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

Not Restricted

S ECI 2022 01719

GIPPSLAND ENVIRONMENT GROUP INC — Plaintiff

v

VICFORESTS — Defendant

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATES OF HEARING:	30 November 2022
DATE OF JUDGMENT:	30 November 2022
CASE MAY BE CITED AS:	Gippsland Environment Group Inc v VicForests
MEDIUM NEUTRAL CITATION:	[2022] VSC 752

ENVIRONMENT LAW – Timber harvesting in State forests in Gippsland – Interlocutory injunctions restricting timber harvesting – Judgment and orders in other litigation concerning East Gippsland and Central Highlands – Plaintiff's application to vary interlocutory injunctions to replicate orders in other litigation – Parties agreed on appropriate interlocutory orders except in respect of riparian strips – Whether interlocutory orders should be made in respect of riparian strips – Interlocutory injunction granted.

EVIDENCE – Evidence of decision and findings of fact in other judgments – Whether admissible on interlocutory application in other proceeding – Mixed questions of fact and law – *Evidence Act 2008* s 91.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Korman Dr K Weston-Scheuber	Oakwood Legal
For the Defendant	Mr P Solomon KC Ms H Douglas	Johnson Winter & Slattery

HIS HONOUR:

1 The plaintiff, Gippsland Environment Group Inc., seeks an interlocutory injunction restricting timber harvesting operations in all coupes in Gippsland Forest Management Areas. Justice Richards granted such an interlocutory injunction in this proceeding on 27 May 2022, but since then, this proceeding has been in abeyance while proceedings about East Gippsland and Central Highlands coupes were decided. That occurred when Richards J made orders on 11 November this year. The plaintiff now seeks orders replicating the orders made by Richards J to replace the orders made on 27 May.

2 Gippsland Environment Group's pleadings allege that VicForests, the defendant, has failed to identify greater gliders and yellow-bellied gliders and has commenced timber harvesting operations in coupes in Gippsland without pre-harvest surveys being conducted. It contends that VicForests has refused to conduct those surveys and has failed to address risks to those gliders in breach of clauses 2.2.2.2 and 2.2.2.4 of the *Timber Code of Practice for Timber Production 2014* ('the Code').

3 The parties are agreed as to the form of interlocutory orders that should be made today with two exceptions, being paragraphs 2(b) and 3(a) of the proposed order, which concern riparian strips. Clause 2, which Gippsland Environment Group seeks and which, save as to differences as to the Forest Management Areas, Richards J made in the other proceedings, states:[1]

> Until further order, VicForests must not, whether by itself, its servants, agents, contractors, or otherwise, conduct timber harvesting operations in any coupe in the Gippsland FMAs in which greater gliders have been detected unless:
>
> (a) it excludes the greater gliders' located home ranges from timber harvesting operations; and
>
> (b) it excludes from timber harvesting riparian strips at least 100 metres wide located along all waterways in the coupe, with an exclusion area of at least 50 metres wide on each side of those waterways; and
>
> (c) it retains at least 60% of the basal area of eucalypts in the harvested area of the coupes.

---

1 See *Environment East Gippsland Inc v VicForests (No 4)* [2022] VSC 668, [377].

4 Gippsland Environment Group seeks a similar order to paragraph 2(b) to deal with riparian strips in respect of yellow-bellied gliders, which order will be paragraph 3(a).

