[2010] HCATrans 165

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane No B3 of 2010

B e t w e e n -

HARVEY SCOTT SIMPSON

Applicant

and

PETER ROBERT WITHEYMAN

Respondent

Application for special leave to appeal

FRENCH CJ
BELL J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON THURSDAY, 24 JUNE 2010, AT 12.18 PM

MR S.J. KEIM, SC: If the Court pleases, I appear with my learned friend, **MR P.D. SHERIDAN**, for the appellant. (instructed by p & e law)

MR W. SOFRONOFF, QC, Solicitor-General of the State of Queensland**:** If the Court pleases, I appear with my learned friend, **MR D.J. LANG**, for the respondent. (instructed by Crown Law - Brisbane)

FRENCH CJ: Yes, Mr Keim.

MR KEIM: Thank you, your Honour. We wanted to spend most of our allocated time identifying as clearly as we can the errors which we say were made by the Court of Appeal in reversing the decisions of the two lower courts. However, in paragraph 18 of our outline, we identify the particular legislative context which, of course, we say is very important in this case. That can be found at page 85 of the application book and the reference there is to the both the second reading speech and the explanatory notes to the *Vegetation Management Amendment Act*.

FRENCH CJ: You put a fair amount of weight, do you not, on the removal of 3(1)(a)(ii) and the reasons for that, which were an absence of Commonwealth funding to support that aspect of the legislation?

MR KEIM: Yes, absolutely. We wanted to take the Court briefly to those two documents, the second reading speech. They can be found, the second reading speech, in the respondent's bundle at volume 2 behind tab (j).

FRENCH CJ: Yes.

MR KEIM: The particular parts that we would take you to commence on the following page, page 2784 and your Honours will see, starting at the paragraph "As a consequence of" and going down to perhaps the end of that page. These are the matters that your Honour the Chief Justice referred to. The same, or similar, comments are identified in the explanatory notes themselves. They are at the preceding, or behind the preceding tab which is tab (i) and on the very first page of that, under the heading, "Reasons for the Bill", your Honours will see under that paragraph on the next page, under the heading "Ways in which the policy objective is to be achieved" and "Alternative ways of achieving the objective" similar comments to those which are identified in the second reading speech itself.

We say this in our outline - one of the things we say is that what we have and it may not mean anything if it was not actually reflected in that extrinsic material but you had a specific promise made, an election intervening and then a specific promise repeated in the second reading speech in terms of legislation intending to implement that.

BELL J: Accepting that for the moment, Mr Keim, can I take this up with you. His Honour Judge Botting, as I understand it, accepted a submission made on the applicant's behalf.

MR KEIM: Yes.

BELL J: Having regard to the extrinsic materials, it was necessary to read the language of the offence-creating provision other than by reference to its terms. If you go to application book 42 - - -

MR KEIM: Yes, your Honour, perhaps on - - -

BELL J: That seems to be the approach that his Honour took. Now, I mean, appreciating that there is this history to which you have referred in your submissions, nonetheless, how do you get around the difficulty that the offence-creating provision, I think that is contained in the IPA, alleged an offence involving starting assessable development without an effective development permit for the development.

MR KEIM: It is not the section which literally creates the offence that is the problem. It is the definitional provision also in the *Integrated Planning Act* that is referred to as paragraph 3A.

BELL J: Yes.

MR KEIM: It is that definitional provision where, we say, the drafting error occurs. Can we just take your Honour back to the previous paragraph and read the – the drafting error has not been identified perhaps as clearly below as might have occurred but certainly his Honour Judge Botting realised that the way in which it was to be fixed was by - and he says such an approach means reading more into the words of section 4.3.1(1) and it is not that section so much as paragraph 3A of Part 1 of Schedule 8 that a literal reading would warrant.

So it is the failure to make substantive changes to that which we say is the drafting error. We say that that drafting error meets the conditions laid down in *Wrotham Park* and picked up in *Newcastle City Council* v *GIO* and, in fact, applied to the *Insurance Contracts Act* in *GIO*. So we do not simply say they intended to do this and the legislation is nothing like it, what we say is, it is clear from the changes they did make and the extrinsic material, the changes to section 3 of the *Vegetation Management Act*, that there was a drafting error and then we go on to say the way in which that drafting error should be corrected by emotional reading in of words into 3A.

