08/00; [2000] VSC 63

SUPREME COURT OF VICTORIA

PLEMING v JACKSON

Balmford J

17, 18, 21 February, 8 March 2000

ENVIRONMENT – PREPARATION OF LAND FOR CONSTRUCTION OF SOCCER GROUNDS – ACCEPTANCE BY CONTRACTOR OF LANDFILL – SITE NOT LICENSED TO ACCEPT INDUSTRIAL WASTE – CONTRACTOR SERVED WITH CLEAN-UP NOTICE AND REQUIRED TO PAY A CERTAIN FEE – FEE NOT PAID – CHARGES LAID AGAINST CONTRACTOR – CHARGES FOUND PROVED BY MAGISTRATE – APPEAL TO COUNTY COURT – CHARGES FOUND PROVED ON APPEAL – WHETHER JUDGE MADE ERROR OF LAW: *ENVIRONMENT PROTECTION ACT* 1970 SS4, 27(1), 27A, 60C; *ENVIRONMENT PROTECTION (SCHEDULED PREMISES AND EXEMPTIONS) REGULATIONS* 1996 S5, Table A.

P. was convicted in the Magistrates' Court of three offences under the *Environment Protection Act* 1970. The charges arose out of work which P. carried out in relation to the construction of two soccer grounds. There was evidence that P. had advertised for fill material and that he accepted onto the land 30-40% of material which was not acceptable. P. appealed to the County Court and was found guilty of:

(i) being the occupier of Schedule 2 premises at which waste was deposited;

(ii) failing to pay a fee after being served with a clean-up notice.

Upon an originating motion seeking an order to quash—

HELD: Claim dismissed.
There was no error of law in relation to any of the matters relied on by P. There was ample evidence before the court that—

(i) the property was not a soccer ground but a landfill used for the discharge or deposit of solid wastes onto land being land disposal facilities for solid wastes;

(ii) a very large amount of the material deposited on the property was intended to remain there and not to be sorted and removed; and

(iii) P. accepted onto the land more than 10% inert building material.

BALMFORD J:

Introduction

1. In this proceeding, which was commenced on 23 April 1999 by originating motion under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 1996 ("the Rules"), the plaintiff seeks an order in the nature of *certiorari* to quash a decision of His Honour Judge Ross made in the County Court on 26 February 1999, or, in the alternative, declarations to the effect that His Honour made certain specified errors of law. His Honour's decision was made on an appeal by way of rehearing from a decision of the Magistrates' Court convicting the plaintiff of three offences under the *Environment Protection Act* 1970 ("the Act").

2. The first defendant is the informant who filed the charges. It is to be assumed that he is an officer of the Environment Protection Authority ("the Authority"), but nothing turns on that. There was no appearance for the second defendant, which advised that it would abide the decision of the Court save any order as to costs.

3. The evidence before the Court was contained in three affidavits of Mr Pleming, one affidavit of his solicitor, Ms Rigoli, and one affidavit of Mr Vasel, an officer of the Authority, together with their exhibits. There was some inconsistency in the evidence as to the terms of His Honour's judgment, but in the event the inconsistency did not appear to be regarded by either party as significant.

4. At the outset, counsel for the plaintiff sought leave to appeal out of time against what he stated to be the refusal by Master Wheeler on 1 June 1999 to allow the filing of an amended originating motion seeking to raise new grounds for relief. By virtue of Rule 77.05 (4) and (6), the prescribed time for the making of such an appeal is five days from the making of the order, and that period may be extended by order of a Judge or Master. The application before me was made on 17 February 2000, that is, more than seven months out of time. This application was opposed by counsel for the first defendant ("the defendant") on the ground, *inter alia*, that to grant it would be in effect to allow the making of a fresh claim outside the prescribed time.

5. The decision of the County Court which is sought to be reviewed was delivered on 26 February 1999. Rule 56.02(1) provides that a proceeding under Order 56 shall be commenced within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose. That period expired on 27 April 1999. Rule 56.02(3) provides that the Court shall not extend that time "except in special circumstances". I considered the meaning of the expression "special circumstances" at some length in *No 2 Pitt Street Pty Ltd v Wodonga Rural City Council* [1999] VSC 133; (1999) 104 LGERA 239 and will not repeat that consideration here. Counsel did not put before me any circumstances which he claimed to be "special" in that context. In my view, there is nothing in the circumstances of this case which could be regarded as "special" so as to justify what is in effect the making of a fresh claim well outside the prescribed period, given that Rule 56.01(4) requires that the originating motion shall state the grounds on which the relief or remedy is sought. That application therefore fails.

