been retained on his land through the neighbour below doing something on his own land to prevent the water coming there. The distinction between the liberty to deal with surface water on public land, including the road, and the right to do so might have been of significance and does not appear to have been addressed.

42. Before me, Mr Uren for the appellant sought to advance considerations raised by the *Water Act* 1989 s8(4)(c) and s8(7). The *Water Act* in effect purports to cover the field in relation to rights to ownership of and rights to water which Mr Uren claimed to be effective. It was pointed out by me that no question of law founded on the *Water Act* was ever raised in the Magistrates' Court nor was it raised before the Master when the questions of law were formulated. Mr Nash for the respondents strongly objected to the raising of the *Water Act* point, he contending that it was simply assumed in the lower court that the Honigs had a right to the water falling on a public road and into the drains at the side of the road. This may be true, or not, but the legal point was addressed by no one. The Magistrate certainly did not consider it but addressed only the factual issue of whether the cows' trampling of the spoon drains had prevented the water flowing through the conduit from west to east and down to the dam. On reading his notes and the summaries of the evidence I find little evidence myself that would support the conclusion which the Magistrate reached. For all that, he made that a finding of fact.

43. Mr Nash also claimed that, if the *Water Act* aspect been raised a question would then have to be examined as to whether the water on the road was in fact a watercourse within the meaning of the Act which would have raised other questions including questions of fact. He argued, not very convincingly, that this may have led to the calling of evidence about the history of the roadway and as to whether or not it was a watercourse, a matter which seems to me to be highly unlikely since the old road to Lorne had gone along there. Indeed, I am doubtful that the spoon drains were constructed and maintained by the Council.

44. I indicated during the hearing that I was not prepared to permit the questions of law to be amended to raise any issue arising under the *Water Act*. There have been many cases dealing with the circumstances in which appellants should or should not be permitted to raise questions on appeal (or under the old order nisi procedure). See *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491; (1988) 77 ALR 193; (1988) 62 ALJR 209; [1988] Aust Torts Reports 80-160; *Holcombe v Coulton* (1988) 17 NSWLR 71 at 75, and on appeal [1986] HCA 33; (1986) 162 CLR 1; 65 ALR 656; (1986) 60 ALJR 470, *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418; [1950] ALR 820 and the decision of Ashley J in *Mond v Lipshut* ((1999) VSC 103, paras 32-51; [1999] 2 VR 342, 8th April 1999), where his Honour discusses the decisions of *TAC v Hoffman & Ors* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193, *Frugniet v Secretary of the Department of Justice (No 2)* [1996] 10 VAR 314 and the decision in the Court of Appeal in *Green v The Victorian Workcover Authority* [1997] 1 VR 364.

45. Mr Uren contended on this aspect that it could not be said that the trampling of the spoon drains unreasonably interfered with a right which was connected to or annexed to the Honigs' property because they could not demonstrate that they had a right to the passage of surface water, even if the proper conclusion was that the Jeffreys had interfered with it.

46. Mr Nash's argument was that the Magistrate clearly decided—

> (a) that the passage of the cows damaged the road from time to time and so damaged the drains at the side of it that the damage to the road became worse because of its inability to recover, the water not being drained off it;
>
> (b) that whether or not there was a right in his clients to surface water they were entitled or had the liberty to take it off where it would have simply flowed to the west, and to divert it under the road down to their property to enable them to fulfil the terms of their permit by having a fire-fighting dam;
>
> (c) the Magistrate inferred that the Jeffreys had thrown aside the pipe after the passage of the cows had unearthed it.

All of this, he contended, did not fall into the category of any temporary interference with the road surface, that may have made it either temporarily impassable or difficult to pass, or with the problems of smells and flies created by the cow excrement, all of which might be regarded as temporary or evanescent. This, he argued, was the destruction of drains put in to keep the road surface dry and that to do so had interfered with the landowners' entitlement to drain off the surface water. In addition, he argued that the interference with the drains in conjunction with the road damage impacted upon the reasonable right to access in a double way. As to the latter point, it would seem likely that the Magistrate thought the two aspects were linked in relation to interference with the road surface. Although, in my view the "balancing out" exercise was not done

by the Magistrate in this context and my own judgment is that the relatively sparse visitation by the respondents balanced against the rights of the appellant to drive his cows along the highway tips the balance in favour of concluding that the times and days of cow movement were reasonable in the whole of the circumstances, a continuing destruction of the drains is bound to compound the degradation of the road surface, particularly in winter.

