MANTEC THOROUGHBREDS PTY LTD v BATUR and Another

HABERSBERGER J

10–13, 16 February, 20 August 2009
[2009] VSC 351

Real property — Easements — Plan of subdivision — Express easement of way — Nature and extent of right — Obstruction — Clear and substantial — Dam pre-dating creation of easement — Whether dominant tenement easement subject to or free of obstruction — Right of dominant tenement owner to effect access improvement works — Notice of works — Rights of servient tenement owner — Fence — Common boundary — Servient tenement owner not obliged to maintain full width of easement — Gate — Whether implied easement of necessity — Whether right to deviate on to another part of servient tenement — Remedies — Injunctions — Declarations — "Way".

In 1998 a large rural property was subdivided into six lots. A 10 metre wide drainage reserve ("the reserve"), which was Crown land, ran north-south beside the western boundaries of lots 4 and 5. The plan of subdivision created an easement of way 10 metres wide over lot 5 in favour of lot 4 and abutting the reserve. In 2000, the defendants ("the dominant tenement owners") purchased lot 4 and the plaintiff ("the servient tenement owner") purchased lot 5. As a result of the subdivision, a dam which had been established in 1970 on that part of the property which formed part of lot 5 after the subdivision encroached approximately four metres into the path of the easement even after clearing works by the servient tenement owner in 2000. The dam impeded the dominant tenement owners from gaining access to lot 4 from a main road, prevented them from driving anything larger than a small tractor or four-wheel motorbike the full length of the easement, and impeded moving cattle from lot 3 (which those owners had purchased in 1988) to lot 4. Until 2006, the easement was also blocked by trees and a fence running roughly parallel with, but several metres inside, the southern boundary of lot 5. The dominant tenement owners regularly obtained access to lot 4 (which was accessible by other means) by traversing the reserve, but without having obtained the necessary licence pursuant to s 138 of the Land Act 1958.

The servient tenement owner erected post and wire fences inside the easement in 2000, to the north of the dam; and in 2005, to the south of the dam thereby reducing the width of the easement to no more than six metres.

In 2006, the dominant tenement owners complained that the servient tenement owner was obstructing the easement and the dominant tenement owners resorted to self help. The servient tenement owner at its expense erected a farm gate across the easement at the road, padlocked but with a key provided to the dominant tenement owners; and the servient tenement owner obtained an interim injunction, later extended to trial, restraining the dominant tenement owners from taking certain action on lot 5. In this proceeding, the parties each sought an injunction and declarations as to their rights. It was agreed that although s 72(3) and the Twelfth Schedule of the Transfer of Land Act 1958 which defined a right of carriageway were inapplicable, the expression, "right of way", had similar meaning to "right of carriageway". The plaintiff accepted that the easement included a right to enter and re-enter the easement by foot or by a vehicle such as a tractor which could negotiate the boggy ground and the narrowing of the track at the dam wall. The main point of difference was whether the defendants had a right of full access along the easement, including by large vehicles and heavy machinery, if suitable changes could be made to the dam wall to permit such access.

Held, making declarations in favour of both parties: (1) For the purpose of establishing the scope of the express easement created by the plan of subdivision and specified by the

one word, "way", the provisions in the Subdivision Act 1988 and the Transfer of Land Act 1958 dealing with implied easements were irrelevant. [62]–[64].

(2) Because there was no grant setting out the scope of the easement, there were no words to construe beyond the single word, "way". However, the surrounding circumstances at the time of the plan including the presumed intentions of the parties were not irrelevant to the construction question. So construed, this easement included all forms of vehicular traffic because (a) this accorded with the ordinary meaning, (b) the plan of subdivision disclosed no indication that it was conditional or limited, and (c) the easement benefited a rural property, and so it must have been contemplated that it would be used both in the ordinary course of farming activities, including the occasional large truck or semi-trailer, and to construct a house on lot 4. [66]–[69], [73], [74].

Robinson v Bailey [1948] 2 All ER 791; *Rodwell v GR Evans & Co Pty Ltd* (1977) 3 BPR 9114; *Finlayson v Campbell* (1997) 8 BPR 15,703 applied.

White v Grand Hotel Eastbourne Ltd [1913] 1 Ch 113 distinguished.

(3) For an obstruction of an easement to be actionable, the obstruction had to be substantial. In determining this, the court was entitled to consider all the circumstances including the rights of the owner of the servient tenement. [76], [77].

Pettey v Parsons [1914] 2 Ch 653; *Saint v Jenner* [1973] Ch 275 followed.

(4) The dam clearly and substantially obstructed the right of way. [78], [79].

Spear v Rowlett [1924] NZLR 801 applied.

(5) However, the dam having predated the easement, the question of whether the easement was taken subject to or free of the obstruction was determined, without any instrument of grant to interpret, from an examination of all the circumstances surrounding the creation of the easement. The dominant tenement owners took the easement subject to the obstruction because they had purchased lot 4 knowing of the position of the dam on the easement and because, although knowing of the easement, the servient tenement owner had purchased lot 5 in the expectation that it could continue to be used as the main water source for the business conducted there. But that conclusion did not mean that the defendants did not have other rights with respect to the easement. [80], [83]–[86].

Spear v Rowlett [1924] NZLR 801 distinguished.

(6) While there was no positive obligation on the servient tenement owner to undertake works on the right of way, the dominant tenement owners had an ancillary right to undertake works in respect of the easement which were reasonably necessary for the effective and reasonable exercise and enjoyment of the easement. In this case, this included works in order to make the easement passable for all types of vehicles, if capable of being done without causing injury to the servient tenement owner's land, in other words, without damaging the dam or surrounding areas. The dominant tenement owners were also entitled to keep the track along the easement clear of vegetation. [88], [92], [94], [105].

Newcomen v Coulson (1877) 5 Ch D 133; *Spear v Rowlett* [1924] NZLR 801; *Zenere v Leate* (1980) 1 BPR 9300; *Lawrence v Griffiths* (1987) 47 SASR 455; *Shelmerdine v Ringen Pty Ltd* [1993] 1 VR 315; *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274 followed.

Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343 referred to.

(7) The servient tenement owner was entitled to know in advance, and have time to consider, the dominant tenement owners' fully detailed plans if they chose to pursue attempting to improve access along the easement. They had led insufficient evidence of this. [94], [98].

Bland v Levi (2000) 9 BPR 17,517 explained and distinguished.

Lawrence v Griffiths (1987) 47 SASR 455 distinguished.

Burke v Frasers Lorne Pty Ltd (2008) 14 BPR 26,111 referred to.

(8) There was a rebuttable presumption that the owner of the servient tenement could fence a common boundary provided the fence did not prevent reasonable access to the property. [101].

Dunell v Phillips (1982) 2 BPR 9517; *Boglari v Steiner School and Kindergarten* (2007) 20 VR 1 followed.

(9) The owner of the servient tenement was not obliged to maintain the full width of the easement, but the width of the right of way extended as far as was required by the reasonable needs of the owner of the dominant tenement. [102].

Powell v Langdon (1944) 45 SR (NSW) 136 followed.

(10) Given the existence of the dam wall, the 2000 and 2005 fences did not currently constitute a substantial obstruction, but whether this would continue if a road was constructed over or beside the dam wall could not now be answered. [103], [104].

(11) The owner of the servient tenement was entitled to erect a gate across a right of way as long as it did not pose a substantial obstruction. [107].

Pettey v Parsons [1914] 2 Ch 653; *Gohl v Hender* [1930] SASR 158 followed.

(12) Because the servient tenement owner wished to keep its expensive stock secure, the locked gate, with a key provided to the dominant tenement owners, was not a substantial interference with their reasonable use and enjoyment of the right of way. Whether this would continue if a road was constructed over or beside the dam wall could not now be answered. Further, if the dominant tenement owners preferred easier access, such as by a remote control or larger gate, they had the right to go onto the easement to undertake such works at their expense, with notice to the servient tenement owners. [108]–[111].

Gohl v Hender [1930] SASR 158 referred to.

(13) The dominant tenement owners did not have a right to use their access along the easement as an implied easement of necessity, both because:

(a) They had an express easement over lot 5. [112];

(b) An easement of necessity was generally only implied where the right claimed was essential, not merely convenient, for the use of the dominant tenement. Although in order to enter onto the main part of lot 4 the dominant tenement owners had to cross the reserve, and strictly required a Crown licence, they had always done so at will, and there was no evidence that this would change or that they would not obtain a licence. There was no necessity until this permissive access was closed off and the land became landlocked. However, the main part of lot 4 would become landlocked if there was no easement over lot 5 and no access over the reserve notwithstanding access along the "battleaxe" handle. [113], [115], [116].

McLernon v Connor (1907) 9 WALR 141; *Parish v Kelly* (1980) 1 BPR 9394 followed.

Barry v Hasseldine [1952] Ch 835 distinguished.

(14) The grantee of a right of way had no right of deviation onto another part of the servient tenement unless some form of obstruction was created by the grantor. The

obstruction by the dam was not brought about by the servient tenement owner, and the dominant tenement owners had no right to deviate around it. [118]–[120].

Bullard v Harrison (1815) 4 M&S 387; 105 ER 877; *Selby v Nettlefold* (1873) LR 9 Ch App 111; *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343; *Slorach v Mount View Farm Pty Ltd* (1998) Q Conv R ¶54-512 applied.

(15) Although the interlocutory injunction had been properly granted, neither party sought a permanent injunction. It was appropriate to make declarations as to the rights and obligations of the owners of both tenements. [121]–[130].

