IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 8547 of 2009

ENVIRONMENT EAST GIPPSLAND INC — Plaintiff

v

VICFORESTS — Defendant

JUDGE:	OSBORN J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 September 2010
DATE OF JUDGMENT:	14 September 2010
CASE MAY BE CITED AS:	Environment East Gippsland Inc v VicForests
MEDIUM NEUTRAL CITATION:	[2010] VSC 416

INJUNCTION – Terms of final order providing for transparency and finality

COSTS - Costs order where plaintiff generally successful overall but not on all issues — Allowance made for the success of the generally unsuccessful party - Percentage of costs to be awarded in set-off in respect of the costs of the issues on which the plaintiff failed - *Pricom Pty Ltd v Sgarioto* (Unreported, Supreme Court of Victoria, Eames J, 24 April 1995)

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms D Mortimer SC with Mr R Niall Ms P C Knowles	Bleyer Lawyers Pty Ltd
For the Defendant	Mr I Waller SC with Mr H Redd	HWL Ebsworth Lawyers, acting as agents for Komesaroff Legal Pty Ltd

HIS HONOUR:

1 This matter comes before me for the purpose of final orders as to substantive relief and resolution of the issue of costs.

Final orders

2 The defendant has submitted a form of order which reflects the terms of my conclusions at [761] of my principal judgment.

> In my view VicForests should be restrained from logging the Brown Mountain coupes until:
>
> (a) an SMZ and Long-footed Potoroo retained habitat area have been created in respect of detections of the Long-footed Potoroo within coupes 15, 19 and 26 and in accordance with Appendix I to the FFGAS to the satisfaction of the Director, Biodiversity Policy and Programs, DSE[1] ('the Director');
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> (b) a survey is carried out for the presence of the Giant Burrowing Frog and the Large Brown Tree Frog within coupes 15, 19, 26 and 27 during appropriate climatic conditions by appropriately qualified persons to the satisfaction of the Director;
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> (c) a review of the provision of POMAs and SOMAs within the East Gippsland FMA taking into account the report of Dr Bilney dated December 2009 is completed to the satisfaction of the Director;
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> (d) a survey is carried out for the presence of the Spot-tailed Quoll within coupes 15, 19, 26 and 27 during the breeding season of the Spot-tailed Quoll in and between May and August by appropriately qualified persons to the satisfaction of the Director, and in the event of detection of the Spot-tailed Quoll, a review of the provision of reserves for the Spot-tailed Quoll within the East Gippsland FMA is completed to the satisfaction of the Director;
>
> (e) an SPZ of approximately 100 hectares is created to the satisfaction of the Director in response to the detection of densities of Greater Gliders and Yellow-bellied Gliders in coupe 15 exceeding those specified in the guideline relating to arboreal mammals contained in the FMP.[2]

3 This order is premised upon the giving of undertakings by the plaintiff to the effect stated at [771] of my principal judgment:

(a) that the plaintiff provide to DSE copies of all photographic evidence it

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1 Department of Sustainability and Environment

2 *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [761].

possesses relating to the presence of the Long-footed Potoroo in the Brown Mountain coupes; and

(b) the plaintiff take all reasonable steps to assist DSE to confirm the precise location of the taking of the images produced in evidence by Ms McLaren.

4 The plaintiff submits that:

> ... a self-executing injunction is not appropriate and the Court should make orders in the form attached. There is too much at stake in terms of ensuring the species receive the protection the Court has decided the law entitles them to, to leave the unsuccessful and strongly resisting party and its ineffective regulator, to work out compliance in an unsupervised fashion.

5 The plaintiff submits that the defendant should be restrained from logging at Brown Mountain until further order of the Court made upon achievement of the further steps specified at [761] of my principal judgment.

6 The plaintiff submits that the Court's order should seek to achieve both transparency and certainty in the public interest. It submits that the history of the matter demonstrates that the dialogue between members of DSE and VicForests has not always been transparent from the point of view of the public and from the point of view of the plaintiff in particular.

7 The defendant concedes that the Court's order should address the issue of transparency, but submits that the Court's order should provide for finalisation of the habitat protection measures necessary at Brown Mountain within the statutory framework referred to in my principal judgment. In particular, it should accord to the Director, Biodiversity Policy and Programs, DSE, the role envisaged at [761] of my principal judgment.

8 I accept the defendant's submission as to finalisation of the proceeding. It is not appropriate to require further application to this Court, when there is a statutory framework for administrative resolution of the habitat protection measures in issue. DSE was not joined as a party to this proceeding and it stands outside the dispute

before the Court.

