SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 4629 of 2005

SANDOR AND SUSANNA BOGLARI — Appellants

v.

STEINER SCHOOL AND KINDERGARTEN — Respondent

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| JUDGES: | CHERNOV and NEAVE JJA and HABERSBERGER AJA |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 1 February 2007 |
| DATE OF JUDGMENT: | 4 April 2007 |
| MEDIUM NEUTRAL CITATION: | [2007] VSCA 58 |

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Real Property – Easements – Easement of way – Whether easement created by implication of law – Whether fence and gate and occasional locking of gate constituted an unreasonable interference with the easement – Scope of easement – Change in use – Whether excessive use of easement – Rights of access along an easement of way – *Transfer of Land Act* 1958, s 98.

Orders – Whether magistrate erred by granting an injunction and damages in the alternative under *Lord Cairns Act* powers conferred by *Supreme Court Act 1986*, s 33, s 38.

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| APPEARANCES: | Counsel | Solicitors |
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| Mr S Boglari appeared for the Appellants | | |
| For the Respondent | Mr G Pierorazio | Saines & Partners |

CHERNOV JA:

1 I consider that the appeal should be dismissed for the reasons given by Neave JA.

NEAVE, J.A.:

***Background***

2 Mr and Mrs Boglari have appealed against an order by a Supreme Court judge dismissing an appeal from orders of the Magistrates' Court, which required them to remove a gate at the entrance to an easement of way over their property (the servient tenement) and a portion of a fence running between their property and the next door property (the dominant tenement).

3 The Boglaris own a T-shaped piece of land at 110 Daylesford Road. Their house is at the back of that land, and a driveway runs along the leg of the "T" to its foot, which opens on to Daylesford Road. There is an easement over the driveway on their property which benefits the neighbouring property at 112 Daylesford Road. The eastern boundary of the easement is the boundary of the appellants' property. Thus, the driveway is contiguous to the western boundary of the dominant tenement. This property was occupied by the Steiner School at the time of the Magistrates' Court proceedings. The Steiner School paid outgoings associated with the land but did not pay any rent to the registered proprietor. The registered proprietor of 112 Daylesford Road was a Mr Saines, but he was not a party to the proceedings in the Magistrates' Court.

4 Mr and Mrs Boglari acquired 110 Daylesford Road in 1989. It was originally part of a larger property which was sub-divided in 1986. For reasons explained below, the effect of that sub-division was to create an easement of way in favour of 112 Daylesford Road. At that time, 112 Daylesford Road was used as a residence and the occupiers used the driveway to gain access to the house situated at the back of the block.

5 Although it is not directly relevant to this appeal, it may also be noted that Mr Saines

has a fee simple interest in land on the other side of the driveway, which lies immediately behind 108 Daylesford Road.

6 When this matter came before the Magistrates' Court, Mr Saines had allowed the Steiner School & Kindergarten to occupy the buildings at the rear of 112 Daylesford Road, which had previously been used as a residence. Initially the premises were used for a kindergarten, but later a school was set up as well. Approximately 30 students attended the Steiner School & Kindergarten.

7 When a permit was granted by the Council to operate the kindergarten, the Steiner School was required to construct a car park at the northwest corner of 112 Daylesford Road. The northern and narrower side of the car park was bordered by the southern side of Daylesford Road. Its western side faced the driveway over which the occupiers of 112 Daylesford Road had the benefit of an easement. At some unspecified time the car park was fenced on its eastern and southern sides. Initially there was no fence along the western side of the car park which bordered on the easement.

8 Some time between August 2002 and December 2003, Mr and Mrs Boglari constructed a fence between the driveway on their property and the car park on the dominant tenement. They also constructed two pillars and put a gate across the easement of way at its entrance on Daylesford Road.

9 In January 2004 the Steiner School issued a complaint in the Magistrates' Court at Ballarat seeking an order that the gate and fence be removed within a specified period or alternatively, an order that the plaintiff be allowed to remove it at the cost of the defendants. The plaintiff also sought damages, including aggravated damages. The basis for the complaint was that the gate and fence constituted a nuisance because it interfered with the easement of way.

