

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

Not Restricted

S ECI 2021 01794

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

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 25 June 2021
DATE OF RULING: 9 August 2021
CASE MAY BE CITED AS: Kinglake Friends of the Forest Inc v VicForests (BMZ 2)
MEDIUM NEUTRAL CITATION: [2021] VSC 473

PRACTICE AND PROCEDURE - Interlocutory injunction - Scope of injunction granted narrower than sought by plaintiff - Interlocutory injunction confined to plaintiff's pleaded claim - Subject matter of claim not expanded by claim for declaration as to legal effect of relevant provision.

PRACTICE AND PROCEDURE - Application to summarily dismiss or permanently stay proceeding as an abuse of process - Where plaintiff brought earlier proceeding to enforce compliance with cl 5.8.1.5(a) of the *Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014* in respect of specified Bushfire Moderation Zones - Second proceeding brought by plaintiff to enforce compliance with provision, in respect of different Bushfire Moderation Zone - Whether same issues raised in both proceedings - Whether plaintiff should have included new claims in first proceeding - Second proceeding is not inherently oppressive to defendant or inimical to timely and efficient administration of justice - *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*, r 23.01 - *Civil Procedure Act 2010 (Vic)*, ss 7, 8, 9.

APPEARANCES:

For the Plaintiff

For the Defendant

Counsel

Mr J Korman

Mr E Nekvapil with
Ms M Narayan

Solicitors

Oakwood Legal

Johnson Winter & Slattery

HER HONOUR:

1 There are now three proceedings brought by Kinglake Friends of the Forest Inc (**Kinglake FF**) against VicForests in this Court. In each proceeding, Kinglake FF seeks injunctions to restrain VicForests from harvesting timber in a way that Kinglake FF claims is contrary to the *Sustainable Forests (Timber) Act 2004* (Vic) (**Timber Act**) and the applicable codes of practice and management standards. All three proceedings concern timber harvesting in State forests in the Central Highlands region of Victoria. Two proceedings, including this one, concern timber harvesting in what Kinglake FF refers to as 'Bushfire Moderation Zones'.

2 In this proceeding, Kinglake FF seeks permanent injunctions restraining VicForests from carrying out clearfall or seed tree timber harvesting operations in coupes in a number of Bushfire Moderation Zones in excess of a specified area. It seeks a declaration to similar effect, in respect of 'any bushfire moderation zone'.

3 On 25 June 2021, I heard an application by Kinglake FF for interlocutory injunctions to restrain VicForests' timber harvesting operations in certain coupes until the determination of this proceeding or further order. I also heard an application by VicForests for an order that the proceeding be summarily dismissed or permanently stayed on the basis that it is an abuse of process.

4 At the conclusion of the hearing, I reserved my decision in relation to VicForests' summary dismissal application, and granted an interlocutory injunction in the following terms:

1. From 5:00 pm on 25 June 2021 until the final determination of this proceeding or further order, the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, fell or cut trees or parts of trees using clearfall or seed tree harvesting within the areas of any of the following coupes, or parts of the following coupes, within the plaintiff's Bushfire Management Zone 1 (**BMZ1**) which are designated Bushfire Moderation Zone (in accordance with the relevant spatial layer maintained by Department of Environment, Land, Water and Planning (**DELWP**) and updated from time to time):

- (a) Coupe 345-510-0001 ("Ralph");

- (b) Coupe 345-528-0001 (“Apu”);
 - (c) Coupe 345-527-0005 (“Smithers Thinnings”);
 - (d) Coupe 345-528-0006 (“Chief Wiggum”);
 - (e) Coupe 346-504-0009 (“Cemetery Thinnings”); and
 - (f) Coupe 346-504-0011 (“Judge Thinnings”).
2. For the avoidance of doubt, nothing in paragraph 1 prevents the defendant from:
- (a) harvesting within any part of a coupe not designated Bushfire Moderation Zone in accordance with the relevant spatial layer maintained by DELWP and updated from time to time;
 - (b) harvesting within the area of any coupe designated Landscape Management Zone or any other zonation separate and distinct from that of a Bushfire Moderation Zone;
 - (c) harvesting within any coupe designated Bushfire Moderation Zone using selective harvesting and/or thinning;
 - (d) removing timber already felled;
 - (e) undertaking regeneration activities, including regeneration burning, within those coupes and any other activities to address the fuel hazard rating in a subject coupe; or
 - (f) felling or cutting trees or parts of trees:
 - (i) for the creation or maintenance of any road;
 - (ii) as necessary to create road access to the interior of a coupe;
 - (iii) to permit the construction of snig tracks;
 - (iv) for the construction of roadside landings within a Bushfire Moderation Zone;
 - (v) for the purposes of seed collection; or
 - (vi) in order to address a risk to human safety (including when otherwise advised, ordered or directed to by a responsible authority, including the DELWP or Parks Victoria).

5 I now provide my reasons for granting a more limited form of interlocutory injunction than was sought by Kinglake FF. I have also determined, for the reasons that follow,

to refuse VicForests' application for summary dismissal or a permanent stay of the proceeding.

