IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION AND PLANNING LIST

Not Restricted

S ECI 2020 00373

WOTCH INC — Plaintiff

v

VICFORESTS — Defendant

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| JUDGE: | McMillan J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 27 March 2020 |
| DATE OF JUDGMENT: | 29 April 2020 |
| CASE MAY BE CITED AS: | WOTCH v VicForests (No 3) |
| MEDIUM NEUTRAL CITATION: | [2020] VSC 220 |

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INTERLOCUTORY INJUNCTION — Whether serious question to be tried — Whether balance of convenience favours granting injunction — Where interlocutory injunction previously granted in relation to different coupes: *WOTCH v VicForests (No 2)* [2020] VSC 99 — *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102.

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| APPEARANCES: | Counsel | Solicitors |
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| For the Plaintiff | Ms KE Foley, Ms J Watson and Ms C Mintz | Environmental Justice Australia |
| For the Defendant | Mr IG Waller QC, Mr H Redd and Ms RV Howe | Baker McKenzie |

HER HONOUR:

1 On 5 March 2020, the Court granted an interlocutory injunction to prevent the defendant from undertaking timber harvesting operations in 13 coupes in Victoria pending the hearing and determination of the plaintiff's case ('*WOTCH (No 2)*').[1] The evidence, submissions and findings in those reasons are not repeated here.

2 The plaintiff has filed two further summonses:

(a) On 19 March 2020, the plaintiff filed a summons seeking an interlocutory injunction in relation to an additional ten coupes; and

(b) On 24 March 2020, the plaintiff filed a summons seeking an interlocutory injunction in relation to an additional three coupes.

3 The plaintiff therefore seeks interlocutory injunctive relief over 13 coupes ('the subject coupes') additional to the 13 coupes the subject of *WOTCH (No 2)*. The injunction is sought on the same bases as in *WOTCH (No 2)*.

4 At the hearing, the Court granted interim injunctions in relation to the subject coupes pending determination of the interlocutory injunction applications.

**The subject coupes**

5 The subject coupes are all identified on the Timber Release Plan dated December 2019 and published by the defendant. They are named as follows: Ezard, Fergana, Stimpy, Nine Miles High, Ruprecht, Zinger, Turkey Feet, Bauble, Facet, Tenderloin, Magellan, Wanderlust, and Monster. The latter three were those the subject of the 24 March 2020 summons.

6 One of the subject coupes is in the Benalla-Mansfield forest management area and the other 12 are in the Central Highlands.

**Plaintiff's case**

7 The plaintiff submits that the subject coupes all fall within the subject matter of the

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1 *WOTCH v VicForests (No 2)* [2020] VSC 99 ('*WOTCH (No 2)*').

plaintiff's statement of claim filed on 5 February 2020, being:

> coupes known to the defendant or the Department of Environment, Land, Water and Planning ('DELWP') to contain or be likely to contain a species identified as threatened pursuant to the *Flora and Fauna Guarantee Act 1988* ('FFG Act') and affected by the recent bushfires, or habitat of such species.

8 The plaintiff submits that the defendant either has been conducting or is proposing to imminently conduct harvesting operations in the subject coupes, as follows:

(a) In relation to Ezard, Fergana, Stimpy, Nine Miles High and Ruprecht ('the active coupes'), the defendant is actively conducting harvesting operations (or would be save for the interim injunctions);

(b) In relation to Zinger, Turkey Feet, Bauble, Facet and Tenderloin ('the notice coupes'), the defendant has given the plaintiff notice that it intends to commence or re-commence harvesting operations from 26 March 2020;

(c) In relation to Magellan, Wanderlust and Monster ('the recent coupes'), the plaintiff became aware of active or imminent operations since it filed the summons on 19 March 2020 — these coupes are the subject of the summons filed 24 March 2020.

9 The plaintiff sought undertakings from the defendant not to conduct harvesting operations in the subject coupes prior to the hearing and determination of the proceeding. Such undertakings were not provided.

10 The plaintiff has filed detection records of the following threatened species in the subject coupes: Ezard, one sooty owl; Fergana, seven greater gliders; Stimpy, two greater gliders; Nine Miles High, one sooty owl; Ruprecht, six greater gliders; Zinger, seven greater gliders; Turkey Feet, seven greater gliders; Bauble, eight greater gliders; Facet, one sooty owl; Tenderloin, two greater gliders and two powerful owls; Magellan, three greater gliders; Wanderlust, four greater gliders and one powerful owl; and Monster, three greater gliders and three sooty owls.

