

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2013 05722

KYLE MAGEE

Appellant

v

SHAYNE WALLACE

Respondent

JUDGE: GINNANE J
WHERE HELD: Melbourne
DATE OF HEARING: 7 August 2014
DATE OF JUDGMENT: 16 December 2014
CASE MAY BE CITED AS: Magee v Wallace
MEDIUM NEUTRAL CITATION: [2014] VSC 643

CRIMINAL LAW - Appeal - Summary offences - Bill posting - Whether defence of consent established - *Summary Offences Act 1966* s 10.

HUMAN RIGHTS - Freedom of expression - Lawful restrictions reasonably necessary - Protection of public order - Rights of other persons - Reasonable limits on rights - *Charter of Human Rights and Responsibilities Act 2006* ss 3(1), 7(2), 15, 32(1), 36.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	In person	
For the Respondent	Ms K Argiropoulos	Office of Public Prosecutions

HIS HONOUR:

1 The appellant, Mr Kyle Magee, is opposed to commercial advertising in public places. His actions have brought him before this Court previously in the case of *Magee v Delaney*.¹ At the Southern Cross railway station on 14 February 2013, he posted or attached pieces of black paper and documents covering over an advertising board displaying an advertisement for iced tea. The documents contained statements of his opposition to commercial advertising. He was charged with the summary offence of bill posting. He claimed that he was exercising his human right of freedom of expression which is recognised by the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') and thereby had a defence to the charge. The Magistrate did not agree and fined him \$400. Mr Magee appeals against that decision. For the reasons that follow, I have concluded that Mr Magee has not established his grounds of appeal. The appeal is dismissed.

2 The relevant provisions of s 10 of the *Summary Offences Act 1966* ('Summary Offences Act') state:

10 Posting bills etc. and defacing property

- (1) Any person who posts any placard bill sticker or other document on or writes or paints on or otherwise defaces any road bridge or footpath or any house building hoarding wall fence gate tree tree-guard post pillar hydrant fire-alarm petrol pump or other structure whatsoever without the consent of the occupier or owner of the premises concerned or of any person or body having authority to give such consent shall be guilty of an offence.

Penalty: 15 penalty units or imprisonment for three months.

- (2) Upon any proceedings for an offence against subsection (1)–
- (a) the burden of proving any consent aforesaid shall be upon the accused; and
- (b) in the case of any placard, bill, sticker, poster, or other document containing an advertisement of a commercial nature any person who appears to the satisfaction of

¹ [2012] VSC 407.

the court to have authorized the publication thereof or to be in any manner concerned in the promotion or management of any business or entertainment or any sport, game, exhibition, or other event of a commercial nature whatsoever referred to therein shall, unless he satisfies the court that he did not post such placard, bill, sticker, poster, or document or authorize the posting thereof and that otherwise he had no knowledge of such posting, be deemed to have posted such placard, bill, sticker, poster, or document (as the case may be).

- (3) Nothing in subsection (2) shall affect the liability under subsection (1) of any person who actually posts any such placard, bill, sticker, poster, or other document and the conviction of any other person in relation thereto shall not exonerate from any penalty under this section any person who actually so posts any such placard, bill, sticker, poster, or document.

...

- (6) The court before which any person is convicted for an offence against this section may, in addition to imposing any penalty, order the accused to pay to any person named in the order the cost of removing or obliterating any thing written posted or painted without such consent as aforesaid and making good any damage done thereby and every amount so ordered to be paid shall for the purpose of enforcing the payment thereof be regarded as part of the penalty and be recoverable accordingly.

The proceedings in the Magistrates' Court

3 The informant, Constable Wallace, gave evidence that he saw Mr Magee carry out the actions of bill posting and that Mr Magee told him that he was making a political protest.

4 Mr Magee gave evidence that he attended Southern Cross railway station and covered some advertising boards displaying advertisements for ice tea in black paper to obscure all images and written messages on the advertising board. He then affixed documents that explained the reasons for his objection to advertising. He did so as a protest against advertising and the media system that props it up. He considered that the traditional methods of raising awareness of the issue would be ineffective because the developed democracies were under the thumb of global capitalism. He agreed that he did not ask anyone for permission to post the bills.