Zenere v Leate (1980) 1 BPR 9300 followed.

Lawrence v Griffiths (1987) 47 SASR 455 referred to.

Action

This was the trial of a claim and counterclaim concerning an easement of way in which the servient tenement owner and the dominant tenement owners sought injunctive and declaratory relief as to their respective rights. The facts are stated in the judgment.

D F Hyde for the plaintiff.

J J Isles for the defendants.

Cur adv vult.

Habersberger J.

Introduction

1 This proceeding resulted from a dispute concerning the parties' rights and obligations with respect to an easement that benefits the property of the defendants, and burdens the property of the plaintiff.

2 In 1998, a large rural estate named "Annesleigh Park" ("the original property") situated on Bungower Rd, Moorooduc was subdivided into six separate lots by Plan of Subdivision No PS 415764E. The original property was situated to the north of Bungower Rd, which runs approximately east-west, and to the east of Derril Rd, which runs approximately north-south. Under the subdivision, lot 2 is in the north-east corner of the intersection of Bungower Rd and Derril Rd. To the east of lot 2 are lots 3, 5 and 6 respectively, which also have frontages on to Bungower Rd. Lot 1, with a frontage to Derril Rd, is to the north of lots 2 and 3 and the main part of lot 4 is to the north of lot 5. Lot 4 is in the shape of a "battleaxe", the handle of which runs out to Derril Rd, to the north of lot 1. A 10 metre drainage reserve in the form of a small gully runs approximately north-south through the subdivision between lots 1 and 3 to the west and lots 4 and 5 to the east. The drainage reserve is Crown land.

3 The first and second defendants, Mr Nediljko ("Eddie") Batur and his wife, Mrs Gordana Batur, are the registered proprietors of lot 4, the dominant tenement. The plaintiff, Mantec Thoroughbreds Pty Ltd ("Mantec"), is the registered proprietor of lot 5, the servient tenement. Mrs Diana Anceschi is a director and shareholder of Mantec.

The easement

4 Plan of Subdivision No PS 415764E created an easement of way, referred to as "E-1" and "E-2", over lot 5 in favour of lot 4. The plan also shows a powerline easement, referred to as "E-2" and "E-3", over lots 5, 4 and 1 in favour of United

Energy Ltd. The strip of land constituting "E-1" is about 10 metres wide and runs north for about 400 metres from Bungower Rd along the western boundary of lot 5 to the south-west corner of lot 4. Thus, "E-1" abuts the drainage reserve. The strip of land constituting "E-3" is 15 metres wide. It starts at Bungower Rd about 11 metres to the east of "E-1" and proceeds slightly west of north for a short distance until it meets "E-1". It then runs parallel with "E-1", but overlapping it by some 2.4 metres, up to the southern boundary of lot 4, where "E-1" ends. Easement "E-3" continues north for about half the way to the northern boundary of lot 4, where it turns west and proceeds some distance into lot 1. The reference to "E-2" is a reference to the land constituted by the overlapping of easements "E-1" and "E-3". I will refer hereafter to the easement formed by easements "E-1" and "E-2" as "the easement".

5 The dispute in this proceeding has largely arisen because since about 1970 there has been a large "Turkey Nest" dam ("the dam") situated towards the north-west corner of what is now lot 5. The presence of the dam has been a major impediment to the Baturs gaining access to lot 4 from Bungower Rd, because the western wall of the dam starts to rise up less than 10 metres from the drainage reserve, thereby reducing the flat area which could be used as a carriageway.

6 The easement is also limited as a means of access from Bungower Rd during the winter months, especially for vehicular traffic, because the land between lots 3 and 5 often becomes inundated with water, even during a drought. The parties agreed that at times throughout the year the easement is subject to flooding from the drainage reserve and the land becomes very boggy and difficult to traverse. Also, Mrs Anceschi said that there was an underground spring south of the dam which added to the boggy conditions on part of the easement.

Factual background

7 In 1992, the then owner, Trevola Holdings Pty Ltd ("Trevola Holdings") was seeking to subdivide the original property and some other land to its north. A seven lot proposal was put forward, which involved what became lot 4 having access to Bungower Rd by means of a thin strip of land running parallel to the drainage reserve configured as the handle of a "battleaxe". Internal memoranda of the Shire of Hastings indicated that an alternative plan, for lot 4 to have access to Derril Rd by means of a thin strip of land running parallel to the northern boundary of what became lot 1, was not favoured because the shire officers did not "support a lot divided by a drainage easement". It was not clear how it was thought that the thin strip of land running down to Bungower Rd would fit in with the existing dam on what became lot 5.

8 The 1992 proposal did not proceed, apparently because of objection by VicRoads, including on the ground that:

> The plan does not make provision for the proposed freeway reservation.

9 However, on 15 December 1997, the Mornington Peninsula Shire Council ("the council") issued a planning permit for a six lot subdivision of the original property. Once again the plan involved lot 4 having access to Bungower Rd by means of that lot incorporating a 20 metre strip of land constituting the handle of a "battleaxe".

10 By a letter dated 2 February 1998, Ian Muir of Watsons Pty Ltd ("Watsons"), the surveyors and town planners for Trevola Holdings, wrote to the Department of Natural Resources and Environment ("the DNRE") as follows:

> We enclose a copy of a 6 lot plan of proposed subdivision and a copy of a Planning Permit recently issued by Council for the subdivision …
>
> Lot 4 is proposed to be accessed by a 20 metre wide driveway area from Bungower Road. A dam is partly constructed on the driveway and the driveway is on low lying land which can flood during Winter and Spring.
>
> As an alternative method of access to lot 4 the owners are considering a driveway along the northern boundary of proposed lot 1 from Derril Road and a culvert/bridge over the drainage reserve. Council Planners have given their tentative approval to this proposal, subject to approval being obtained from the relevant authority to construct the necessary vehicular crossing. We are therefore seeking your approval to the construction of an appropriate structure across the drainage reserve and permission to use the structure for a period of say 50 years.

11 The DNRE responded by a letter dated 16 February 1998:

> The Department would be prepared to issue a licence to your client company under Section 138 of the Land Act 1958 for a period of 10 years to permit access to proposed lot 4 across the Crown land near the north east corner of proposed lot 1. Ten years is the maximum term available for this type of licence. It may be renewable for a further term, however, the Department cannot guarantee that a renewal would be effected. The rental for the licence will be advised by the Department.
>
> The licence would have a special condition which required compliance with any specifications imposed by the Mornington Peninsula Shire Council concerning the construction of any access track, including any bridges or culverts, within the Crown land …
>
> Please note that it may be possible for the Department to sell the strip of Crown land to your client company, however, if such a sale were to take place, it would be for the whole length of the strip within your client's holding, not just for that part required of the possible access to proposed lot 4. Please advise this Department if the possible sale is of interest to your client company and the Department will provide you with further details.

12 On 17 February 1998, Watsons submitted a different plan of subdivision to the council. This provided for lot 4 to obtain its access from Derril Rd, by means of a 20 metre strip of land to the north of proposed lot 1. Watsons informed the council that a dam was located on the access strip to Bungower Rd originally proposed and that the land on that access strip "can flood during winter and spring".

13 By a letter dated 25 February 1998, Mr Muir wrote to Mr Tom Trevaskis of Trevola Holdings enclosing a copy of the letter from the DNRE and referring to the two options (licence or sale) set out in that letter. Mr Muir said in his letter that if Trevola Holdings opted for the 10 year licence:

> As a backup we could amend the plan of subdivision by showing a carriageway easement along the western boundary of lot 5 in favour of lot 4.

Mr Muir gave evidence that the easement was only a backup method of access to lot 4.

14 By a letter dated 31 March 1998, Mr Muir asked the solicitors for Trevola Holdings:

> … whether the plan of subdivision should be amended to include a ten metre wide carriageway easement along the western boundary of lot 5.

15 A file note by Mr Muir dated 9 April 1998 recorded that he had raised this issue with Mr Trevaskis and he had agreed that such an easement was to be included. The file note continued:

> Tom also advised there is to be something in the section 32 about removing the easement when access across the drainage reserve is resolved and the easement becomes redundant.

16 The plan of subdivision, containing the easements referred to above, was registered on 10 August 1998.

17 In October 1998, Mr and Mrs Batur purchased lot 3, on which the original "Annesleigh Park" homestead is situated. They now live at that property. Mr Batur said that his occupation was "primary producer and sandblaster painter". He said that they kept a small number of cows and calves and sheep, and that they cut hay from the pastures.

18 Although Trevola Holdings had expressed interest in purchasing the whole of the land constituting the drainage reserve in the original property, the DNRE eventually refused to proceed down that path due to opposition from the council, which expressed the view in a letter dated 30 September 1998 that:

> … it would be inappropriate to sell the land into private ownership due to the subsequent loss of control over future land use … [and that] a drainage easement over the subject land would not be adequate to ensure proper management of the land for drainage purposes.

19 Thus, on 30 October 1998, Watsons on behalf of Trevola Holdings, applied to the DNRE for a 10 year licence to use the drainage reserve for access and grazing purposes. The letter also sought confirmation that the department had no objection to the owners of lot 4 constructing:

> … a bridge or similar structure across the drainage reserve linking the accessway and the main portion of lot 4.

20 The DNRE responded by a letter dated 26 November 1998 offering Trevola Holdings a 10 year licence, under s 138 of the Land Act 1958, "for access purposes", commencing on 1 December 1998 at an interim rental of $6000 for the full 10 year term. A copy of the standard licence was enclosed. It provided that, apart from the licensor having the right to cancel the licence if the licensee failed to comply with any of its terms and conditions, the licensor also had the right to terminate the licence upon 30 days' notice notwithstanding that there had been no default by the licensee.

