06/05; [2005] VSC 77

SUPREME COURT OF VICTORIA

BAYPEAK PTY LTD v LIM

Balmford J

10, 22 March 2005

CIVIL PROCEEDINGS – DIVIDING FENCE – LAND BETWEEN ADJOINING OWNERS NOT FENCED – ACCESS TO ONE PROPERTY VIA AN EASEMENT – PROPOSED FENCE OF 23 METRES WITH A DOUBLE GATE TO PERMIT ACCESS TO LAND – AGREEMENT NOT REACHED – WHETHER PROPOSED FENCE WAS AN UNREASONABLE OR SUBSTANTIAL INTERFERENCE OR A DIMINUTION OF ANY RIGHTS OF THE DOMINANT TENEMENT – COMPLAINT DISMISSED BY MAGISTRATE – FINDING BY MAGISTRATE THAT ERECTION OF FENCE WOULD BE A SUBSTANTIAL INTERFERENCE WITH OWNER'S RIGHT – WHETHER MAGISTRATE IN ERROR: *FENCES ACT* 1968, S4.

B P/L was the registered proprietor of residential property which adjoined a property owned by L. The only access to L.'s property is via a strip of land on B P/L's property. An easement in L.'s favour permits access to L.'s property. B P/L served a notice to fence on L. specifying the unfenced strip of land to be fenced and for provision of a double gate to allow access to L.'s property. Agreement was not reached and the matter referred to a magistrate. In dismissing the matter, the magistrate found that if the fence were constructed it would obstruct the view from L.'s property; that L. would lose the right to use any part of the strip of land for access; and that it would be an unreasonable impediment to L. and a diminution of L.'s rights to require the strip of land to be fenced. Upon appeal—

HELD: Appeal allowed.

1. The policy behind the *Fences Act* ('Act') is that it is appropriate that properties be fenced and that neighbours should share the cost of fencing equally. If B P/L's land were not subject to the easement of carriageway, there is no question but that both parties would be rendered liable by s4 of the Act to construct or join in or contribute to the construction of a sufficient fence along the unfenced portion of the boundary. As the land is owned by B P/L, to make any order which denied them the right to fence their property could interfere significantly with their rights as to constitute an undue burden on servient tenement.

2. The erection of a fence along the boundary of the right of way in this case does not of itself constitute an unlawful interference with the right of way. Reasonable user of the right of way is achieved by gateways placed at appropriate places in the fence. Accordingly, the magistrate was in error in deciding that L. had a right to use for access to and from the servient tenement any part of the strip of land boundary which she chose to use. The magistrate was also in error in giving weight to the loss of amenity against the right of the owner of land to fence that land in a manner which was reasonable and which did not constitute a substantial interference with the rights of the owner of the dominant tenement, being the rights conferred by the grant of the easement.

BALMFORD J:

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 against a final order made on 30 August 2004 by the Ringwood Magistrates' Court, whereby it was ordered that a claim under the *Fences Act* 1968 ("the Act") by the appellant ("Baypeak") be dismissed and Baypeak pay to the defendant ("Mrs Lim") the sum of $1613 costs.

2. On 21 October 2004 Master Wheeler ordered that the questions of law shown by the appellant to be raised on the appeal were:

> (a) whether for the purposes of section 4 of the *Fences Act* 1958 the appellant and respondent being occupiers of adjoining lands are liable to construct, or join in or contribute to the construction of a dividing fence and/or a dividing fence and gate along an unfenced portion of boundary between their two properties which is subject to an easement of carriageway in favour of the respondent?
>
> (b) whether the learned Magistrate in dismissing the appellant's complaint took into account an irrelevant and extraneous consideration being the loss of amenity to the view available to the respondent?
>
> (c) whether the learned Magistrate in dismissing the complaint erred at law in determining that it

would be:

(i) an unreasonable impediment to the defendant to order the construction of a fence and gate;

(ii) a diminution of the defendant's rights to require her to contribute to the fencing of the area in dispute; and

(iii) a substantial interference with the defendant's rights to require her to contribute to the fencing of the area in dispute?

(d) whether as a natural and necessary incident to the use and enjoyment of that part of the appellant's land which is subject to an easement of carriageway in favour of the respondent's land:

(i) that the common boundary should be fenced in with an entrance gate erected to enable access to the respondent's land; and

(ii) that it is not unreasonable that persons using the private road, (easement of carriage way), should open and close the gate, which is to be reasonably erected for that purpose, when they pass through the appellant's property?