**Defendant's case**

11 The defendant submits that, in light of events that have transpired since *WOTCH (No 2)*, the Court should not grant an interlocutory injunction in relation to the subject coupes on the same bases.

12 It submits that new evidence is relevant to both the 'prima facie case' and 'balance of convenience' limbs of the test for whether an interlocutory injunction should be granted.

**Prima facie case**

13 In *WOTCH (No 2)*, the Court concluded as follows:

> (a) It is arguable that there is a threat of serious and irreversible damage to the environment in respect of the threatened species.
>
> (b) That threat is attended by a material lack of scientific certainty. In particular, the adequacy of the current greater glider IPA, as well as the POMAs and SOMAs, is uncertain. In respect of the IPA, it is not yet finalised and the AS in its current terms contemplates an update to its content and the boundaries of protected areas.
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> (c) With the exception of Wabby coupe, at least one of the threatened species is known to be present in each of the coupes in which timber harvesting is proposed.
>
> (d) In the circumstances, the plaintiff has satisfied the Court that there is a sufficient likelihood of success in its case that if the defendant were to proceed with the proposed timber harvesting, it would be doing so in breach of the precautionary principle. That prima facie case justifies the preservation of the status quo pending trial.[2]

14 The defendant points to four new matters relevant to this limb.

15 Firstly, it submits that the fact that there are now 13 coupes already the subject of injunctive orders is a relevant consideration. This argument is rejected, as the existence of injunctive orders in relation to other coupes does not bear on the issue of whether there is a serious question to be tried. It can only be relevant as to the balance of convenience.

16 Secondly, Mr Paul, Manager of Environmental Performance for the defendant,

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2 Ibid [132].

deposes that he was informed by Jeremy Allen of DELWP that the boundaries for the immediate protection areas ('IPAs') for the greater glider referred to above have now been finalised and are available to the public as a spatial data file on DELWP's website. Mr Paul provides a link to the relevant website address, but does not exhibit any documents in support of this assertion. The Court is therefore not in a position to rely upon the content of the IPAs but nevertheless accepts that they have been finalised. Given that the defendant has undertaken to not harvest any forest in the IPAs, there would be no need for injunctive relief in relation to those areas.

17 In *WOTCH (No 2)*, it was found:

> The Court in *MyEnvironment* also rejected the plaintiff's argument that timber harvesting should be suspended until finalisation of a review of the [action statement] for the species in issue. In that case, however, there was no suggestion that the protections in the [action statement] would be relevantly altered. Here, by contrast, the area that was set aside as necessary for immediate protection in East Gippsland has been extensively consumed by the fires. The greater glider [action statement] expressly states that the IPAs were 'indicative', with boundaries not yet finalised, and a finalised map was foreshadowed. This has not yet occurred. It will now require the government to consider whether additional areas where the greater glider is found should be set aside for immediate protection. The plaintiff submits that the coupes are obvious candidates for this immediate protection.[3]

18 The finalisation of the IPAs since *WOTCH (No 2)* is a relevant distinction between the evidence available to the Court then and now. The plaintiff's previous submission 'that finalisation of the IPA may well mean changes to the protected areas' is now redundant,[4] as is the Court's finding that the action statement 'contemplates an update to its content and the boundaries of protected areas'.[5]

19 The status of the IPAs was an important factor in the Court's determination that the plaintiff had demonstrated a prima facie case, but it was not a critical factor. The plaintiff's case was put at two other levels: (a) that the defendant must await the review and finalisation of the management areas for the two owl species; and (b) that the defendant must await the assessment and advice from the State and

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3 Ibid [127] (citation omitted).
4 Ibid [59].
5 Ibid [132(b)].

Commonwealth governmental responses.[6] Ultimately, the question remains whether the defendant has made careful evaluation of management options to, wherever practical, avoid serious or irreversible damage to the environment and properly assessed the risk-weighted consequences of the various options.[7] The scope of that precautionary principle in light of the bushfires is a question for trial.

