

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

Not Restricted

S ECI 2020 02658

KINGLAKE FRIENDS OF THE FOREST INC.
(ABN 35 186 838 481)

Plaintiff

v

VICFORESTS

Defendant

JUDGE: John Dixon J
WHERE HELD: Melbourne
DATE OF HEARING: 2 July 2020
DATE OF RULING: 2 July 2020 (Reasons: 9 July 2020)
CASE MAY BE CITED AS: Kinglake Friends of the Forest Inc. v VicForests (No 2)
MEDIUM NEUTRAL CITATION: [2020] VSC 418

ENVIRONMENTAL LAW - Application to extend interim injunction - Timber harvesting in State forest coupes - Whether serious question to be tried that defendant failing to screen timber harvesting operations from view, in breach of statutory forestry management standards - Whether serious question to be tried that harvesting not in accordance with statutory timber release plan - Balance of convenience - Extension of interim injunctions granted - *Sustainable Forests (Timber) Act 2004* (Vic), s 46 - Code of Practice for Timber Production 2014 - Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014, cl 2.2.1.1.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Korman	McMullan Solicitors
For the Defendant	Ms FJ Hudgson	Russell Kennedy

HIS HONOUR:

- 1 Kinglake Friends of the Forest Inc. (**Kinglake FF**) is an incorporated association ‘established for people who want to learn about, discuss and advocate for the preservation of the native forests in Kinglake and the Central Highlands’. **VicForests** is a Victorian Government owned business, whose purpose is to ‘sustainably manage the State’s renewable timber resources for the long-term environmental, social and economic benefit of all Victorians’.
- 2 In this proceeding, Kinglake FF seeks a declaration and a permanent injunction in respect of timber harvesting by VicForests that it alleges is in contravention of the *Sustainable Forests (Timber) Act 2004* (Vic), the **Code** of Practice for Timber Production 2014, and the Management **Standards** and Procedures for timber harvesting operations in Victoria’s State Forests 2014.
- 3 By summons filed on 23 June 2020, Kinglake FF sought interim injunctions restraining VicForests’ timber harvesting operations in 14 coupes in State forest in the Central Highlands forestry management area. Richards J granted Kinglake FF’s application for an interim injunction in the Practice Court on 24 June 2020. Briefly, the effect of her Honour’s orders was that VicForests was restrained from felling or cutting trees, as specified in the orders, until 5:00pm on 14 July 2020. The application is listed for further hearing before her Honour on that day and directions for further material for that hearing are extant.
- 4 Richards J published her reasons for making those orders on 26 June 2020.¹
- 5 Exercising liberty to apply, Kinglake FF applied again to the Practice Court on 2 July 2020 for further interim relief, which I granted, stating that I would publish my reasons in due course. Significantly, I was only considering the maintenance of the status quo from 2 July 2020 to 14 July 2020.
- 6 I made the following orders.
 1. Until 5:00 pm on 14 July 2020, the defendant must not, whether by itself,

¹ *Kinglake Friends of the Forest Inc. v VicForests* [2020] VSC 394 (**‘Richards J Reasons’**).

its servants, agents, contractors or howsoever otherwise, within any coupes in the Central Highlands Region:

- (a) subject to Order 2, fell or cut trees or parts of trees within 20 metres of any road or track in any coupe in the Central Highlands Region; or
 - (b) conduct Timber Harvesting Operations within a nett harvestable area in excess of the nett area identified for that coupe in the defendant's Timber Release Plan dated 19 December 2019, or any varied Timber Release Plan that is gazetted before 14 July 2020.
2. Order 1(a) does not prohibit the defendant from felling or cutting trees or parts of trees necessary to create road access to the interior of a coupe, as shown on the defendant's published operations map for that coupe, or in order to address a serious risk to human safety.
 3. Costs reserved.

7 As they did before Richards J, the parties accepted that an interim injunction should only be granted if Kinglake FF could establish that:

- (a) there was a serious question to be tried that VicForests was harvesting timber in contravention of the Act, the Code, or the Standards, and would continue to do so unless restrained; and
- (b) the balance of convenience favoured granting an injunction.²

8 In relation to the balance of convenience, the parties accepted that the Court should 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'.³

9 VicForests reserved its position before Richards J as to whether Kinglake FF has standing to seek the relief set out in the writ.⁴ By an affidavit of John McMullan dated 3 July 2020, the plaintiff alleged before me that it has standing in relation to the area contained within the map of the Central Highlands (being exhibit JM-5 to the

² *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 81-2 [65].

³ *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65, 73 [35] ('*Bradto*').

⁴ Richards J Reasons, [7].

affidavit), which it contended was as a fair representation of the extent of the Central Highlands. For present purposes, this allegation is not contested and the orders I granted were confined by a notation in other matters:

The reference to the Central Highlands region in this order is a reference to the area described in the map that is exhibit JM-5 to the affidavit of John McMullan dated 3 July 2020.

10 I also noted that the plaintiff by its counsel continued the undertaking as to damages given to the court on 24 June 2020.