He did not know who owned the advertising boards but said that they were

emblazoned with the name of a multi-national advertising company. He submitted that he had not disturbed public order, that he had not prevented anyone from using the space normally and had not caused anxiety or disturbance to anyone. He had not impinged on property rights or caused damage.

5 Mr Magee relied on the human right of freedom of expression recognised by s 15(2) of the Charter.

6 The Magistrate found that Mr Magee had posted several documents, using a flour and water paste, on a glass advertising board at Southern Cross railway station, without the consent of any person having authority to give consent.² The documents included plain black paper and typed pages containing information described by the Informant as 'media protest signs'.³ Mr Magee told the Magistrate that his 'actions were part of his personal protest against the global advertising industry'.⁴ The Magistrate found that Mr Magee's purpose 'was to be seen in a busy area and was to interfere with advertising which had been paid for and which was in a private place, freely used by the public'.⁵

7 The Magistrate decided that Mr Magee's actions were not protected by any Charter right. He applied the decision of Kyrou J in *Magee v Delaney*⁶ and decided that damage to a third party's property or a threat of such damage is not protected by s 15. Mr Magee was also the appellant in that case.

Mr Magee's questions of law

8 Mr Magee's notice of appeal contained the following questions of law:

1. When considering whether an expression should be protected pursuant to Section 15 of the *Charter of Human Rights and*

² Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 1.

³ Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 20 August 2013) 3.

⁴ Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 1.

⁵ Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 2.

⁶ [2012] VSC 407.

Responsibilities Act 2006 (the Charter), should consideration of alternative, unquestionably legal modes of expression, be a factor in determining the legality of the expression chosen?

2. Can an expression involving damage to a third party's property, or a threat of such damage, be protected by section 15(2) of the Charter?
3. Can an expression that causes no damage be equated with an expression ruled to have caused damage?
4. Can political expression that does not cause damage, carried out fully as intended and not resulting in damage, constitute a threat of damage?

Magee v Delaney

9 It is convenient at this point of the judgment to refer to the previous decision of this Court in *Magee v Delaney*.⁷ This case is distinguishable from that case where Mr Magee sought to rely on the defence of lawful excuse available under s 197(1) of the *Crimes Act 1958*, which creates the offence of destroying or damaging property, and s 199(a)(i) of the *Crimes Act 1958* which creates the offence of possessing anything with intent to destroy or damage property. He there argued that his acts of painting over an advertisement on a bus shelter with white paint and possessing a bucket of paint and a paintbrush for that purpose were acts that engaged the right to freedom of expression in s 15(2) of the Charter. He submitted that the protection of an act as an 'expression' under s 15(2) of the Charter amounted to a 'lawful excuse' for the purposes of ss 197(1) and 199(a)(i) of the *Crimes Act 1958* and that this construction was supported by applying the interpretative obligation in s 32(1) of the Charter.

10 Justice Kyrou decided six key points in *Magee v Delaney*.⁸ His Honour held that:

- a. The painting over of the advertisement was capable of imparting information or ideas for the purposes of s 15(2) of the Charter;
- b. The imparting of information or ideas by means of damage to a third party's property did not engage the right to freedom of expression conferred by s 15(2) of the Charter;

⁷ [2012] VSC 407.

⁸ [2012] VSC 407.

- c. For the purposes of s 15(3)(a) of the Charter, the right to freedom of expression was subject to lawful restrictions reasonably necessary to respect the property rights of other persons, irrespective of whether those persons are human beings, companies, government bodies or other types of legal entities;
- d. For the purposes of s 15(3)(b) of the Charter, the expression 'lawful restrictions reasonably necessary ... for the protection of ... public order' includes laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property;
- e. The restrictions in ss 197(1) and 199(a)(i) of the *Crimes Act 1958* are reasonably necessary to respect the property rights of other persons and for the protection of public order;
- f. The conclusions in (a), (b), (c), (d) and (e) above are not affected by ss 7(2) or 32 of the Charter.

