

FEDERAL COURT OF AUSTRALIA

MOSHINSKY J

VID 345 of 2022

**AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED v
WOODSIDE ENERGY LTD AND ANOTHER
MELBOURNE, 20 APRIL 2023**

HIS HONOUR: There are two applications before the Court: first, an interlocutory application filed by the applicant, dated 14 December 2022, seeking leave to amend its pleading; and, secondly, an interlocutory application filed by the respondents, dated 14 December 2022, seeking strike-out of certain paragraphs or all of the current pleading of the applicant. The proposed pleading of the applicant has gone through a number of iterations. The latest iteration (the **proposed pleading**) was attached to the applicant's proposed short minutes of order provided to the Court on 12 April 2023.

In relation to the respondent's interlocutory application, there are two affidavits in support. There is an affidavit of Eve Lynch, dated 14 December 2022, and an affidavit of Charles Blaxill, dated 19 April 2023.

The matter came before me on 15 December 2022 when there was a discussion of various different pleadings issues, and I made orders which sought to have the parties resolve those issues. Pursuant to those orders, on 31 March 2023 the parties provided an update to my Chambers which indicated that the pleadings issues had not been fully resolved. The matter was then listed for a case management hearing before me on 12 April 2023, and the parties outlined to me the remaining outstanding issue between them which focused, in particular, on paragraph 98A of the proposed pleading.

The matter was then listed for the hearing of the two interlocutory applications at 4.30pm today. In advance of the hearing today, the parties filed outlines of submissions.

The Court has power, under the *Federal Court Rules 2011* (Cth), to permit a party to amend a pleading. However, the Court would not do so where the proposed amended pleading is not in proper form. If I am satisfied that it is appropriate to give leave to amend, then it is unnecessary to determine whether the current pleading should be struck out. Accordingly, it is practical in the circumstances to consider, first, whether I should grant leave to amend. If I consider that leave to amend should be granted, then the respondent's interlocutory application seeking to strike out the current pleading falls away.

There is no real issue between the parties as to the applicable principles regarding

pleadings and amendments to pleadings. The key relevant principle is that set out in paragraph 8 of the respondents' outline of submissions based on *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287.

In broad terms, the appellant alleges that the respondents, by engaging in the Scarborough Project, which is an offshore project for the extraction, processing and export of petroleum, will contravene ss 12, 15B and 67A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The applicant seeks relief by way of declarations and injunctions. In order to make good the proposition that, by engaging in the project, the respondents would contravene s 12(1) of the EPBC Act, the applicant needs to prove that the respondents would be taking an action that has, will have or is likely to have a "significant impact" on the World Heritage values of a declared World Heritage property. In order to make good the proposition that, by engaging in the project, the respondents would contravene s 15B(1) of the EPBC Act, the applicant needs to prove that the respondents would be taking an action that has, will have or is likely to have a "significant impact" on the National Heritage values of a National Heritage place.

Critical for present purposes is the concept of an "impact" for the purposes of the EPBC Act. This term is defined in s 527E of the EPBC Act. Subsection (1) provides that:

*For the purposes of this Act, an event or circumstance is an **impact** of an action taken by a person if:*

- (a) the event or circumstance is a direct consequence of the action; or*
- (b) for an event or circumstance that is an indirect consequence of the action – subject to subsection (2), the action is a substantial cause of that event or circumstance.*

Section 527E(2) then contains a qualification on the operation of paragraph (b) of s 527E(1).

In the first part of the proposed pleading, at paragraphs 1 to 31, the applicant pleads key provisions of the EPBC Act. In the next part of the pleading, at paragraphs 32 to 41, the applicant pleads facts and matters relating to the Great Barrier Reef. The Scarborough Project is pleaded at paragraph 47, and then paragraph 47A sets out a series of steps to be carried out under the project, which are defined as the Project Action, the Extraction Action, the Processing Action and the Export Action (together, **Actions**). In paragraphs 60 to 94 of the proposed pleading, the applicant pleads certain matters relating to greenhouse gas emissions, climate change, tipping points and the Great Barrier Reef.