11 In summary, Richards J was satisfied that there are serious questions to be tried that:

- (a) VicForests is failing or will imminently fail to screen timber harvesting operations from view in ten coupes, contrary to cl 5.3.1.5 of the Standards; and
- (b) VicForests is harvesting or will imminently harvest six coupes in a way that is not in accordance with the current timber release plan and is not authorised by the Act.

12 Her Honour considered that the balance of convenience favoured granting interim injunctions, although in more confined terms than was sought by Kinglake FF.

13 I proceed on the same basis. These reasons should be read in conjunction with the Richards J Reasons, with which I respectfully agree. I do not propose to restate any of the matters that her Honour set out in her reasons, most of which remain directly relevant on the issues before me and I have taken into account.

14 In substance, what Kinglake FF sought to achieve was to extend, until 5:00pm on 14 July 2020, the interim relief already granted in respect of coupes scheduled for June harvesting, to coupes scheduled for July harvesting. Kinglake FF contended there was no relevant difference between the need to ensure interim protection from destruction of forest scheduled to be logged in June, and forest scheduled for logging in July. Kinglake FF submitted, and I agree, that a broader approach to the restraint will avoid repeated applications for variation once specific monthly forest harvesting plans become known, whether through the form of public disclosure by VicForests that has until now been

adopted, or through other means.

- 15 Richards J's order was in specific terms. It restrained destruction of buffers along named roads in named coupes that were scheduled for June harvesting. It restrained harvesting in named coupes, also scheduled for June harvesting, whose operational plans (published by VicForests on its website) indicated an intention to harvest a net area in excess of that identified on the timber release plan. Why a serious question for trial arises in respect of those matters is explained by her Honour in her reasons.⁵
- 16 Kinglake FF claimed that it could not continue this targeted approach to restrict the extension of the injunction to specific roads within the coupes scheduled for harvesting in July, and to such coupes whose operations maps indicated an excessive net area. When, on 1 July 2020, it sought VicForests' co-operation and requested its July harvesting schedules and operations plans, that request was refused, precipitating this application. The request was for copies of the July 2020 monthly harvesting schedule for the North East region and West Gippsland region.
- 17 Kinglake FF claimed that in the event that the July harvesting schedules and operations plans are not available, all it seeks is to either apply the buffer and overharvesting protections to all relevant coupes,⁶ or to simply put harvesting on hold until it's known what is going to be harvested for the month.
- 18 VicForests contended that in asking for the July 2020 schedules, the plaintiff was seeking to ascertain whether or not it had a proper basis to expand the current proceeding from some (but not all) of the coupes listed in the June 2020 harvesting schedules for the North East and West Gippsland regions to any of the coupes listed in the July 2020 harvesting schedules for those regions. This was, VicForests submitted, an impermissible request for discovery prior to the close of pleadings in this proceeding.
- 19 VicForests submitted there was nothing to suggest that will harvest anywhere beyond

⁵ Richards J Reasons, [8]–[35].

⁶ Meaning coupes in respect of which it arguably has standing.

the coupes it is currently logging in the Central Highlands, as permitted, subject to certain restrictions, by Richards J's order on 29 June 2020. It submitted that it was logging in accordance with those restrictions. However, it was also entitled to log, in July, other coupes that were on the June schedule which were not the subject of an injunction. It has said it has not worked out its July schedule.

20 VicForests contended there were a number of matters that the plaintiff did not know and in respect of which it was fishing for information that included:

- (a) Was there a proper basis to expand its claim to include any coupes which VicForests proposes to harvest in July?
- (b) Did the plaintiff have standing for its claim, given that only a limited number of coupes in the North East region are located in the Central Highlands and some coupes in the West Gippsland region are located outside the Central Highlands?
- (c) Did VicForests propose to harvest any coupes scheduled for July within 20 metres of a roadway or track using an impermissible silvicultural method?
- (d) Were any works in a 20 metre buffer solely for the permitted purpose of creating a roadway for the defendant to access the timber in the coupe?

21 VicForests contended that it was under no legal obligation to publish its harvesting schedules. While legally obliged to publish certain information (for example, under the Act, it must give notice in the government gazette of a proposed timber release plan,⁷ and must say where the plan can be viewed),⁸ there is no such obligation in relation to its harvesting schedules.

22 Pausing here, the legislative structure is set out in Richards J Reasons. On review of that material I cannot accept this submission, and in oral argument both counsel accepted that the following analysis showed that there was an obligation to publish

⁷ Act s 37(1).

⁸ Act s 37(2).

harvesting schedules.

23 The Standards are incorporated into the Code that must be observed by VicForests.⁹ The Standards provide detailed mandatory operational instructions, including region-specific instructions for timber harvesting operations in Victoria's State forests. They are consistent with the 'Operational Goals' and 'Mandatory Actions' of the Code and must be complied with for timber harvesting operations in Victoria's State forests.