3. Baypeak is, and has been for some two years the registered proprietor of a residential property known as 130-132 Central Road, Blackburn. Mrs Lim is, and has been for some sixteen years, the registered proprietor of an adjoining residential property, known as 134 Central Road, Blackburn. Baypeak's property lies to the south of Mrs Lim's property, save for a long strip of land, being part of Baypeak's property, which abuts the western boundary of Mrs Lim's property and runs north and south. The only access to Mrs Lim's property is along a portion of that long strip of land which is subject to an easement of carriageway in her favour. The easement at its northern end connects with what is apparently a public road leading to Central Road. For 23 metres of its length the easement runs along the boundary between the two properties, (the eastern boundary of the long strip of Baypeak's land and the western boundary of Mrs Lim's land). That portion of the boundary (and that portion only) is unfenced, and is the only portion of the land subject to the easement which abuts Mrs Lim's land, and thus the only means of access from Baypeak's land to Mrs Lim's land.

4. The easement was created by a transfer of land registered on 21 June 1979, using words which, by virtue of section 72(3) of the *Transfer of Land Act* 1958, in effect imported into the transfer the following words from the Twelfth Schedule to that Act ("the Twelfth Schedule"):

> Together with full and free right and liberty to and for the registered proprietor for the time being of [Mrs Lim's property] or any part thereof and his tenants servants agents workmen and visitors to go pass and repass at all times hereafter and for all purposes and either with or without horses or other animals carts or other carriages into and out of and from the said land or any part thereof through over and along the [land subject to the easement]

5. Baypeak served on Mrs Lim a Notice to Fence under section 6 of the Act specifying the unfenced 23 metres to be fenced (the fence to include a 3.5 metre double gate) and containing a proposal that by agreement a specified quotation be adopted and that the two parties contribute equally to the cost of fencing. Agreement was not reached, and Baypeak sought orders in the Magistrates' Court that a fence (including double gates) be constructed in accordance with the town planning permit issued by the City of Whitehorse, that the costs be contributed equally, and that the gate remain closed save as required for reasonable access to Mrs Lim's property. No issue arises as to the validity of the Notice to Fence. The town planning permit (which has now expired, but nothing turns on that) authorises a fence to match the existing timber paling fence, with a double gate 3.5 metres wide.

6. Before the Magistrate, Mrs Lim opposed the construction of any fence, but her counsel indicated that if there were to be a fence she would prefer a ti-tree fence with no gate - that is, with an unfenced opening left to enable access to her property without the necessity to open and close gates.

7. Sections 4 and 7 of the Act read so far as relevant:

4. <u>Liability of occupiers of adjoining lands to fence despite agreements</u>

(1) The occupiers of adjoining lands not divided by a fence sufficient for the purposes of both occupiers shall be liable to construct, or join in or contribute to the construction of, a dividing fence sufficient for the purposes of both occupiers between the adjoining lands in accordance with the following provisions—

. . .

(b) in other cases—the occupiers of the adjoining lands shall be liable to join in or contribute

> in such proportions as are agreed upon or, in the absence of agreement, are determined by the Magistrates' Court under this Act.
> . . .
>
> 7. In default of agreement, Court or arbitrator may decide
> (1) If within one month after the service of a notice to fence the person serving and the person served with the notice do not agree upon the construction of a fence, the kind of fence to be constructed, or the proportions in which they are to join in or contribute to the construction of the fence, the Magistrates' Court on the complaint of either of them may make an order prescribing--
> (a) the kind of fence to be constructed;
> (b) the portion of the fence to be constructed by each person, or the proportion of the cost of constructing the fence to be contributed by each person; and
> (c) where such further order is necessary, the position of the fence.