20 Thirdly, the Office of the Conservation Regulator ('OCR')[8] has provided the defendant with four letters concerning three of the subject coupes, namely: Facet, Ezard and Nine Miles High. Three of the letters note a detection report of a sooty owl in one of the subject coupes. It then states that there is no protective prescription for 'discreet [sic] observations' of an individual sooty owl in the area and, as such, there is no regulatory requirement for the defendant to apply any exclusion zone in the area. It states that the defendant will provide relevant contractors with information on sooty owls, including nesting and roosting sites, and that the defendant will be notified if such values are encountered during operations. These three letters concern compliance with current prescriptions without addressing the adequacy of those prescriptions. As such, they do not address the plaintiff's case, and do not affect the Court's determination as to whether there is a prima facie case.

21 The fourth letter notes a detection report of Leadbeater's possum in Ezard coupe. It then states that, as such, there would be 'the appropriate zoning process', and that timber harvesting 'is to be excluded'. This letter was not addressed further at the hearing.

22 Fourthly, the defendant gave evidence about a biodiversity risk assessment being undertaken by the defendant and under Mr Paul's supervision. The assessment for the Central Highlands area remained underway at the time of the hearing and the little documentation exhibited gives no insight into the nature of the assessment or its conclusions. Despite this, Mr Paul deposed:

> Based on my knowledge of the assessment as it currently stands, the result of

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6 Ibid [14]. The nature of the governmental responses is set out at [33]–[37].

7 *Code of Practice for Timber Production 2014* , 'precautionary principle'. See *WOTCH (No 2)* (n 1) [20]–[23].

8 See *WOTCH (No 2)* (n 1) [104], which outlines the function of the OCR.

> that biodiversity assessment is expected to show little to no threat to Greater Glider, Powerful Owl and Sooty Owl in the Central Highlands RFA Area. That is because the area was not affected by the fires in East Gippsland, and the existing prescriptions are adequate to protect the populations of those species in the Central Highlands RFA Area where they are found.

23 This evidence does nothing to support the defendant's case. Indeed, the fact that the defendant has seen fit to undertake a biodiversity assessment, and that assessment remains underway, would only support the plaintiff's case.

24 The Court is satisfied that the plaintiff has demonstrated a prima facie case in relation to the subject coupes on the same grounds as in *WOTCH (No 2)*.

**Balance of convenience**

25 The plaintiff makes its case on the same basis as in *WOTCH (No 2)*. In this application, its submissions were made in reply to those of the defendant.

*Defendant's submissions*

26 The thrust of the defendant's submissions is that the plaintiff is attempting, through piecemeal applications to the Court, to prevent the defendant, on an interlocutory basis, from harvesting timber in all coupes that all fall within the subject matter of the plaintiff's statement of claim.[9] The defendant submits:

> Although the present application concerns an additional 13 coupes, there is no doubt that were VicForests to move into coupes fitting within the allegation in paragraph 22 of the statement of claim, such coupes would be the subject of an application for further interlocutory relief, in the absence of any undertaking being given.

27 The defendant draws attention to the plaintiff's repeated submissions to the Court that it is not seeking a moratorium on timber harvesting in the State, and that injunctive relief is being sought on specific coupes rather than in a broad-brush fashion.[10] The defendant then points to a letter from the plaintiff dated 10 March 2020, which stated:

> To be clear, it remains our client's position that your client should not be logging in any coupe known to contain or known to be likely to contain fire-affected threatened species or habitat of such species, prior to the hearing and

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9 See above [7].

10 Counsel for the plaintiff made statements to this effect at hearings on 28 January 2020 and 18 February 2020.

> determination of this proceeding. The interlocutory relief previously sought was limited to coupes our client knew were the subject of active or imminent timber harvesting. As additional information comes to our attention, our client has needed to take action accordingly. As has previously been indicated to you and to the Court, if your client could provide clear information about its current and proposed operations it would avoid the need for our client to approach the Court in this piecemeal fashion. Of course, if your client commits to not log in such coupes prior to the hearing and determination of the proceeding, there would be no need to approach the Court at all. This would not impact your client's operations in coupes that are not known to contain or be likely to contain fire-affected threatened species or habitat of such species.

28 The defendant submits that the plaintiff's current application is at odds with their 'stated intention' to restrain the defendant from harvesting operations in all coupes the subject of the statement of claim.

29 The defendant then makes submissions as if this 'stated intention' were an application before the Court, relying on Mr Paul's affidavit, which gives detail of DELWP modelling employed by the defendant for forest management planning and analysis. These habitat distribution models (HDMs) use the modelling of a range of environmental variables to rank the relative likelihood of species' occurrence on a scale of 1 (low) to 99 (high). Mr Paul deposes that these HDMs, despite some limitations, are the most useful data available to the defendant absent individual field surveys in each coupe. Taking the greater glider as an example, nearly all of the coupes marked as theoretically available for harvesting contain a likelihood score of at least 32.0–49.3, and the vast majority of the coupes contain habitat modelled with a likelihood score of 49.3–93.