9 Nevertheless, I agree that the order should provide for transparent outcomes in order to protect the public interest in compliance with the injunctions proposed, and to minimise the potential for further dispute and litigation between the parties.

10 The defendant submits that it would be sufficient to obtain an undertaking from it that it would not commence logging within the Brown Mountain coupes without 14 days notice to the plaintiff that the Director was satisfied of the matters specified in the proposed heads of injunctive relief.

11 I do not accept that this would be adequate to achieve appropriate transparency. In my view the defendant should be required:

(a) to provide to the plaintiff within 14 days of their final approval by the Director, maps delineating any special management zone, special protection zone, Long-footed Potoroo retained habitat area, Powerful Owl management area or Sooty Owl management area, created within or including any part of the coupes;

(b) to provide to the plaintiff within 14 days of their approval by the Director, Biodiversity Policy and Programs, DSE, copies of any surveys in respect of the Giant Burrowing Frog, Large Brown Tree Frog and Spot-tailed Quoll completed within the coupes; and

(c) to provide to the plaintiff 28 days notice in writing of any intended resumption of logging within the coupes.

12 Once it is accepted that the order should contain ancillary provisions providing for transparent outcomes (as the defendant in effect concedes by proposing an undertaking directed to this end) then it is necessary for such measures to be relatively detailed if the Court is to have confidence that they will be effective. The management procedures referred to in my principal judgment also provide for

stakeholder consultation prior to any change in the forest management zone regime. This requirement also tends to support the view the above orders are reasonable.

Costs

13 The plaintiff seeks an order that the defendant pay the plaintiff's costs, including any reserved costs.

14 The defendant seeks an order that the defendant pay 60 per cent of the plaintiff's costs, including reserved costs.

15 The general rule is that costs should follow the event. This ordinarily means that the successful party is entitled to receive its costs from the unsuccessful party in circumstances where one party has been wholly successful and the other has wholly failed. In the event that a party has succeeded on some issues and not others, justice and fairness may require a costs order which reflects the parties' relative success and failure.

16 The position where a party has been partially successful was summarised by Eames J in *Pricom Pty Ltd v Sgarioto*:

> As a general rule costs should follow the event, and a successful party should obtain all of the costs of the action even although it failed to establish some of the alternative heads of its claim: *Ritter v Godfrey* (1920) 2 KB 47. However, in the exercise of its discretion the court may decline to order costs in favour of a successful party, or may order the successful party to pay the costs of the unsuccessful party, where the plaintiff failed to establish discrete heads of claim, or failed to establish issues which it pursued in its claim, although ultimately succeeding on the basis of another discrete head of claim: *Hughes v Western Australian Cricket Association Inc* (1986) ATPR 40-748, per Toohey J at 48, 136.[3]

17 In this situation the Court may award costs on either a proportional basis, an issues basis, or if the Court finds that the issues are evenly balanced, make an order that

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3 (Unreported, Supreme Court of Victoria, Eames J, 24 April 1995), 8 cited with approval in *Investec Bank (Australia) Limited v Glodale Pty Ltd (No 2)* [2009] VSCA 113, [4]; *Spotless Group Ltd v Premier Building & Consulting Pty Ltd* [2008] VSCA 115, [13] and *McFadzean v Construction, Forestry, Mining and Energy Union* [2007] VSCA 289, [152].

costs fall as they lie.[4]

18 In the present case, the plaintiff has been substantially successful on the law and the facts and accordingly it should receive a substantial award of costs. Nevertheless, some allowance should be made for the success of the generally unsuccessful defendant on particular issues.

19 The plaintiff submits that it is not appropriate to award costs on either a proportional/percentage or an issues basis.

20 If, however, costs are to be awarded on a proportional basis or issues basis, the plaintiff submits that the following five points should be taken into account:

(a) first, to the extent that issues can be identified EEG was successful on each of them;

(b) second, to the extent that no relief would have been granted in respect of the new species of crayfish and the square tailed kite, those species did not raise discrete issues in the relevant sense but were rather instances of the unlawful conduct alleged by EEG;

(c) third, even a cursory examination of the matters raised in the case, shows that VicForests made positive denials about matters on which it led no evidence, raised EEG's standing both at the interlocutory stage and trial when it had no reasonable prospects of success on that point and was not frank with the Court on the injunction application;

(d) fourth, there was no delinquency on the part of EEG in the running of the case, indeed, apart from unnecessary denials by VicForests in respect of some of the species, most notably the Long-footed Potoroo, the trial ran in an expeditious and cooperative way. The time of the Court during the trial was used efficiently by both parties; and

(e) fifth, VicForests has already been compensated for the costs associated with the new species of crayfish and the Square-tailed Kite, the amount of costs being struck by agreement and not order of the Court: *Environment East Gippsland Inc v VicForests* [2010] VSC 53 (25 February 2010).