First BMZ Proceeding

6 In October 2020, Kinglake FF commenced proceeding S ECI 2020 04058 (**First BMZ Proceeding**), in which it sought relief including an injunction restraining VicForests from harvesting timber in coupes in a number of areas it identified as 'Bushfire Moderation Zones' in the Central Highlands. The claims made by Kinglake FF in that proceeding are based on cl 5.8.1.5(a) of the *Management Standards and Procedures for timber harvesting operations in Victoria's State Forests 2014*, which provides:

5.8.1.5 In Bushfire Management Zones defined in the Code of Practice for Bushfire Management on Public Land 2012:

- (a) In any five year period the area harvested using clearfall or seed tree harvesting must not exceed 1 % of the GMZ or SMZ in that Bushfire Management Zone measured as a rolling average from 1 July 2012.¹

7 The *Code of Practice for Bushfire Management on Public Land 2012* (**Bushfire Code**) does not define the term 'Bushfire Management Zones'. Rather, it refers to Bushfire Moderation Zones. Kinglake FF contends that 'Bushfire Management Zone' in cl 5.8.1.5(a) of the Standards should be read as 'Bushfire Moderation Zone', consistent with the Bushfire Code. VicForests disputes this, and contends that the two expressions have different meanings.

8 Kinglake FF's case in the First BMZ Proceeding is that cl 5.8.1.5(a) of the Standards prohibits VicForests from carrying out clearfall or seed tree timber harvesting operations in areas it describes as 'Bushfire Moderation Zones' in excess of one percent of certain areas within those zones in any five-year period. Kinglake FF claims that VicForests has already clearfelled or seed tree harvested more than the one percent limit in the Bushfire Moderation Zones the subject of the First BMZ Proceeding. VicForests disputes both Kinglake FF's construction of cl 5.8.1.5(a) of the Standards

¹ The acronyms section of the Standards defines 'GMZ' to mean 'general management zone' and 'SMZ' to mean 'special management zone'.

and the way it calculates the area that may be clearfall or seed tree harvested.

9 By summons filed on 6 November 2020, Kinglake FF sought an interlocutory injunction prohibiting VicForests from undertaking timber harvesting operations in some of the coupes within seven identified Bushfire Moderation Zones. It filed a further summons on 4 December 2020, seeking the same relief in respect of additional coupes.

10 Kinglake FF's summonses were heard by Ginnane J on 9 December 2020. In a judgment published on 21 December 2020,² his Honour made the following findings:

(a) There was a serious question to be tried that Kinglake FF had standing to bring the proceeding.³

(b) The proper construction of cl 5.8.1.5(a) of the Standards was a serious question to be tried. Kinglake FF had established a serious case as to which of the competing constructions of cl 5.8.1.5(a) is correct – whether it refers to one year or five, if its reference to 'GMZ or SMZ' is disjunctive or conjunctive, and as to the meaning of the term 'Bushfire Management Zone'.⁴

(c) Kinglake FF had also established a serious question to be tried about whether VicForests had contravened cl 5.8.1.5(a).⁵

(d) The balance of convenience favoured the grant of an interlocutory injunction.⁶

11 As a result, VicForests is restrained until the determination of the First BMZ Proceeding from conducting timber harvesting operations in a number of coupes in the Bushfire Moderation Zones that are the subject of that proceeding. Justice Ginnane heard the trial of the First BMZ Proceeding in February 2021, and judgment is

² *Kinglake Friends of the Forest Inc v VicForests* [2020] VSC 865 (*Kinglake BMZ 1*).

³ *Kinglake BMZ 1*, [19]. See further *VicForests v Kinglake Friends of the Forest Inc* [2021] VSCA 195 (*Kinglake (CA)*).

⁴ *Kinglake BMZ 1*, [30].

⁵ *Kinglake BMZ 1*, [30].

⁶ *Kinglake BMZ 1*, [35].

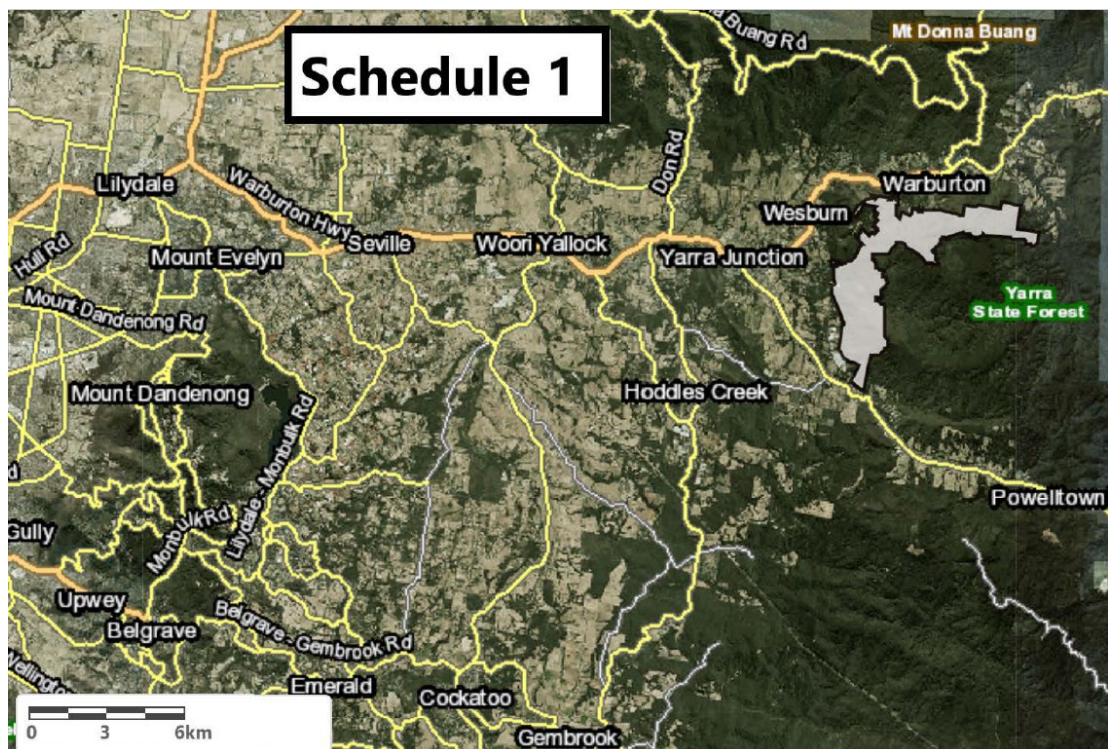
reserved.