6. The charges arise out of the activities of the plaintiff in connection with the preparation of certain land ("the property") in Palmers Road, Werribee for the construction of two soccer grounds for the Chilean Club of Victoria, the owner of the property. The relevant parts of the Charge and Summons read as follows:

> 1. At Werribee between 20/6/96 and 28 November 1996, you were the occupier of a schedule two premises, at which waste was deposited onto land at [sic] without a licence and thereby committed an offence against section 27(1) of [the Act].
>
> **Particulars**
> The premises at 99 Palmers Road Werribee are scheduled premises by virtue of Regulation 5 and Table A of the *Environment Protection (Scheduled Premises and Exemptions) Regulations* 1996. …
>
> 2. At Werribee between 29/11/95 and 28 November 1996 you permitted to be dumped industrial waste at a place not being a site licensed to accept industrial waste and thereby committed an offence against section 27A(2)(a) of [the Act]. …
>
> 3. At Werribee being a person who was served with a clean-up notice on 3 December 1996 in relation to premises situated at 99 Palmers Road Werribee, you did not pay a fee of 40 fee units, namely $320, to the Environment Protection Authority within the time specified under sub-section (1) of section 60C of [the Act], namely on or before 3 January 1997.

7. His Honour dismissed the appeals on the first and third counts and allowed the appeal on the second count. On the first and third counts he imposed an aggregate fine of $500. He ordered the plaintiff to pay compensation of $79,833 pursuant to section 65A of the Act and section 86(1) of the *Sentencing Act* 1991, and to pay costs of $22,820.

8. The relevant provisions of the Act read as follows:

> **4. Definitions**
> (1) In this Act unless inconsistent with the context or subject-matter—
> "Authority" means the Environment Protection Authority constituted under this Act; …
> "schedule two premises" means any premises—
> (a) prescribed by regulation; or
> (b) which are of a class prescribed by regulation—
> as premises from or at which waste is or is likely to be discharged or deposited onto any land or into any waters; …
> "waste" includes—
> (a) any matter whether solid, liquid, gaseous or radio-active which is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment;
> (b) any discarded, rejected, unwanted, surplus or abandoned matter;

(c) any otherwise discarded, rejected, abandoned, unwanted or surplus matter intended for—
(i) recycling, reprocessing, recovery or purification by a separate operation from that which produced the matter; or
(ii) sale; and
(d) any matter prescribed to be waste; …
"works approval" means an approval of works issued under section 19B.

27. Offences
(1) A person who is the occupier of a schedule one premises from which waste is discharged or emitted to the atmosphere or a schedule two premises from or at which waste is discharged or deposited onto land or into waters …—
(a) without a licence where a licence is required by this Act; or (b) …
shall be guilty of an offence against this Act and liable to a penalty of not more than 200 penalty units and in the case of a continuing offence to a daily penalty of not more than 80 penalty units for each day the offence continues after conviction or after service by the Authority on the defendant of notice of contravention of this section.

27A. Offences relating to industrial waste
(2) Any person who dumps or abandons or permits to be dumped or abandoned industrial waste—
(a) at a place not being a site licensed to accept industrial waste under this Act; or (b) …
is guilty of an offence against this Act and liable to a penalty of not more than 400 penalty units.

60C. Payment of notice fee
(1) A person who is served with an abatement notice, pollution abatement notice, noise control notice or clean up notice must within 30 days of being served pay a fee of 40 fee units to the Authority.

9. The relevant provisions of the *Environment Protection (Scheduled Premises and Exemptions) Regulations* 1996 ("the Regulations"), namely section 5 and Table A, read as follows:

5. Scheduled premises
(1) The premises listed in Table A are prescribed as schedule one, schedule two and schedule three premises for the purposes of the Act.

Table A – Scheduled Premises
Description of premises
1. Waste treatment, disposal and recycling …
(e) Landfills used for the discharge or deposit of solid wastes onto land being— (i) … ; or
(ii) land disposal facilities for solid wastes (including solid industrial wastes) …

Municipal landfill premises serving less than 5000 people are exempt from licensing.

The claim for an order in the nature of *certiorari*

10. In *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, the High Court said:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

11. McDonald J in *Flynn v DPP* [1998] 1 VR 322 considered the authorities and found at 336 that relief in the nature of *certiorari* in proceedings instituted pursuant to Order 56 might go to correct an error of law on the face of the record of the County Court, if such error existed, when that Court was exercising its jurisdiction in appeals against conviction and sentence pursuant to section 83 of the *Magistrates' Court Act* 1989. The appeals before His Honour were against sentence for offences contrary to section 95A(1)(b) of the *Conservation, Forests and Lands Act* 1987, which

provided that a person must not hinder or obstruct the lawful carrying out of forest operations. I am therefore satisfied that *certiorari* is available in the matter with which I am concerned.

