

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

Matter Nos P31 of 1997 and P32 of 1997

SOUTH-WEST FOREST DEFENCE
FOUNDATION INC

APPLICANT

AND

EXECUTIVE DIRECTOR OF THE
DEPARTMENT OF CONSERVATION
AND LAND MANAGEMENT & ANOR

RESPONDENTS

Matter No P33 of 1997

BRIDGETOWN-GREENBUSHES
FRIENDS OF THE FOREST INC

APPLICANT

AND

EXECUTIVE DIRECTOR OF THE
DEPARTMENT OF CONSERVATION
AND LAND MANAGEMENT & ORS

RESPONDENTS

*South-West Forest Defence Foundation v Department of Conservation and
Land Management; Bridgetown-Greenbushes Friends of the Forest v
Department of Conservation & Land Management (No 1)
(P31-1997, P32-1997 and P33-1997) [1998] HCA 34
2 April 1998*

ORDER

Applications for special leave to appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

Matter Nos P31 of 1997 and P32 of 1997

J T Schoombee for the applicant (instructed by Environmental Defender's Office of Western Australia)

R J Meadows QC and R M Mitchell for the respondents (instructed by Crown Solicitor for Western Australia)

Matter No P33 of 1997

G M G McIntyre for the applicant (instructed by Environmental Defender's Office of Western Australia)

R J Meadows QC and R M Mitchell for the respondents (instructed by Crown Solicitor for Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

South-West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management and Anor

Bridgetown-Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management & Ors

Practice and Procedure – Special leave to appeal from decision to strike out pleadings – Grounds for refusal – Nature of pleadings – Even if leave granted, applicants could only obtain right to replead – Previous judgment would not preclude bringing fresh proceedings.

Environmental law – Nature of obligations under environmental management plans.

Conservation and Land Management Act 1984 (WA), s 33.

Environmental Protection Act 1986 (WA), s 47.

Wildlife Conservation Act 1950 (WA).

1 GAUDRON, McHUGH, HAYNE AND CALLINAN JJ. The applicants seek special leave to appeal from a decision of the Full Court of the Supreme Court of Western Australia, striking out their statements of claim in three actions. The pleadings that were struck out were long and complex documents in a form which was likely to embarrass the fair trial of the proceedings. The Full Court's decision to strike out the pleadings can be supported on that basis.

2 The Full Court granted the applicants leave to replead to a very limited extent only. The applicants chose not to exercise that leave for reasons which it is not necessary to examine.

3 As argument developed in this Court, it appeared that there were three aspects to the case which the applicants sought to raise. Essentially, the first was that the first respondent was bound to identify, locate and seek to conserve endangered flora and fauna or, alternatively, to take reasonable steps to do so, before logging in the areas identified in the pleadings. The applicants wish to contend that this obligation arises from two separate sources: first, the *Conservation and Land Management Act* 1984 (WA), s 33, in combination with the Forest Management Plan made up under that Act; and secondly, the *Environmental Protection Act* 1986 (WA), s 47, in combination with commitments given in relation to a proposal to amend an earlier Forest Management Plan made under the said *Conservation and Land Management Act*.

4 The applicants also wish to contend that the first respondent has not taken reasonable steps to identify or to locate or to seek to conserve endangered flora and fauna, and that they are entitled, amongst other relief, to an injunction restraining logging activities which will render it impossible for the first respondent to discharge that duty. This was not the way in which the pleadings were understood in the Full Court. And, on any view, they would need to be recast in order to make that case clear.

5 The second aspect of the case asserts a breach of a duty to liaise with the local community. That duty turns upon the terms of commitments given in relation to the proposal to amend the earlier Forest Management Plan, to which reference has already been made. The meaning and effect of those commitments are not matters which should attract the grant of special leave.

6 The third aspect of the case is concerned with the *Wildlife Conservation Act* 1950 (WA). The applicants contend that the respondents, their agents and contractors are bound by the flora and fauna protection provisions of that Act and that the proposed logging activities would involve a breach of those provisions. It is clear, however, that the relevant provisions simply proscribe activity undertaken

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without a licence¹ or without the written consent of the Minister². It is not pleaded that no licence will be granted or no consent given. Moreover, it is difficult to assume that if required, none will be granted or given. In these circumstances, the issues raised with respect to the *Wildlife Conservation Act* raise matters which border on the hypothetical and are not appropriate to attract the grant of special leave.

7 The issues raised by the first aspect of the case to which reference has been made are not, however, hypothetical. Moreover, we are not persuaded that the applicants' contentions in respect of this aspect of their case are necessarily beyond argument. That is, we are not to be taken as concluding that a pleading which conformed to the relevant rules of court and which alleged such a case should be struck out before trial. Other considerations may arise with respect to the applicants' claimed declarations.