21 Subsequently, the DNRE ascertained that the boundary of the drainage reserve was fenced and accordingly advised that a licence was not required for the entire length of the drainage reserve as initially proposed. This reduced the rental to $104 per annum. The DNRE also advised that Trevola Holdings would be allowed to construct a bridge across the drainage reserve "subject to the granting of planning approval, if required". By a letter dated 25 February 1999, Mr Muir advised Mr Trevaskis that Watsons did not consider that a planning permit was required to link "the two sections of lot 4".

22 Trevola Holdings did not proceed to obtain the licence. According to a note from Mr Trevaskis to Mr Muir, it decided to sell the property "as is" and leave it up to the new owner "to negotiate for the crossing".

23 Lots 4 and 5 were advertised for sale by auction on Saturday 17 April 1999. Their address was given on an advertising brochure for the auction as "Bungower Road, Moorooduc". Mr Batur said that he had seen this brochure at the time. Neither lot was sold at the auction.

24 However, in May of the following year, the defendants purchased lot 4. The subject property was described in the contract of sale as:

> Lot 4 Bungower Road (also known as lot 4 Derril Road Moorooduc [sic].

Mr Muir said that the address should have been the other way round because lot 4 had frontage to Derril Rd and only an easement to Bungower Rd. Relevant correspondence from the DNRE and the standard licence were included in the vendor's statement forming part of the contract of sale. Mr Batur said that he was aware of the presence of the dam on the easement. He gave evidence that prior to this purchase he had a discussion with Mr Trevaskis in which Mr Trevaskis told him that whoever bought lot 5 would modify the dam wall to provide the full 10 metre access.

25 In June 2000, the plaintiff purchased lot 5. Mrs Anceschi built a combined house and barn on lot 5 and moved there to live toward the end of 2001. Mantec now runs a horse breeding operation on lot 5. Mrs Anceschi said that water from the dam was reticulated to every paddock on the property. The dam was the main source of water for Mantec's business.

26 Mr Batur agreed in cross-examination that he had been interested in purchasing lot 5. However, an early offer was made by Mrs Anceschi and the property was sold shortly before it was again due to be auctioned. Although Mr Batur was told there had been an offer made for lot 5, he said that he did not believe it or that the vendor would sell before auction, so he did not make a better offer.

27 Mr Batur gave evidence that the first time he met Mrs Anceschi was at the dam. He introduced himself and asked her whether she knew that it was his "driveway" there. She said that she knew that. He then asked her when was she going to remove the wall and give him access to his full 10 metres. He said that Mrs Anceschi said that she was going to organise contractors to do so. And two days later a "big machine" came and chopped back part of the dam wall making a flat part two or more metres in width.

28 Mrs Anceschi denied Mr Batur's evidence about the substance of this conversation. She said that she and her then husband had had amiable meetings with Mr Batur "for the first couple of months, and nothing was ever said about the easement or the dam". She said that it was not until she started work removing gorse from the dam in late 2000 that Mr Batur approached her and asked if she could grade a track along the dam wall "because he was thinking of re-establishing a bridge that was slightly to the south of the dam and that was in line with one of his laneways" in order to move cattle from lot 3 to lot 4. She agreed to do so and arranged for a contractor to cut along the dam wall. Mrs Anceschi said that a track "two to three metres wide" was provided which she thought was "adequate for the things that Mr Batur had asked". She also said that Mr Batur never re-established the bridge or used this part of the easement for the proposed purpose.

29 Although it is probably not necessary to decide which version of the conversation is more accurate, I consider that Mrs Anceschi's evidence, about what was said, to be more plausible, particularly as Mr Batur's evidence differed from what had been pleaded. Whatever was discussed, the work described by both Mrs Anceschi and Mr Batur was carried out, at Mantec's expense. Mrs Anceschi said that this track was wide enough to enable her to drive her

tractor up and down the easement past the dam wall. She agreed, however, that it was possible that in doing so she partly went onto the flat side of the drainage reserve.

30 Mr Batur agreed that until late 2006, apart from the question of the dam, direct access to the easement from Bungower Rd remained blocked by a number of large willow trees and a fence that ran roughly parallel with, but several metres inside, the southern boundary of Mantec's property. Mr Batur said that during this period he walked up and down the easement on a number of occasions.

31 Since purchasing lot 4, Mr and Mrs Batur have undertaken a number of works on that land, including the installation of a large hay shed and the excavation of a sizeable part for use as a wetlands area. It is clear from the evidence that the easement was not used as access during the construction of these projects.

32 It was common ground that there are a number of other ways of accessing lot 4. First, there is an old disused bridge across the drainage reserve from lot 3 to the easement on lot 5 approximately level with the northern wall of the dam ("the disused bridge"). The easement could then be used to gain access to lot 4. However, apart from its poor condition, the disused bridge was difficult to use because of thick gorse surrounding it.

33 Secondly, there is another bridge over the drainage reserve, between lots 3 and 4, just north of the boundary between lots 4 and 5 ("the middle bridge"). Mr Batur improved this bridge by placing a number of telephone poles over the existing pipes. Mr Batur said that he used the middle bridge for stock to cross from lot 3 to lot 4. He had driven his four-wheeled bike or small tractor across it in summer time, but in winter there was a danger of the supporting pipes sinking into the mud. Mrs Anceschi gave evidence that she had seen Mr Batur drive his tractor and tanks across the middle bridge and that she had seen his stock agent's car cross that bridge "on a number of occasions".

34 Thirdly, lot 4 is accessible from Derril Rd. As stated previously, the land in lot 4 is in two parts. The handle of the "battleaxe" consists of a 20 metre wide strip (approximately 1.312 ha in size) which runs for about 700 metres along the northern boundary of lot 1. On the other side of the drainage reserve is the main part of lot 4 which is approximately 33.56 ha in size. Mr Batur has constructed a crushed rock road on the 20 metres wide strip. A narrow bridge at the end of the road where the drainage reserve crosses lot 4 ("the Derril Road bridge") had been improved by him, thus providing access to the main part of lot 4. Mr Batur said that the Derril Rd bridge was not suitable for crossing by heavy machinery, large trucks or semi-trailers. However, he agreed that he did sometimes use this bridge "for trucks and machinery" and that it was also used to bring on the 6.8 tonnes of material used in the construction of the hay shed. However, sometimes drivers of large trucks, like the dairy farmer who had come to collect hay, were not prepared to drive across the Derril Rd bridge. The gateway to lot 4 at Derril Rd has been given the address "1050 Derril Road".

35 Finally, Mr Batur gave evidence that in the summer it was possible to drive heavy machinery over the drainage reserve in a dry, flatter part about halfway between the middle bridge and the Derril Rd bridge, that is between lots 1 and 4. He said that the owner of lot 1 allowed him to use this access. According to Mr Batur, most of the heavy machinery (bulldozer, excavator) used in the construction of the wetlands came on to lot 4 by this means.

36 Mrs Anceschi gave evidence that she had seen "all manner of machinery" on lot 4. She had never seen them crossing the flatter part of the drainage reserve as suggested by Mr Batur. They had appeared "from behind the foliage at the north of lot 4", so she presumed they came down the Derril Rd entrance. Mrs Anceschi described the machinery she had seen:

> Scrapers, bulldozers, a very long truck, I don't know whether it was a semi trailer, but a very long truck. Haymaking equipment, hay cutting equipment, hay baling equipment. Trucks with steel for the shed. All manner of trucks and heavy vehicles.

37 One problem with these various other means of access is that they require the Baturs to cross the drainage reserve which is Crown land. Strictly, this can only be done by way of a licence. Mr and Mrs Batur have not sought, and do not have, such a licence. Mr Batur said in evidence that he saw no point in applying for a licence when it could be taken away on a month's notice. There was no evidence that the Baturs had ever sought to negotiate with the DNRE about the terms of the licence or the cost of improving the Derril Rd bridge. Interestingly, in response to a request by Mantec's solicitors about whether a licence would be granted if the owners of lot 4 applied for it, by a letter dated 23 November 2007 the Department of Sustainability and Environment replied:

> As it is over 9 years since a licence was last offered to the then owners of Lot 4 the rental, conditions etc offered at that stage would be obsolete, therefore the process to determine appropriate rental, conditions etc would have to be undertaken again. This process would only be undertaken if an application to use Crown land was received from the owners of Lot 4.

38 Even though the Baturs do not have a licence, it is clear that they and those working for them regularly cross the drainage reserve to gain access to the main part of lot 4.

39 Mr Batur said that in the future he wished to bring large vehicles onto lot 4, in order to build a house for his son and carry out other works on the land:

> We need big heavy trucks with concrete and some other machinery, maybe crane, whatever, to coming [sic] down there to build the house.

40 The use of the easement was not the subject of any dispute between the parties for several years after the initial work on the dam wall, even though Mrs Anceschi said that in 2000, at about the same time as the work on the dam wall, she erected a post and wire fence ("the 2000 fence") to the north of the dam running up to the southern boundary of lot 4. This fence was about four metres inside the eastern boundary of the easement, roughly in line with the western wall of the dam, but there was no objection from the Baturs at that time.