30 As an aside, the Court was not directed in submissions to the specific likelihood scores in the subject coupes. However, given the plaintiff's evidence of actual sightings of at least one of the three species in each of the subject coupes, such information would be of little assistance.

31 Based on his review of the HDM maps, Mr Paul deposes that if the defendant were restrained from harvesting in coupes likely (meaning a score of at least 49.3) to contain at least one of the three species, or their habitat, it would shut down all of the defendant's operations in the Central Highlands.

32 Thereafter, Mr Paul's evidence, and the defendant's submissions, are directed toward the effect of the defendant being enjoined from harvesting timber in the whole of the Central Highlands. Given the previous communications from the plaintiff, and the above modelling, the defendant submits that it would be artificial to confine the Court's analysis on the balance of convenience, as the plaintiff proposes, to the immediate consequence of an injunction on only the subject coupes, without any consideration as to the practical flow-on for the defendant, its contractors and its customers.

33 As to the importance of the Central Highlands region for the defendant's operations, it is the most productive area in terms of timber production, supplying at least 70 per cent of the defendant's total revenue in the last financial year. Accordingly, if the defendant were restrained from harvesting timber in this area, it would only be a matter of one or two months before the defendant's business became financially and commercially unviable. This would result in loss of employment at the defendant, and place the businesses of its contractors and customers in jeopardy, and the jobs of the employees of its contractors and customers at risk.

34 In addition to foregoing certain revenue supplies, the standing down of harvesting and haulage contractors entails its own charges that the defendant must meet.[11] Compensation is also payable where the defendant fails to meet its minimum contractual supply commitments.

35 The defendant cited several passages from the decision in *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* ('*Bridgetown*').[12] *Bridgetown* concerned an application for interlocutory injunctive relief to restrain logging in a part of Western Australia, based on an alleged non-compliance with a requirement on the agency to conform to a 'precautionary approach' in the conduct of its operations. In the judgment, Wheeler J described the 'precautionary approach' as 'a similar or perhaps identical concept' to the

11 See *WOTCH (No 2)* (n 1) [137].
12 (1997) 18 WAR 102 ('*Bridgetown*').

precautionary principle.[13]

36 The application in *Bridgetown* failed at the prima facie case stage, but her Honour concluded that the application would also fail on the balance of convenience. In that context, her Honour noted:

> The potential loss to a third party and in particular the potential loss of employment of innocent third parties are very serious considerations. Were the evidence clear on this point, the balance of convenience would appear to point inevitably against the grant of any injunction.[14]

37 Further:

> What is immediately striking about the balance of convenience in this case, is the disparate interests involved. On the one side is the public interest in conservation of species, while on the other there is … the community's economic interest and the unquantified risk of economic hardship to innocent individuals. The weight to be accorded to different interests of these kinds is the subject of substantial, and sometimes bitter, community debate. It is difficult to see that there is at present any consensus in favour of one interest rather than another, and the balancing of them is clearly a task which lies at the heart of the political process.
>
> Where such disparate interests are concerned, then in my view it is desirable to evaluate with greater than usual care the strength of the plaintiffs case. If the case is a prima facie one with a substantial prospect of success, that may be enough to tip the balance in favour of the interests protected by the statutory regime which it is sought to enforce by way of injunction. If on the other hand, the plaintiff's case is weak, then in my view it may require a very clear risk of injustice on the plaintiff's side, or a clear absence of any risk of injustice to the defendant, to justify the elevation of one form of interest over the other. Approached from a slightly different perspective, where there is, as here, material to suggest a risk either to conservation, or to the economic interests of innocent third parties, a court should be slow to prefer one to the other, unless it is reasonably clear that the risk on one side is slight.

*Plaintiff's submissions*

38 The plaintiff's submissions may be briefly summarised as follows:

(a) The defendant fails to distinguish between the interlocutory and final relief sought by the plaintiff. The subject coupes represent less than ten per cent of the coupes that the defendant scheduled for logging (or as contingencies)

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13 Ibid 119 (Wheeler J).

14 Ibid 122.

between February and July 2020 in two regions.