10 The Magistrate summarised the evidence of witnesses for the School as follows:

> "the action by the Boglaris has meant fewer cars could be parked in the car park because once the fence posts went in the only entrance was from the narrow, Daylesford Road side. The car park was also used for dropping off and picking up students. Without access from the laneway this was not

possible and those leaving and collecting children had to park on either sides (sic) of [Daylesford Road] and escort the children onto the school grounds. "

11 There was also evidence that the gate had been padlocked from time to time and this had prevented deliveries to the School. The Magistrate characterised Mr Boglari's evidence as to whether there was a padlock on the gate and it was locked or unlocked as "At best…evasive".

12 The Magistrate found, as a matter of fact, that on at least two occasions the locking of the gate had prevented delivery vehicles from entering the driveway to gain access to the rear of the Steiner School. He also found that entrance by delivery vehicles would be impossible if the gate was locked and the car park was full and that the Boglaris had interfered with the easement by the construction of the fence and the gate. He expressed lack of confidence that Mr Boglari would keep the gate unlocked if it were to remain.

13 His orders, made on 18 January 2005, were in the following terms—

"Order that the defendants on or before 5.00 pm on 18 January 2005[1] remove the gate exited at the Daylesford Road end of the property and the fence exited on the other side of the Plaintiff's carpark and in default of compliance the Defendant to pay the Plaintiff's $875 cost of removal."

14 The amount of $875 to cover the costs of removing the fence was based on a quote produced in evidence.[2] The claim for aggravated damages was dismissed. The Boglaris were also ordered to pay the Steiner School's costs, which were fixed at $5023.10.

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1 Exhibited to his affidavit of 25 October 2005 was the appellant's transcript of events when the Order of the Magistrate was handed down. This account of events suggests that at the time of making the order, the Magistrate intended that it be effective from 18 February 2005, rather than 18 January. In his Honour's reasons for decision, the learned Judge noted that "on 19 January 2005 the Magistrate granted a stay". It is unclear whether the original order was intended to operate from 18 February 2005, or whether the Order was dated 18 January 2005, and its operation was stayed by the Magistrate. Neither party has contended that anything turns on this point, as it is clear that the Order was stayed at least until the matter was heard in the Supreme Court.

2 The quote exhibited to the appellant's affidavit indicates that the quote was in fact for $825. Nothing turns on this issue as the amount of the damages ordered was based on a factual finding. See also footnote 36, below.

15 The appellants appealed to the Supreme Court from the Magistrates' Court orders and a Master ordered that the appeal be dismissed, on the basis that the material before him failed to identify sufficiently, or at all, a question of law.[3] On appeal from the Master's order, Bongiorno J ordered the appellants be given the opportunity to place further material before the Court and Hansen J set aside the Master's order and reinstated the appeal.[4] The learned Judge below heard and dismissed the appeal on 13 September 2005. The appellants then applied for leave to appeal, which was granted on 18 November 2005. Mr and Mrs Boglari represented themselves at the hearing of the application, which sought to raise several appeal points which were held to lack substance. Leave to appeal was granted on the limited grounds discussed below.

16 It is most unfortunate that the parties have not been able to resolve their differences without resorting to legal action. The dispute before the Magistrate was initiated by a letter to the Boglaris asking them to remove the fence and threatening to recover damages if they did not. Before the complaint was issued in the Magistrates' Court this was the only step taken by either party to resolve the problem.

17 The Boglaris were concerned that access to their property should not be restricted by people who were entering the Steiner School. The School was concerned to ensure that parents could use the car park to drop off and pick up children. This is a matter which could have been resolved by sensible discussion and agreement. Mr Boglari represented himself and Mrs Boglari in the various hearings held in the Supreme Court and in this hearing, but the Steiner School was represented by counsel. The parties were referred to mediation but were unable to resolve their dispute. Towards the end of the hearing of the appeal we were informed by counsel for the Steiner School that the School had now moved out of 112 Daylesford Road. Since Mr Saines was not a party to the proceedings the outcome of the appeal will not necessarily resolve any dispute which the Boglaris may have with him.

***Ground 1***

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3 On 11 March 2005.