8 And it is to be noted that the Solicitor-General for Western Australia has accepted that the judgment that has been entered in the present action does not preclude the bringing of a fresh proceeding³ with pleadings which identify the points to be argued with precision and without needless and distracting elaboration. It is clear that the most that the applicants could obtain by way of relief from this Court is the right to replead their case, a case which, as already indicated in part, turns on the legislation to which reference has been made and the particular terms of the Forest Management Plan and the commitments made in the proposal to amend the earlier Forest Management Plan.

9 It is said that the Court should rule on the issues that have been debated because the parties are here and the issues have been exposed. It is true that the issues have been exposed, save for that relating to standing upon which the applicants were successful below. However, the special leave procedure is not to be circumvented on that account. Moreover, it is to be remembered that it was said by Chief Justice Brennan, when this matter came before a bench of three in December last year, that the argument would proceed before this Court and it would be left to the Court at the end to say whether or not special leave would be granted or refused and, if granted, whether the appeal would be allowed.

1 s 16(1).

2 s 23F.

3 *Tampion v Anderson* (1973) 48 ALJR 11; 3 ALR 414.

Gaudron J
McHugh J
Hayne J
Callinan J

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- 10 In the circumstances, a majority of this Court is convinced that this is not an appropriate case for the grant of special leave in the circumstances which have been elaborated.

11 KIRBY J. I regret that I do not agree with the conclusion which has been reached by the majority or with the orders which the majority favour.

12 The Court has sat to hear a series of questions argued, as earlier stated by Justice Toohey, and as adjunct to applications for special leave. Two and a half days have been set aside for the hearing. Self-evidently, this is much longer than the time ordinarily granted by this Court for special leave hearings. Already argument extending over nearly a day and a half has been heard; although the principal arguments of the respondent have not yet been reached. The applicants have provided full written submissions on all issues, as has the respondent. The application papers which were filed run into hundreds of pages. The parties are from Western Australia. They have accepted an allotment of time for a hearing before the Court in Hobart. One can only imagine the costs that have been involved to all concerned. Clearly, they would run into many thousands of dollars. In my opinion the Court should conclude the hearing and, for that purpose, sit for the balance of the time allocated.

13 The question is whether arguable special leave points have been revealed by this stage of the argument. In my view, they have. What is sought is not an advisory opinion from this Court, but orders setting aside the orders of the Full Court of the Supreme Court of Western Australia. Unless the orders of that court are set aside, they will, in effect, terminate the proceedings for relief brought by the applicants. Even if the orders of the Full Court were interlocutory in a technical sense, unless they are set aside by order of this Court, the practicalities are, as it seems to me, that any attempt by the applicants to commence afresh in the courts of Western Australia would be doomed to fail. In my opinion, this Court should accept that reality.

14 The elucidation of pleading questions is usually tedious, whether it arises in a practice court or in the highest court of the country. But pleadings stand at the gateway to a court. Unless the applicants can be permitted to plead a case, they may be denied access to the remedies which they say the law affords them.

15 Conformably with principles, including principles stated by this Court⁴, a party's pleadings should not be struck out except in a manifestly clear case, relevantly where the pleadings do not reveal a cause of action known to the law. Even then a party should ordinarily be permitted to replead where the error which has been shown is one of the expression of the cause of action, not the existence of a cause of action.

4 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129; cf *Rajski v Powell* (1987) 11 NSWLR 522 at 524, 538.

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16 It is true that the case before this Court, as presented by the applicants, concerns statutes and subordinate legislation of the State of Western Australia. The elucidation of such legislation is ordinarily left to the Court of Appeal or Full Court of the jurisdiction concerned. However, a number of points, in my view, lift these applications out of the ordinary. I will mention a few of them that seem to me to be the most important.

17 First, in my view (and necessarily subject to the hearing of full argument) serious errors of law have been revealed in the courts below which, in effect, deny the applicants access to the court on their pleadings and thus to orders according to law. Obviously, it is a serious step to prevent a party, for defects in pleading its case, from having a hearing and determination of that case on the merits⁵.

18 Secondly, at least arguably, the legislation which has been construed here is common, or at least similar, to legislation in other jurisdictions of Australia⁶. Environmental legislation of the kind which we have explored in this hearing is now quite common in this and other countries⁷. The elucidation of the way in which parties claiming an interest can enforce, as against the Executive Government and its agencies, environmental plans, such as the management plan principally in question in these proceedings, is an important question. It is one on which this Court has not previously passed. The management plan may appear unusual to those nurtured in more traditional expression of subordinate legislation in Australia. However, by command of the Parliament of Western Australia, the management of the land referred to in the management plan in question here must be carried out in accordance with the management plan⁸. The applicants say, with arguable justification, that that has not occurred.