BELL J: Yes.

MR KEIM: We say it is more than simply what was done in *Cooper Brookes*, but we say it is very analogous to what was done in *Newcastle City Council* and we say that the applicant, particularly where both a criminal offence has been created and property rights are being affected, the applicant should not be disadvantaged because

the offence is created by a legislative scheme that involves two pieces of legislation.

Can I take your Honour to what we say are the words that need to be inserted and it is useful to go to paragraph 3A at page 55 of the application book where it is reproduced in the reasons of the Court of Appeal. We have indicated, we say there are two alternative ways of approaching it and in this case because the facts of this case it does not matter which notion or way the Court goes, but if one goes to 55 we have set out - I am just trying to find the paragraph in our outline where we have indicated the change, but in any event, if one goes to 55, that is the definition of "assessable development" and the way in which the schedule to the *Integrated Planning Act* is framed is that there is a whole lot of little items.

This one relates to clearing vegetation. There are others which relate to perhaps clearing of mangroves or doing work in a subdivision or process. But if one goes to 3A, what we say is the words that need to be inserted come at, in the second line:

Carrying out operational work that is the clearing of native vegetation -

and we would insert the words, that is "within a remnant endangered regional ecosystem" immediately after that. We say that that process of the two alternatives more clearly achieves the expressed intention in the extrinsic material.

The alternative way of approaching it is to go to the definition of "routine management" which is contained in Schedule 8 Part 4 of the *Integrated Planning Act*. It is set out by the Court of Appeal in the following paragraph, paragraph [8] on page 55. We would say that an alternative way of correcting the drafting error is to add in at the end of subparagraph (b) the words "within a remnant endangered regional ecosystem" and we say - - -

FRENCH CJ: You are saying, as I understand it, that the removal of one of the objectives in the VMA which was not, of itself, a substantive provision means that one has to read down the definition of "Operational work" in 3A of the *Integrated Planning Act* which informs in 4.3.1 the offence-creating provision by reference to an assumed change of objective in relation to the IPA carried over from the VMA. Is that right?

MR KEIM: Yes.

FRENCH CJ: And, in other words, narrow the scope of the offence accordingly?

MR KEIM: Yes, and we say – if I could just add to the way in which your Honour the Chief Justice phrased it - section 3 construed enacting in combination with, if I can put it that way, the extrinsic material because 3A - - -

FRENCH CJ: Well, 3 picks up the assessable development concept, yes.

MR KEIM: Yes, but it is the extrinsic material.

FRENCH CJ: The extrinsic material explains the deletion of the objective from the VMA, does it not?

MR KEIM: Yes, we say that it helps in construing section 3 so that one fully understands - - -

FRENCH CJ: Extrinsic material had nothing to say about the IPA.

MR KEIM: It did not, but we say that once one properly construes section 3 of the *Vegetation Management Act* one understands the drafting error that is contained within the definition in paragraph 3A.

FRENCH CJ: You call it a drafting error. What was the timing of the enactment of this by reference to the VMA?

MR KEIM: Paragraph 3A was inserted at the time that the *Vegetation Management Act* - - -

FRENCH CJ: Came into effect.

MR KEIM: Was amended.

FRENCH CJ: Yes, in its amended form.

MR KEIM: Yes.

FRENCH CJ: It came into effect at the same time as the VMA in its amended form, is that what you say?

MR KEIM: No, I will just check with my junior, but what I was saying is that the *Vegetation Management Act* – there was some delay between when it was passed and when it was proclaimed and the amendment - - -

FRENCH CJ: The amendment came in the interim?

MR KEIM: Can I just check that, your Honour.

FRENCH CJ: I understand that from the papers.

MR KEIM: We stand to be corrected with regard to this, your Honour, but what your Honour the Chief Justice said was correct, that the amending Act of 2000 is the

Vegetation Management - also amended other legislation. We will need to check on that, your Honour. Our understanding is that paragraph 3A was inserted at the same time as the 2000 Amendment Act was passed, but we will need to check on that to make absolutely sure.

FRENCH CJ: Well, that is something we should be in a position to know right now, really. Anyway, perhaps you can just go on for the moment.

