Environment East Gippsland Inc v VicForests (No. 2) [2009] VSC 421 (29 September 2009)

Last Updated: 29 September 2009

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IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

PRACTICE COURT

No. 8547 of 2009

ENVIRONMENT EAST GIPPSLAND INC — Plaintiff

v

VICFORESTS — Defendant

JUDGE:	FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 September 2009
DATE OF JUDGMENT:	29 September 2009
CASE MAY BE CITED AS:	Environment East Gippsland Inc v VicForests (No. 2)
MEDIUM NEUTRAL CITATION:	[2009] VSC 421

PRACTICE and PROCEDURE – Interlocutory injunction – Whether security in addition to an undertaking in relation to damages should be given by the plaintiff – Public interest considerations.

APPEARANCES:	Counsel	Solicitors

For the Plaintiff	Ms D.S. Mortimer SC with Mr R.M. Niall and Ms J Forsyth	Bleyer Lawyers Pty Ltd
For the Defendant	Mr I. Waller SC with Mr H.L. Redd	HWL Ebsworth Lawyers as Agent for Komessaroff Legal Pty Ltd

HIS HONOUR:

Introduction

1 On 14 September 2009, I determined that it was appropriate to grant an interlocutory injunction restraining VicForests from carrying out timber harvesting operations in coupes 15 and 19 of Brown Mountain.[1]

2 The plaintiff, Environment East Gippsland Inc ("EEG"), in the course of the hearing of its application, proffered the usual undertaking as to damages.

3 However, VicForests contends that such an undertaking is inadequate and accounts for little, if anything, given EEG's financial position and the overwhelming likelihood that EEG may fail to obtain a permanent injunction. As a condition to the granting of the injunction, VicForests contends that EEG should lodge an amount of between $93,000 and $163,000 with the Court as security.[2]

4 I have concluded that security should not be ordered. This case is brought in the public interest; importantly, it involves consideration of the obligations (imposed by State legislation) of a State statutory corporation to comply with principles of conservation as they affect an endangered species. Accordingly, this is an exceptional case and EEG should not be required to provide security in addition to the usual undertaking as to damages.

Further affidavit material

5 Both EEG and VicForests sought to file additional material on this application. VicForests sought to rely upon a further affidavit of Mr Cameron MacDonald,[3] its director of Strategy and Corporate Affairs. Mr MacDonald had filed two previous affidavits in this application. The new affidavit seeks to explain in greater detail, the potential losses alleged to be suffered by VicForests if an interlocutory injunction is granted preventing logging in the coupes.

6 Whilst I accepted that the material contained within the affidavit was untested, as Ms Mortimer pointed out, I regarded its contents as relevant to the question of the provision of security and gave leave to VicForests to rely upon it.

7 EEG also seeks to rely upon a fresh affidavit sworn by Ms Bleyer,[4] its solicitor. That affidavit attaches an email from an officer of the Department of Sustainability and the Environment ("DSE") relating to the number of saw logs which could be extracted from the two coupes. I regarded the affidavit as admissible on this application and gave leave to EEG to rely upon it as it is relevant to the estimate provided by Mr MacDonald regarding potential loss of profits.

Background

8 In my earlier reasons, I noted that the estimates of EEG's assets varied from $10,000 to $45,000; I assumed, given the costs involved with the proceeding, that there would be "no money available to satisfy the undertaking as to damages".[5]

9 I also expressed some doubt as to the quantum of VicForests' loss of profits given that the asset (i.e. the timber within the two coupes) remains to be harvested at a later date, if EEG's claim fails.[6]

10 In Mr MacDonald's second and third affidavits, he deposes to the estimated losses which VicForests would suffer as a result of a delay in the logging of coupes 15 and 19. Central to Mr MacDonald's calculations are the months of September to November, which are critical for VicForests in meeting its budgeted harvest. A delay of up to six months will inevitably mean a significant loss of profits. Mr MacDonald estimates those loss of profits to be $23,334 if one month's delay, $93,336 for three months' delay, and $163,338 if there is six months' delay.[7]

11 The trial of the primary claim will be heard in the Supreme Court at Sale in either December of this year or March 2010.

Relevant principles

12 In Air Express Limited v Ansett Transport Industries (Operations) Pty Ltd,[8] Gibbs J said regarding the purpose of requiring an undertaking as to damages when granting an interlocutory injunction:

"The object of requiring a plaintiff who seeks an interlocutory injunction to enter into an undertaking of this kind is to attempt to ensure that a defendant will receive compensation for any loss which he suffers by reason of the grant of the injunction if it appears in the event that the plaintiff was not entitled to obtain it. The insistence upon the giving of an undertaking is a very important, if not essential, means of preventing injustice from being done by the court when it makes an order at an interlocutory stage, before the rights of the parties have been finally determined. The court has a discretion not to enforce such an undertaking, but unless the defendant has been guilty of conduct that would render it inequitable to enforce the undertaking it would seem just, speaking generally, that a plaintiff who has failed on the merits should recompense the defendant for the damage that he has suffered as the result of the making of the interlocutory order".