4 On 22 April 2005.

18 As I have said, leave to appeal was granted on limited grounds. The first ground of appeal is that the learned Judge erred in characterising the Magistrate's decision about use of the driveway as a factual matter, rather than a matter of law.

19 The issue before the Magistrate was whether the Steiner School had made out its claim for nuisance by showing that the Boglaris had interfered with the easement which benefited 112 Daylesford Road. This required the Magistrate to determine:

(a) the scope of the easement of way which existed over the Boglaris' property;

(b) whether the use which the Steiner School made of the driveway was excessive; and

(c) whether the Boglaris had unlawfully interfered with the easement created for the benefit of 112 Daylesford Road.

20 In order to determine the scope of the easement, the Magistrate was required to apply the principles which determine the scope of an implied easement of way created by subdivision of the land,[5] to the facts of this case. This is a mixed question of fact and law, as is the question of whether the Steiner School's use of the driveway went beyond what was authorised by the easement. The question of whether the Boglaris' acts interfered with the easement required a finding of fact. Thus the Magistrate's decision on the nuisance claim required the determination of mixed questions of fact and law.

21 The learned Judge below heard Mr Boglari on a large range of matters which he held to have no substance or merit. In relation to the nuisance claim the learned Judge below referred to Mr Boglari's reliance on the English Court of Appeal decision in *Jelbert v Davis*,[6] which dealt with the issue of excessive use of an easement. His Honour said that the case showed that the question whether the proposed use was excessive was:

> "…one of fact and degree. [***Jelbert v Davis***] was referred to the Magistrate. However, in my view it is unnecessary to refer to it. The Magistrate stated

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5 Under *Transfer of Land Act* 1958, s 98. The meaning of this provision is discussed at [27] below.

6 [1968] 1 WLR 589.

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

22 Although his Honour characterised the issue to be decided by the Magistrate as "one of fact and degree", in my view the above passage from his reasons implicitly recognised that the complaint raised a mixed question of law and fact. This is apparent in the reference to the Magistrate's statement of the correct principle. A large part of the factual dispute between the parties concerned whether Mr Boglari had in fact blocked access to the driveway by locking the gate at its entrance. His Honour's remarks must be read in that context. In referring to the issue as "one of fact" his Honour may perhaps have elided the separate stages in the reasoning process which the Magistrate was required to undertake to determine the complaint, but he was correct in saying that the question was ultimately a factual matter. I would therefore reject the first ground of appeal.

23 If I am wrong in this view however, it is necessary to consider whether the appeal should succeed, because the Magistrate erred in law in concluding that the easement did not permit the appellant to limit access to the car park by erecting the fence and the gate.

24 On the hearing of the appeal the submissions made by counsel for the Steiner School focused mainly on the Magistrate's finding that the respondent did not use the easement excessively, rather than on the logically prior question of the scope of the easement. This is not surprising because, as I have already said, there is an inter-relationship between the construction of the easement and the question of whether it was used excessively by the holder of the dominant tenement.[7] I examine the question of excessive use below, in the context of the second ground of appeal.

25 So far as the scope of the easement is concerned, the submissions made by Mr Pierorazi on behalf of the respondent were implicitly based on the view that the Steiner School was entitled to gain access to its property at any point along the easement of way. In particular, the respondent's case depended on the proposition that the easement of way

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7 *Gallagher v Rainbow* (1994) 179 CLR 624.

allowed visitors to the property to drive directly from the easement of way on the servient tenement into the car park situated on the dominant tenement, and that the Boglaris interfered with access to the car park by erecting the gate and the fence.

26 An easement of way created by an express grant, which does not indicate an access or conclusion point for the easement, does not confer a right to enter the dominant tenement from any point along the easement.[8] Thus the owner of the servient tenement may fence the land, even though the fence limits the points at which the dominant tenement holder can enter and leave his or her property from the right of way, provided that the fence does not prevent reasonable access to the property.[9] What is reasonable is determined by reference to the language of the grant, construed in the light of the surrounding circumstances.[10]

27 In this case the easement over the Boglaris' property was created by implication of law under *Transfer of Land Act* 1958, s 98, rather than by express grant. Section 98(a) provides that—

> "All such easements of way … to the allotment or the lot on over or under the lands appropriated or set apart for those purposes respectively on the plan of subdivision as may be necessary for the reasonable enjoyment of the allotment or the lot and of any building or part of a building at any time thereon."