The defence to a charge under s 10 of the Summary Offences Act 1966

- 11 The only relevant defence to a charge under s 10 of the Summary Offences Act is proof by a defendant that he posted a bill on property with the consent of the property owner. There was no evidence that Mr Magee posted the bill over the advertisement displayed at Southern Cross railway station with the consent of either the owner of the advertisement or the owner or lawful controller of the railway station.
- 12 The case did not raise issues about the ambit of the defence of consent, including questions such as who must provide the consent and whether it must be express or could be implied.
- 13 Mr Magee submitted that s 10 of the Summary Offences Act should be read down so that it did not apply to legitimate individual expressions that are envisaged by s 15 of the Charter. He submitted that the application of the interpretative provision in s 32 of the Charter should lead to s 10 being read as including 'a protected right as the

consent to a body having authority to give such consent, that body being the Victorian Government'.⁹ He submitted that a protected right to freedom of expression constituted a 'lawful excuse' for criminal damage or 'the consent of ... [a] body having authority to give such consent' for posting bills.¹⁰

14 Mr Magee did not refer to authority for that proposition and I do not accept it. The consent required to establish a defence to actions which would otherwise contravene s 10 of the Summary Offences Act is consent by the owner of the property or someone with the authority to give consent. The rights recognised by the Charter do not confer that consent.

15 Mr Magee argued that if that interpretation were not possible, then s 10(1) could not be read compatibly with the right in s 15 and he would seek a declaration of inconsistent interpretation under s 36 of the Charter.

16 I consider that the Magistrate correctly decided that the elements of the offence with which Mr Magee was charged were proved. Mr Magee did not establish the defence of consent. The only remaining issue arises from Mr Magee's application made during the hearing of the appeal for a declaration of inconsistent interpretation, which I next consider.

The claim for a declaration of inconsistency

17 During Mr Magee's submissions on appeal, he said that he claimed a declaration of inconsistent interpretation under s 36 of the Charter.¹¹ Section 36(2) of the Charter states:

36 Declaration of inconsistent interpretation

(1) This section applies if –

(a) in a Supreme Court proceeding a question of law arises

⁹ Transcript of Proceedings, *Magee v Wallace* (Supreme Court of Victoria, S CI 2013 05722, Ginnane J, 7 August 2014) 26.

¹⁰ Transcript of Proceedings, *Magee v Wallace* (Supreme Court of Victoria, S CI 2013 05722, Ginnane J, 7 August 2014) 26.

¹¹ As to the application of s 36, see *WBM v Chief Commissioner of Police* (2012) 27 VR 469 (appeal dismissed in *WBM v Chief Commissioner of Police* [2012] VSCA 159).

that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

- (b) the Supreme Court has had a question referred to it under section 33; or
 - (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).
- (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.
- (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.
- (4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that –
- (a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and
 - (b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

...

18 However, Mr Magee had not sought such a declaration in his notice of appeal to this Court and the notice required by s 36(4) had not been given. The respondent objected to his application for a declaration of inconsistent interpretation. Although an application for such a declaration was not properly before me, the application of the Charter right contained in s 15 was the subject of much debate before the Magistrate and before me. Therefore, it seems appropriate to state my views on the likely outcome of such an application if it had been before me. I will proceed on the assumption that the application for a declaration of inconsistent interpretation was based on Mr Magee's questions of law and grounds of appeal that are contained in his notice of appeal.

The relevant provisions of the Charter

19 Section 15 of the Charter sets out the scope of the right to freedom of expression and the circumstances in which this right may be subject to lawful restrictions:

15 Freedom of expression

...

- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether –
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary –
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

7 Human rights – what they are and when they may be limited

...

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

...

32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

...

20 In *Slaveski v Smith*,¹² Warren CJ, Nettle and Redlich JJA described the correct approach to the interpretation of the Charter in the following terms:

The operation of ss 32(1) and 7(2) was recently considered by the High Court in *Momcilovic v R*. So far as s 32(1) was concerned, French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.¹³

...

[I]t ... emerges from *Momcilovic* that the effect of s 32(1) is limited. It requires:

... statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application ...

Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.¹⁴

21 Nothing contained in Mr Magee's submissions created any uncertainty about the

¹² (2012) 34 VR 206.

¹³ (2012) 34 VR 206, 214 [20] (citations omitted).

¹⁴ (2012) 34 VR 206, 215 [23]–[24] (citations omitted).

plain meaning of s 10 of the Summary Offences Act.

The Magistrate's approach to the Charter issues

22 The Magistrate considered the Charter issues raised by Mr Magee. He followed the approach of Kyrou J in *Magee v Delaney*¹⁵ with some modifications. His Honour decided that Mr Magee's expression, by pasting over advertisements, was capable of imparting information or ideas for the purposes of s 15(2) of the Charter. However, the imparting of information and ideas, by interfering with a third party's property by bill posting, does not engage the right to freedom of expression recognised by s 15(2) of the Charter. The Magistrate concluded that s 10(1) of the Summary Offences Act constituted a reasonable limitation on the right to freedom of expression, 'taking into account all the matters' referred to in s 7(2) of the Charter, which he described as setting out 'the relevant matters to consider when determining the circumstances in which a human right may be limited'.

23 His Honour decided that the imparting of ideas by means of damage to a third party's property does not engage the right to freedom of expression conferred by s 15(2) of the Charter.¹⁶ Mr Magee's act of placing a bill over an existing pane of glass protecting an advertisement does not fall within the right to freedom of expression in s 15(2) of the Charter.

First question of law

24 Mr Magee's first question of law 1 states:

When considering whether an expression should be protected pursuant to Section 15 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), should consideration of alternative, unquestionably legal modes of expression, be a factor in determining the legality of the expression chosen?

25 The ground of appeal relating to this question is:

The learned Magistrate erred by considering the availability of alternative unquestionably legal modes of expression, as partial justification, for ruling that the expression in question was not protected under section 15 of the

¹⁵ [2012] VSC 407.

¹⁶ *Magee v Delaney* [2012] VSC 407, [97].

Charter.

26 This question of law and its associated ground relate to the following passage from the Magistrate's reasons:

Mr. Magee argues he has no other means of communicating his message, hence he has to take the action he has, [I] disagree.

There are many ways one can communicate a message without it interfering with the property of another.¹⁷

27 Mr Magee submitted that the inclusion of these comments in the Magistrate's reasons indicates that, in determining whether the relevant conduct constituted a breach of s 10(1) of the Summary Offences Act that was not protected by the Charter, the Magistrate had considered whether there were 'alternative, unquestionably legal modes of expression' that he could have exercised. He submitted that any such consideration was not relevant in determining whether a chosen expression is protected under s 15 of the Charter.¹⁸ The Magistrate's reasons constituted a departure from the test he was required to apply, namely: whether s 10(1) of the Summary Offences Act lawfully constrained the appellant's right to freedom of expression under s 15(3) of the Charter.

28 The respondent submitted that the reference made by the Magistrate in his reasons to alternative modes of expression that might have been employed was a brief, passing comment responding to a matter raised by Mr Magee, rather than a significant basis of the Magistrate's decision.

29 The respondent also submitted that, in any case, the alternative legal modes of expression could be relevant to a determination of the nature and scope of the right to freedom of expression under s 15(2) and the reasonable limitations upon that right permissible under s 15(3). The respondent referred to the statement of Kyrou J in *Magee v Delaney*:

¹⁷ Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 4.

¹⁸ The appellant relied on the decision of the New Zealand High Court in *Pointon v New Zealand Police* [2012] NZHC 3208. That case does not have direct relevance to this case. It is an example of a court applying an incorrect legal test to the charge of offensive conduct under the *Summary Offences Act 1981* (NZ).

[T]here were many alternative forms available to Mr Magee to exercise that right, which would not have interfered with third party property rights. The fact that Mr Magee could have chosen other means to communicate his message which respected the property rights of others is a relevant consideration.¹⁹

Consideration of the first question of law

30 I do not consider that the Magistrate did take into account alternative, unquestionably legal modes of expression as a factor that was significant in his determination of Mr Magee's Charter arguments. The Magistrate's observations on which Mr Magee relies formed no part of his reasoning on the legal issues to be determined.