13 Subsequently, in Combet v Commonwealth of Australia,[9] Heydon J said:

"In my judgment, the Court will almost always decline to grant an interlocutory injunction unless the plaintiff undertakes to the Court to pay any damages which the Court may later assess as necessary to compensate the defendant for any harm caused by the interlocutory injunction in the event that the Court at the final hearing refuses to grant a final injunction. The importance of the undertaking is that without it a defendant ultimately successful at the final hearing would not be able to recover damages for any loss suffered by complying with the interlocutory injunction."[10]

14 In First Netcom Pty Ltd v Telstra Corporation Ltd, in relation to the provision of security where the undertaking may be of dubious value, the Full Court of the Federal Court said:[11]

“However since its terms are a matter for the discretionary judgment of the court, its provisions will be moulded so as to fit the circumstances of the case at hand. These circumstances may include the likelihood of the plaintiff’s insolvency, which might produce an inability to discharge any liability to the party enjoined pending a final hearing that might accrue under the undertaking. In that event, the court is required to exercise its judgment as to what is an appropriate order to ensure the reality of adequate compensation, and not merely an empty form of compensation, to a party who is ultimately successful.

In such a case the court may stipulate a further condition in connection with the undertaking, in the event that the plaintiff should elect to give the undertaking, and thus secure the injunction. The extra condition could be that any contingent liability under the undertaking be appropriately secured ... Again, the plaintiff can elect to comply with this condition or decline to do so, but must accept the consequences of its election.”

15 In Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No 2),[12] Dodds-Streeton J noted that a condition relating to an undertaking (be it the undertaking simpliciter or the undertaking with appropriate security) could not be imposed retrospectively and that:

“All a Court may do is refuse the injunction if the undertaking is declined. It cannot require the provision of security, but may refuse an injunction if security or other relevant condition is declined”.

16 In most cases it will be necessary for a plaintiff to provide the undertaking or, where applicable, security. However, there are cases where exceptional circumstances will mandate dispensing with either the undertaking or security. In Blue Wedges Inc v Port Melbourne Corporation[13] Mandie J, when speaking of the provision of an undertaking said:

“In my opinion a fundamental consideration on this application for an interlocutory injunction is that no viable undertaking as to damages is or can be offered by the plaintiff. Such an undertaking is required save in exceptional circumstances. It is convenient to refer to, and I adopt, what was most recently said in that regard in the High Court by Heydon J in *Combet v Commonwealth of Australia*. I can conceive that in some circumstances an interlocutory injunction might be granted without requiring the usual undertaking as to damages if there was a manifest breach of the law threatened. It might then be in the public interest to grant such an injunction without requiring the usual undertaking as to damages. Likewise if there was a proven danger of irremediable harm or serious damage an interlocutory injunction might perhaps be granted in some circumstances without the undertaking being required.”

17 I think the same principle must apply where the worth of any undertaking is seriously in issue and the question of appropriate security is raised; namely, are there exceptional circumstances which warrant departure from the general rule that a party, either by undertaking alone or with security, ensures that its opponent will not be out of pocket if the primary claim fails.

18 Of course the granting of an injunction and its terms necessarily depend upon the nature of the case being considered. In determining whether exceptional circumstances have been shown, the Court will examine the strength of the plaintiff’s case on a prima facie basis while ensuring such considerations do not inhibit the function of the trial judge. The Court will also examine the nature of the damage which the plaintiff seeks to prevent or will suffer if the injunction is

not granted, and, in the context of this litigation, whether there is an issue of public importance or public interest that would count against ordering security over and above the undertaking.

19 As has been seen, in the vast majority of cases involving private litigants, the question of an appropriate undertaking and/or the need for a security will be of considerable importance in determining whether to grant the injunction. However, in proceedings involving public interest issues, that consideration may not be as great. There is a line of authority in the Land and Environment Court of New South Wales to this effect. For instance, in Ross v State Rail Authority of NSW,[14] Cripps CJ said:

"Where a strong prima facie case had been made out that a significant breach of an environmental law has occurred, the circumstance that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account in considering the balance of convenience."

20 Subsequently in Oshlack v Richmond River Council and Irongates Developments Pty Ltd, [15] Stein J said:

"For justice to be administered through open standing provisions it was and remains necessary for the Court to review any unreasonable procedural barriers to public participation. One such example is the traditional requirement for an applicant to give an undertaking as to damages upon an application for an interlocutory injunction. The requirement had its origins in private litigation in order to do justice to strike a balance between the competing private interests. However, applicants in public interest litigation have no private interest in the proceeding. Their prime motivation is to seek to uphold the public interest in the rule of law. In *Ross v State Rail Authority*, Cripps J held that in recognition of the public interest nature of the litigation the offering of an undertaking for damages was but one factor to be considered in the balance of convenience. *Ross* has been repeatedly followed in the Court in public interest cases."

21 More recently in Tegra (NSW) Pty Ltd v Gundagai Shire Council,[16] Preston CJ said:

"The appropriateness of requiring an applicant to give an undertaking as to damages may vary depending upon the nature of the proceedings. In public interest, environment proceedings, it may be less appropriate."