8. The issue before the Magistrate, as he stated, was whether or not he should declare that in all the circumstances Mrs Lim should contribute to the cost of the proposed fence and gate. He summarised his reasons for decision as follows:

> So what would this fence and gate mean to the defendant? It would be loss of amenity and being able to look directly into the Blackburn Lake Sanctuary Reserve. It would be a loss of an entitlement to use any part of the 23 metres which she might choose from time to time to use as a right of way with vehicles leaving and parking off her property so that they are off the right of way and parked in the property. Or arguably you could fit vehicles along that length if you wanted to – no doubt there are trees and some shrubs in various places but she would have her rights to use that border to her property, she'd lose her rights to use it as she wishes. Why should she be confined to a gateway that is a standard gateway for a single vehicle?
>
> I've mentioned the safety issue. I've mentioned the inconvenience of getting in and out of the vehicle in order to achieve this purpose [opening and shutting the gate] and there is also the added like inconvenience to guests and service personnel who might come to the property and necessarily park on this narrow right of way.
> . . .
> In my judgment, having heard all the evidence and looked at the exhibits and heard argument it would be an unreasonable impediment, in all the circumstances, upon her and a diminution in her rights, to require her to fence this area and there would be a substantial interference with her rights in my judgment. The case is dismissed.

9. The principles governing appeals against discretionary judgments were set out by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth*[1] and have been frequently applied. His Honour said:

> I shall not repeat the references I made in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, at pp532-534; [1950] ALR 944 to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

The questions in the Master's order must be considered in the light of those principles.

10. As to question (a), it seems to me that the policy behind the Act is that it is appropriate that properties be fenced, that neighbours should share the cost of fences equally, but that a neighbour should be required to contribute only an appropriate share of the cost of a fence which is "sufficient for the purposes of both occupiers". Thus if one party wishes to erect a fence which is more expensive than a sufficient fence would be, the Act does not (subject to such order as the Magistrates' Court may make under section 7) inhibit that party from doing so; but it provides that that party must bear the additional cost occasioned by the more expensive fence.

11. If Baypeak's land were not subject to the easement of carriageway, there is no question

but that both parties would be rendered liable by section 4 of the Act to construct or join in or contribute to the construction of a sufficient fence along the unfenced portion of the boundary. I note the passage from the judgment of Napier J of the Supreme Court of South Australia in *Gohl v Hender*,[2] cited with approval by Waddell J of the Supreme Court of New South Wales in *Dunell v Phillips*[3] that:

> It is a natural and necessary incident to the use and enjoyment of the plaintiff's land that it should be fenced in.

It is, of course, relevant that in that case the plaintiff was a dairy farmer and the land was used for stock. Nevertheless Southwell J in *Wilson v Bahr,*[4] dealing with residential property in Warrnambool, said, to similar effect:

> The disputed land is, after all, land owned by the defendants, and to make any order which denies them the right to fence their property is to interfere so significantly with their rights as to constitute an undue burden on the servient tenement.

I would with respect adopt both of those passages as being of general application.

12. The question is whether the existence of the easement affects the liability imposed on the parties by section 4. Clearly the erection along the 23 metres of a fence without a gate would be an impermissible interference with the right of the owner of Mrs Lim's land, as the dominant tenement, to use the land subject to the easement, as the servient tenement, in order to pass and repass in and out of the dominant tenement. But what is proposed by the appellant is the erection of a fence containing a gate.

13. The question thus is whether Mrs Lim has, as the Magistrate assumed, a right to pass and repass into her property at any point along the unfenced 23 metres of the boundary. He said:

> On the face of it, there is no reason why the defendant could not use the whole length of the 23 metres to drive vehicles through the right of way and park in her property. The fact that she chooses to go through a particular point is noted but that right of way gives her direct access on to her property. The plaintiff, in fact, is seeking orders that would restrict her from choosing what point along that length she should enter her property.

14. The Magistrate made no reference to any authority in his reasons for decision. There are, however, a number of cases in point, some of which were cited before him.

15. *Pettey v Parsons*[5] was a decision of the English Court of Appeal (Cozens-Hardy MR, Swinfen Eady and Pickford LJJ). The terms of the grant of an easement of carriageway over what is referred to as "the blue land" were sufficiently similar to those in the Twelfth Schedule for the case to be of relevance in the present context. The Master of the Rolls said:[6]

> The defendant says, on the terms of the deed, which I have read, "I have not merely a right to pass in at one end of the blue road and out at the other, but I have a right to go to all or any part of my reserved land, and I have a right to go upon the blue land wherever I like and therefore I have a right to prevent the plaintiff from putting upon her own land any fence or division to rail it off." Whether in the case of a private right of way like this there is or is not the right to enter upon the private road merely by defined gates or passages, or a right to enter at any other place where it is desired, seems to me to depend upon the construction of the deed itself. I will assume in favour of the defendant, without expressly deciding it, that before any building was erected on this property he might have made an access into the blue land where he liked; but to say that right entitled him as against the plaintiff to say, "The whole of this blue road which is next to me must be kept unfenced and open, so that at all times I may be at liberty from any point upon my land to get into this road," seems to me to be a wholly untenable proposition. . . . Here in my view the contention of the defendant is wholly and absolutely unreasonable.