Second BMZ Proceeding

- 12 Kinglake FF commenced this proceeding on 28 May 2021 (**Second BMZ Proceeding**). As originally pleaded, its statement of claim concerned one specific area in the Yarra State Forest, described as follows:⁷

The Bushfire Management Zone located between Big Pats Road and Burns Road to the west, Woods Point Road to the north, Yarra Junction Road to the east, and Blacksands Road to the south (**Bushfire Moderation Zone 1**) is a bushfire moderation zone.

A map depicting the borders of **Bushfire Moderation Zone 1** was included as Schedule 1 to the statement of claim.



- 13 The statement of claim then set out the basis on which Kinglake FF claimed that VicForests had been carrying out, or intended to carry out, timber harvesting operations in Bushfire Moderation Zone 1 in breach of cl 5.8.1.5(a) of the Standards, and was likely to continue to do so unless restrained.⁸

⁷ Statement of claim filed 28 May 2021, [29].

⁸ Statement of claim filed 28 May 2021, [30]-[38].

14 The relief sought in the statement of claim was:

- A. A permanent injunction restraining VicForests from carrying out clearfall or seed tree timber harvesting operations in the Bushfire Moderation Zone 1 Coupes unless the sum of the area harvested using clearfall or seed tree harvesting in the five year period up to the date of the proposed harvesting and the area of the proposed harvesting:
 - a. does not exceed 1% of the average area of the GMZ since 1 July 2012 in the affected bushfire management zone or series of such zones since 1 July 2012 that include the area of proposed harvesting; and
 - b. does not exceed 1% of the average area of the SMZ since 1 July 2012 in the affected bushfire management zone or series of such zones since 1 July 2012 that include the area of proposed harvesting.
- B. Further or alternatively, a declaration that VicForests is restrained from carrying out clearfall or seed tree timber harvesting operations in any bushfire moderation zone unless the sum of the area harvested using clearfall or seed tree harvesting in that bushfire moderation zone, in the five year period up to the date of the proposed harvesting, and the area of the proposed harvesting:
 - a. does not exceed 1% of the average area of the GMZ since 1 July 2012 in the affected bushfire management zone or series of such zones since 1 July 2012 that include the area of proposed harvesting; and
 - b. does not exceed 1% of the average area of the SMZ since 1 July 2012 in the affected bushfire management zone or series of such zones since 1 July 2012 that include the area of proposed harvesting.

15 Kinglake FF filed two summonses seeking interlocutory injunctions pending the trial of the proceeding, the first on 2 June 2021 and the second on 7 June 2021. Both applications came before O'Meara J in the Practice Court on 9 June 2021. His Honour made orders that day in the following form:

- 1. The plaintiff has leave to amend its summons dated 7 June 2021, in the form of the draft amended summons exhibited as Exhibit KAL-5 to the affidavit of Kwabena Adjei Larbi filed on 8 June 2021 in this proceeding.
- 2. From 5:00pm Wednesday 9 June 2021 until 5:00pm Friday 25 June 2021 or further order, the defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise, fell or cut trees or parts of trees in coupes:

- (a) 245-510-0001 (“Ralph”)
 - (b) 281-506-0013 (“Caraway”)
 - (c) 281-506-0011 (“Guinea Spice”).
3. For the avoidance of doubt, nothing in paragraph 2 prevents the defendant, from:
- (a) removing felled timber as at 5:00pm Wednesday 9 June 2021 in any of the above coupes; and
 - (b) felling trees or parts of trees for the creation or maintenance of any road; and
 - (c) felling trees or parts of trees in order to address a risk to human safety.

16 Justice O’Meara adjourned the hearing of both summonses to 25 June 2021. His Honour made directions for the filing and service of VicForests’ summary dismissal application, which was also listed for hearing on 25 June 2021.

Interlocutory injunction granted 25 June 2021

17 Kinglake FF’s first summons filed 2 June 2021 sought an order that:

[U]ntil further order, the Defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise conduct timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) in respect of an area greater than 2.54 hectares in coupe 345-510-0001 (“Ralph”).