5 Justice Richards gave the following reasons for her orders about riparian strips in the East Gippsland and Central Highlands proceedings:[2]

> The plaintiffs' proposed form of order included additional areas of habitat that they said should be excluded from harvesting, in order to reflect my conclusions about the need to maintain connectivity between areas of retained habitat, including by retaining riparian strips along waterways.
>
> I considered this point to be well made, in relation to connecting riparian strips along waterways. There were several reasons why I considered it appropriate to specify, in the second and third injunctions, that riparian strips at least 100 metres wide located along all waterways in the coupe, are to be excluded from timber harvesting operations:
>
> (a) First, both ecologists stressed the importance of riparian strips in maintaining connectivity between areas of retained habitat. This is reflected in my conclusions at [216] and [252] of the Judgment.
>
> (b) Second, VicForests is already required by the Code to retain buffer strips along waterways, with minimum widths as prescribed in the Standards. However, the minimum prescribed width of these buffer strips is narrower than the 100 metres recommended by Dr Benjamin Wagner.
>
> (c) The third reason was related to my conclusion that the 40% retention prescription in the Greater Glider Action Statement is wholly inadequate for the protection of greater gliders within a coupe — because the Greater Glider Action Statement does not specify that 40% basal retention must be in addition to the retention of riparian buffers. For that reason, I considered it important to specify in the injunctions that riparian buffer strips must be excluded from harvesting. This has the additional benefit of clarifying that these riparian buffer strips are not part of the harvested area of a coupe, within which a minimum of 60% of the basal area of eucalypts must be retained.
>
> Beyond that, I did not consider it appropriate for the injunctions to include detailed prescription about connectivity between retained areas of habitat. I reiterate that the injunctions ordered in these proceedings clarify rather than replace VicForests' existing obligations under ss 2.2.2.2 and 2.2.2.4 of the Code. When planning and conducting timber harvesting operations, VicForests should continue to be guided by relevant experts and relevant research, including as to the need for connectivity between areas of retained glider habitat and the characteristics of these wildlife corridors.

6 Because of the parties' agreement about much of the interlocutory orders to be made

---

2 *Environment East Gippsland Inc v VicForests (No 5)* [2022] VSC 707, [19]-[21].

today, I need say no more about the proposed orders, other than paragraphs 2(b) and 3(a), save to say that I am satisfied from Ms L Crisp's affidavit, filed on behalf of the plaintiff, that it has established a serious question to be tried about whether VicForests has breached the provisions of the Code by harvesting timber in coupes containing greater gliders' and yellow bellied gliders' habitats.

7 So far as the riparian strip restrictions that the plaintiff seeks are concerned, VicForests argues that the plaintiff has not presented any evidence justifying their inclusion for each coupe across Gippsland. It relies on s 91 of the *Evidence Act 2008* as preventing the plaintiff merely relying on Richards J's judgment to establish any question of fact about the need for the riparian strips. It contends that the plaintiff has to present evidence in this proceeding to justify those restrictions. Section 91 states:

> **91 Exclusion of evidence of judgments and convictions**
>
> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

8 Section 91 was considered by the Full Court of the Federal Court in *National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld) Pty Ltd*[3] on which VicForests relied. That appeal was from orders of Spender J staying a proceeding because it had not been prosecuted with due diligence. The proceeding was in part against valuers concerning a property valuation report. The relevant feature of the proceeding was that another proceeding had been commenced in the Queensland Supreme Court arising from an earlier valuation of the property which led to a judgment by White J, including against one of the valuers sued in the Federal Court. The appellant in the Full Federal Court proceeding, who was the applicant in that proceeding, argued that Spender J erred in making insufficient use of the Supreme Court reasons for judgment and in wrongly concluding that the Federal Court proceedings were not in fact parallel to, or dependent upon, the Supreme Court proceedings. The Full Court, in dismissing

---

[3] (2001) 183 ALR 700.

the application for leave to appeal, said:[4]

> The observations of Justice White as to the conduct of Richardson, his reliability as a witness, and as to the adequacy of the available documentation in proceedings between different parties as to different valuations made by different valuers at different points in time, even if there are some factual overlaps between the two proceedings, are in truth statements of opinion which are irrelevant to the proceedings in this Court… Relaxation of the general rule as to the inadmissibility of a judge's finding of fact against a non-party may only occur where the connection of the non-party with the original proceedings is so close that he or she will not suffer any injustice by allowing for such an exception to the general rule, eg when considering in a summary way the making of a costs order against a non-party…That is not this case.
>
> ….
>
> What Spender J was entitled to do with the judgment as the record of a superior court of record, which he did, was to ascertain the parties to the Supreme Court litigation and the issues raised in that litigation as disclosed in the reasons, and to determine whether the proceedings in this Court were in fact parallel, or substantially parallel to and dependent upon, the Supreme Court proceedings as had been put to him on the appellants' behalf.