12. In the present case, relief is sought on the basis of error of law on the face of the record. Section 10 of the *Administrative Law Act* 1978 has the effect that the reasons for His Honour's decision shall be taken to form part of the decision and accordingly to be incorporated in the record. The plaintiff's claim was based principally on a number of what were said in the originating motion to be errors of law in His Honour's decision, and which were there described as follows:

> (i) That the premises were a Schedule 2 premises as set out in Table A 1(e)(ii) of [the Regulations].
>
> (ii) That the Court had the power to find that waste was deposited onto land when the materials were only there to be sorted and in part removed.
>
> (iii) That the works approval letter from [the Authority] was not sufficient to permit all of the material which was on the land to be there and that the premises did require a licence.
>
> (iv) That the plaintiff was not operating within the terms of the licence or approval whereby he was permitted to accept on the land concrete brick and 10% inert building material.
>
> (v) That [the Authority] was a person suffering loss or damage to property as a result of an offence within the meaning of section 86 of the *Sentencing Act* 1991 and was thereby entitled to [a] compensation order.
>
> (vi) That the Appeal by the Plaintiff to the Administrative Appeals Tribunal against the Requirement set out in the Pollution Abatement Notice dated 14 June 1998 did not operate to stay the operation of the Notice pursuant to section 36 of [the Act] so as to permit further materials to come onto the site for the purpose of sorting and partial use in the earthworks being carried out on the site.

Ground (i): was the property "Schedule two premises"?

13. The relevant provisions are the definition of "schedule two premises" in section 4 of the Act, and Table A 1(e)(ii) of the Regulations, to which that definition refers. The words in that part of Table A are ordinary non-technical English words In so far as the meaning of "waste" is governed by the definition in section 4 of the Act, the words used in that definition are similarly ordinary non-technical English words. That being so, the determination of the meaning of the words of that definition and of the relevant passage from Table A involves a question of fact and not a question of law. (See the extensive discussion of this principle by Tadgell J in *Francheschini v Melbourne & Metropolitan Board of Works* [1980] 1 PABR 276; (1980) 57 LGRA 284 at 290 and following.) That being so, the question must be considered in the light of the following passage from the judgment of Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19:

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour & Co. Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ, in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41).

For present purposes, the same principle must apply to the decision of the County Court with which I am concerned.

14. I am satisfied on the material before me that there was ample evidence before His Honour on which he could find that at the relevant time the property fell within the terms of Table A 1(e)(ii), and such a finding must be implied from his decision on the first charge. Mr Radford submitted that the property was not a "landfill" but a "soccer ground". Whatever it may have been intended to be in the future, the evidence, including videos, photographs, and the plaintiff's advertisement seeking filling material, could leave no doubt that at the relevant time it fell within the description

of "landfills used for the discharge or deposit of solid wastes onto land being ... land disposal facilities for solid wastes". As to the exemption from licensing of "municipal landfill premises ...", that expression does not appear to be defined in the Act or the regulations, and I take it to refer to landfill premises operated by or for a municipality, and therefore to be irrelevant to this proceeding.

Ground (ii): was the material to be sorted and in part removed?

15. This is again a question of fact. I am satisfied on the evidence before me that there was ample evidence before His Honour, in particular the video of material buried and covered, on which he could find that a very large amount of the material deposited on the property was intended to remain there, and not to be sorted and removed.

Ground (iii): the "works approval"

16. Mr Radford indicated, rightly in my view, that he was not proceeding with this ground.

Ground (iv): exceeding 10% unacceptable material

17. His Honour found that the evidence for the Authority was that "up to 10% of incidental material which was inextricably bound up with the material being legitimately brought onto the site would have been acceptable", but that "30% to 40% of the material coming onto the site was not acceptable" and concluded that Mr Pleming went far beyond any latitude given to him by the Authority. Again, whether the 10% was exceeded was a question of fact, and there was ample evidence on which His Honour could find that to be the case.

Ground (v): the compensation order

18. Mr Radford indicated, rightly in my view, that he was not proceeding with this ground.

Ground (vi): the Pollution Abatement Notice

19. There is no reference to this matter in His Honour's decision, and his finding does not require it as a matter of necessary implication in respect of any of the charges. The charge under section 60C was based on the issue of a clean up notice pursuant to section 62A of the Act on 3 December 1996.

20. I find no error of law in any of the matters relied upon by the plaintiff. The claim that the decision of His Honour "is a denial of natural justice in that the proper person who should pay clean-up costs (if any) is the Chilean Club of Victoria, the owner and occupier of the land" is misconceived. Mr Radford sought to establish that the matters on which he relied to constitute errors of law on the face of the record also went to establish jurisdictional error. As I have found no error of law in those matters the question of jurisdictional error does not arise.

The claim for a declaration

21. The claim for a declaration included in the originating motion fails with the claim for an order in the nature of *certiorari*.

Conclusion

22. The claim of the plaintiff will be dismissed with costs.

APPEARANCES: For the plaintiff Pleming: Mr AE Radford, counsel. Mantello Lawyers, solicitors. For the first defendant Jackson: Mr A Lindeman, counsel. Rosemary Martin, solicitor for the Environment Protection Authority.