MR KEIM: Thank you, your Honour. If I can take your Honours to section 3, as it was amended, and that can be seen - - -

FRENCH CJ: Of the VMA?

MR KEIM: Yes, of the VMA. That can be seen at page 58 of the record book at the bottom of the page. What the Court of Appeal said in construing section 3 was that the paragraphs (b), (c), (d) and (e) should be understood as being objects or purposes that should be construed broadly. In doing that the Court of Appeal – and if we can take your Honours to the relevant pages of the Court of Appeal, the paragraphs of the Court of Appeal – they are contained at application book 62 at paragraphs [36] and [37] on that page. His Honour Justice - - -

FRENCH CJ: They say that, in substance, that reduces the proposition that the offence-creating provision can serve the other wider purposes.

MR KEIM: Yes, what Justice Muir does there is to construe section 3 in what we say is a very forced construction, even on literal terms, but construe section 3 in the absence of the purpose of the amendment that one can obtain from the extrinsic material. The Court of Appeal construes section 3 very narrowly and then they go on in the succeeding paragraphs - and they do that without reference to the extrinsic material, and his Honour Justice Muir in paragraphs [38] and [39] justifies that by saying section 14B(1) of the *Acts Interpretation Act* does not allow access to the extrinsic material until there is an ambiguity.

We say that there is an error in that approach because the common law, as explained in *CIC v Bankstown* - and we would seek to take your Honours to the relevant passage in that. That is contained in volume 1 of our material behind tab 8. It is a classic passage that your Honours will no doubt have seen on many previous occasions, at page 408. The plurality there states:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act* 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage where ambiguity might be thought to arise, and (b) uses “context” in

its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

BELL J: Mr Keim, accepting the statement of those uncontroversial principles, the Court of Appeal proceeded by reference to the principles articulated in *Kingston v Keprose* and elsewhere concerning the limited circumstances in which a court might embark on an exercise of reading words into a statutory provision. It is just not clear to me how you overcome the force of that reasoning.

MR KEIM: We accept that it is not every day that one inserts words notionally into a statute, but - - -

FRENCH CJ: Particularly not when it is based simply on a change in the objectives, as distinct from what is necessary, for example, to make - what might be necessary and extremist to make two statutes mesh intelligibly. You simply have the change in the statement of objectives and a statement of extraneous policy which explains this because there is not enough Commonwealth money that they have taken that objective out of the VMA.

MR KEIM: We say that the extrinsic material goes further and says that the regulation of clearing of vegetation will be restricted to endangered regional ecosystems. That is what we take from the extrinsic material, but if - - -

FRENCH CJ: The Minister might have said that but the Parliament did not.

MR KEIM: But what we say the Court of Appeal did wrongly is they did not construe or give full weight to the purpose by reference to those principles of common law. Then at paragraph [42] they sought to construe paragraph 3A, the operative provision from the *Integrated Planning Act,* by reference to a purpose which had been wrongly construed. So we say that they compounded the step. They took a very forced, non-contextual construction of the purpose and then used that to justify not finding any ambiguity in item 3A and then, again, did not look to the extrinsic material because they found no ambiguity in construing item 3A.

That is the process which we say by which the court went wrong, and having gone wrong it then becomes a question which the courts below took which is what are the words that can be inserted and we have identified those in the paragraph that I took your Honours to, that the drafting error can be corrected.

Can we just say this, that *WACB v The Minister*, which is one of the classic cases to which your Honour Justice Bell referred, that actually refers in the footnote of that passage to an 1845 case where Lord Denman actually changed the words because there was clearly a wrong reference to an earlier statute in those words.

FRENCH CJ: That has happened from time to time. I think your time is up, Mr Keim.

MR KEIM: Thank you, your Honour.

FRENCH CJ: Thank you. We will not need to trouble you, Mr Solicitor.

The applicant in this case raises a question of statutory interpretation in relation to the interaction between the *Integrated Planning Act* 1997 (Qld) and the *Vegetation Management Act* 1999 (Qld). In our opinion, the decision of the Court of Appeal in this case proceeded according to established principles of statutory interpretation. No error is disclosed which would warrant the grant of special leave.

The Court will now adjourn to reconstitute.

AT 12.42 PM THE MATTER WAS CONCLUDED