9 The plaintiff argued that s 91 does not apply to mixed questions of fact and law. It gained some support for that proposition from Schmidt J's statement in *Attorney-General (NSW) v Mohareb*:[5]

> The term 'finding of fact' is not defined in the *Evidence Act*. While issues which arise for resolution in particular proceedings will very frequently depend on findings of fact made on the evidence, not every finding made, or conclusion reached on matters in issue involves a finding of fact. In some cases they involve the resolution of questions of law and often, the resolution of questions of mixed fact and law.

10 I bear in mind that that *Mohareb* and *Attorney-General (Vic) v Garrett*,[6] which referred to Schmidt J's judgment, were vexatious litigant proceedings where by very definition, it is necessary for the court to take into account earlier proceedings. Nevertheless, the statements in the two cases provide some support for the plaintiff's submission that s 91 does not apply to prevent its reliance in this proceeding on Richard J's judgment to the extent that it involved mixed questions of fact and law.

11 I accept for the purposes of the present application that Richards J's judgment

---

4 Ibid [48], [50] (authorities omitted).
5 [2016] NSWSC 1823, [26] ('*Mohareb*').
6 (2017) 51 VR 777, 784 [20].

involved questions of law being the meaning of the two clauses of the Timber Code to which I have referred. In addition, I consider it arguable that her Honour's judgment, when dealing with the need for riparian strips, decided mixed questions of fact and law. I consider that the plaintiff's right to rely on Richards J's judgment and conclusions and her orders about the need for riparian strips to ensure compliance with the Timber Code, arguably involves questions of law and fact to which s 91 of the Evidence Act does not apply.

12 I also bear in mind the obvious fact, that East Gippsland, which was one of the areas which Richard J's judgment and orders considered, is part of Gippsland, with which this proceeding is concerned. I also take into account for this interlocutory application that counsel for the plaintiff contended that the evidence established that gliders are to be found throughout Gippsland. The agreed orders apply throughout Gippsland Forest Management Areas.

13 In those circumstances, I conclude that the plaintiff has established that there is a serious question to be tried whether the plaintiff's reliance on her Honour's order and judgment establishes its claim for the riparian strip restrictions contained in paragraphs 2(b) and 3(a) of its proposed orders.

14 However, in my opinion, there is a second and stronger ground that the plaintiff has established to the required standard on which to obtain the interlocutory orders proposed in paragraphs 2(b) and 3(a). I will next discuss that second ground.

15 The plaintiff responded to VicForests' argument about its lack of evidence by referring to an expert opinion of Associate Professor Wardell-Johnson of Curtin University, who is a forest ecologist. That opinion is exhibited to the affidavit of the plaintiff's solicitor and was prepared for the two proceedings about East Gippsland and Central Highlands that Richards J decided. The Associate Professor has been employed as a divisional forestry officer, then as a senior researcher/scientist and has 22 years as an academic in universities and experience in conducting field-based research on five continents and six Australian states. His evidence was referred to by Richards J in her

judgment, as was the evidence of Dr B Wagner who gave expert evidence as part of VicForests' case.

16 Associate Professor Wardell-Johnson's expert opinion concerned the principles to be applied in relation to suitable habitats for protection areas for the yellow-bellied and southern great gliders, the requirements for a substantial population of yellow-bellied and greater gliders to be located in isolated habitats, requirements for surveys as well as addressing the risks of, and prevention of, serious or irreversible damage to the environment.