16. Similarly, Swinfen Eady LJ said:[7]

> In each case it is a question of construction. Assuming in favour of the defendant that he is entitled to open new means of access to this roadway, he is not entitled to have it continuously unfenced along the whole of the line so that at every inch of the way he may pass on to it at any times he pleases.

17. Pickford LJ said, after in effect agreeing with the Master of the Rolls and Swinfen Eady LJ:[8]

> I think the obligation is that, assuming the right of access from each part of the land from which access is required to any part of the way, such access shall be given as will be reasonable. It is obviously difficult to explain, but it is an inevitable word, I think. It means such access as will give reasonable opportunity for the exercise of the right of way, or, to put it in another way, such access should be given as will not be a derogation from the grant of the right of way.

18. In the Victorian case of *Hose v Cobden*[9] Mann J, dealing with a similar problem, found that on an undertaking being given by the complainant to allow any reasonable gateways in the fence, a fence between a lane on the complainant's land over which the defendant had a right of way and the balance of the complainant's land would not constitute a substantial interference with the defendant's easement. He said:

> I may express a doubt as to whether a right of access "from the dominant tenement or any part thereof" necessarily involves a right of access from all parts thereof at all times. But whether that be so or not, the question of interference with the right of way must, I think, always be decided with reference to the conditions of user and occupation attaching to the lands in question by reason of their position and so on.

19. Rath J of the Supreme Court of New South Wales followed both those decisions and others in a careful consideration of the position in *Saggers v Brown.*[10] His Honour said:[11]

> At the outset it is to be observed that there is a distinction between ownership of land giving rights to the soil and to every inch of the soil and the rights of enjoyment conferred by a grant of a right of way: *Clifford v Hoare* (1874) LR 9 CP 362 at 370-1 and *Robertson v Abrahams* [1930] WN (Eng) 79. The test to be applied in determining whether the right of way has been or is proposed to be unlawfully obstructed is whether what the defendants have done or propose to do is a substantial interference with the enjoyment of the right of way: *Pettey v Parsons* [1914] 2 Ch 653 at 662. . . . [*Pettey v Parsons* and *Hose v Cobden* [1921] VicLawRp 110; [1921] VLR 617; 27 ALR 326; 43 ALT 106] show that the erection of a fence along the right of way is not necessarily an interference with the reasonable enjoyment of the way. *Pettey v Parsons* lays down, as a matter of general principle, that the grant of a right of way does not confer a right to go upon the right of way from any part of the dominant tenement adjoining the right of way. What the grant of the right of way involves is such access as shall be reasonable: see *Lewis v Wakeling* (1923) 54 OLR 647. The grant of the right of way is to be construed according to its language having regard to the surrounding circumstances at the time of the grant. It is necessary to determine whether the use claimed was within the reasonable contemplation of the parties at the time when the grant was made and all relevant circumstances are to be considered: *Todrick v Western National Omnibus Company Ltd* [1934] Ch 190 at 206-7; on appeal [1934] 1 Ch 561 at 576, 577, 592. The question of unlawful interference with the right of way is to be determined having regard to the reasonable requirements of the dominant tenement from time to time: *Keefe v Amor* [1965] 1 QB 334 at 346-7; *McKellar v Guthrie* [1920] NZLR 729-31. The grant in this case is a general right of way, that is to say there is no *terminus a quo* or *terminus ad quem* but neither this circumstance nor the wording of the grant, permitting, as it does, passage from any part of the dominant tenement with which the right is capable of enjoyment, precludes reasonable user of the servient tenement and, in particular, fencing of the servient tenement. . . .

Applying these principles I am of the opinion that the erection of a fence along the boundary of the right of way in this case does not of itself necessarily constitute an unlawful interference with the right of way. Reasonable user of the right of way is achieved by gateways placed at appropriate places in the fence.