18 In its second summons, as amended on 9 June 2021, Kinglake FF sought an order to restrain logging in a number of other coupes, as well as an order that VicForests provide notice of its intention to commence logging in any other coupe in any Bushfire Moderation Zone. The orders sought were:

1. Until further order, the Defendant must not, whether by itself, its servants, agents, contractors or howsoever otherwise conduct timber harvesting operations within the meaning of s 3 of the *Sustainable Forests (Timber) Act 2004* (Vic) (**Timber Harvesting Operations**) in:
 - a. that part of Coupe 281-506-0012 (“Cayenne”) located within a Bushfire Moderation Zone;
 - b. Coupe 281-506-0013 (“Caraway”)

- c. that part of Coupe 281-512-0013 (“Chicory”) located within a Bushfire Moderation Zone;
 - d. that part of Coupe 281-512-0013 (“Chicory RDC”) located within a Bushfire Moderation Zone;
 - e. that part of Coupe 281-506-0011 (“Guinea Spice”) located within a Bushfire Moderation Zone.
2. Until further order, the Defendant must provide written notification to the Plaintiff no less than 21 days prior to commencement or further conduct of Timber Harvesting Operations in any coupe located wholly or partly within a Bushfire Moderation Zone, of:
- a. the coupe within which Timber Harvesting Operations are proposed to commence;
 - b. the maximum area that is to be harvested in the coupe;
 - c. the earliest date upon which Timber Harvesting Operations will commence (being no earlier than 21 days from the date of the notice).
- 2A. It is noted, for clarity, that Order 2 requires the defendant to immediately suspend all Timber Harvesting Operations currently in progress in any coupe located wholly or partly within a Bushfire Moderation Zone, and not to resume such operations until a period of at least 3 weeks has elapsed from the date that written notification as required by Order 2 is provided to the plaintiff.

19 Kinglake FF relied on four affidavits of Kwabena Adjei Larbi of Oakwood Legal made on 28 May 2021, 8 June 2021, 15 June 2021 and 18 June 2021, and three affidavits of its President, Susan Mary McKinnon, made on 30 May 2021, 7 June 2021 and 15 June 2021.

20 VicForests relied on four affidavits of Erin Elizabeth Condello of Johnson Winter & Slattery. Ms Condello’s first three affidavits were dated 10 June 2021 and her fourth was made on 24 June 2021.

21 Ms McKinnon’s first affidavit of 30 May 2021 set out the basis on which she had determined the boundaries of Bushfire Moderation Zone 1, using the online mapping program Google Earth Pro, together with spatial data for VicForests’ timber release plan published on its website, and spatial data for Bushfire Management Zones across Victoria published by the Victorian Government at www.data.vic.gov.au. She then

explained the way in which she had identified the GMZ and SMZ areas within Bushfire Moderation Zone 1.

22 The following coupes within Bushfire Moderation Zone 1 are listed as 'current' in VicForests' latest timber release plan prepared under Pt 5 of the Timber Act:

- (a) coupe 345-510-0001, known as 'Ralph';
- (b) coupe 345-528-0001, known as 'Apu';
- (c) coupe 345-527-0005, known as 'Smithers Thinnings';
- (d) coupe 345-528-0006, known as 'Chief Wiggum';
- (e) coupe 346-504-0009, known as 'Cemetery Thinnings'; and
- (f) coupe 346-504-0011, known as 'Judge Thinnings'.

23 The evidence established that VicForests planned to log Ralph in the near future. As at 24 June 2021, VicForests did not currently plan to harvest the other coupes.

24 Ms McKinnon's second affidavit of 7 June 2021 contained an explanation of the process by which she had identified a further area of land, **Bushfire Moderation Zone 2**, in which the Cayenne, Caraway, Chicory, and Chicory RDC coupes are located, and how she had worked out the GMZ and SMZ areas within Bushfire Moderation Zone 2. There was evidence that, as at 10 June 2021, VicForests:

- (a) did not plan to harvest Cayenne before late September 2021;
- (b) was currently harvesting Caraway, having commenced on 13 May 2021;
- (c) had partially harvested Chicory, and was planning to recommence harvesting that coupe no earlier than 19 July 2021; and
- (d) had finished felling trees within Chicory RDC, a roading coupe, in order to

create access to adjacent coupes, and did not propose further harvesting of that coupe.

25 Kinglake FF sought an injunction to restrain VicForests from carrying out any timber harvesting operations in the coupes that it apprehended VicForests was harvesting, or was about to harvest, in Bushfire Moderation Zone 1 (Ralph) and Bushfire Moderation Zone 2 (Cayenne, Caraway, Chicory and Chicory RDC). It also sought an order requiring VicForests to give it 21 days' notice of its intention to harvest any other coupe in any Bushfire Moderation Zone.

26 Kinglake FF relied on the findings of Ginnane J in the First BMZ Proceeding that it had established serious questions to be tried in relation to the proper construction of cl 5.8.1.5 of the Standards and as to whether VicForests had contravened cl 5.8.1.5(a), and that the balance of convenience favoured granting an interlocutory injunction. It submitted that I should reach the same conclusions in relation to the coupes the subject of the Second BMZ Proceeding. It stressed that it only sought to restrain harvesting that was imminent or actual. It characterised its application for an order requiring VicForests to give notice of its intention to log other coupes in Bushfire Moderation Zones as 'minimally intrusive', given VicForests' existing obligation to make its harvesting schedule available for public scrutiny.⁹

27 The principal response by VicForests to Kinglake FF's applications for interlocutory injunctions was that the entire Second BMZ Proceeding was an abuse of process. I address that contention at [37] to [58] below.

28 VicForests also submitted that any interlocutory injunctive relief should be limited to relief that would preserve the subject matter of the proceeding as set out in Kinglake FF's statement of claim.¹⁰ It identified that subject matter to be Kinglake FF's asserted

⁹ Relying on cl 2.2.1.1 of the Standards, and *Kinglake Friends of the Forest Inc v VicForests (No 2)* [2020] VSC 418, [22], [26], [31].