31 The Magistrate's statement has to be read in context. It was expressed as the Magistrate's response to a proposition put by Mr Magee. I do not read the statement as forming a central part of the Magistrate's reasons. His Honour had already determined that Mr Magee had not disputed the physical elements of the offences. His Honour proceeded to give reasons for concluding that the restriction in s 10(1) of the Summary Offences Act constituted a reasonable limitation on the right to freedom of expression recognised in s 15 of the Charter taking into account all the matters referred to in s 7(2) of the Charter.

32 His Honour did not err in law in making the statement upon which Mr Magee relies.

33 No error is established by the first question of law or the associated grounds.

The second question of law

34 Mr Magee's second question of law states:

Can an expression involving damage to a third party's property, or a threat of such damage, be protected by section 15(2) of the Charter?

35 Ground of appeal 2 stated:

In *Magee v Delaney* [2012] VSC 407 at [97] Justice Kyrou held 'it is sufficient for me to state my conclusion that the exercise of the right in the form of damage to a third party's property or a threat of such damage, is not protected by s

¹⁹ [2012] VSC 407, [182].

15(2).’ The learned Magistrate applied the law as stated in *Magee v Delaney*.

With respect, the precedent of Justice Kyrou in *Magee v Delaney* [2012] VSC 407, that any expression involving any level of damage to a third party’s property, or a threat of such damage, can in no circumstance amount to a protected expression for the purpose of section 15(2), is wrongly decided. Although bound by this decision, the learned Magistrate fell into error by applying precedent wrongly decided.

36 This ground was developed in argument as a challenge to the decision of Kyrou J in *Magee v Delaney*.²⁰ But the appellant also suggested that the Magistrate did not consider whether s 10(1) of the Summary Offences Act constituted a lawful restriction on the right to freedom of expression that was reasonably necessary under s 15(3)(a) or (b) of the Charter. Instead, the Magistrate referred to s 7(2) of the Charter and did not consider the application of s 15(3)(a) and (b).

The parties’ submissions on the second question of law

37 The appellant submitted that in *Magee v Delaney*, Kyrou J had incorrectly taken public policy into consideration in considering the operation of s 15 of the Charter, and had wrongly excluded all acts involving damage or the threat of such damage from protection under s 15. In oral submissions, Mr Magee acknowledged that the Parliament in enacting the Charter had not intended the abrogation of laws protecting property, but submitted that it had intended to give force in Victoria to the *International Covenant on Civil and Political Rights*. The achievement of that intention required the balancing of the operation of the criminal law against human rights, including those that the Charter seeks to protect and promote, including those in s 15, especially in the case of minor offences that cause little public inconvenience. In this case, for instance, no damage had been caused to the advertisement and no restitution sought from Mr Magee. Mr Magee relied on the Canadian Supreme Court decision of *Corporation of the City of Peterborough v Ramsden*²¹ to which I refer below. He submitted that his expression involved very low levels of damage and fell short of being a sufficient threat to public order that might justify the limitation of his human right.

²⁰ [2012] VSC 407.

²¹ [1993] 2 SCR 1084.

38 The respondent relied on the judgment of Kyrrou J in *Magee v Delaney*²² as establishing that the exercise of the right to freedom of expression in the form of damage to a person's property or a threat of such damage is not protected by s 15(2).

Consideration of the second question of law

39 I will direct my comments about the second question of law to the facts and circumstances of the offence of which Mr Magee has been convicted. The clash of freedom of expression and laws that restrict that expression has a long history in free societies and generally cases raising those issues are best dealt with on their own facts.

40 I do not base my conclusions on any consideration of how public policy considerations affect the operation of the Charter. The Charter contains widely recognised human rights. The sections of the Charter are to be interpreted according to the ordinary principles of statutory interpretation referred to in *Slaveski v Smith*.²³

41 The appellant relied on the judgement of the Canadian Supreme Court in *Corporation of the City of Peterborough v Ramsden*.²⁴ In that case, the Supreme Court considered the constitutional validity of a municipal by-law prohibiting all postering on public property. The Court held that the absolute prohibition of postering on public property prevented the communication of political, cultural and artistic messages and therefore infringed the right to freedom of expression recognised by s 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court discussed the important function of bill posting in appropriate contexts.