41 In about June 2005, Mantec erected a post and wire fence ("the 2005 fence") near the western boundary of lot 5 between Bungower Rd and the dam. The fence is parallel with the drainage reserve and is constructed approximately four metres inside the line of the 10 metre wide easement, although as it approaches the dam it tapers slightly west to the line of the dam wall. Prior to that time there was a fence along the boundary between the drainage reserve and lot 5, but it had fallen into disrepair.

42 This time, the defendants did object. Mr Batur gave evidence that, at the time the 2005 fence was constructed, he had a discussion with Mrs Anceschi and explained that he did not agree with the positioning of the fence inside the boundary of the easement. He said that she told him that he did not need to use

the easement as he had other access. Mr Batur also said that around this time he asked Mrs Anceschi on several occasions when was she going to do something about the dam wall.

43 Mrs Anceschi agreed that she did not discuss the erection of the 2005 fence with the Baturs prior to undertaking the work. She said in evidence that she believed that the erection of the fence in that position, rather than on the boundary of her property, caused no impediment to Mr Batur's access, given that the fence lined up with the dam wall which already encroached approximately four metres into the path of the easement.

44 On 29 September 2006, Mrs Anceschi attempted to arrange a meeting on 2 October 2006 with Mr Batur and Mr John Parker, a former Surveyor-General of Victoria and an ex-director of Watsons, to discuss possible solutions to the problems of access associated with the easement. Mr Batur did not attend the meeting. Two days later Mrs Anceschi left a note in their letter box expressing her disappointment that they did not attend, and proposing a further meeting.

45 Mr Batur did not respond. Instead, he and his wife sought legal advice regarding their rights with respect to the easement. On 9 October 2006, their solicitors sent a letter to Mantec seeking removal of the fence and the modification of the "encroaching large farm dam". The letter read in part:

> With respect to the dam wall that clearly interferes with our clients way rights we ask that you modify the dam with respect to its containment so that the dam is removed from E1 and E2. It should also be clear of E3.
>
> …
>
> In your response we ask again that you set out a programme for a date to complete the dam modification works, who will undertake those works, and how E1 and E2 will be left as a way capable of pedestrian and vehicular access.
>
> …
>
> We trust that it will not be necessary for our client to either take action to remove the fence or fill the dam.
>
> Our client reserves the right to take legal proceedings to seek redress in securing and maintaining their clear property law rights of access and to deal with the unlawful situation regarding the fence and the dam.
>
> …
>
> All that is necessary is your recognition of our clients' right and that you act to rectify the situation in the manner contemplated above.
>
> We appreciate that it may take some time for you to establish when the fence and the dam works will be undertaken. However your first response that you will proceed this way will be gratifying.
>
> Our clients otherwise reserve their rights with respect to your action and their access and easement rights.

46 On behalf of Mantec, Mrs Anceschi replied to the solicitors by a letter dated 13 October 2006. She proposed a re-scheduled meeting "as we have some useful suggestions to make regarding boundaries". She pointed out that the dam had been in place before lot 5 was put up for sale and asked that the solicitors advise their client "not to trespass on our property or take unilateral action until these matters are resolved". Mrs Anceschi did not respond to the request to submit a timetable for the undertaking of works to modify the dam wall and remove the fence.

47 On the evening of the 13 October 2006, without discussing his plans with his neighbour, Mr Batur entered onto Mantec's property and cut down one or two large willow trees on the outside of the Bungower Rd fence, which was one to two metres inside the southern boundary of lot 5. He then removed the trees and cut a section of the fence at the Bungower Rd end of the easement, between the drainage reserve and the recently erected fence, and rolled back the wire. Mr Batur then entered the easement with his tractor and slashed the grass along the length of the easement up to the dam. It appears that this, or a later, slashing by Mr Batur may also have destroyed many small trees which had been planted by Mrs Anceschi on what she believed was the boundary between the drainage reserve and the easement.

48 Mrs Anceschi gave evidence that she was "frightened" by Mr Batur's actions. She said that even though she accepted that he had the right to remove vegetation on the easement, his behaviour in doing so without consulting her was "threatening". Mrs Anceschi also indicated that his actions — in cutting the trees and the fence — gave rise to her belief that the dam and the fence on her property would be destroyed or damaged by him.

49 Mr Batur said that he believed it was his right to be able to access the easement of way, and that he was taking steps to perfect that access.

50 Some time after Mr Batur cut the fence on Bungower Rd, Mantec installed a gate in order to secure the property and its valuable thoroughbred stock. The gate was padlocked, and a key provided to the Baturs.

51 The Baturs' solicitors wrote again to Mantec on 8 November 2006 complaining that they had not "had a response from Mrs Anceschi to our correspondence save to seek to convene a meeting". The letter concluded:

> We write to place you on notice that unless written advice is received within 7 days that:
>
> 1. the recently erected fencing will be removed within a short period, and
> 2. an acceptable proposal is made for the relocation of the dam restoring our clients' access rights
>
> legal action will be taken accordingly.

52 By a letter also dated 8 November 2006, on behalf of Mantec, Mrs Anceschi wrote again to the Baturs' solicitors. She stated in part:

> A 5 metre access road beside the dam was constructed within the easement in 2001 as requested by Mr Batur, at our expense. The road was elevated to ensure that it does not drop below the high water mark of the dam. Previous to this the easement past the dam was impassable.
>
> …
>
> We are quite willing to allow a 5 metre wide access to lot 4 — in fact it now exists — albeit with an elevated section to accommodate the dam. The integrity of this dam, especially in drought times, is critical for our horse breeding operations.

Mrs Anceschi explained in evidence that she had said five metres because she felt that:

> … if we tickled the dam wall a bit more we could just get 5 metres without compromising the wall of the dam and I measured my drive with my driveway which is 3 metres wide and I thought well 5 metres wide would be adequate, because I get very heavy vehicles up and down my drive with no problem.

Later she said that:

> … because of the slope of the dam wall, a lot of the wall has eroded down onto the path that I created, narrowing it from when it was first done. I mean it's — I agree it's not really satisfactory. It's wide enough for me to drive my tractor down but, of course, it's not satisfactory for what Mr Batur wants. But I'm sure it could be tickled in a way to give him 5 metres past the dam.

53 On 12 November 2006, Mr Batur entered the easement and sprayed grass and vegetation. Mr Batur acknowledged that he also sprayed over the line of the 2005 fence into the plaintiff's paddock to the full extent of the 10 metre width of the easement. Mr Batur said that he did this because he had received a fire hazard notice from the council, but admitted it was in respect of other land.

54 On 12 December 2006, Mrs Anceschi became concerned, as a result of a conversation with Mr Leigh Allen, the contractor she had employed to erect her fence in 2005, that there was a real and immediate threat that Mr Batur would destroy the fence and damage the dam wall.

55 Accordingly, Mantec sought legal advice. At 2.11 pm on 13 December 2006, Mantec's solicitors faxed a letter to the Baturs' solicitors seeking an undertaking from their clients. The letter concluded:

> We are instructed that on or about 12 December 2006 Mr Batur in a telephone discussion with Mr Leigh Allen, a local fencing contractor used by our client for fencing, stated that unless the fence was removed by 8.00 am Thursday 14 December 2006 he would enter the land with bulldozers and destroy it, it was further intimated that your clients believe that they have some right to construct upon our client's land a roadway. We are not presently aware as to the asserted right to construct a roadway over the land which in any event is clearly flood prone. Our client believes from the threats made that your clients may also damage the dam wall.
>
> The threats made by your clients are clearly inappropriate and are such that our client has no choice but to seek legal assistance in the matter. We advise that unless an undertaking is given by your client that they will not enter upon the land to remove or damage the fence and dam wall then we are to apply to a court for an injunction restraining your client's conduct. Accordingly we advise that unless we receive from you by 3.45 pm today an undertaking in writing that your clients will not damage, remove or interfere with the fence erected upon the easement or otherwise cause damage to client's property including the dam we shall apply ex parte to the Court for appropriate orders …

56 No such undertaking was given. On 13 December 2006, the court granted an ex parte interim injunction restraining the Baturs from damaging, destroying, altering or otherwise interfering with any property of Mantec, including but not limited to any fencing or dam situated on Mantec's land (including any easement). On 22 December 2006, the injunction was extended by consent until the trial of the proceeding or further order.

57 Mr Batur denied in evidence that he had told Mr Allen that he intended removing the fence. Mr Batur stated that he sought a quotation from Mr Allen for the cost of removing the fence, which he would pay for, with the suggestion that Mantec pay to rebuild the fence further east, on the boundary of the easement.

58 Various survey plans were tendered in evidence. It is unnecessary to spend time attempting to spell out the precise measurements because by and large the parties were agreed about the approximate measurements. For example, it was agreed that part of the 2005 fence was sometimes a bit over four metres in from

the eastern boundary of the easement. It was also agreed that the track along the wall of the dam was generally between two and five metres in width, but sometimes a little less than two metres. More importantly, it was agreed that a car or a truck could not travel along the easement past the dam wall as it currently stood. Whether a four-wheel drive car could do so without entering onto the drainage reserve, was the subject of debate.

The proceeding

59 By its amended statement of claim filed on 21 December 2006, the plaintiff sought a permanent injunction restraining the defendants from damaging or interfering with the property of the plaintiff; a declaration that the construction and positioning of the plaintiff's 2000 fence and 2005 fence did not unreasonably interfere with the defendants' use and enjoyment of the right of way created by the easement, and damages for trespass.