28 The history and effect of this provision was examined by Brooking J in *Shelmerdine v Ringen Pty Ltd*[11] In that case the question was whether an easement of footway or of carriageway had been created by the plan of subdivision. In determining the scope of the easement Brooking J discussed whether the effect of s 98 of the *Transfer of Land Act* 1958 was to determine the scope of the easement by reference to the kind of easement of way which was "appropriated or set apart" on the plan of subdivision, or by reference to the kind

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8 *Pettey v Parsons* [1914] 2 Ch 653 at 662; *Baypeak Pty Ltd v Lim* [2005] VSC 77.

9 *Saggers v Brown* (1981) 2 BPR 9329; *Pettey v Parsons* and *Hose v Cobden* [1921] VLR 617; *Todrick v Western National Omnibus Company Ltd* [1934] 1 Ch 190 at 206–7; on appeal [1934] Ch 561, 577, 592; *Butler v Muddle* (1995) 6 BPR 13,984.

10 *Gallagher v Rainbow* (1994) 179 CLR 624 at 639 per McHugh J. Although Mc Hugh J dissented in the result, the majority judgment of Brennan, Dawson and Toohey JJ does not disagree with this proposition.

11 [1993] 1 VR 315.

of right of way which was necessary for the reasonable enjoyment of the land. On the facts of that case it was unnecessary for his Honour to reach a conclusion on that question.

29 In this case neither the appellant nor the respondent relied on the nature of the easement "appropriated" on the plan of subdivision to support their submissions about the construction of the easement. Nor was the plan of subdivision tendered in evidence. An easement of carriageway is clearly marked on Mr and Mrs Boglari's certificate of title, but it was not submitted that the certificate of title showed any particular access point from the easement to the dominant tenement.

30 Section 98 of the T*ransfer of Land Act* 1958 does not require the person asserting an implied easement to show that access to the land is impossible without use of the right of way, but only to show that the easement of way is "necessary for the reasonable enjoyment of the lot".[12] It seems to me that the statutory requirement that the easement of way be necessary for the reasonable enjoyment of the lot has a similar effect to the test which applies in determining what amounts to reasonable access to the dominant tenement, where the easement of way is created by an express grant, which does not indicate an access or conclusion point for the easement.

31 Thus, in the absence of the concession referred to below, the Magistrate would have been required to consider the factual context which existed when the land was subdivided, in order to determine the access points which were necessary for the reasonable enjoyment of the lot.

32 The Magistrate in this case accepted that the entitlements of the holders of the easement are determined by the construction of the grant (although he did not refer to s 98 of the *Transfer of Land Act* 1958*)*. It was, however, unnecessary for him to decide whether access at any point along the easement was "necessary for the reasonable enjoyment of the lot" because—

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12 The scope of the easement may be affected by *Transfer of Land Act* 1958, s 72(3) which provides that an easement referred to in a folio of the Register is to be construed as if the words in Schedule 12 had been inserted in the folio. No reference to this provision was made in argument.

> "Both parties [accepted] that under an easement of the kind under consideration access can be had at any point along the boundary."

33 Mr Boglari was represented by counsel in the Magistrates' Court and in my view he should not be permitted to re-open that issue.

34 The learned Magistrate also said that:

> "parking is not a right granted by the easement, however, the defendants have not shown that parking constitutes a substantial interference."

35 An easement of way created by express grant does not confer a right to park on the easement. This issue was discussed by Young J in *Butler v Muddle,*[13] where his Honour said—

> "The easement is for passing and repassing. Unless parking is a necessary part of the passing and repassing, then one does not normally conclude that parties intended to confer a right of parking in the grant of a right of way… The question always is, where there is no express reference to parking, whether such is reasonably necessary for the effective and reasonable exercise and enjoyment of the rights expressly granted." (Citations omitted).

36 The same principle must apply to an easement of way created by implication under the *Transfer of Land Act*. It follows that the Magistrate may have been wrong in saying that the Boglaris could not object to the parking of cars along the easement, unless this constituted substantial interference.