42 This case is distinguishable from *City of Peterborough v Ramsden*.²⁵ In this case, the advertisement had been displayed by a commercial enterprise and, although it did not appear specifically from the evidence, presumably that had occurred pursuant to a contractual right with the owners or operators of the railway station. The other

²² [2012] VSC 407.

²³ (2012) 34 VR 206.

²⁴ [1993] 2 SCR 1084.

²⁵ Ibid.

difference was that unlike the bill poster in *City of Peterborough v Ramsden*,²⁶ who posted a bill to advertise his band's concert, Mr Magee posted a bill to prevent the public seeing or reading the commercial advertisement that had been displayed and to display his own notice that stated his opposition to commercial advertising.

43 I do not consider that the right of freedom of expression contained in s 15 of the Charter extends to Mr Magee's actions in posting bills or posters to obscure advertisements lawfully placed by other persons or businesses pursuant to some contractual arrangement and placing his own statement instead of the original advertisement.

44 In my opinion, s 10(1) of the Summary Offences Act, insofar as it applies to Mr Magee's actions that resulted in his conviction, contains lawful restrictions reasonably necessary for the protection of public order, in accordance with s 15(3)(b) of the Charter. That provision recognises special duties and responsibilities attached to freedom of expression. Mr Magee's actions concerned a commercial advertisement that was displayed in a space open to members of the public. His actions sought to prevent that advertisement being displayed. I consider that such conduct is capable of interfering with the maintenance of public order. The capacity of individuals or businesses to obtain access to property to advertise their products or services is a feature of Australian society. Mr Magee's actions, or similar actions taken in a public place which interfere with advertisements lawfully posted, have the capacity to interfere with public order. It is certainly possible that actions of the type that Mr Magee engaged in might lead to some form of public disturbance involving persons seeking to stop those actions. It is not appropriate to attempt a complete definition of public order. It is a wide term. In *Coleman v Power*,²⁷ Gleeson CJ stated:

Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant

²⁶ Ibid.
²⁷ (2004) 220 CLR 1.

conduct occurs.²⁸

45 Kirby J stated:

While the precise scope of public order is unclear at international law, it is evident that public order includes the following: 'prescription for peace and good order', public 'safety' and 'prevention of disorder and crime'.²⁹

46 I consider that unauthorised interference with lawfully posted advertisements is capable of disrupting public order.

47 I would not regard the restriction on expression contained in s 10 of the Summary Offences Act as being a lawful restriction reasonably necessary to respect the rights of 'other persons' as permitted by s 15(3)(a) of the Charter if the other person was a corporation. With all respect to the contrary view, I consider that in interpreting s 15(3)(a) regard is to be had to the definition of 'person' in the Charter as meaning a 'human being'.³⁰

48 However, in view of my conclusion about the application of s 15(3)(b) in this case, it is unnecessary to consider further the application of s 15(3)(a). The legal status of the person who obtained the right to display the commercial advertisement is not clear from the evidence. Nor is it necessary to consider the rights of 'other persons' to view commercial advertisements lawfully displayed.

49 I would also consider that the limits that s 10 of the Summary Offences Act imposes on Mr Magee's freedom of expression in this case are reasonable limits that can be demonstrably justified in a free and democratic society based on 'human dignity, equality and freedom' taking into account all relevant factors including those contained in s 7(2)(a) to (e). I have reached that conclusion for the same reasons that I have given in respect of the application of s 15(3)(b). I consider that the limitation on Mr Magee's human right of freedom of expression that results from the operation of s 10 of the Summary Offences Act in this instance is for the important reason of preserving public order, is limited to interference with a lawfully displayed

²⁸ Ibid 25 [12].

²⁹ Ibid 93 [242] (citations omitted).