¹⁰ Relying on *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [10]-[16] (Gleeson CJ), [59]-[61] (Gaudron J), [91] (Gummow and Hayne JJ).

right to restrain VicForests from undertaking clearfall or seed tree harvesting in the coupes specified in the statement of claim, beyond what is permitted under cl 5.8.1.5(a) on Kinglake FF's construction.

29 VicForests pointed out that Kinglake FF sought interlocutory injunctions beyond the scope of its pleaded claim. The coupes in Bushfire Moderation Zone 2 were not the subject of any pleading, and there was no basis on which VicForests could be required to provide Kinglake FF with notice of its intention to log *any* coupe in *any* Bushfire Moderation Zone *anywhere* in Victoria. VicForests emphasised that Kinglake FF's claimed special interest in protecting native forests was limited to the Central Highlands region.

30 In the course of the hearing on 25 June 2021, I asked counsel for Kinglake FF to explain the basis on which it sought interlocutory injunctions in respect of coupes beyond the Bushfire Moderation Zone 1 pleaded in its statement of claim. The answer given was that the subject matter of the proceeding included all Bushfire Moderation Zones, because of the claim for a general declaration of the legal effect of cl 5.8.1.5(a) of the Standards. The argument was that VicForests, as a government business enterprise, could be expected to act in accordance with the Court's declaration in relation to the harvesting of coupes in Bushfire Moderation Zones generally. Because that would be the effect of the declaration sought by Kinglake FF, the subject matter of the proceeding extended beyond the specific Bushfire Moderation Zone pleaded and the permanent injunction sought. No authority was cited in support of this ambitious proposition.

31 I accepted, for the reasons given by Ginnane J for granting an interlocutory injunction in the First BMZ Proceeding, that Kinglake FF had established a serious question to be tried that VicForests planned to clearfall or seed tree harvest coupes in Bushfire Moderation Zone 1 beyond what is permitted under cl 5.8.1.5(a) of the Standards, on

its proper construction.¹¹ I also accepted, again in line with Ginnane J's reasoning, that the balance of convenience favoured granting an interlocutory injunction to restrain VicForests from doing so, until the hearing and determination of the Second BMZ Proceeding.¹² VicForests did not contend otherwise, subject to its overall contention that the Second BMZ Proceeding was an abuse of process.

32 I did not accept that Kinglake FF had, on 25 June 2021, established a basis for interlocutory injunctions in respect of coupes outside the pleaded Bushfire Moderation Zone 1. Its claim for a declaration as to the legal effect of cl 5.8.1.5(a) of the Standards did not, in my opinion, have the effect of extending the subject matter of the proceeding beyond the specific Bushfire Moderation Zone pleaded, and the coupes within it. My reasoning was as follows:

- (a) For reasons I have given previously, Kinglake FF has a special interest in preserving the native forests of the Central Highlands region of Victoria.¹³ That special interest means it has standing to bring a proceeding seeking equitable remedies of injunction and declaration in respect of a justiciable controversy concerning that subject matter.
- (b) Kinglake FF did not claim standing in respect of native forests beyond the Central Highlands.
- (c) The justiciable controversy in relation to which Kinglake FF had established a serious question to be tried was whether VicForests planned to clearfell or seed tree harvest coupes in Bushfire Moderation Zone 1 contrary to cl 5.8.1.5(a) of the Standards. Kinglake FF's pleaded claim did not at that time extend beyond Bushfire Moderation Zone 1.
- (d) The Court's power to grant an interlocutory injunction may only be exercised

¹¹ *Kinglake BMZ 1*, [30].

¹² *Kinglake BMZ 1*, [35].

¹³ *Kinglake Friends of the Forest Inc v VicForests (No 4)* [2021] VSC 70. See also *Kinglake (CA)*.

to protect some legal or equitable right of Kinglake FF that the Court might enforce by a final judgment.¹⁴ The right asserted by Kinglake FF was its special interest in the observance by VicForests of the limitations on its timber harvesting activities imposed by cl 5.8.1.5(a) of the Standards in respect of coupes in Bushfire Moderation Zone 1.

- (e) The Court does not have a freestanding jurisdiction to make declarations as to the law. Its power to grant declaratory relief is ‘confined by the considerations which mark out the boundaries of judicial power’, with the result that a declaration ‘must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions’.¹⁵
- (f) Kinglake FF’s claim for a declaration did not expand the justiciable controversy in respect of which it sought remedies. There was therefore no basis for interlocutory injunctions extending beyond Bushfire Moderation Zone 1.

33 For those reasons, I was not persuaded that I should grant an interlocutory injunction in respect of coupes in Bushfire Moderation Zone 2, or require VicForests to give notice to Kinglake FF of its intention to log any coupe in any Bushfire Moderation Zone anywhere in Victoria.

34 VicForests proposed a form of interlocutory injunction that reflected the wording of cl 5.8.1.5(a), and which restricted its activities in all of the then identified coupes within Bushfire Moderation Zone 1, not only Ralph. There was therefore no need to determine whether VicForests should be required to give notice of its intention to log coupes other than Ralph within Bushfire Moderation Zone 1.

¹⁴ See, in relation to interlocutory injunctions, *Lenah Game Meats*, [10]-[16] (Gleeson CJ), [61] (Gaudron J), [105] (Gummow and Hayne JJ).

