NELR casenotes

Supreme Court of Victoria

Environment East Gippsland Inc v VicForests [2009] VSC 386 (14 September 2009)

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This case involved Environment East Gippsland (EEG), an incorporated association, seeking an interlocutory injunction restraining VicForests from carrying out logging operations in State forest on Brown Mountain in East Gippsland.

The area of forest designated for logging was a major habitat for native fauna, in particular the endangered Long-Footed Potoroo and Sooty Owl. EEG asserted that such logging was unlawful given the environmental obligations upon VicForests to protect native fauna. EEG argued that such obligations were provided by a number of statutory provisions affecting the operations of VicForests, particularly those contained in the Sustainable Forests (Timber) Act 2004 (Vic) (SFTA) and the Flora and Fauna Guarantee Act 1988 (Vic) (FFGA), the Code of Practice for Timber Production 2007 (the Code), the East Gippsland Forest Management Plan (the Plan), and action statements concerning individual species (action statements) promulgated by the Department of Sustainability and Environment (DSE) and the FFGA itself.

In the Supreme Court decision, Forrest J refuted VicForests argument that these obligations amount to 'statements of principle, rather than specific responsibility'. He also refuted the argument that reference to the precautionary principle in the Code was 'simply a statement of objective or lofty principle' (at paras 72 and 80). Rather, Forrest J concluded that particular parts of these respective codes or plans had the force of law and thus commencement of logging operations would necessarily result in breach of those provisions. At paras 82 he stated:

> 'In summary, I am satisfied that there is a prima facie case that the provisions of the action statements, the Code and the Plan create lawful obligations upon VicForests with which it must comply when carrying out logging operations in the two coupes'.

Forrest J affirmed the following principles held by the High Court in Australian Broadcasting Corporation v O'Neill as relevant to the grant of an interlocutory injunction (at paras 62 to 71):

> 'The plaintiff must demonstrate that there is a serious question to be tried. It must prove, prima facie, a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial. In the context of this case it must show that it has a putative legal or equitable right in respect of which final relief is sought'.
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> 'The injury which the plaintiff is likely to suffer must be one that damages will not provide an adequate remedy'.
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> 'The balance of convenience must favour the granting of an injunction. The balance of convenience requires a consideration of the relevant matters favouring or militating against the granting of an injunction and will necessarily involve a consideration of the strength of the plaintiff's claim assuming that a serious issue has been identified. The Court must, in determining whether to grant an interlocutory injunction, 'take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong, in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial'.
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> 'There may be other discretionary considerations which militate against the grant of the injunction'.

Forrest J held that the EEG had standing to bring the claim, affirming the following matters as relevant to determining of the standing of an environmental organisation to bring a claim before the court (as held by the Federal Court in North Coast Environment Council Inc v Minister for Resources) (at paras 64 to 71):

> EEG had to 'demonstrate a 'special interest' in the subject matter of the action. A 'mere intellectual or emotional concern' for the preservation of the environment (was) not enough to constitute such an interest. The asserted interest must go beyond that of members of the public in upholding the law and must involve

more than genuinely held convictions'.

Possible non-compliance with the Administrative Procedures, the Environment Protection Act (with the possible exception of s 10), or the Administrative Procedures is not enough of itself to confer standing on an environmental organisation.

The fact an environmental organisation makes 'comments on an EIS produced pursuant to directions given under the Administrative Procedures does not of itself confer standing (on that organisation) to challenge or complain of a decision resulting from the environmental assessment process'.

An organisation does not 'demonstrate a special interest in the environment sufficient to establish standing simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment'.

Forrest J concluded that what was vital was 'the importance of EEG's concern with the subject matter, the decision and the closeness of its relationship to that subject matter'. Based on the facts, he held that the EEG had standing to bring the case, given it's (at para 71):

> […] level of membership, constant activities on Brown Mountain (including its conducting of fauna surveys), regular communications with government concerning the area and the fact that it appears to be the only body directly interested in the preservation of the area's natural habitat demonstrates in a practical sense.

Forrest J stated that the balance of convenience strongly favoured the granting of an interlocutory injunction to 'preserve the status quo until final hearing' (at para 105). As summarized at paras 102 and 104:

> '[…] once the logging is carried out and the native habitat destroyed, then it cannot be reinstated or repaired in anything but the very, very long term. An award of damages is, of course, irrelevant'.

> 'I accept that there will be significant financial ramifications for VicForests by the granting of an interlocutory injunction, but, as I have said, that needs to be balanced against the irreversible damage that will be caused to the habitat, bearing in mind that the Potoroo is an endangered and threatened species'.

Finally, Forrest J held that 'a strict timetable should be set' in relation to the full hearing of EEG's claim (at para 111):

> 'Given VicForests' legitimate concerns as to the worth of any undertaking as to damages and its potential economic detriment as a result of the granting of the injunction, the trial should be held as soon as is practicable. I propose to discuss with counsel the best way in which to advance the case, with a view to having a trial conducted early in 2010'.

[Editors note: The trial has now been scheduled for March 2010. A comprehensive collection of pleadings and affidivits can be found at Environmental Law Publishing: www.envlaw.com.au/brown_mountain.htm.
Environment East Gippsland is seeking contributions to support continuation of this legal action. For details see the Brown Mountain advertisement on the inside back cover of this issue, or go to www.eastgippsland.net.au]