³⁰ Section 3(1).

advertisement and is connected with preventing that interference. I consider that there is no less restrictive means reasonably available to achieve the purpose of the limitation. That is because the limitation in this case is directed at preventing interference with a contractual right to display advertisements in places open to the public, which interference could disrupt public order.

50 It is unnecessary to consider whether the rights of corporations which are not included in the term 'persons' as defined in the Charter are to be considered for the purposes of the application of s 7(2).

51 No error is established by the second question of law or the associated grounds.

The third and fourth questions of law

52 Mr Magee's third and fourth questions of law can be considered together.

53 Question of law three states:

Can an expression that causes no damage be equated with an expression ruled to have caused damage?

54 Question of law four states:

Can political expression that does not cause damage, carried out fully as intended and not resulting in damage, constitute a threat of damage?

55 The related grounds of appeal under these questions are as follows:

Ground 3: In *Magee v Delaney* [2012] VSC 407 at paragraph 3(b) Justice Kyrou held "Does the imparting of information or ideas by means of damage to a third party's property engage the right to freedom of expression conferred by s 15(2) of the Victorian Charter? No". The learned Magistrate erred in equating and substituting the "interference" of the expression in the case before him with the "damage" in Justice Kyrou's ruling above.

Ground 4A: The learned Magistrate erred in his construction of the phrase "threat of damage" by including within it acts which neither cause, nor intend to cause, damage.

Ground 4B: On the correct construction of the phrase "threat of damage", it was not open to the learned Magistrate to find that the appellant's act constituted a "threat of damage" and was therefore excluded from protection under section 15 of the Victorian Charter, following the findings of Justice Kyrou in *Magee v Delaney* [2012] VSC 407.

The Magistrate's reasons that relate to the third and fourth questions of law

56 The Magistrate considered that he was bound to follow *Magee v Delaney*³¹ because the appellant's offending was analogous to the offences considered in that case. Even though there was no damage caused by the appellant's actions in the present matter, it similarly involved an act of public protest about advertisements by him, was likely to be understood by passers-by as being for that purpose, and the appellant's actions were similarly capable of 'expressing information or ideas for the purposes of section 15 subsection 2 of the Victorian Charter'.

57 Kyrou J stated:

For the purposes of the present case, it is not necessary for me to decide whether, as a matter of public policy, the forms of exercise of the right to freedom of expression that are protected by s 15(2) of the Victorian Charter exclude any expressive act which constitutes a criminal offence. It is sufficient for me to state my conclusion that the exercise of the right in the form of damage to a third party's property or a threat of such damage, is not protected by s 15(2).³²

58 The Magistrate stated that:

It is apparent in the further discussion around section 15 (3)(a) and (b) of the Charter that damage is just an example of a general principle that one has the right to own and enjoy one's property free from unlawful interference, damage is but just one example of such interference.³³

59 The Magistrate determined the Charter issues raised by Mr Magee by applying the issues stated by Kyrou J in *Magee v Delaney*,³⁴ with some variations for the different actions that Mr Magee took in this case. In particular, the Magistrate posed the following questions:

- (a) Was the painting over of the advertisement capable of imparting information or ideas for the purposes of s 15(2) of the Victorian Charter?
- (b) Does the imparting of information or ideas by means of interfering with, **by bill posting**, with a third party's property engage the right to freedom of

³¹ [2012] VSC 407.

³² [2012] VSC 407, [97].

³³ Transcript of Proceedings, *Magee v Wallace* (Magistrates' Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 3.

³⁴ [2012] VSC 407.

expression conferred by s 15(2) of the Victorian Charter?³⁵

60 The Magistrate, in applying the judgment of Kyrou J, stated that ‘there does not actually have to be damage caused for there to be a limitation on the expressive conduct’.³⁶

The parties’ submissions

61 The appellant submitted that the Magistrate had erred by making his decision on the basis of an adapted version of Kyrou J’s second question, wherein the words ‘by means of damage to a third party’s property’ were replaced with the words ‘by means of interfering by bill posting, with a third party’s property’. The appellant further argued that the Magistrate erred in considering the postering expression was unlawful interference and accordingly conflating the notion of unlawful interference with damage.