24 The Standards are informed by relevant policy documents including policies relating to specific forest values, such as threatened species, guidelines and strategies within forest management plans made under the *Forests Act 1958* (Vic) and 'Action Statements' made under the *Flora and Fauna Guarantee Act 1988* (Vic). The Standards replace any directions relating to timber harvesting operations contained within these documents.

25 Relevantly, the Standards provide:

2.2 Communication and engagement

2.2.1.1 The managing authority must make maps and schedules of coupes that have been selected for timber harvesting operations and associated access roading available for public scrutiny prior to commencement of the operations. This information must provide:

- (a) clear maps showing the location of coupes and major access roading (including extensions or upgrading of the permanent road network); and
- (b) approximate timing and duration of timber harvesting operation schedules.

26 I am satisfied that there is a serious question for trial that VicForests is under a legal obligation to publish its harvesting schedules before it commences timber harvesting operations. Having declined to do so, in order to preserve the status quo in the absence of a July harvesting schedule, Kinglake FF may seek more wide ranging relief on the basis of the inference that Richards J considered to be open on the material then before the court. I am not persuaded that there is any material change in circumstance for the July harvest from what was before the court in respect of the June harvest. There was

⁹ Act s 46; Code cl 1.2.6.

a suggestion that VicForests is still working through its June harvest schedule, but there was no explanation of the absence from its website of the documents to which the plaintiff would normally refer in assessing the forestry activities for the coming month. VicForests has neither stated that it will not, nor undertaken not to, continue with timber harvesting operations.

27 There was no evidence of any specific change in VicForests' practices since the interim injunction was granted. VicForests submitted that it is assessing all of its planning and operations in light of the decision by the Federal Court of Australia in *Friends of Leadbeater's Possum Inc v VicForests (No 4)*¹⁰ and orders made in various other court proceedings (including this proceeding), but no detail or specific context was provided. In relevant respects, the inference remains open that VicForests may be failing or will fail to screen from view the coupes that it proposes to harvest in July in accordance with cl 5.3.1.5 of the Standards.

28 Further, the evidence before Richards J, which has also not varied in any material respect before me, was that under current practices there were significant discrepancies between the net areas for the six coupes for June harvesting in the timber release plan, and the net harvestable areas specified in the operations plans and maps. In each case, VicForests plans to harvest a greater net area of timber than is stated in its timber release plan, and the variance remains unexplained. At the hearing, it appeared that VicForests was seeking to make opaque the proposed net harvest area in a timber release plan. VicForests submitted that it was planning to change the method of compliance with s 38 of the Act by gazetting a new timber release plan format that would not include any reference to net harvest area. I was informed that proposed change was still in public consultation phase and had not, and may not have, come into effect. It was of no relevance to the application before me.

29 In the absence of the relevant documents before the court, I have not been persuaded that when considering the status quo until 14 July 2020, I ought to adopt any different

¹⁰ [2020] FCA 704.

position from that taken by her Honour.

30 Although the pleadings are yet to be filed, there is no impediment to the plaintiff's making a claim in respect of forest areas that may comprise the July harvest. The plaintiff has submitted that it will seek a declaration that the Code requires VicForests to screen its harvesting activities from all tracks and roads that are accessible by the public, and that harvesting is required to be carried out in accordance with a timber release plan that complies with the net area specified on that plan.

31 It is inappropriate to characterise the plaintiff's requests for information, which it is entitled to under the Standards in order to monitor forestry activities, as impermissible fishing for a proper basis for an extended claim. The real question is whether, when the serious questions for trial identified by Richards J remains extant in relation to any future harvesting activity, the balance of convenience favours the maintenance of the status quo until 14 July 2020.

32 Richards J analysed the factors relevant in assessing the balance of convenience and granted an injunction.¹¹ I prefer the plaintiff's submission that two additional factors tip the balance in the plaintiff's favour in respect of the relief now sought.

33 First, the period of time (11 days) for which relief is sought is short.

34 Second, VicForests has stated that it is reworking its July harvesting schedules and operations plans in the context of recent court orders, extending the area of forest that is subject to interim restraint on the basis identified by Richards J for the required period, appears to carry the lower risk of injustice if the court should turn out to have been 'wrong', in the sense described in *Bradto*. I was invited to infer that VicForests is not currently proposing to implement a July harvesting schedule because of this review/reworking of its harvesting schedules and operations plans, but I have neither evidence nor an undertaking that might persuade me to do so.

35 Whether or not that be so, the restraint on harvesting is only partial, and if further

¹¹ Richards J Reasons [37]-[39].

relief is refused on 14 July, negligible harm will have been done. If logging has not yet commenced, or has just commenced, in any coupes affected by my order, these coupes are unlikely to be completely logged by 14 July, and the roadside buffers, or amounts in excess of the areas specified in the timber release plan, could be harvested if relief is not then extended.

CERTIFICATE

I certify that this and the 8 preceding pages are a true copy of the reasons for ruling of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 9 July 2020.

DATED this ninth day of July 2020.