¹⁵ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [47]-[48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [103].

Postscript

- 35 On 29 June 2021, Kinglake FF filed an amended statement of claim in this proceeding, in which it specified an additional 14 Bushfire Moderation Zones, and sought permanent injunctions in respect of coupes in all 15 pleaded Bushfire Moderation Zones. It also filed a further summons seeking interlocutory injunctions in respect of the additional coupes.
- 36 On 2 July 2021, Incerti J made orders by consent which included interlocutory injunctions restraining VicForests from clearfelling or seed tree harvesting coupes in Bushfire Moderation Zone 2, including Cayenne, Caraway and Chicory, and in several of the other Bushfire Moderation Zones specified in the amended statement of claim.

VicForests' summary dismissal application

- 37 VicForests made its summary dismissal application in this proceeding under r 23.01(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), which enables the Court to stay a proceeding or give judgment where a proceeding is an abuse of the process of the Court. It also relied on the Court's obligation to give effect to, and powers to further, the overarching purpose of the *Civil Procedure Act 2010* (Vic) – that is, to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.¹⁶
- 38 VicForests contended that the Second BMZ Proceeding was an abuse of process because the primary issue for determination, the proper construction of cl 5.8.1.5(a), had already been litigated in the First BMZ Proceeding. It argued that Kinglake FF had ample opportunity to include in the First BMZ Proceeding the claims it now makes in this proceeding in respect of Bushfire Moderation Zone 1, but had elected not to do so. The proper course in respect of Kinglake FF's additional claims would have been for it to apply to Ginnane J for leave to amend its pleadings in the First BMZ Proceeding. VicForests submitted that issuing a fresh proceeding was oppressive to

¹⁶ *Civil Procedure Act 2010* (Vic), ss 7, 8, 9.

it, and undermined the timely and efficient administration of justice.¹⁷

39 Counsel for VicForests undertook a careful comparison of Kinglake FF's pleadings in both proceedings, with a view to establishing that the real issue for determination in each was the proper construction of cl 5.8.1.5(a) of the Standards. On that basis, VicForests argued that Kinglake FF was seeking to relitigate the issue of construction, in respect of a different form of relief. The Ralph coupe was listed on VicForests' current, publicly available timber release plan, and could have been included in the case pleaded by Kinglake FF in the First BMZ Proceeding. Similarly, Kinglake FF could have sought a broad declaration in the First BMZ Proceeding, of the kind it now seeks in this proceeding.

40 VicForests submitted that Kinglake FF's additional claims could and should have been included by Kinglake FF in the First BMZ Proceeding, and said that no satisfactory explanation had been given for their omission. Having established that Kinglake FF could have brought these claims in the First BMZ Proceeding, the normative question was whether it should have done so. VicForests argued that question was to be answered by reference to the unnecessary vexation involved in it having to respond to a claim raising exactly the same issues in respect of a new geographical area.

41 VicForests referred me to the High Court's decision in *UBS AG v Tyne*,¹⁸ in which a majority of the Court held that a Federal Court proceeding commenced by the trustee of a family trust was an abuse of process, in light of earlier litigation brought by related parties in the Supreme Court of New South Wales. Both proceedings arose out of the same facts and made essentially the same claims. It relied on the following passages in the reasons of the plurality:¹⁹

The timely, cost effective and efficient conduct of modern civil litigation takes

¹⁷ Relying on the two broad conditions that enliven the power to permanently stay a proceeding as an abuse of process: see *UBS AG v Tyne* (2018) 265 CLR 77, [1] (Kiefel CJ, Bell and Keane JJ), cf [72] (Gageler J).

¹⁸ (2018) 265 CLR 77.

¹⁹ *UBS*, [38]-[39], [43] (Kiefel CJ, Bell and Keane JJ) (citations omitted).

into account wider public interests than those of the parties to the dispute. These wider interests are reflected in s 37M(2) of the FCA.²⁰ As the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* explain, the “just resolution” of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a “just resolution” is the minimisation of delay and expense. These considerations inform the rejection in *Aon* of the claimed “right” of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute in terms of the parties having a sufficient *opportunity* to identify the issues that they seek to agitate. The respondent’s argument in *Aon*, that the proposed amendment to raise the fresh claim was a necessary amendment to avoid multiple actions, did not avail. As their Honours observe, if reasonable diligence would have led to the bringing of the claim in the existing proceedings, any further proceeding might be met by a stay on *Anshun* grounds.

In separate reasons in *Aon*, French CJ holds that the institution of fresh proceedings by the Australian National University, raising the claim which could have been raised earlier in the existing proceedings, might be an abuse of process. His Honour observes that abuse of process principles may be invoked to prevent attempts to litigate a claim that should have been litigated in earlier proceedings as well as attempts to re-litigate a claim that has been determined. ...

...

This is not to say that ... the circumstance that a claim could have been raised in earlier proceedings makes the raising of it in later proceedings an abuse of process. It is to recognise that in some circumstances the bringing of a claim which should have been litigated in an earlier proceeding will be an abuse and that that may be so notwithstanding that the later proceeding is not precluded by an estoppel. ...