47. Notwithstanding the conceptual difficulties involved in reaching any conclusion that the respondents had a right to draw off surface water for their own purposes, to the exclusion of any right in the appellants to prevent or deter it, the consequences do add some kind of a dimension to the access difficulties.

48. I do not find it necessary to address the issue concerning the alternative route. The Magistrate found that the eastern track (Track Two) was a viable option to enable the Jeffreys to access Roscoe's block but he also found that the establishment of a link road was essential for the proper management of the appellant's herd. According to the Magistrate's findings, that could be constructed and fenced for between $15,000 and $20,000. He also thought, although he did not much identify the evidence on which he relied, that the milk yield for the herd would not be reduced by the additional walk, the Magistrate apparently concluding the alternative route was both economically and environmentally possible.

49. The Magistrate dismissed the issue of abatement of the nuisances which he found existed out of hand, claiming that any order requiring maintenance to be carried out on the Old Lorne Road by the Jeffreys would require court supervision which was undesirable. There can be no doubt that constant supervision of these matters by a court is undesirable. Notwithstanding that, and the principle that the way in which an injunction might be fashioned is discretionary, I find it difficult to share the view of the Magistrate that, even if a nuisance was established, about which I have considerable reservations, that an injunction which totally prevented the use by the Jeffreys of the Old Lorne Road to drive the cattle down to Roscoe's block was just and necessary. If there were no nuisance then no injunction could run, and if there were no nuisance the issue of whether the eastern route was viable or not could never arise. The expenditure of $15,000-$20,000 to take the cows down seems to me to be a very significant expenditure to a farmer with a herd of a little over a hundred cows.

50. I invited the parties to make submissions about possible alternative forms of injunctive relief but there proved to be difficulties about this. The appellants in effect were unable to propose one, perhaps other than a general injunction. The respondents did not display much greater enthusiasm other than to make some suggestions about them. Doubtless the Magistrate was right if he thought that that supervision involves a problem of definition. In formulating injunction orders, the Court ought to avoid vague or ambiguous language which may arguably fail to give appropriate guidance or might postpone for another day the decision of what actually constitutes a violation of the plaintiff's rights. It has been said that when an issue "is ripe for decision between the parties" the Court should decide it then and there. That is easily enough said but in my view general forms of injunction, coupled with some statements that might give guidance as to what would probably amount to a breach, prohibiting the defendant from acting in a manner hitherto pursued by him or in any other manner so as to cause a nuisance (see *Beamish v Glenn* (1916) 28 DLR 702) have been approved by appellate courts.

51. In determining these issues, the magistrate probably had little confidence in the capacity of the parties to co-operate sensibly, and with respect for each others' rights in the management of the situation. Notwithstanding those difficulties, the injunction was virtually Draconian, in that it wholly deprived the Jeffreys of the right to drive their cows lawfully down the road, even if they occasioned no nuisance or damage to anyone. Moreover, the injunction was permanent in form and essentially had the effect of defeating the use by the Jeffreys of the Roscoe land other than by the expensive route around the eastern side. This was so even though no neighbour other than the Honigs offered complaint and the Honigs were absent from the area for a substantial part of the time.

52. Mindful as I am of the narrow basis upon which an appellate court ought to interfere with the fashioning of a discretionary remedy, I am of the view that it was not a reasonable exercise of the discretion within the meaning of the cases to impose an injunction of that width, although I do

not disagree that, if a nuisance has occurred, some injunctive relief is appropriate in this case. My inclination is that some remedy ought be granted even though the Honigs may not yet be resident in the property for some time, if Ms Light exercises her option. There are many examples in this Court, both reported and unreported, of injunctions being granted restraining the defendant from committing a nuisance, eg *Dunstan v King* [1948] VicLawRp 46; (1948) VLR 269 (a noise case) in which an injunction "restrained the defendant his servants or agents from carrying his sawmill in such manner as to commit a nuisance for the plaintiffs by the emission of noise"; in *Munro v Southern Dairies Ltd* [1955] VicLawRp 60; [1955] VLR 332; [1955] ALR 793 (horses on dairy premises, with noise and smell and flies), Sholl J gave an injunction in the form: "To restrain the defendant by its director servants or agents from causing committing on the premises at Grenville Street and Willer Street Hampton on which it conducts its business any nuisance (whether by way of smell, noise or flies) to the plaintiff as an owner and occupier of premises at 23 Willer Street Hampton by the having and keeping of horses at or near the defendant's said premises." See too *Colls v Home and Colonial Stores Ltd* [1904] UKHL 1; [1904] AC 179 where Lord Macnaghten reformulated the form of injunction used since *Yates v Jack* (1866) LR 1 Ch 295 and made an order to "restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows".