20. Waddell J in *Dunell v Phillips* referred to "the natural presumption that a servient owner should be entitled to fence his land" as being "a matter of considerable importance to be taken into account in deciding what inference is to be drawn from the circumstances existing at the time of the grant of the right of way."[12] In that case he found that consideration to be outweighed by other circumstances in the particular case before him. He relied on *Pettey v Parsons*, *Hose v Cobden*, *Saggers v Brown* and other cases as authority for the proposition that "in cases where a right of way is wide enough to permit the purpose for which it was granted and in the absence of any provision in the grant to the contrary and in the absence of the purpose for which the right of way was granted requiring otherwise, the servient owner is entitled to fence the common boundary and the dominant owner is entitled to access to the right of way by means of gates at such points as reasonably meet his requirements".[13]

21. In *Butler v Muddle*[14] Young J of the Supreme Court of New South Wales was concerned with this question. He said:[15]

> . . . *prima facie* the servient owner is entitled to fence a right of way and gain security for his land along the whole of the boundary unless he interferes with what the parties intended to be the spots from which the holder of the dominant tenement was to have access. (*Dunnell v Phillip*s (1982) 2 BPR 9517, 9522).

And, after considering the submissions of both parties before him

> One must look at the reasonableness of it all when construing the grant and, in my view, the defendants are entitled to access from more than one point, but only such access as is reasonable; see *Pettey v Parsons* [1914] 2 Ch 653 and *Hose v Cobden* [1921] VicLawRp 110; [1921] VLR 617; 27 ALR 326; 43 ALT 106.

In that case, the defendants, the owners of the dominant tenement, proposed to construct a building according to plans providing for three access points from the easement, totalling 13 metres out of a length 23 metres. His Honour found, in all the circumstances of that case, that a total of nine metres for access points was reasonable.

22. There is no evidence before the Court as to the intention of the parties at the time of the creation of the easement in 1979, and I do not consider that any reliable inference can be drawn from the fact that the 23 metre strip along the boundary has remained unfenced. I should also note that it was not suggested that Mrs Lim or her predecessors as owners of the dominant tenement had acquired any prescriptive right to cross the boundary at any point in the 23 metre strip. It is necessary to look to the present circumstances in order to determine whether the proposal of the appellant is reasonable, or whether it would constitute a substantial interference with the enjoyment of the easement by Mrs Lim, as the owner of the dominant tenement.

23. It is necessary, as I have said, to look at the matter in the light of the passage from the judgment of Kitto J cited in [9] above. I find, on the basis of the authorities to which I have referred, that the Magistrate acted upon two wrong principles of law, namely: that Mrs Lim, as the owner of the dominant tenement, had a right to use, for access to and from the servient tenement, any part of the 23 metres boundary which she chose to use; and that Baypeak, as the owner of the servient tenement, was not entitled to erect a fence and gate on that boundary. The effect of those findings is that I find the answer to question (a) to be Yes.

24. As to question (b), noting the passages from *Gohl v Hender* and *Wilson v Bahr* which are cited in [11] above, I find that, in taking into account the loss of amenity caused by the inability of Mrs Lim to look into the Blackburn Lake Reserve, the Magistrate gave weight to an irrelevant matter. That loss of amenity is not, in my view, a matter to be given weight against the right of the owner of land to fence that land in a manner which is reasonable and which does not constitute a substantial interference with the rights of the owner of the dominant tenement, being the rights conferred by the grant of the easement. Accordingly, I find the answer to question (b) to be Yes.

25. As to question (c), it is apparent from the authorities that the construction of a fence and gate across an easement of carriage way is not, in itself, an unreasonable or substantial interference with the rights of the adjoining owner as owner of the dominant tenement. There may be circumstances in a particular case, where a particular proposed fence and gate may constitute such an interference; see for example *Powell v Langdon*[16] where the proposed fence and gate were such as to cause an obstruction to the right of way, rendering it, as the court found "too narrow for ordinary convenience". It is not suggested that that will be the case here.

26. It was put for Mrs Lim that the construction of the proposed fence and gate would, in a manner which I did not understand, affect her ability to use her car port, and would limit the area in which visitors to her property could park, particularly on the one day of the year when the property is open to the public. Further, access to the wheelchair ramp outside the house (which is only used on that one day) would be less convenient. However, while she may have found, as a result of the absence of a fence, that in those respects there was greater flexibility in the use of her land than there would be if there were a fence, that flexibility does not derive from the easement of carriage way, but from the absence of a fence. None of these matters is an incident of

her rights as owner of the dominant tenement; and the loss of that flexibility cannot be regarded as an interference with her rights in that capacity. The answer to question (c)(i) is accordingly Yes.