- 42 VicForests also referred me to other authorities that considered whether bringing successive proceedings amounted to an abuse of process, in particular *Tomlinson v Ramsey Food Processing Pty Ltd*²¹ and *Kermani v Westpac Banking Corporation*.²²
- 43 Kinglake FF submitted that VicForests’ application was based on the novel proposition that it was an abuse of process to bring a second proceeding applying the

²⁰ Section 37M(1) of the *Federal Court of Australia Act 1976* (Cth) provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Its Victorian equivalent is s 7 of the Civil Procedure Act (footnote added).

²¹ (2015) 256 CLR 507, [22], [25]-[26] (French CJ, Bell, Gageler and Keane JJ).

²² (2012) 36 VR 130, [97] (Robson AJA, Neave and Harper JJA agreeing).

same law to a different pleaded set of facts. It also referred to the pleadings in both proceedings, and submitted that there is no overlap between the factual elements of the claims made in each – all that the two proceedings have in common is the statutory provision that Kinglake FF alleges is being breached.

44 Kinglake FF argued that it is not the law in Australia that merely because a matter could have been raised in an earlier proceeding, it should have been raised.²³ The test is not whether it could have been raised, but whether it was so relevant as to make it unreasonable not to raise it.²⁴ Kinglake FF said that the authorities relied on by VicForests all concerned attempts to revisit the facts of an earlier proceeding, either on the same legal basis or by introducing a new cause of action. It submitted that VicForests had cited no authority in which a party was restrained from applying the same law in successive proceedings, each founded on separate and independent facts.

45 As to why it had not included its claims concerning coupes in Bushfire Moderation Zone 1 in the First BMZ Proceeding, Kinglake FF pointed out that there are thousands of coupes listed in VicForests' timber release plan. Ms McKinnon's first and second affidavits demonstrated that it is a complex exercise to work out the dimensions of a single Bushfire Moderation Zone, and to identify the coupes scheduled for harvesting within that geographical area. Kinglake FF said that this was a reasonable explanation as to why it had not identified and included all possible Bushfire Moderation Zones in the Central Highlands in the First BMZ Proceeding.

46 Kinglake FF submitted that it cannot be the law that a plaintiff in its position must, before commencing any proceeding, undertake a wide-ranging investigation of the defendant's conduct to ensure that every act of the defendant that could possibly contravene the relevant provision is identified and pleaded. That would either delay the commencement of a proceeding about known contraventions, or leave VicForests

²³ Referring to *Port of Melbourne Authority v Anshun Pty Ltd* [1981] 147 CLR 589, 601-602 (Gibbs CJ, Mason and Aickin JJ).

²⁴ Referring to *Truthful Endeavour Pty Ltd v Condon* (2015) 233 FCR 174, [74].

free to engage in arguably unlawful logging in respect of any areas omitted from the first proceeding. This approach would, Kinglake FF argued, lead to absurd outcomes.

Consideration

47 As VicForests submitted, the doctrine of abuse of process is sufficiently flexible to encompass the bringing of successive proceedings in circumstances where no estoppel has arisen. A subsequent proceeding between the same parties may amount to an abuse of process where the second proceeding would be unjustifiably oppressive to the defendant, or would bring the administration of justice into disrepute.²⁵ More neutrally, whether a subsequent proceeding is an abuse of process may be determined by reference to the public interest in the timely and efficient administration of civil justice.²⁶

48 I am not persuaded that the Second BMZ Proceeding is an abuse of process. My reasons are as follows.

49 *First*, I do not accept VicForests' contention that the issues in dispute in this proceeding are identical to the issues in dispute in the First BMZ Proceeding. It is the case that a central issue in both proceedings is the proper construction of cl 5.8.1.5(a) of the Standards. However, the issues of fact in the two proceedings are not the same.

50 The second half of the statement of claim in the Second BMZ Proceeding, in which Kinglake FF made allegations regarding Bushfire Moderation Zone 1, was quite different from the equivalent section of the amended statement of claim in the First BMZ Proceeding. The difference is even more pronounced since Kinglake FF amended its statement of claim in the Second BMZ Proceeding. In the First BMZ Proceeding, Kinglake FF pleaded existing or potential non-compliance with cl 5.8.1.5(a) in respect of a large number of identified coupes in 10 separate Bushfire Moderation Zones, each of which was described in detail in the amended statement

²⁵ *UBS*, [1] (Kiefel CJ, Bell and Keane JJ).

²⁶ *UBS*, [72] (Gageler J).

of claim. In the Second BMZ Proceeding, it alleges non-compliance with the same clause in respect of different coupes in (now) 15 different Bushfire Moderation Zones that cover distinct geographical areas within the State forests of the Central Highlands.

51 *Second*, there is a reasonable explanation as to why Kinglake FF did not include in the First BMZ Proceeding the factual allegations it now makes in the Second BMZ Proceeding. The process of determining the boundaries of a Bushfire Moderation Zone, described in Ms McKinnon's first and second affidavits, is complex and time consuming, drawing on spatial data downloaded from several different sources. It is not really to the point that the spatial data is all publicly available; it remains a laborious exercise to locate and combine the relevant data. Further, there was an element of urgency in the commencement of the First BMZ Proceeding. It was arguable that VicForests was clearfelling or seed tree harvesting areas in Bushfire Moderation Zones in excess of that permitted by cl 5.8.1.5(a) of the Standards, and the balance of convenience favoured restraining it from doing so pending determination of that question. In those circumstances, it was reasonable for Kinglake FF to commence the First BMZ Proceeding, and seek interlocutory injunctions, in respect of those Bushfire Moderation Zones it had reason to believe were being overharvested. It was not necessary for Kinglake FF to identify all other possible contraventions by VicForests of cl 5.8.1.5(a) before seeking to restrain the contraventions that it believed were occurring.