62 The appellant submitted that:

The act of taking the second question posed by Kyrou J and ‘transpos[ing] it to the facts of this case’ is to change an operative term of the question, essentially changing the question so that the answer to the first question cannot be relied upon as an answer to the second.³⁷ ...

Similarly it could be stated, correctly, that in practical terms, the bill posting in this case achieved a similar objective to the damage of \$40.17 caused by the painting in the case of *Magee v Delaney*, and from there it could be argued that the two methods can be used interchangeably in a question of law – but this is incorrect, there are important and substantial legal differences between an expression that was ruled to have caused damage and an expression in which no damage was caused or alleged, regardless of any practical similarity in effect.³⁸ ...

[The] Magistrate ... thought it appropriate to regard these two expressions as basically identical, and therefore it was inappropriate to distinguish between the two expressions just for the trivial difference in method and the absence of any damage. While some of the circumstances were the same, the different method constitutes a significant legal difference in the circumstances of each case – the different method gives rise to a different, much less serious charge, and a charge in which damage is not an element – these are

³⁵ Emphasis added to indicate the different second question posed by the Magistrate.

³⁶ Transcript of Proceedings, *Magee v Wallace* (Magistrates’ Court of Victoria, D10987761, Magistrate Capell, 7 October 2013) 3.

³⁷ Outline of Appellant’s Submissions, [24].

³⁸ Outline of Appellant’s Submissions, [27].

important legal distinctions which cannot be ignored in a courtroom for the 'common sense reasoning' that they are brought about in similar circumstances and bring about a similar effect.³⁹

63 The appellant submitted that his action was a temporary non-damaging way to make the point about for profit advertising in public spaces and the effect of it on the public sphere. He submitted:

There exists no valid reason for [the] Magistrate ... to rule that my actions constituted a threat of damage, and no reason was given. The ruling that my actions posed a threat of damage was unjustified, and, it follows, so too was the exclusion of my expression from protection under the Charter by reference to the findings of Justice Kyrrou in *Magee v Delaney* relating to threats of damage.⁴⁰

64 The appellant also submitted that interference could occur without any illegality, for example when a person stands in front of an advertisement.

65 The respondent submitted that the purpose of s 10(1) of the Summary Offences Act is to protect a person's property rights from interference by others. This object would be undermined if the right to freedom of expression was interpreted to encompass a right to interfere with another person's property rights. The common law and the Charter both recognise property rights. Section 15(2) of the Charter does not create a defence to an offence under s 10(1) of the Summary Offences Act. The respondent further submitted that bill posting is a criminal offence and thus distinguishable from other forms of interference such as standing in front of an advertisement.

Consideration of the third and fourth questions of law

66 The Magistrate concluded that damage is not required for there to be 'a limitation on the expressive conduct'. In the context of the reasons read as a whole, his Honour was referring to a restriction on the right of freedom of expression permitted by s 15. His Honour considered that for the purposes of the application of s 15, an interference with property by the conduct that Mr Magee took can be equated with damage. His Honour considered that property owners or those who have a lawful

³⁹ Outline of Appellant's Submissions, [29].

⁴⁰ Outline of Appellant's Submissions, [41].

right to use property have the right to enjoy the property without interference, whether by damage or otherwise. I do not consider that his Honour was referring to conduct such as standing in front of an advertisement to block the view of it. As I have stated previously in this judgement, in human rights cases, it is generally important to consider the facts presented in particular cases. I consider that it is generally appropriate to confine conclusions about the exercise of human rights to the facts of the case. I consider that that is what the Magistrate intended to do in his statement of reasons.

67 I do not consider that the Magistrate's reference to threat of damage involved any error.

68 The third and fourth questions of law and their associated grounds of appeal do not establish any error in the Magistrate's decision.

Conclusion

69 None of the questions of law relied on by the appellant established an error of law. The grounds of appeal relied on by the appellant have not been established.

70 Therefore, if a valid application by the appellant for a declaration of inconsistent interpretation under s 36 of the Charter had been before the Court, I would have dismissed it.

71 The appeal is dismissed.