60 In their further amended defence and counterclaim filed on 12 March 2008, the defendants sought a number of declarations:

(a) a declaration that the construction and positioning of the plaintiff's 2000 fence and 2005 fence constituted an unreasonable interference with the defendants' use and enjoyment of the right of way created by the easement;

(b) a declaration that the defendants have a right to use their access along the easement as an easement of necessity;

(c) a declaration that the defendants have a right to deviate onto another part of the servient tenement as an alternative right of way enjoyed by them as owners of the dominant tenement having regard to the obstruction created by the plaintiff over the easement; and

(d) a declaration that the defendants are entitled to construct a road or way and/or upgrade the land where the easement is situated and to carry out works in relation to the large dam and the Bungower Rd gate so as to be able to properly, fully and/or reasonably enjoy the rights of way created by the easement.

The counterclaim also sought an injunction restraining the plaintiff from preventing the reasonable use and enjoyment by the defendants of the easement, and damages for obstruction of the easement.

61 The opposing claims for damages can be put aside. Counsel for Mantec stated at the commencement of the hearing that its claim for damages for trespass was not being pursued. Although counsel for the Baturs never formally abandoned their claim for damages for obstruction of the easement, no evidence was led about quantum and the claim was not pressed in final submissions.

The scope of the easement

62 To determine the parties' rights with respect to the easement, it is first necessary to establish the scope of the easement involved. It was created as an express easement by Plan of Subdivision No PS 415764E, which was certified under s 11(7) of the Subdivision Act 1988. I consider that the requirements of s 12(1), (1A) and (1B) of the Subdivision Act were complied with. In particular, the purpose of the easement was specified as "way". Therefore, in my opinion, provisions such as s 12(2) of the Subdivision Act and s 98 of the Transfer of Land Act 1958, which deal with implied easements, are irrelevant.

63 The question is what is meant by the single word "way". Mr Muir, the surveyor who drew up the plan of subdivision, gave evidence that suggested that he used the word "way" interchangeably with the word "carriageway". He said:

> I had no particular reason for using way rather than carriageway … but the intention was that it wouldn't be any different to carriageway.

64 The defendants accordingly argued that s 72(3) and the Twelfth Schedule of the Transfer of Land Act applied. I do not agree. Under that section where in any folio of the register or instrument, an easement is referred to or created by the use of the words "a right of carriageway over", such words are to have the same effect and be construed as if the words contained in the Twelfth Schedule had been inserted in the folio or instrument. The Twelfth Schedule defines what is meant by a "right of carriageway", which is a right for the registered proprietor, his or her "tenants servants agents workmen and visitors to go pass and repass at all times … for all purposes" over the easement, whether by foot, horse, cart or carriage. However, the word used in the plan of subdivision was "way" not "carriageway", and while the words might be interchangeable in meaning, the wording of the plan of subdivision did not, in my opinion, meet the statutory requirement.

65 Nevertheless, nothing seems to turn on whether or not s 72(3) and the Twelfth Schedule of the Transfer of Land Act applied, because the parties accepted that a "right of way" would have a similar meaning to a "right of carriageway".

66 The plaintiff accepted that the easement of way included a right to enter and re-enter the easement by foot or by a vehicle such as a tractor which could negotiate the boggy ground and the narrowing of the track at the dam wall. The main point of difference was whether the defendants had a right of full access along the easement, including by large trucks, semi-trailers and heavy machinery, if suitable changes could be made to the dam wall to permit such access.

67 In *White v Grand Hotel Eastbourne Ltd*, Lord Cozens-Hardy MR said:[1]

> [This] is a right of way claimed under a grant, and that being so, the only thing that the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant …

In this instance, there is no grant setting out the scope of the easement, so that there are no words to construe beyond the single word "way".

68 However, the surrounding circumstances are not irrelevant to the construction question. In *Robinson v Bailey*, Lord Greene MR stated:[2]

> Obviously the question of the scope of the right of way expressed in a grant or reservation is prima facie a question of construction of the words used. If those words are susceptible of being cut down by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut down.

1. [1913] 1 Ch 113 at 116.
2. [1948] 2 All ER 791 at 795.

69 Similar views have been expressed more recently by the Supreme Court of New South Wales, with the addition that the surrounding circumstances include the presumed intention of the parties. In *Rodwell v GR Evans & Co Pty Ltd*, Holland J stated:[3]

> However wide the words used, the ambit of a right of way will be construed having regard to the state of affairs at the time of the grant and the purposes of the grant and an excessive or unreasonable user may be restrained by the court on the ground of going beyond the presumed intention of the parties.

70 In *Finlayson v Campbell*, Young J said:

> One ordinarily construes the grant of an easement as at the date of its creation and if there is any ambiguity, looks at the physical attributes of the land as at that day to see what sort of right of carriageway could have been intended.[4]
>
> …
>
> One must work out what was in contemplation at the time of the grant though perhaps the cases suggest that one must objectively attribute to the grantor more than he or she may have actually had in contemplation.[5]

71 Counsel for the plaintiff submitted that it was not the intention of the grantor, Trevola Holdings, that the easement from Bungower Rd be the primary access to lot 4. He submitted that rather the intention was, as Mr Muir put it, that the easement be the backup or alternative access pending resolution of the issues about the drainage reserve. It was not possible to ascertain what Mr Trevaskis had in contemplation at the time, because he had died before the hearing.

72 On the other hand, counsel for the defendants referred to the alleged statement by Mr Trevaskis to Mr Batur that the purchaser of lot 5 would modify the dam wall to provide the full 10 metre access. I cannot place any reliance on this evidence. Not only is it vague and implausible hearsay, it also could only be evidence of what Mr Trevaskis was thinking in mid-2000 and not in mid-1998, when the easement was created.

73 More importantly, counsel for the defendants pointed to the fact that the easement was created by the plan of subdivision, which was referred to on the titles to lots 4 and 5, and that the plan showed that it was 10 metres wide for its full length, and that there was no indication that it was conditional or otherwise subject to some limitation, as reasons why the easement of way should be given its ordinary meaning, which would include all forms of vehicular traffic. This is a persuasive argument, in my opinion.

74 One other circumstance that I consider should be taken into account is that the easement in question benefited a rural property. Thus, it must have been contemplated that the easement would be used in the ordinary course of farming activities, should it be needed. This would likely involve the movement of cattle or other stock, the driving of tractors, motorbikes and other machinery and access by car or utility vehicle. I see no reason why this should not also include the occasional large truck or semi-trailer. Trucks are clearly used in farming activities, and occasionally bringing a larger vehicle onto the land is not an unlikely occurrence. In addition, it must have been contemplated at the time that

3. (1977) 3 BPR 9114 at 9119.
4. (1997) 8 BPR 15,703 at 15,707.
5. At 15,708.

a house might be built on the newly subdivided lot 4. There seems to be no reason, therefore, why the easement of way does not extend to all forms of vehicular traffic and I so find.

Obstruction of an easement

75 The next question for determination is whether the plaintiff has obstructed or interfered with the defendants' right of way along the easement between Bungower Rd and lot 4. There are three possible instances of that obstruction or interference — the dam, the plaintiff's two fences and the gate at Bungower Rd. I will consider each situation in turn, but before doing so it is important to set out what is meant by obstructing an easement.

76 For an obstruction to be actionable at common law it must be a substantial obstruction. In *Pettey v Parsons*, Lord Cozens-Hardy MR stated that:[6]

> [I]n the case of a private right of way the obstruction is not actionable unless it is substantial. There must be a real substantial interference with the enjoyment of the right of way.

77 Further, in *Saint v Jenner*[7] it was determined by the Court of Appeal that in deciding what is a substantial interference with a right of way, the court is entitled to consider all the circumstances including the rights of the owner of the servient tenement.

The dam

78 The dam clearly obstructs the right of way because its western wall is built on part of the land which became subject to the easement, thereby reducing the width of easement, between the eastern boundary of the drainage reserve and the dam wall, generally to approximately five metres but, at its narrowest point, to approximately two metres. As previously stated, the defendants are in effect prevented from driving anything larger than a small tractor or four-wheel motorbike the full length of the right of way.

79 In the New Zealand case of *Spear v Rowlett*,[8] a coach house encroaching onto the right of way was held to be a substantial obstruction. Salmond J stated:[9]

> I find as a fact that the obstruction is substantial, the available width of the right-of-way being, at the point of obstruction, reduced thereby from 14 ft to 6ft, and the right-of-way being thus rendered useless for vehicular traffic.

These facts are similar to the situation in this proceeding. The inability to drive any form of vehicle along the easement onto lot 4 would indeed appear to be a substantial interference with the defendants' reasonable use and enjoyment of the right of way. In this sense, I consider that the dam is a substantial obstruction.

80 An important fact is that the dam was in existence prior to the creation of the easement. Obvious questions, in this situation, are whether the dominant tenement takes the easement subject to the obstruction or whether it is taken free from the obstruction and what impact that answer has on the rights and obligations of the respective owners of the dominant and servient tenement.

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6. [1914] 2 Ch 653 at 662.
7. [1973] Ch 275 at 279 per Russell, Edmund Davies and Stamp LJJ.
8. [1924] NZLR 801.
9. At 802.

81 In *Spear v Rowlett*, the dominant tenement's predecessor in title was granted the right of way by one Fanny Valentine, subject to the express proviso that the coach house on the easement remain standing while she was alive. The grantor died and her interest in the servient tenement was acquired by the defendants. The plaintiff brought an action on the basis that as the grantor was no longer alive the right to maintain the obstruction on the right of way was at an end. The plaintiff sought a mandatory injunction that the defendants be required to remove the coach house.