21 I do not accept that the issues relating to the crayfish species and the Square-tailed Kite were not, as the plaintiff contends, other than substantially discrete. The

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4 See eg. *Sumar Produce Pty Ltd v Griffith City Council* [2000] NSWLEC 104 (Unreported, Land & Environment Court (NSW), Talbot J, 7 June 2000).

plaintiff failed to make out a case for relief with respect to these species. The relief it otherwise obtained was species specific.

22 I also do not accept that the conduct of the defence was so unreasonable as to warrant a special order for costs but I do accept that the defendant put in issue a substantial number of issues on which the plaintiff succeeded.

23 I accept that the case was conducted on behalf of the plaintiff in an expeditious and cooperative way.

24 I also accept that the defendant has already received some costs relating to issues concerning the new species of crayfish and the Square-tailed Kite.

25 The defendant submits that the following three factors should be taken into account:

(i) The plaintiff wholly failed on four separate and distinct issues, namely whether the proposed harvesting would be unlawful by reason of the actual or likely presence of:

(a) the Orbost Spiny Crayfish;

(b) the Bonang Crayfish taxon;

(c) the Square-tailed Kite; and

(d) hollow bearing trees.

(ii) The plaintiff did not obtain the full extent of its claimed relief.

(iii) The plaintiff decided not to include DSE as a defendant.

26 I accept that the plaintiff failed entirely with respect to three species, namely the two crayfish (the Orbost Spiny Crayfish and the new Bonang Crayfish taxon) and the Square-tailed Kite. The case with respect to the first two species was so closely interrelated however, that in substance the plaintiff has failed on two discrete sets of

issues relating to threatened species. In my view, some allowance should be made with respect to these issues.

27 Insofar as the crayfish and the Square-tailed kite are concerned, the defendant has already obtained the costs of the amendment process in this proceeding. Nevertheless, the defendant should get some allowance with respect to other costs related to these issues including preparation and trial costs.

28 The plaintiff also failed to obtain relief with respect to hollow bearing trees. However, the evidence regarding hollow bearing trees and the analysis of conservation guidelines and specifications relating to them was inextricably bound up with the evidence relating to a series of species on which the plaintiff succeeded, namely the Greater Glider, the Yellow-bellied Glider, the Spot-tailed Quoll, the Powerful Owl and the Sooty Owl. In an underlying sense, the case with respect to hollow bearing trees related to common issues of biodiversity which went to the heart of the dispute concerning these species in respect of which it was successful. Accordingly, although the defendant should receive some allowance with respect to the costs of this issue, that allowance should be materially less than the allowance with respect to the crayfish species and the Square-tailed Kite.

29 The defendant submits that the fact that the plaintiff has been granted a conditional injunction and has not obtained the full extent of its claimed relief in the form of a permanent and unconditional injunction and declaratory relief, should be taken into account. I do not accept this contention. In my view, this is a case in which it is appropriate to bear in mind the observation of Jacobs J in *Cretazzo v Lombardi:*

> But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a

> favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues.[5]

30 It is true that the plaintiff failed to obtain a permanent and unconditional injunction or declaratory relief. However, the fact that the plaintiff framed its case in terms of alternative relief and succeeded on one alternative in substantial part, and the fact that its success was so limited is no satisfactory reason to reduce an award of costs. A plaintiff should not be punished for formulating its claim in the alternative and costs should not be dependent upon success in every aspect of relief sought.

31 This is particularly so when as the plaintiff submits the case involved issues of the public interest and the plaintiff has succeeded in its fundamental claim which sought to restrain immediate logging of the coupes in issue.

32 Further, I accept the submissions made on behalf of the plaintiff that it should not be required to have anticipated precisely the form of relief which it ultimately obtained. The determination of that form of relief ultimately required the balancing of a series of competing factors.

33 The defendant further submits that the plaintiff's decision not to include DSE as a defendant should be taken into account. I do not accept this is so. The plaintiff has been substantially successful despite this course. The decision not to join DSE (or its Secretary) as a party did not prevent the plaintiff from obtaining substantial relief. In one sense, it limited the issues before the Court. It provides no basis for limiting the plaintiff's costs.

34 The question then arises as to what form the award of costs should adopt. In my view, the better approach is to reduce the costs awarded to the plaintiff by an appropriate amount which in effect obviates the need for cross orders or particular orders with respect to particular costs.[6] It is desirable that the costs of taxation

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5 (1975) 13 SASR 4, 16. Discussed in *State of Victoria v The Master Builders Association of Victoria* (Unreported, Supreme Court of Victoria, Appeal Division, Tadgell, Ormiston and Eames JJ, 15 December 1994). Cited with approval at 5 (Tadgell J) and 7 (Eames J).