(b) The plaintiff has made its applications based on actual detections in the subject coupes. It provided evidence of observations of timber harvesting in 11 other coupes in the Central Highlands over which an interlocutory injunction is not sought.

(c) The defendant has not adduced any evidence in respect of the impact of an injunction over the subject coupes.

(d) The defendant has not adduced evidence demonstrating that it has taken account of the impact of the bushfires on the threatened species as a whole.

(e) The piecemeal approach to interlocutory relief has been necessitated by the defendant's refusal to inform the plaintiff in relation to its intended operations or provide the plaintiff with a document referred to as the 'rolling operations plan'.

*Consideration*

39 The defendant has adduced no evidence, and made no submissions, as to the direct economic impact of the granting of the injunctive relief sought by the plaintiff in this application. Instead, the defendant asks the Court to make two significant steps in its reasoning:

(a) First, the plaintiff's actual intention, anticipating further applications, is that the defendant be enjoined from harvesting timber in all coupes falling within the subject matter of the statement of claim, rather than just the subject coupes; and

(b) Second, that this would have the effect of preventing the defendant from harvesting in the entire Central Highlands area, meaning the Court should consider the impact of such an effect on the defendant, its contractors, and its customers.

40 Whilst the plaintiff bears the onus of proof in this application, it is incumbent on the

defendant to satisfy the Court that it is appropriate to engage in this type of speculative reasoning. The Court was not made aware of any particular authority on this point. In *Bridgetown*, the 'unquantified risk of economic hardship to innocent individuals' would have flowed as a direct result of the interlocutory injunctive relief sought, not as a result of future anticipated applications. Were the defendant in this application able to adduce evidence of such a risk flowing from an injunction in relation to the subject coupes, that would clearly be a weighty consideration for the Court — but that is not the case.

41 It is appropriate, however, that the Court engage with the defendant's submissions at this juncture. As respondent to the application, the defendant has no control over the scope of the interlocutory injunctive relief sought by the plaintiff. Were the scope wider — for example, seeking an interlocutory injunction in the same terms as the final relief sought — then the defendant would be in a far better position to meet the plaintiff's case, with much the same evidence of economic impact as was adduced in this application. As it stands, absent any further applications pending trial, the economic impact on the defendant of an injunction over the subject coupes may be relatively minimal, whilst the cumulative effect of this piecemeal approach could well be devastating to the defendant's operations. The plaintiff's submissions in this regard are myopic, but the defendant's case does not give proper regard to the merits of this application.

42 The plaintiff's statement of claim can be extrapolated as covering four types of coupe:

(a) coupes known to contain a species identified as threatened pursuant to the FFG Act and affected by the recent bushfires;

(b) coupes known to be likely to contain such a species;

(c) coupes known to contain habitat of such a species; and

(d) coupes known to be likely to contain habitat of such a species.

43 It can fairly be said that the plaintiff's case is strongest in relation to the first of these

categories, and decreases in strength accordingly. At this stage, the plaintiff has sought interlocutory relief only in relation to specific coupes falling within the first of the above categories. It does not follow that the plaintiff is entitled to an interlocutory injunction in relation to any coupe falling within the first category, let alone any coupe falling within any other of the above categories.

44 The limited scope of the plaintiff's application assists its case. However, pending trial, the plaintiff should have close regard to its obligations under pt 2.3 the *Civil Procedure Act 2010* ('the CPA'), and recall that, in the exercise of its powers, the Court is required to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.[15] It has already become increasingly incumbent on the plaintiff to justify the interlocutory course it is adopting. Equally, the defendant should consider its own obligations under the CPA.

45 The existing interlocutory injunction is a relevant consideration in the balance of convenience, as are the defendant's submissions as to the cumulative effect of these applications. However, these considerations do not outweigh the importance of preserving the threatened fauna pending trial, in circumstances where the defendant failed to adduce any evidence as to the direct consequences of the interlocutory relief sought.

46 The Court is satisfied, on the balance of convenience, that the plaintiff should be granted an interlocutory injunction in relation to the subject coupes. The parties are to forward proposed orders reflecting these reasons.

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15 *Civil Procedure Act 2010* (Vic) s 7.

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**CERTIFICATE**

I certify that the 12 preceding pages are a true copy of the reasons for judgment of the Honourable Justice McMillan of the Supreme Court of Victoria delivered on 29 April 2020.

DATED this twenty-ninth day of April 2020.