The key paragraph in contention, for present purposes, is paragraph 98A of the proposed pleading. This appears under the heading "The impacts and likely impacts of the Actions". As the heading suggests, paragraph 98A sets out the alleged impacts of the Actions alleged earlier in the pleading. The paragraph commences by stating:

If any of the Actions occurs, including if any of the Project Action, Extraction Action, Processing Action or Export Action occurs, the following is likely: ...

Paragraph 98A then contains a series of paragraphs from paragraph (a) through to paragraph (l). The allegations in these paragraphs may broadly be described as the alleged impacts of the alleged Actions. It should be noted that the paragraphs of paragraph 98A are not all alternatives to each other. Rather, to some extent, they build on each other or add content to other paragraphs within paragraph 98A. For example, paragraphs (b), (c) and (f) describe certain alleged impacts. It is then pleaded, in paragraph (g), that, by reason of those matters, there will be substantial greenhouse gas emissions generated.

By way of further example, paragraph (i) alleges that the greenhouse gas emissions, being those referred to earlier, will have certain effects. These effects are set out in subparagraphs (i), (ii) and (iii) of paragraph (i). Then, paragraph (j) contains further detail or content in relation to the matters referred to in paragraph (i). Likewise, paragraph (k) contains further detail and content in relation to matters referred to in paragraphs (i) and (j). The same is true of paragraph (l).

The key complaint made by the respondents is that paragraph 98A contains conclusions and does not plead material facts to make good those conclusions. The respondents contend that there are no allegations of material fact to make the link between each of the alleged Actions pleaded earlier in the document and each of the alleged impacts pleaded in paragraph 98A such as, for example, “the destruction of parts of the Great Barrier Reef” (paragraph 98A(j)(ix)), or “the loss of jobs in communities around the Great Barrier Reef” (paragraph 98A(j)(xii)). In oral submissions, the respondents submitted that paragraph 98A is deficient in that it lacks quantification facts and contextual facts. The latter point was developed by reference to paragraph (i) and also paragraphs (j) and (k).

I do not accept these submissions. In my view, when paragraph 98A is considered in the context of the other paragraphs of the proposed pleading, and the structure of paragraph 98A is properly appreciated, the paragraph sufficiently makes clear to the respondents the case they need to meet and provides sufficient material facts. The paragraph needs to be read together with the earlier pleadings regarding greenhouse gas emissions, climate change and the Great Barrier Reef. The structure of the paragraph, as outlined above, is both cumulative and involves paragraphs that provide additional content or explication of other paragraphs.

I do not consider it necessary, as a matter of pleading, for the applicant to plead the environmental context of climate change. This is a matter that will likely need to be dealt with in the evidence for the applicant to make good some of the propositions in paragraph (i) of paragraph 98A, but I do not consider that it is necessary for these matters to be pleaded in order for the respondents to understand the case they need to meet.

Further, insofar as paragraph (k) pleads matters of *damage* that are alleged to arise from the earlier pleadings, which include matters of *risk*, it may be that some of the

alternatives embedded in paragraph 98A will fall away once the applicant's expert evidence is filed. However, the presence of these alternatives does not, in my view, mean that the applicant's case is not clear or that additional material facts need to be pleaded.

In light of this view, the objections to the other paragraphs of the proposed pleading fall away.

Further and in any event, I consider that if there is any concern on the part of the respondents that they do not know the case they need to meet, this is likely to be rectified once the applicant provides its expert evidence. In the interests of the efficient and just case management of this matter, I consider it appropriate to grant leave to the applicant to amend, at this stage, and allow the respondents to raise any issue concerning their ability to understand the case that they need to meet if a concern remains after the applicant's expert evidence has been filed.

I will, therefore, grant the applicant leave to amend the pleading, and I will dismiss the respondents' application to strike out the current pleading.