52 *Third*, it is difficult to see how the commencement of the Second BMZ Proceeding could undermine the timely and efficient administration of justice. It will not delay the determination of the First BMZ Proceeding. To the contrary, commencement of a fresh proceeding means that Ginnane J will not be burdened with an application to further amend the pleadings in the First BMZ Proceeding, or an application by Kinglake FF to reopen its case. Once judgment has been given in the First BMZ Proceeding, both parties will be bound by Ginnane J's construction of cl 5.8.1.5(a) of the Standards in respect of its application in the Second BMZ Proceeding.

53 *Fourth*, I do not consider that the Second BMZ Proceeding is inherently oppressive to VicForests. Appropriate case management can ensure that it is not. I made an order on 25 June 2021 suspending the requirement for VicForests to file a defence, and at present neither party is required to take any further step in the Second BMZ Proceeding. I do not expect that either party will seek directions until after Ginnane J has given judgment in the First BMZ Proceeding. Critically, there is no prospect that the parties will contest the issue of the proper construction of cl 5.8.1.5(a) afresh in this proceeding once Ginnane J has decided that question in the First BMZ Proceeding, and any appeal from that decision has been determined.

54 It is also relevant here that VicForests could have avoided the commencement of the Second BMZ Proceeding altogether, if it had simply given an undertaking in respect of the Ralph coupe. Kwabena Larbi, the solicitor for Kinglake FF, wrote to VicForests' solicitors, Johnson Winter & Slattery, on 13 May 2021 in the following terms:

We are instructed that Ralph is situated within a Bushfire Moderation Zone, and we are further instructed that your client's proposed timber harvesting operations will cause it to breach clause 5.8.1.5 of the *Management Standards and Procedures for timber harvesting operations in Victoria's state forests*.

We accept that the Bushfire Moderation Zone containing Ralph was not the subject of the litigation presently before Justice Ginnane. However, the principles that will be determined by his Honour's decision will obviously impact your client's harvesting operations in all Victorian bushfire moderation zones. As a model litigant, we would expect your client to apply those principles to coupes throughout Victoria, so as to avoid unnecessary litigation.

We are instructed to commence proceedings in relation to the proposed harvesting at Ralph, and, further, to seek to be heard by Justice Ginnane in respect of urgent interim and interlocutory relief to preserve the status quo in that coupe.

Mindful of our obligations under the *Civil Procedure Act*, we will not issue proceedings should your client undertake not to commence or continue timber harvesting operations within Ralph until further order or, in the event your client is wholly successful in the currently reserved proceeding, until our client's proceeding is dismissed.

55 VicForests' solicitors replied on 14 May 2021, to the effect that there was no urgency because harvesting in Ralph was not scheduled to commence before 24 May 2021. In

two successive letters, dated 18 May and 20 May 2021, Kinglake FF's solicitors sought an undertaking that VicForests would provide 21 days' notice of any timber harvesting operations in the Ralph coupe, or an undertaking in respect of Ralph in the terms of the injunction ordered by Ginnane J on 21 December 2020 in the First BMZ Proceeding. On 27 May 2021, Mr Larbi sent an email to Johnson, Winter & Slattery attaching the writ and statement of claim he was instructed to file the following day, and giving VicForests 'a final opportunity to avoid this litigation by providing an undertaking that it will give 3 weeks' notice prior to commencement of any timber harvesting operations in Ralph'.

56 VicForests' response was provided in a letter from its solicitors dated 27 May 2021, which read:

It is unclear from either your client's correspondence or its Statement of Claim dated 26 October 2020, that Ralph coupe is part of its Bushfire Moderation Zone 3. Ralph coupe is not located within the area of any of the 9 polygons your client identified as Bushfire Moderation Zones, which were the subject of its proceeding in the Supreme Court (S ECI 2020 04058).

In the circumstances, it is unclear why your client considers VicForests is restrained from harvesting Ralph coupe. Consequently, VicForests will not consent to providing 21 days' notice prior to harvesting this coupe.

57 In light of this rather obtuse response to (as events have transpired) reasonable requests for an undertaking in order to avoid further litigation, it is hard to give credence to VicForests' claim to be oppressed by the Second BMZ Proceeding.

58 As to VicForests' assertion that the Second BMZ Proceeding would cause 'further disruption' to its operations,²⁷ it may be that the interlocutory injunctions that are now in place will have that effect. However, the injunctions were granted because Kinglake FF had established an arguable case that VicForests planned to harvest timber in the Bushfire Moderation Zones the subject of the Second BMZ Proceeding contrary to cl 5.8.1.5(a) of the Standards. VicForests did not attempt to demonstrate, by evidence or submission, any disruption to its operations that might have affected

²⁷ VicForests' outline of submissions dated 7 June 2021, [85].

the balance of convenience. In any event, the injunctions are framed so as to minimise the impact on VicForests' operations while also restraining it from logging activities that may contravene cl 5.8.1.5(a).

Disposition

59 VicForests' summons filed 7 June 2021 must be dismissed. I will hear the parties on the question of the costs of that summons.

CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for ruling of Justice Richards of the Supreme Court of Victoria delivered on 9 August 2021.

DATED this ninth day of August 2021.


.....
Associate