37 Although this may have been an error of law, it was not material to the Magistrate's decision. It was conceded on behalf of the Boglaris that the Steiner School was entitled to access to the dominant tenement at any point along the boundary between the easement on 110 Daylesford Road and 112 Daylesford Road. The Boglaris might have sought an injunction to restrain the Steiner School from permitting its licensees to park on the easement, but they did not do so. The orders made by the Magistrate were based on his factual finding that the Boglaris had interfered with the use of the easement by erecting the gate and fence and, on occasions, locking the gate. The issue of parking was not relevant to that conclusion.

38 To summarise, the learned Judge below did not incorrectly characterise the

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13 *Butler v Muddle* (1995) 6 BPR 13,984.

Magistrate's decision as to the use of the carriageway as a factual matter. Moreover, even if his Honour erred in this respect, the Magistrate did not err in law in finding that the Boglaris had interfered with the easement. My further reasons for concluding that the Magistrate's view was correct are discussed under Ground 2 below.

***Ground 2***

39 Ground 2 is that the learned Judge erred in holding that there was nothing in the Magistrate's reasons to suggest there was any error relating to his conclusions as to a change in the use of the carriageway.

40 Having determined the scope of the easement, the Magistrate was required to decide whether the use of the driveway by the Steiner School and its licensees was excessive.

41 Mr Boglari submitted that the easement was originally provided to allow access to the dwelling at the rear of 112 Daylesford Road. Thus the driveway could not be used for the different purpose of providing access to the car park used by parents whose children were attending the school. Even if this change in use came within the scope of the easement, Mr Boglari contended that the driveway was used excessively by the licensees of the Steiner School. In support of this submission Mr Boglari relied on the English Court of Appeal decision in *Jelbert v Davis*.[14]

42 In *Jelbert v Davis*[15] an easement of way was granted to a farmer to gain access to his land "at all times and for all purposes". The dominant tenement was used for agricultural purposes at the time the easement was created but it was later proposed to use it as a camping and caravan site. Previously the right of carriageway had been used only by a small number of agricultural vehicles, but after the caravan site was established it was likely to be used by about 200 vehicles per day. The English Court of Appeal[16] declared that this amounted to excessive use of the easement.

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14 [1968] 1 WLR 589.

15 [1968] 1 WLR 589.

16 Lord Denning MR, Danckwerts and Edmund Davies LJJ.

43 Mr Pierorazi, for the Steiner School, submitted that a change in the use of the dominant tenement does not necessarily prevent use of the easement for the benefit of the dominant tenement. His submission is clearly correct.

44 In *Jelbert v Davis*, Lord Denning MR said that where a right was granted to pass over an easement of way "at all times and for all purposes" a change in the use of the dominant tenement did not prevent use of the right of way, provided the extent of the use was not beyond that contemplated at the time of the grant. [17]

45 Similarly, in *Finlayson v Campbell*[18] Young J said that—

> "It is …clear that a grantee is not confined to using a right of way for the purpose prevailing at the date of the grant but may use the right of way for any reasonable different purpose.[19] Thus one can use for the purpose of a motel a right of way that had been originally granted in general terms when the dominant tenement had erected on it a block of flats."[20]

46 Both those cases concerned an easement created by express grant. Here we are concerned with an easement created by implication under s 98 of the *Transfer of Land Act* 1958. The section does not restrict the use of the easement to the purposes for which the dominant tenement was used at the time of the subdivision. In *Bowman v Taylor*[21] where the easement of way was implied by s 212(2) of the *Transfer of Land Act* 1928 (the predecessor provision to s 98 of the *Transfer of Land Act* 1958) Lowe J interpreted the provision broadly to permit the use of the easement "for any purpose which the law permits".[22]

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17 [1968] 1 WLR 589 at 595.

18 (1997) 8 BPR 15,703.

19 His Honour cited Bradbrook & Neave, *Easements and Restrictive Covenants in Australia* Butterworths Melbourne 1981 [620].