82 Salmond J found that the dominant tenement took the grant of easement free from the obstruction once Fanny Valentine died:[10]

> Where, therefore, as in the present case, a right of way is granted over land on which there exists an obstruction at the date of the grant, it is a question of interpretation of the instrument of grant whether the easement is granted subject to the obstruction or whether it is granted free from it.
>
> …
>
> In the present case the terms of the grant leave no doubt as to whether the grant was taken subject to the existing obstruction by the coach-house or free from it. It was taken subject to that obstruction so long as the grantor lived, and free from it after her death.

83 Unfortunately, the approach outlined in *Spear v Rowlett* does not provide much assistance in this proceeding, as there is no instrument of grant to interpret. As such, it is necessary to look at all the circumstances surrounding the creation of the easement. It is clear that neither of the parties is responsible for the difficulties caused by the position of the dam. It had existed for many years before they purchased their respective lots.

84 Mr Batur did not dispute that the defendants purchased lot 4 with full knowledge of the position of the dam on the easement. The defendants live on lot 3, and were aware of the physical attributes of the adjoining lots. Mr Batur's claim that the vendor's director promised him that the purchaser of lot 5 would remove or modify the dam wall to allow full access to the easement does not assist the defendants. Even accepting that such a promise was made to Mr Batur by Mr Trevaskis, verbal promises made by the vendor cannot bind the plaintiff.

85 Further, the plaintiff purchased lot 5 in the expectation that she would be able to continue to use the dam as the main water source for her business, although, obviously, she also knew of the existence of the easement.

86 In the absence of a clear indication such as was present in *Spear v Rowlett*, it does not seem reasonable to contend that the defendants took the grant of the easement free from the obstruction, thereby giving them a right to insist on the dam being removed from the easement. But that conclusion does not mean that the defendants do not have other rights with respect to the easement.

87 It seems clear that for a long time the Baturs were labouring under the misapprehension that Mantec was obliged to take the necessary steps to allow them full access along the easement. That this was not the correct legal analysis was apparently recognised when the defendants amended their defence and counterclaim in March 2008 to seek the declaration that they were entitled to construct a road or way and/or upgrade the land where the easement is situated

10. At 804.

and to carry out works in relation to the dam and the Bungower Rd gate so as to be able to properly, fully and/or reasonably enjoy the rights of way created by the easement.

88 As Salmond J held in *Spear v Rowlett*, when dismissing the plaintiff's contention that the defendants were required to remove the coach house, there is no positive obligation on the owner of the servient tenement to undertake any works on a right of way. His Honour stated:[11]

> Ever since the decision of the Exchequer Chamber in *Pomfret v Ricroft* ([(1669)] 1 Wm Saund 321 [85 ER 454]) it has been settled law that the grant of an easement does not ordinarily and in itself impose upon the grantor any positive obligation to undertake upon his servient tenement any works, whether by way of repair, construction, or otherwise, for the purpose of rendering that tenement fit for the exercise and enjoyment of the easement by the grantee. The obligation of the grantor is merely negative — an obligation, that is to say, to refrain from acts of misfeasance which obstruct the exercise of the grantee's rights. It is for the grantee himself, at his own cost, to execute on the servient land such works as may be reasonably necessary for the exercise and enjoyment of the easement; and a right to enter and to do all such works is impliedly conferred on him by the grant without any express provision in that behalf.

The right to undertake works to permit access over the right of way included not only removal of the obstructing building. It would also extend by way of example, according to Salmond J, to cutting a way through "impenetrable native bush" or erecting a bridge over a river.[12]

89 One of the cases relied on by Salmond J was *Newcomen v Coulson*, where Jessel MR stated:[13]

> [T]he grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only the right of keeping the road in repair but the *right of making a road*. If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather.

90 In *Lawrence v Griffiths*,[14] the plaintiffs, the owners of the dominant tenement, possessed a right of way three metres wide over the defendant's land. The right of way was impassable for vehicular traffic because the land in question was across the top of the gully that sloped away to one side. Substantial works were needed to construct a road in order to make use of the right of way. The plaintiffs sought a declaration that they had a right to construct a road, in accordance with detailed engineering plans they had obtained, and an injunction restraining the defendant from preventing them from doing so. The Full Court of the Supreme Court of South Australia held that the plaintiffs had a right to construct the road provided that such works did not injure the defendant's land beyond the boundaries of the easement.[15] White J concluded that it was:[16]

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11. At 803.
12. At 804.
13. (1877) 5 Ch D 133 at 143.
14. (1987) 47 SASR 455.
15. At 482 per Legoe J.
16. At 465.

> … implicit in the grant of a right of way like this that the plaintiffs could make it passable to traffic. It is, therefore, appropriate that the court should declare that the plaintiffs are entitled to make a road over the right of way. In the present state of the evidence, how they go about the exercise of their right is their business provided (i) the structures associated with the altered right of way do not trespass 1 centimetre beyond the limits of the 3 metres width of the north-south part of the right of way; and (ii) they do not interfere with the defendant's access to the rest of Lot 29 at the southern side of the right of way. The plaintiffs are entitled to make the right of way level and passable, to "seal" it and to erect some retaining walls, even though construction of such a slightly raised right of way will have the effect of diminishing the defendant's ordinary use of this eastern strip of Lot 29.

91 Similarly, in *Shelmerdine v Ringen Pty Ltd*,[17] it was submitted by the defendant that the grant of a right of way should be construed as a right of footway only, because at the time of the grant the street was unfit for vehicular traffic and permanently incapable of being used as a road. Brooking J, in rejecting that submission, stated:[18]

> No doubt at the time of the plan of subdivision and at all times since most of the land has in fact been inaccessible to vehicles, if only by reason of the cliff. But that is no answer to the suggested existence of a right of carriageway, for the grantee is entitled to make a road at his own expense.

Nor was it shown, according to Brooking J, that at the time of the transfer of lots on the plan of subdivision it was impossible, either legally or physically, for a road to be constructed. His Honour said:[19]

> So far as feats of engineering are concerned, altering the levels of the land and constructing a road suitable for vehicles would have been well within the capacity of the great civilisations of the ancient world.

92 However, the right to undertake works is not unlimited. In *Zenere v Leate*,[20] it was held that the right to construct a road is limited by what is reasonably necessary for the effective and reasonable exercise and enjoyment of the easement. The question of what amounts to reasonable use and enjoyment is to be answered in light of all the circumstances. McLelland J stated:[21]

> It is necessary to examine the respective rights and obligations of the dominant owner and the servient owner arising from the grant of an easement such as a right of way. The dominant owner has only such rights as are to be found expressly or by necessary implication in the terms of the grant. The servient owner has all the rights of an owner except those which are inconsistent with the exercise by the dominant owner of the rights expressly or by necessary implication conferred on him by the terms of the grant.

93 This issue was highlighted by the following passage from the judgment of von Doussa J in *Lawrence v Griffiths*. (Although his Honour dissented in part, this passage reflects the view of the whole court.) His Honour said:[22]

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17. [1993] 1 VR 315.
18. At 333 (Marks and Hedigan JJ agreed with Brooking J). See also *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343 at 348 per Kirby P, at 355–6 per Priestley JA, at 357 per Handley JA.
19. At 332.
20. (1980) 1 BPR 9300 (NSW Supreme Court).
21. At 9304.
22. (1987) 47 SASR 455 at 488.

> However the conclusion that the owner of the dominant tenement has the right to enter and construct a road, in this case leaves untouched another question which was to the forefront of the appellant's opposition to the work. That is the question whether the works would constitute only a reasonable use of the right of way, or would lead to an unreasonable interference with the use and enjoyment of the balance of the plaintiff's land.

94 The result is, therefore, that in my opinion the defendants have an ancillary right to undertake works in respect of the easement in order to make it passable for all types of vehicles, if those works can be performed without causing injury to the plaintiff's land, in other words, without damaging the dam or surrounding areas. This right might include a right to cut back the dam wall to widen the track next to the dam wall sufficiently to enable large vehicles to travel along it, or a right to build up the track so that it traversed along the top of the dam wall, if either option was found to be necessary and able to be carried out without damaging the plaintiff's land, and in particular the dam. But, in contrast with *Lawrence v Griffiths*, in this proceeding there has been no evidence of detailed engineering plans setting out how a road might be constructed and whether it is in fact possible to construct a road without damaging the dam or reducing its capacity. Mr Batur gave some vague evidence about how he envisaged the road could be constructed over the dam wall, but I consider that no final conclusion could be reached, on the basis of that evidence, as to whether that work could be undertaken without damage to the dam.

95 Mr Batur also gave some evidence about how he would like to raise and improve the track along the easement to overcome the problems of flooding and bogginess. Again, this evidence was vague and entirely devoid of any engineering plans or assessment. This omission is important. Mrs Anceschi gave evidence that she was concerned that such work might cause drainage problems on lot 5, as had happened when Mr Batur had built a road along the southern boundary of lot 4.

96 It has been held that the owner of the dominant tenement has:[23]

> … the right to select the contractor who will build [the carriageway], the right to select the particular form of paving which will be used, and so on.

So much may be accepted. However, I cannot, with respect, accept that a passage from the ex tempore judgment of Young J in *Bland v Levi*[24] should be read literally. In that case, which concerned the replacement of an existing driveway on the easement, his Honour stated:[25]

> The right to decide what works will be done, what is the thickness of the driveway and the like, are part of the rights that are granted to the dominant owner and are a matter for it alone.
>
> Accordingly, it seems to me that it follows that the plaintiffs cannot complain that they have not been given full and precise details of the work that is to be done.