53. Thus there is ample authority that would, if it were thought that some injunction should be applied, to justify a restraint upon the appellants from using Old Lorne Road between their farm premises at its northern end to its southern end so as to constitute a nuisance to land-holders and/or their tenants in such a way as to constitute a nuisance.

54. I have formed the view, for the reasons already articulated, that the Jeffreys' conduct as found by the Magistrate to have occurred may re-occur when the Honigs resume exclusive possession of their property. This is likely to occur at some time in the not too distant future.

55. Notwithstanding the reservations expressed by me concerning the Magistrate's conclusions, particularly his failure to advert to the letting of the property, he found that the driving of the cows had significantly degraded the road surface and so damaged the roadside drains as to inhibit the run-off of surface water, thus making the road surface impassable from time to time. He also concluded that that at least contributed to lowering the volume of water in the dam. The first finding marginally justified the finding of nuisance but in any event the injunction imposed was too wide and cannot be upheld in its present form.

56. But if, as appears likely, the Honigs resume exclusive possession at the end of Ms Light's tenancy, this matter will become a probable source of dispute between the parties again. This should be avoided, if possible.

57. What I intend to do is to set aside the injunction and substitute the following injunction:

> That the appellants Malcolm and Olive Jeffrey of Deans Marsh-Lorne Road, Deans Marsh, their servants and agents be restrained from permitting or allowing passage of their cows on the Old Lorne Road between their home block and dairy at that point near which the Old Lorne Road and the Deans Marsh-Lorne Road meet at the northern end and that point near on the Old Lorne Road next to their land known as Roscoes Block at any time in such a manner so as to cause, create or constitute a nuisance to the respondents David and Marilyn Honig as owners and occupiers of the land and premises known as Honig's block in Old Lorne Road.

58. I cannot determine in advance nor have I the power to do so, whether or not the appellants' cows will be driven or moved so as to constitute a legal nuisance to the respondents, or any other person whose rights may be affected by such conduct. However, by way of guidance, and perhaps warning, it should be apparent from what I have said that

> (a) temporary closure of the Old Lorne Road at the two intersection points by electronic tape-fencing for the periods referred to once every few days is not likely to constitute an actionable nuisance;
>
> (b) substantial destruction of or damage to the road surface and the neighbouring drains is likely to constitute such a nuisance if such destruction or damage occurs with such frequency or without reasonable remedial work that access to and egress from the Honig property is seriously and persistently impeded; and

(c) the depositing without removal to a reasonable degree of cow excrement in such quantities as to make the road slippery and as to create unpleasant and continuing odour for those living just off the road may constitute a nuisance to the owners and/or tenants of Honig's Block.

59. It would seem to be a prudent course to engage more than one person on cow movements and to clean up when and where necessary and to re-constitute the road and drains if they become excessively trampled.

60. Finally, it is self-evident that life in the Old Lorne Road will be more pleasant and less expensive if the parties to this melancholy litigation make genuine and serious efforts to work out their differences in a constructive and peaceful manner.

61. I have on other occasions doubted the efficacy or necessity of answering the formulated questions on s109 appeals, as more often than not the real issues argued on the appeal drift away from the questions of law, which are devised without the submissions of both parties. Subject to the application of my views as revealed in these reasons, I answer the questions as follows:
(a) Yes; (b) Yes, in part; (c) No; (d) Yes; (e) Not necessary to answer; (f) Not necessary to answer, and unable to be answered.

62. Accordingly the appeal is allowed and there shall be substituted for the order made by the Magistrates' Court at Geelong on 9 March 1999 the order set out in para 57 of these reasons.

63. I will hear counsel on costs.

**APPEARANCES:** For the appellants Jeffrey: Mr AG Uren QC and Mr A Donald, counsel. Harwood Andrews, solicitors. For the respondents Honig: Mr G Nash QC and Mr R Lombardi, counsel. Anderson Rice, solicitors.

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