20 *Grinskis v Lahood* [1971] NZLR 502. See also *Kyren Pty Ltd v Cinema Place Pty Ltd* [2004] SASC 268 at [49]; *Shean Pty Ltd & Anor v The Owners of Corinne Court 290 Stirling St Perth Strata Plan 12821 v* [2001] WAR 65; in *Gallagher v Rainbow* (1993) 179 CLR 624 the majority of the High Court held that an easement of way granted for the benefit of specified lots was enforceable by owners of the lots into which the dominant tenement was subdivided, unless the construction of the easement showed that it was only intended to benefit the land in its original form.

21 [1934] VLR 34.

22 [1934] VLR 34 at 39.

47 Although the change of use of the dominant tenement does not, of itself, prevent use by the easement in favour of the benefited land, a change in the extent of use which substantially increases the burden on the servient tenement is not permitted.[23] In *Todrick v The Western National Omnibus Company Limited*[24] Farwell J said that in deciding whether that was the case—

> "I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land at the time when the grant was made… a grant of this kind must be construed as a grant for all purposes within the reasonable contemplation of the parties at the time of the grant."

48 The question whether the use was excessive is a question of fact. The learned Magistrate found that the use by delivery vehicles and the parents of the 30 children attending the school was not excessive.

49 In order to set aside that finding of fact the Boglaris would have to show that his Honour erred in finding that this conclusion was open on the evidence before the Magistrate. Although a complete transcript of the evidence before the Magistrate was not available to this Court, the Magistrate's reasons carefully set out the basis on which he reached his decision. In my view his Honour correctly found that the evidence was sufficient to support the conclusion that the use of the easement was not excessive and that the erection of the gate and fence by the Boglaris interfered with the Steiner School's use of the easement. Thus the second ground of appeal is not made out.

***Ground 3***

50 The third ground of appeal was that the learned Judge erred in holding that the form of order requiring removal of 16.7 metres of the fence was a question of fact and not otherwise shown to be erroneous.

51 The reference to the Magistrate's order requiring the removal of 16.7 metres of fence is itself an error. The order of the Magistrate is set out in paragraph 13 above. In his reasons

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23 *Jelbert v Davis* at 595.

24 [1934] Ch 190 at 206–7.

the learned Judge below said—

> "It is clear that the parties understand what part of what fence was to be removed as was apparent from what I was told. I was told that the length of the fence in question is 16.7 metres."

52 Mr Boglari submitted that the length of 16.7 metres did not take account of the fact that there is a small triangular piece of land at the entrance to the driveway which reduces the length of the fence running along the western side of the easement and the eastern boundary of the respondent's property. The precise length of the fence is an issue of fact. The Judge below found that the parties understood the effect of the Magistrate's court order. I would dismiss this ground of appeal.

***Ground 4***

53 The final ground of appeal was that the learned Judge should have upheld the appeal from the order of the Magistrate, because the Magistrate erred by granting both an injunction and an order for damages. Paragraph 15 of the reasons granting leave state:

> "the order of the magistrate seems arguably contrary to principle in that it grants both an injunction and damages in lieu at the same time. It may be argued that this should not have been done see *Johnson v Agnew*[25] and Spry, *Equitable Remedies*[26]."

54 The respondents submitted that this issue was not raised before the Magistrate or in the appeal before the Judge below. They also submitted that the learned Magistrate did not ***both*** grant an injunction requiring the appellants to remove the gate and fence and order damages in lieu of an injunction, but rather ordered these remedies consecutively.

55 The fact that the appellant did not question the form of orders in the earlier proceedings may not preclude him from doing so on appeal, because the issue is whether the Magistrate had the power to make the orders he did. A jurisdictional issue of this kind does not fall within the principle in *Whisprun Pty Ltd v Dixon*[27] where the issue was whether a

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25 [1980] AC 367.

26 Fifth edition at page 643.

27 (2003) 77 ALJR 1598.

concession made in proceedings below prevented the party making the concession from arguing a particular point on appeal.[28]

56 Section 100 of the *Magistrates Court Act* 1989 confers jurisdiction to hear and determine any claim for damages or for equitable relief if the value of the damages or the relief sought is within the jurisdictional limit of the court. Section 38 of the *Supreme Court Act* 1986 provides that—

> "If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

57 This provision applies to the Magistrates' Court by virtue of s 33 of the *Supreme Court Act* 1986 which says that—

> "Unless otherwise expressly provided by this or any other Act, the rules of law enacted by Part 5 apply to all courts so far as the matters to which those rules relate are within the jurisdiction of those courts."