19 These proceedings therefore represent a suitable vehicle for allowing an exploration of the approach which should be taken in such cases. Unless corrected, if it be wrong, the holding and approach of the Supreme Court of Western Australia will stand as a serious obstacle to the enforcement of such management plans in that State, and possibly in other parts of Australia as well. It will encourage the

5 *Burton v Shire of Bairnsdale* (1908) 7 CLR 76 at 92; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 92.

6 See *Native Vegetation Conservation Act* 1997 (NSW), ss 18-19, 24-36; *Water Resources Act* 1997 (SA), ss 9(3)(e), 9(4), 90-115; *Water Act* 1989 (Vic), ss 30, 64A; *Catchment and Land Protection Act* 1994 (Vic), ss 23-36.

7 Robinson, "International Trends in Environmental Impact Assessment" (1992) 19 *Boston College Environmental Affairs Law Review* 591 at 597-602; Raff, "Ten Principles of Quality in Environmental Impact Assessment" (1997) 14 *Environmental and Planning Law Journal* 207.

8 *Conservation and Land Management Act* 1984 (WA), s 33(3).

notion that such management plans in environmental matters are mere exhortations and either not justiciable, or ultimately unenforceable rules made under the authority of the Parliament concerned and, thus, not necessarily to be obeyed by the Executive Government and its agencies as Parliament apparently requires. If that is the law it is important that Parliaments throughout this country, those concerned with the environment and indeed everyone else should know what an empty gesture is thereby established. If it is not the law, the Executive Government and its agencies should be held to the obligations ostensibly demanded by Parliament to protect the environment.

20 Thirdly, the respondents came to argue an issue of standing of the applicants⁹. Their counter challenge was raised by way of an application for special leave to cross appeal. That question too, is an important one: whether organisations, such as the applicants, have the standing on behalf of concerned citizens, many but not all living in the vicinity of the areas affected, to approach the courts for orders requiring enforcement of public environmental law. This is a developing area of the law¹⁰. These applications afford a suitable vehicle for considering that question. The question is one important to courts throughout this country. If the applicants do not have standing, as the respondent claims, that is also a matter which should be made clear by this Court so that, if desired, reformatory legislation can be considered and enacted and, if not, the respondent and those in a like position can be spared from legal process.

21 Fourthly, there are other important legal questions which have been argued in full by the applicants, but not yet by the respondent. In my opinion, they would alone attract a grant of special leave. These include

9 See *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526-530; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 41-42, 44, 57, 62, 72; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 680; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 at 514; 127 ALR 617 at 638-639; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516 at 553; 127 ALR 580 at 614-615; *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation and Land Management* (1997) 93 LGERA 436 at 445-446.

10 Brennan, "The Purpose and Scope of Judicial Review" (1986) 2 *Australian Bar Review* 93 at 100; Australian Law Reform Commission, *Standing in Public Interest Litigation, Report No 27* (1985); Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies, Report No 78* (1996).

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(a) the circumstances in which declaratory or injunctive relief should be granted to enforce environmental law where that law is supported, as here, by criminal sanctions¹¹; and

(b) the rule of construction for deriving the intention of Parliament to bind the Crown to conform with special environmental plans such as the management plan in issue in these proceedings¹².

These are important questions which warrant the time and attention of this Court. Not least do they do so, given that the time has been set aside and the attention has already been fully engaged on the question for a day and a half.

22 It would be tempting to reject these applications on the basis that they do not represent suitable vehicles for grants of special leave. Pleading questions, as I have said, are often tedious and usually unpleasant. The questions formulated in this case were very numerous and detailed. The issues, and many of the facts and statutory provisions, were elaborate and sometimes obscure. Yet behind the applicants are a number of important questions of environmental law, practice and approach. There are also a number of forests which, if the applications are refused, may stand at risk of conduct which the applicants say, with arguable justification, does not comply with the law of Western Australia. The applicants' cases will not then be heard on their merits in these proceedings. They are closed off in these proceedings from a hearing. The practicalities, not least those of costs, make it tolerably clear that another proceeding, starting from the beginning, would not be likely.

23 This is a result with which, most respectfully, I do not agree. I would favour continuing with the hearing. At the point at which the argument was stopped, I was in favour of grants of special leave to appeal. Indeed, at that stage, I was distinctly in favour of answering several questions in a way favourably to the applicants, allowing the appeals and permitting the applicants to replead freed from the unacceptable limitation which the Full Court imposed, in my view incorrectly, on that facility.

11 cf *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 84, 99-100; *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 at 270-271; *Webster v The Bread Carters' Union of NSW* (1930) 30 SR (NSW) 267 at 273-274.

12 See *District Council of Kingscote v Kangaroo Island Eco Action Inc (No 1)* (1996) 67 SASR 410 at 419-420; cf *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 256; *Bropho v Western Australia* (1990) 171 CLR 1 at 28; *Prineas v Forestry Commission of NSW* (1984) 53 LGRA 160 at 163; *West Australian Field and Game Association v Pearce* (1992) 8 WAR 64 at 71-78.