17 I will refer to two passages in Associate Professor Wardell-Johnson's opinion. In paragraph 174, he referred to the writing of R P Kavanagh and G A Webb, who concluded that:

> 'It is unclear when the species most disadvantaged by integrated logging, that is, the large gliding possums, will recolonize the logged areas. The persistence of these gliders was attributed to the retention of unlogged forest within and adjacent to logged areas. This highlights the role of riparian reserves ('wildlife corridors') and filter strips in retaining residual populations of the Greater Glider and the Yellow-bellied Glider until the logged areas are suitable for recolonization, and the importance of determining the effective size for these unlogged reserves. The data were not sufficient to determine conclusively whether reduced logging intensity at the levels applied was a better option than standard logging practices for managing populations of gliding possums in these forests.' In the case of broad-scale intensive logging, there is some uncertainty as to whether SGGs will ever return to regenerated coupes (see response to *Question Ten*). This is because their return is often dependent on narrow dispersal corridors and populations in indetermined distant mature forest as a source of recolonisation.

18 In paragraph 176, the Associate Professor quoted R P Kavanagh as stating that:

> Greater Glider populations can be maintained at or near pre-logging levels when at least 40% of the original tree basal area is retained through out logged areas and when the usual practice of retaining unlogged forest and riparian strips is applied.

19 It was not suggested that the Associate Professor's opinion, which was prepared for the East Gippsland and Central Highlands cases, would not be admissible and relevant in this proceeding. The Associate Professor does not limit his opinion to particular coupes in Gippsland. In addition, the agreed form of the other interlocutory orders that I am asked to make today suggests that VicForests does not contend for

the purpose of the interlocutory orders that restrictions on timber harvesting throughout Gippsland should not be ordered. As I have already mentioned, the plaintiff's counsel contended that gliders are present throughout Gippsland.

20 I consider that the opinion of Associate Professor Wardell-Johnson establishes a serious question to be tried as to whether riparian strips are required at each coupe throughout Gippsland to ensure that clauses 2.2.2.2 and 2.2.2.4 of the Code are observed. The area or size of the riparian strips will ultimately be a matter of judgment for the trial judge based on expert opinion.

21 Upon the recommencement of the proceeding this afternoon, the plaintiff's counsel referred me to passages in Associate Professor Wardell-Johnson's opinion, which he said indicated the rationale behind the size of the riparian strips that the plaintiff sought, which are the same as Richards J ordered. For instance, the Associate Professor stated in paragraph 131:

> *Hostile* habitat with narrow corridors (i.e., less than 100 m in width) of suitable habitat connecting to larger areas of suitable habitat, is designated as isolated for SGGs. That is because narrow corridors pose a risk in dispersal as *ecological traps* for this species.

22 That passage provides some support for the adoption of the areas for the riparian strips proposed in the plaintiff's paragraphs 2(b) and 3(a). Paragraph 176 of Associate Professor Wardell-Johnson's report, to which I have previously referred, might also be read as suggesting that the riparian strips have to be of significant size. However, as I have stated, the appropriate size of the riparian strips will be a matter of judgment for the trial judge based on expert opinion.

23 I therefore consider that the plaintiff has established a serious question to be tried for the two reasons I have mentioned. That serious question to be tried is whether the provision in paragraphs 2(b) and 3(a), including riparian strips with areas of at least 100 metres wide along all waterways in the coupe with an exclusionary area of at least 50 metres on each side of that waterway, should be ordered to ensure breaches of the Code do not occur.

24 VicForests did not rely on balance of convenience factors and no argument was made about any effect of the orders on persons not parties to this proceeding. Accordingly, I find that the plaintiff has established a serious question to be tried for the inclusion of paragraphs 2(b) and 3(a) in the interlocutory orders.

25 Subject to receiving the usual undertaking as to damages from the plaintiff's counsel on behalf of the plaintiff, I will make an order in the terms of the plaintiff's proposed orders.

CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Ginnane of the Supreme Court of Victoria delivered on 30 November 2022.

DATED this seventh day of December 2022.

.....
Associate