58 The question then is whether, as Ormiston JA suggested may be the case, the Magistrate erred by granting an injunction and damages in the alternative.

59 In *Johnson v Agnew*[29] the vendors sought specific performance of a contract for the sale of land. After the purchaser failed to comply with the order for specific performance, the vendor sought damages for breach of the contract. A party may seek specific performance of a contract for sale of land and damages in the alternative. When the matter comes to trial however, that party must choose between these remedies.[30] The House of Lords took the same view as that taken by this Court in the earlier decision in *McKenna v Richey*.[31] It was held that if the purchaser did not comply with the order for specific performance the contract

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28 In *Federated Engine-Drivers and Firemen's Assn of A'asia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 Griffith CJ at 415 said that it is "the first duty of every judicial officer … to satisfy himself that he has jurisdiction …". More recently in *Fingleton v the Queen* [2005] HCA 34, the High Court recognised in the context of a criminal case that a concession by one party about the Court's jurisdiction "would not bind the Court."

29 [1980] AC 367.

30 *Johnson v Agnew* at 392 per Lord Wilberforce.

31 [1950] VLR 360; see also *Bosaid v Andry* [1963] VR 465.

remained on foot and was not merged in the judgment. Thus, if the purchaser failed to comply with the order, the vendor could apply to the court for an order dissolving the order for specific performance and could then obtain damages for breach. [32]

60 It is obvious that a party to a contract cannot simultaneously seek to enforce the other party's obligation to perform the contract and obtain damages as a substitute for performance of that obligation.[33] But this principle is not relevant to the facts of this case, where there is no duplication of relief in the orders which were made.[34] Nor does this case fall within the principles determining when a court which has exercised its discretion against granting an injunction has power to exercise its *Lord Cairns Act* power to award equitable damages instead.[35]

61 The Magistrate did not grant damages in lieu of an injunction. Instead he granted a mandatory injunction. It was only if the Boglaris failed to comply with the terms of the injunction that they were to be liable to pay the costs of removing the fence. The order for damages was intended to obviate the need for the Steiner School to return to the Court if the Boglaris did not comply with the injunction and remove the fence.

62 Normally a court would not make an order giving a defendant the option of complying with the terms of an injunction or paying damages for failing to do so. Instead it would be assumed that the plaintiff would take proceedings to enforce the injunction, if the defendant failed to comply with that order.

63 On the facts of this case however, the order for payment was intended to ensure that the fence was removed, either by the appellants removing it or by the respondent paying a contractor to remove it. The order for payment was made conditionally on the non-

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32 The other issue in the case related to the nature of the damages and the date at which they should be assessed.

33 Spry, *Equitable Remedies* (6th ed, 2001) at 224.

34 Note that Spry ibid explicitly bases the principle on the need to avoid duplication of relief.

35 As to which, see *Shelfer* v *City of London Electric Lighting Co* [1895] 1 Ch 287 at 322.

performance of the obligation imposed by that injunction and was intended to ensure that the respondent did not have to return to court to enforce the injunction. In principle, it seems to me that no objection can be made to such an order, which avoids a multiplicity of proceedings in circumstances where both parties had already incurred considerable costs. Accordingly, the fourth ground of appeal fails.[36]

64 I would therefore dismiss the appeal.

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36 It was suggested in argument that the amount of $875 was not consistent with the order of the Magistrate to remove the gate and the fence. The learned Magistrate noted in his reasons that the quote obtained by the plaintiff did not include the cost of removing the gate and gate posts. Nonetheless the Magistrate concluded that this was the plaintiff's omission, and the order for payment would be limited to the amount of the quote. See also footnote 2, above.

HABERSBERGER AJA:

65 I have had the advantage of reading in draft the reasons for judgment of Neave JA and I agree with her Honour that the appeal should be dismissed.

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