Analysis

22 The thrust of VicForests' submission is that if EEG fails in its primary claim and the undertaking is not secured, then it will sustain losses of between approximately $20,000 and $160,000. I have previously concluded that it is inevitable that VicForests will suffer a real financial loss as a result of its inability to harvest coupes 15 and 19 this season. However, I am not convinced that the losses are as great as Mr MacDonald sets out, notwithstanding the fresh material contained in the third affidavit. The reality is that VicForests retains the asset even though it cannot harvest the coupes this year.

23 Mr MacDonald's estimate of the loss of profits[17] is based upon an inability to harvest the timber this year or early next year. His estimate is untested, but, more importantly, the question of the level of loss, assuming that harvesting can occur next year, is couched in conclusionary and what appears to be only partially substantiated opinion. For instance, Mr MacDonald swears, in relation to the losses:

“It is unlikely that VicForests will ever be able to recover these losses.”[18]

The substantiation for this opinion seems to be contained in paragraph [8] of his second affidavit:

“This profit is not recovered in subsequent financial years as it is dependent on both customers being willing to accept any shortfall in subsequent years and VicForests’ ability to produce additional volume over and above base contract commitments in subsequent financial years.”

Mr MacDonald refers to a discussion with one of his customers who apparently asserted that “some customers” have opted to obtain saw logs from alternative suppliers.[19] The further elaboration in paragraphs [6]-[8] of his third affidavit does not assist me in identifying the basis for his figures. Indeed, the email attached to Ms Bleyer’s most recent affidavit (untested as it is) indicates that there may be an issue as to the amount of sawn logs to be harvested from the coupes.[20]

24 This combination of hearsay, untested and somewhat difficult to follow supposition is, I think, unconvincing as to the level of loss.

25 Moreover, there is no suggestion by Mr MacDonald that VicForests will be liable for any contractual penalty to either its customers or its contractors. Rather, it runs a real risk of not being able to recoup its loss of profits for this year in the following years if it is unable to harvest coupes 15 and 19 over the next few months.

26 Whilst I accept that the inability of VicForests to harvest coupes 15 and 19 will produce financial disadvantage, I am not persuaded, given the preservation of the asset and the quality of the timber (which VicForests says exists on Brown Mountain), that the losses are as great as predicted by Mr MacDonald.

27 Notwithstanding my scepticism as to the level of loss asserted by VicForests, the question still remains whether security in a modest amount should be ordered.

28 I have set out at [12]-[21] the principles relevant to provision of security. In my view, EEG has established exceptional circumstances in the context of this case. I say that for the following reasons.

29 The difficulty in balancing the economic benefits of the logging of native forests to both the State’s economy and regional communities as against the preservation of endangered native fauna is well recognised in the community. The statutory obligations cast upon VicForests seem to me to be intended to achieve a balance between these two seemingly irreconcilable interests. The statements of principle contained in the action statements, the code and the plan demonstrate the clear legislative intent that protecting threatened or endangered species such as the potoroo is particularly important. The purpose of the legislation and the incorporation of the various documents is to afford a significant degree of protection to a native species, if detected. This is important in this consideration.

30 Second, and this flows from the first point, there is the issue of the public interest in the protection of threatened and endangered species. That interest is reflected, to a considerable extent, in the legislation I have referred to in my earlier reasons. As the statements by members of the New South Wales Land and Environment Court demonstrate, public interest litigation may be differentiated from that concerned with the enforcement of private rights.

31 Third, to make an order that EEG provide security, even in a modest sense, will probably stultify its ability to conduct its case against VicForests and therefore run contrary to the public interest.

32 Fourth, there is a genuine risk of irremediable harm or serious damage to the potoroo, an endangered and threatened species. It may not be a "proven danger", but on the material that I have referred to in my previous reasons, there seems to be a genuine risk that its habitat may be destroyed if the harvesting commences.

33 Finally, I have concluded that there is a prima facie case that VicForests may, if it carries out its harvesting operations in the two coupes, breach several statutory obligations. True it is that it may not be a "manifest breach" as Mandie J described nor a continuing breach, but there is, given the evidence of detection, at least an arguable breach if the harvesting goes ahead.

34 I note that this case is factually quite different to that considered by Mandie J in Blue Wedges. EEG is a long-standing environmental group and has demonstrated a sufficiently sound case to preserve the status quo, which was not the case in Blue Wedges.

35 I should add that I do not think that there is any force in the submission made on behalf of EEG that VicForests, in making its submission as to the provision of security, was acting contrary to a "model litigant" code. Not only was there no evidence as to the contents of the code or as to whether it applied to VicForests, it seems to me that this is not an issue for the Court to determine on an application such as this. Rather, it is an issue, if it is one at all, between VicForests' legal advisers, VicForests itself and perhaps the relevant Minister. It has no relevance as to whether, and on what terms, an injunction should be granted.

Conclusion

36 For the reasons which I have endeavoured to articulate, I have taken the view that it would be inappropriate to order EEG to provide security over and above its undertaking as to damages.