The decision, which his Honour regarded as urgent, seems to have been influenced by the view that the objections to the replacement driveway were spurious and had more to do with the plaintiffs' objection to the defendant's plan to erect a block of apartments on their land.

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23. *Burke v Frasers Lorne Pty Ltd* (2008) 14 BPR 26,111 at 26,116, [28] per Brereton J.
24. (2000) 9 BPR 17,517.
25. At 17,520, [22]–[23].

97 It will be recalled that in the quotation from the judgment of White J in *Lawrence v Griffiths* set out above, his Honour said that:[26]

> In the present state of the evidence, how they [the plaintiffs] go about the exercise of their right is their business …

However, in that case "the present state of the evidence" was that the plaintiffs had provided the defendant with detailed engineering plans and White J went on to state two important provisos to the plaintiffs' ability to "go about the exercise of their right" as "their business" without considering the interests of the defendant.

98 In the circumstances, I consider that the situation in this case is distinguishable from that in *Bland v Levi* and that in *Lawrence v Griffiths*, not the least because of the drastic consequences to the plaintiff should the defendants' attempts to improve their access along the easement damage the dam. I consider that the plaintiff is entitled to know in advance, and have time to consider, the defendants' fully detailed plans if they choose to follow the course of attempting to improve the access along the easement.

99 I will defer consideration of just what this all means in terms of orders or declarations until I have dealt with the remaining issues.

The fences

100 The defendants submit that the two fences erected by the plaintiff in 2000 and 2005 respectively reduce the width of the right of way, such that they create an obstruction of, or an interference with, the defendants' reasonable use and enjoyment of the easement. The plan of subdivision provides for an easement of 10 m, but each fence is placed approximately four metres inside the easement's boundary, thus reducing the width to no more than six metres. The defendants submit that the full 10 m width is necessary to construct a two lane road on the easement. This point was emphasised by reference to a possible need for fire trucks to pass in an emergency. Further, counsel for the defendants pointed out that the 40% of the easement taken by the plaintiff was the driest 40%, thus aggravating the problem of bogginess.

101 While there is no absolute right of the owner of the servient tenement to fence the common boundary, in *Dunell v Phillips*[27] Waddell J found that there is a presumption that the servient owner should be able to do so. However, this presumption may be rebutted in the appropriate circumstances, if for example the effect of the fence on the common boundary would block the right of way and make it too narrow to use. In *Boglari v Steiner School and Kindergarten*, Neave JA stated the principle as follows:[28]

> 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. What is reasonable is determined by reference to the language of the grant, construed in the light of the surrounding circumstances. [Footnotes omitted.]

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26. At 465.
27. (1982) 2 BPR 9517 (NSW Supreme Court).
28. (2007) 20 VR 1 at 6–7, [26] (Chernov JA and Habersberger AJA agreed with Neave JA).

102 These cases dealt with the erection of a fence on the common boundary, which is not the present situation. The case of *Powell v Langdon*[29] was concerned with a right of way, 20 feet wide, that existed in favour of the plaintiff. The defendant constructed a gate and a wall across the right of way which reduced the width of the access to approximately eight feet. Roper J held that the gate and wall constituted a substantial interference. However, the decision is also authority for the proposition that there is no obligation to maintain the full width of the easement. His Honour held that there was no obligation on the defendant to maintain the full 20 feet, and that a 10 foot opening would have sufficed.[30] Thus, the width of the right of way extends as far as is required by the reasonable needs of the owner of the dominant tenement.

103 It is difficult to determine the issue of the fences in isolation because the bigger problem is the dam itself. Given the existence of the dam wall, which roughly lines up with the fences, while removal of the fences would widen the northern and southern ends of the easement, this would not provide any real benefit for the defendants in terms of providing vehicular access from Bungower Rd to lot 4.

104 Thus, the question of whether any relief should be granted in respect of the fences is clearly tied to the question of what happens with respect to the dam. At present, in my opinion, the fences alone do not constitute a substantial obstruction, because, in the current situation, they do not interfere with the dominant owner's reasonable use of the easement. Counsel for the plaintiff submitted that a right of way six metres was wide enough for the reasonable needs of the defendants in the current situation.[31] Certainly this appears to be the case while the easement can only be used by tractor or bike along its full extent. Whether this view would remain the same if the road was constructed over or beside the dam wall cannot now be answered. Much would depend on the type of road sought to be made on the easement.

105 Finally, it was not disputed that the defendants are entitled to keep the track along the six metres of easement clear of vegetation by slashing the grass or cutting back any overhanging branches from trees or shrubs growing on the drainage reserve.[32]

The Bungower Rd gate

106 It was submitted by the defendants that the gate erected by the plaintiff across the easement at Bungower Rd prevented the defendants from properly and fully enjoying their right of way and that they should be permitted to open up the entrance and place a gate some 10 metres in from Bungower Rd, so that large vehicles would not have to wait on that road while the gate was being opened. This design was said to be necessary in order to stop the waiting vehicle creating a traffic hazard.

29. (1944) 45 SR (NSW) 136.
30. (1944) 45 SR (NSW) 136 at 140.
31. *Cousens v Rose* (1871) LR 12 Eq 366.
32. *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274 at 280 per McTiernan J.

107 It is clear from *Gohl v Hender*[33] that the owner of the servient tenement may erect a gate across the right of way. In that case, and also in *Pettey v Parsons*,[34] it seems that the gate was not held to be actionable as long as it did not pose a substantial obstruction and was left unlocked. Napier J said:[35]

> For the reasonable use and enjoyment of their property the plaintiffs are entitled to fence it in, and, for that purpose, to maintain their gate, if in so doing there is no substantial interference with the defendants' right to pass and repass … 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.

108 In the current circumstances, the gate does not appear to pose a substantial obstruction to the defendants' access from Bungower Rd. The plaintiff erected the gate at her own expense when the fence was cut, in order to secure her property. It is an ordinary farm gate, padlocked, with a key provided to the defendants. At present, Mr Batur has only entered the easement from Bungower Rd by tractor or on foot and the locked gate has not caused any difficulty. In any event, the gate is large enough to drive a car through, and presumably even a small truck, and in that sense, it cannot be said to pose a substantial obstruction to the defendants' reasonable use and enjoyment of the right of way.

109 On the question of the lock on the gate, counsel for the plaintiff submitted that the line of authority suggesting that the gates must be left open and/or unlocked should not be followed, in the circumstances of this case. It was submitted that where gates are locked for the reasonable security of the owner of the servient tenement and a key is provided, there was no unreasonable interference with the rights of the dominant tenement. As Napier J said in *Gohl v Hender*:[36]

> [T]he question is one of fact to be determined upon the circumstances of the particular case, with a due regard to the competing rights and interests of the parties.

110 The gate in question provides access to the property from a public road. The plaintiff has expensive stock on its property which it wishes to keep secure. Having regard to this interest of the plaintiff, I consider that the locked gate, with a key provided to the defendants, currently does not pose a substantial interference with the defendants' reasonable use and enjoyment of the right of way.

111 Whether this view would remain the same if a road was constructed over or beside the dam wall, again is a question which cannot now be answered. In any event, if the defendants would prefer easier access, such as by a remote control gate or by a larger gate, they have a right to go onto the easement to undertake works to improve their access, at their own expense. Again, as previously stated, I consider that the plaintiff is entitled to know in advance of any changes that the defendants propose to make with respect to the gate.

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33. [1930] SASR 158.
34. [1914] 2 Ch 653.
35. At 162–3.
36. At 162.

Easement of necessity

112 I turn then to the final two issues. The defendants sought a declaration that they have a right to use their access along the easement as an easement of necessity. This was said to be an implied easement. In my opinion, the defendants' claim should be rejected. First, the Baturs have an express easement over lot 5. It is inappropriate, therefore, in the present circumstances to imply an easement of necessity.

113 Secondly, an easement of necessity is generally only implied where the right claimed is essential for the use of the dominant tenement, it must be more than a matter of convenience. In *Parish v Kelly*, Rath J stated:[37]

> The meaning of a right of way of necessity is that the grantor (or grantee, as the case may be) is not to have more than necessity requires, as distinguished from what convenience may require.

His Honour pointed out that the classic example of such necessity was where land became landlocked. Thus, with respect to an easement of way the courts have generally regarded the existence of an alternative means of access, as fatal to a claim of necessity, even if the alternative access is very inconvenient.[38]

114 It was submitted by counsel for the defendants that the existence of possible permissive access to landlocked land did not prevent the implication of an easement of necessity. In *Barry v Hasseldine*,[39] the plaintiff's predecessor in title bought from the defendant a block of land which was enclosed on all sides by the defendant's land and others. At the time of purchase, access to the land was obtained over a disused airfield which abutted the public highway, by permission of the owner of the airfield. The plaintiff purchased the property in 1949 and enjoyed the same permissive access over the airfield as the original grantee until it was closed off in 1950. The plaintiff brought an action claiming an implied right of way by necessity over the defendant's land. The court held the plaintiff had a right of way by necessity notwithstanding that at the date of the grant there existed a permissive way to his property over the land of a stranger. In that case, Danckwerts J held that:[40]

> [i]t is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased.