6 *Byrns v Davie* [1991] 2 VR 568; *Murdesk Investments Pty Ltd v Roads Corporation* [2007] VSC 175.

should be minimised and restricted to those of one side only if possible.

35 This proportional approach has a number of benefits which have been described by Redlich JA in *Spotless Group Ltd v Premier Building and Consulting Pty Ltd:*[7]

> [15] Thus a pragmatic approach may be taken in cases where no party is wholly successful and there are clearly practical difficulties in awarding costs on an issue by issue basis. In exercising its discretion as to costs the court is entitled to take into account the failure of a party on certain 'issues'. 'Issue' is not used in the technical pleading sense, but refers to any disputed question of fact [or] law. In *Reading Entertainment Australia Pty Ltd v Whitehorse Property Group Pty Ltd* this Court observed:
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> > In cases where neither party is wholly successful there are clearly practical difficulties in awarding costs on an issue by issue basis which would involve making separate costs orders. His Honour took a pragmatic approach, which has much to commend it, of apportioning the costs between the parties.
>
> [16] A trial judge may find that despite the complex nature of the case it remains entirely possible to identify the disputed issues which were resolved, and the evidence adduced specifically with respect to them so as to conclude that particular issues dominated the trial. In *McFadzean* the Court said:
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> > In fixing costs a superior court may treat 'heads of controversy as units of litigation' and give directions to the taxing master in relation to them, such units not being circumscribed by pleadings, causes of action or issues capable in themselves of leading to the granting of relief. But to avoid the complications of taxation resulting from making orders recognising the entitlements to costs of a party on each action on which they were successful, the orders may be notionally set off against each other or other adjustments made so as to produce an order for a proportion of one party's costs. This approach to costs orders where an action has had mixed success has been followed in a number of cases. In *Hughes v Western Australian Cricket Association (Inc)*, Toohey J had regard to the fact that the plaintiff had succeeded on some issues but failed on others, but concluded that: 'it would be unsatisfactory to attempt to apportion issues and leave the fixing of costs of those issues to the taxing officer. That would impose a very great burden on him and upon the parties' legal representatives.' In our view, the judge's approach to the apportionment of costs was particularly apposite in this case, having regard to the multiplicity of parties, actions, and issues, and the mixed success enjoyed by the plaintiffs.

36 The submissions made on behalf of the defendant with respect to the issue of costs explicitly accept that a percentage costs order is appropriate in this case.

37 Having regard to the evidence filed and served as a whole on behalf of the parties, the history of the proceeding and the course of the hearing, I would allow the

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7 [2008] VSCA 115.

plaintiff 90 per cent of its costs of this proceeding, including reserved costs. This figure reflects a set-off in respect of the costs of the issues on which I have held the plaintiff failed relating to the two crayfish species and the Square-tailed Kite. It also makes some allowance for the issue of hollow bearing trees.

38 The percentage I have adopted reflects the plaintiff's success on a series of overarching issues relating to all of the species in respect of which relief was sought and the plaintiff's fundamental success in restraining immediate logging at Brown Mountain. It also reflects the plaintiff's entitlement to the costs of the interlocutory injunction proceedings it instituted and the fact that the prescriptions governing logging at Brown Mountain were strengthened only after these proceedings were instituted which bears on the basis on which the claim was first formulated.

39 As counsel for the defendant conceded, the appropriate percentage is not capable of precise calculation. I have arrived at the figure of 90 per cent after considering the individual matters highlighted by counsel within the framework of the history and outcome of the proceeding as a whole.

40 I propose to make orders generally in accordance with the defendant's draft form of order, but subject to amendments reflecting the above conclusions. I will order:

A: The matters submitted by the defendant be included under the heading 'Other Matters'. The undertakings referred to have been given on behalf of the plaintiff by its counsel as contemplated by [771] of my principal judgment.

B: Paragraph 1 be expressed in the terms submitted by the defendant reflecting [761] of my principal judgment.

C: A further paragraph be included embodying my conclusions as stated in [11] above with respect to notice by the defendant to the plaintiff.

D: The order discharge the existing injunction in the terms submitted by the defendant.

E: The defendant be ordered to pay 90 per cent of the plaintiff's costs of the proceeding, including reserved costs.

CERTIFICATE

I certify that this and the 10 preceding pages are a true copy of the reasons for Judgment of Justice Osborn of the Supreme Court of Victoria delivered on 14 September 2010.

DATED this fourteenth of September 2010.

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Associate