27. The requirement that Mrs Lim contribute to the fencing of the 23 metre strip is imposed by the Act and for that reason cannot be regarded a diminution of, or a substantial interference with, any right of hers as owner of the dominant tenement or otherwise. The answer to questions (c)(ii) and (c)(iii) is accordingly Yes.

28. As to question (d), it follows from the authorities cited in [11] above that the answer to question (d)(i) must be Yes.

29. As to question (d)(ii), it was put that Mrs Lim's main concern was what she considered to be the legal burden of closing the gate which would be imposed on her if the proposed fence and gate were constructed. She was concerned that she would be responsible if the gate were left open and a child were to get through from Baypeak's property and drown in the lake which is partly on her land. Given that she prefers to have no fence and no gate I do not understand the force of this concern. At present, given that the boundary is unfenced because of the decision of the Magistrate occasioned by her opposition to the fence, she might well feel a similar responsibility in such circumstances.

30. Question (d)(ii), in the circumstances of the present case, seems to me to be a question of fact rather than of law, and accordingly it is not necessary to answer it. However, some guidance may be obtained from the judgment of Napier J in *Gohl v Hender* in which case, it is to be remembered, the land in question was used for stock. His Honour said[17] of a proposal to put a gate across land, referred to as "the private road", which was subject to a carriageway easement:

> In my view of the case, it is a natural and necessary incident to the use and enjoyment of the plaintiffs' land that it should be fenced in and in the circumstances of the case it is not unreasonable that persons using the private road should open and close the gate – which is reasonably erected for that purpose – when they pass through the plaintiffs' property. . . .

The Full Court has held that an action would not lie for merely leaving the gate open, and it is implied in the reasons for judgment that there may be times when it is so inconvenient to close it that it would not be unreasonable to leave it open. But in the ordinary course of things I think that any person who is entitled to open the gate in the exercise of the right, and thereby to interfere with the plaintiffs' property for the purpose of passing through it, acts unreasonably if, having opened the gate, he leaves it open when he knows, or ought to know, that it is, or may be, necessary to keep in the stock depastured on the land. I think this is implied in the summing-up of Scrutton J in *Attorney-General v Meyrick* [[1915] 79 JP 515] where he speaks of the public "having to open and close the gates when they want to pass," and, in my view of the facts, it is a fair and reasonable basis for the adjustment of the rights and obligations of the parties.

His Honour went on to order *inter alia* that the defendants were "under a duty or obligation to close [the gate] when they . . . have opened it in the exercise of the rights conferred by the easement, unless the circumstances of the particular occasion afford some sufficient reason or excuse for leaving it open". He granted an injunction to restrain the defendants from any unreasonable use of the private road by leaving the gate open in breach of that duty or obligation. He recommended that the parties "as reasonable people . . . endeavour to adjust their differences upon the basis of live and let live" and referred to "a simple application of the principles of good sense and forbearance."

31. For the reasons given, the appeal will be allowed. Counsel may wish to make submissions as to the form of the orders and as to costs.

---

[1] [1953] HCA 25; (1953) 94 CLR 621 at 627.
[2] [1930] SASR 158 at 163.
[3] (1982) 2 BPR 9,517 at 9,522.
[4] (1991) V Conv R 54-392 at 22.
[5] [1914] 2 Ch 653.
[6] at 662-3.
[7] at 667.
[8] at 669.

[9] [1921] VicLawRp 110; [1921] VLR 617 at 620; 27 ALR 326; 43 ALT 106.
[10] [1982] NSW Conv R 55-054; (1981) 2 BPR 9329.
[11] at 9331-2.
[12] at 9522.
[13] at 9522.
[14] (1995) 6 BPR 13,984; [1995] NSW Conv R 55,750; [1995] NSW Conv R 55-745; [1996] ANZ Conv R 147.
[15] at 4.
[16] (1944) 45 SR (NSW) 136; (1944) 61 WN (NSW) 238 at 240.
[17] at 163-5.

APPEARANCES: For the appellant Baypeak Pty Ltd: Mr RA Edmunds, counsel. Telford Story & Associates, solicitors. For the Respondent Lim: Ms E Konstantinou, counsel. Harwood Andrews Lawyers.