115 In my opinion, the facts in *Barry v Hasseldine* can be distinguished from the facts in this proceeding. Here, the defendants have not shown that the permissive access was at risk of being closed off to them. They have access from Derril Rd, but in order to enter onto the main part of lot 4, they must cross the drainage reserve, which is Crown land. Strictly, the defendants must have a licence to cross the bridge over the drainage reserve. But the defendants have never sought a licence, and since 2000 they have crossed the drainage reserve at will, despite not possessing a licence. There is no evidence that this position is about to change. Nor is there evidence that they would not be granted a licence. On the

37. (1980) 1 BPR 9394 at 9399 (NSW Supreme Court).
38. *McLernon v Connor* (1907) 9 WALR 141.
39. [1952] Ch 835.
40. At 839.

contrary, there is evidence that a 10 year licence would have been easily obtainable in 1998 for a small sum. The fact that the suggested terms of that licence would have allowed the Crown to terminate the licence on a month's notice without any default on the part of the defendants does not mean that the defendants could not continue to have lawful access while the licence was in existence. In my opinion, there is no necessity, until such time as the permissive access is closed off to the defendants and their land becomes landlocked.

116 Counsel for the plaintiff submitted that it could never be said that lot 4 was landlocked because part of lot 4, the "battleaxe" handle, fronts Derril Rd. Counsel submitted that the defendants therefore enjoyed complete and unfettered access to lot 4 and that they gained that access the moment they turned from Derril Rd and travelled past the gate marked "1050 Derril Road". He submitted that the problem for the owners of lot 4 was not that they had no access from their lot to a road, but that their lot was split into two by the drainage reserve. I do not agree. It seems to me that it would be correct to describe the main part of lot 4 as "landlocked", if there was no easement over lot 5 and the Crown was refusing access over the drainage reserve. However, that is not this situation.

Deviation

117 The defendants also sought a declaration that they have a right to deviate onto another part of the servient tenement as an alternative right of way, because of the obstruction posed by the dam. Once again, the evidence relating to such a proposal was very vague. It was simply suggested that the vehicular traffic travelling north could turn east off the easement just south of the dam and then turn north again to the east of the dam and either turn west to the north of the dam and then return to the original easement once past the west wall of the dam or continue north through lot 5 until lot 4 was reached. Not surprisingly, Mrs Anceschi was unhappy with this suggestion which, among other problems, would bring the vehicular traffic much closer to her home. It would also involve a much greater use of lot 5 because of the need to shape the 90° turns to accommodate large vehicles.

118 Fortunately, these difficulties do not need to be considered further because it is clear that the right to deviate only arises where some form of obstruction is created by the grantor. Ordinarily, the grantee of a right of way has no right of deviation onto another part of the servient tenement.[41] However, in *Selby v Nettlefold*[42] Lord Selbourne LC said:[43]

> It is admitted that if A grants a right of way to B over his field, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land without trespass.

119 The obvious point of distinction is that *Selby v Nettlefold* describes a situation where an obstruction was subsequently created by the grantor. Counsel for the defendants submitted that although the dam was pre-existing it did not become an obstruction until the date of the grant when the grantor's agent, Watsons,

41. *Bullard v Harrison* (1815) 4 M&S 387; 105 ER 877 (KB).
42. (1873) LR 9 Ch App 111.
43. At 114. See also *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343 at 348 per Kirby P, 355 per Priestley JA; *Slorach v Mount View Farm Pty Ltd* (1998) Q Conv R 54-512; BC9803366 at 5 per Jones J.

positioned the easement in apparent ignorance of the position of the dam. I do not consider that this has any relevance. The fact is that the obstruction of the right of way by the dam was not something which was brought about by the plaintiff.

120 In my opinion, therefore, the defendants have no right to deviate around the dam.

Injunctive relief

121 Counsel for the plaintiff indicated in closing submissions that the permanent injunction originally sought by the plaintiff would not be pursued. The plaintiff submitted that the better approach was to discharge the injunction obtained, albeit that it had been properly obtained on an interlocutory basis, and that the rights of the parties be determined by reference to the declaratory relief sought in the defendants' counterclaim.

122 Counsel for the defendants submitted that in any event no permanent injunction should be granted in favour of the plaintiff because all of the conduct of the defendants about which the plaintiff had complained was conduct in which the defendants were lawfully entitled to engage. Thus, removing the willow tree or trees and rolling back the fence at the southern end of the easement and slashing the grass along the easement was not unlawful conduct by Mr Batur, as he was one of the owners of the dominant tenement.

123 It even seemed to be suggested that there had been no basis for the interlocutory injunction in the first place because the defendants had stated that they would take legal action if the plaintiff did not comply with their demands. I do not agree. While the defendants' solicitors' letter of 8 November 2006 did say that legal action would be taken, the same had been suggested as a possible course of action in their letter of 9 October 2006 and yet Mr Batur had resorted to self-help some four days later. While Mr Batur's conduct set out above may have been lawful, carrying out the threat in the October letter that he might have to take action to "fill the dam" would not have been lawful in that, as has been discussed, it would go well beyond the rights of the owner of the dominant tenement. However, it is unnecessary to pursue this issue further at this stage because no permanent injunction is sought against the defendants.

124 Although it was not completely clear, it seemed to me that the defendants also did not seek the making of the permanent injunction originally sought by them. They seemed to be content with the making of declarations which would set out just what were the rights and obligations of the owners of the dominant and servient tenements.

125 This sensible approach by both sides accorded with the approach outlined by McLelland J in *Zenere v Leate*:[44]

> In relation to the matters discussed … it is proper to make appropriate declarations of the rights of the parties, but I have reached the conclusion that it would be inexpedient to grant injunctive relief in respect thereof, at least at the present stage. The considerations which lead me to refuse immediate injunctive relief are as follows: First, I consider that neither the plaintiffs nor the defendants have done other than assert or attempt to exercise rights which they genuinely thought they had. The questions which have been litigated have not been free from difficulty, but now that they have been determined so far as they presently can be, it seems to me unlikely that any party will

44. (1980) 1 BPR 9300 at 9308 (NSW Supreme Court).

> attempt to act inconsistently with those determinations. Secondly, the parties are neighbours and may well remain neighbours for many years. To have their future relationships carried on under the shadow of permanent injunctions (which in at least one area would have to be expressed in very general terms) with the ever present threat of proceedings for contempt of court in respect of the slightest deviation, could hardly fail to exacerbate the mutual animosities which have given rise to, and have no doubt been nurtured by, this litigation.

Declaratory relief

126 It will be clear from the above discussion that I will not make the declarations sought by the defendants with respect to an easement of necessity and the right to deviate. That leaves the question of declarations with respect to carrying out road works in the vicinity of the dam and with respect to the fences and the gate.

127 Counsel for the plaintiff submitted that, in the present situation, it would be dangerous for the court to make any declaration concerning the road and the dam given the difficulties of wording the declaration precisely and fairly taking into account the legitimate interests of either side. No doubt counsel had in mind the warning sounded by von Doussa J in *Lawrence v Griffiths*:[45]

> … it is important that the court not grant a decree which authorises the respondents to carry out particular works, unless and until the court is satisfied that no unnecessary interference will result from those works to the appellant in her use and enjoyment of her land.

128 However, I consider that it is important that an attempt be made by the court, with the assistance of counsel, to set out what have been held to be the relevant rights and obligations of the owners of the dominant and servient tenements in the current situation. I therefore propose that the following might be an appropriate form of declaration:

> Declare that the defendants as the owners of the dominant tenement, lot 4, have the right at their own expense to improve their access to lot 4 along the 10 metre wide easement by carrying out such works as may be reasonably necessary to achieve that improvement, so long as such works do not interfere with the use and enjoyment by the plaintiff of the servient tenement to a greater extent than is reasonably necessary.

129 I agree that this declaration may do no more than re-state the general legal position, but it may, at least, assist the parties to move forward by agreement, which, as this proceeding demonstrates, has not been possible so far. Further, in the absence of the detailed engineering plans, one cannot be more precise about what is or is not permitted. When those plans are available then, as previously stated, I consider that the plaintiff should have the opportunity to consider and comment on the plans in advance of any work being commenced by the defendants on the easement. Counsel for the defendants suggested in final submissions that his clients might be prepared to give an undertaking along these lines and, in my opinion, this question should be revisited as part of the consideration of the final orders.

130 As for the remaining issue of the fences and the gate, I propose the following:

> Declare that, whilst the access past the dam remains as it currently is, none of:
>
> (a) the 2000 fence,
>
> (b) the 2005 fence, or

45. (1987) 47 SASR 455 at 490.

(c) the gate at Bungower Road

constitutes a substantial obstruction of the defendants' right of the use and enjoyment of the easement.

Final orders

131 Once the parties have had the opportunity to consider these reasons, I will hear submissions about any suggested changes to the wording of the proposed declarations, and about the making of any other orders, including the question of costs.

132 I cannot conclude these reasons for judgment without making the following observations. Despite the risk that a licence to cross the drainage reserve by the Derril Rd bridge might be subject to termination on 30 days' notice, the history of the past nine years suggests to me that the option of obtaining a licence might be considerably cheaper and easier than pursuing the option of attempting to construct a road along the easement past, or over, the dam wall. Alternatively, as both counsel mentioned during the hearing, it is open to the parties to agree, outside the constraints of a legal proceeding, on other possible solutions to the problem caused by the presence of the dam on the easement, without incurring the trouble and cost of attempting to construct the proposed road. Needless to say, however, these are matters for the parties to decide for themselves.

Declarations accordingly.

Solicitors for the plaintiff: *Oakley Thompson & Co* (in February 2009) and *Hopkins Lawyers* (in August 2009).

Solicitors for the defendants: *Dominic Esposito Solicitors*.

P H BARTON
BARRISTER-AT-LAW