

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

Not Restricted

S ECI 2021 01527

ENVIRONMENT EAST GIPPSLAND INC.

Plaintiff

v

VICFORESTS

Defendant

S ECI 2021 04204

KINGLAKE FRIENDS OF THE FOREST INC.

Plaintiff

v

VICFORESTS

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 9 March 2022
DATE OF JUDGMENT: 23 March 2022
CASE MAY BE CITED AS: Environment East Gippsland Inc. v VicForests (No 3)
MEDIUM NEUTRAL CITATION: [2022] VSC 141

PRACTICE AND PROCEDURE – Security for costs – Corporate plaintiffs with insufficient assets to satisfy adverse costs order – Relevance of ability to seek a protective costs order – Discretionary factors – Where one plaintiff alienated substantial funds – Whether ordering security would stultify proceedings – Public interest in resolution of issues in dispute – Timing of application – Security not ordered – *Civil Procedure Act 2010* (Vic), s 65C(2A).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr J Korman	Oakwood Legal
For the Defendant	Mr P Solomon QC with Mr O Ciolek	Johnson Winter & Slattery

HER HONOUR:

- 1 These two proceedings are brought by incorporated associations that both claim to have a special interest in the preservation of State forests. Environment East Gippsland Inc. (EEG) seeks to preserve State forests in East Gippsland, while Kinglake Friends of the Forest Inc. (KFF) is concerned with State forests in the Central Highlands region of Victoria. The defendant to both proceedings is VicForests, a Victorian Government owned business that conducts timber harvesting operations in State forests in Victoria.
- 2 The issues in dispute and the procedural history to the end of 2021 are set out in my reasons for granting interlocutory injunctions in both proceedings.¹ Subsequently, on VicForests' application, I vacated the trial of the separate questions about survey requirements, which had been listed to commence on 7 March 2022. The two proceedings are now listed for trial together commencing on 9 May 2022, on an estimate of 6 to 10 days.
- 3 The interlocutory injunctions ordered on 22 December 2021 remain in place until further order. While VicForests foreshadowed applications to vary those orders, no such application has been made.
- 4 By summons filed in each proceeding on 17 February 2022, VicForests seeks orders that the plaintiff provide security for its costs of the proceeding. The applications are made under r 62.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), and in the inherent jurisdiction of the Court. The application in each proceeding is supported by affidavits of Christopher Sones of Johnson Winter & Slattery made on 16 February 2022 and 8 March 2022.
- 5 Mr Sones' first affidavit in each proceeding exhibits a report prepared by a costs consultant, Christopher Grisenti of Blackstone Legal Costing. Mr Grisenti estimates that, if VicForests is successful in defending the two proceedings, it would be entitled

¹ *Environment East Gippsland Inc v VicForests (No 2)* [2021] VSC 869, [1]-[27] (**December Reasons**).

to recover costs exclusive of GST in the amount of:

(a) In the EEG proceeding:

- | | | |
|------|--|--------------|
| (i) | Up to and including the first day of trial | \$410,382.24 |
| (ii) | Remainder of trial | \$84,113.25 |

(b) In the KFF proceeding:

- | | | |
|------|--|--------------|
| (i) | Up to and including the first day of trial | \$408,111.04 |
| (ii) | Remainder of trial | \$84,113.25. |

6 At the hearing of its applications, VicForests sought orders in each proceeding that the plaintiff provide security for costs in the amount of \$450,000, within 14 days of the orders being made.

7 For the reasons that follow, I have decided not to order either plaintiff to provide security for costs.

Security for costs – applicable principles

8 The Court may order security for costs under r 62.02 of the Rules and in its inherent jurisdiction.

9 Rule 62.02(1) of the Rules provides, relevantly:

Where –

...

- (b) the plaintiff is a corporation ... and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;

...

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given.

10 The inherent jurisdiction of the Court to order security for costs is an adjunct of its power to regulate its own procedure.² It is generally exercised by reference to the same considerations that guide the specific power under r 62.02, although the overriding consideration is whether it is necessary in the interests of justice to order security for costs.³

11 The power to order security for costs is enlivened where there is reason to believe that a corporate plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so. There was no dispute that the power is enlivened here. The evidence was that neither EEG nor KFF has substantial assets. Both associations rely on donations from the public and other not-for-profit associations and have only modest funds available in their respective bank accounts.

12 Once enlivened, the exercise of the Court's power to order security for costs is discretionary.⁴ VicForests accepted that the burden rested on it 'from first to last' to persuade me that the order should be made.⁵ While the discretion is unconfined, and all of the relevant circumstances must be considered, the parties were agreed that the following factors were relevant here:⁶

- (a) whether the application for security for costs was brought promptly;
- (b) the strengths and bona fides of the plaintiff's case;
- (c) the quantum of risk that a costs order would not be satisfied;
- (d) whether the making of an order would be oppressive in that it would stifle a reasonably arguable claim;
- (e) whether any impecuniosity of the applicant arises out of the conduct

² *Stuart v Said* [2021] VSCA 226, [5]-[6].

³ *Stuart v Said*, [7].

⁴ *Stuart v Said*, [7], [35(b)].

⁵ *LivingSpring Pty Ltd v Kliger Partners* (2008) 20 VR 377, [21].

⁶ VicForests referred to *Equity Access Ltd v Westpac Banking Corporation* (1989) ATPR 40-972.

complained of;

(f) the public interest; and

(g) whether there are any particular discretionary matters peculiar to the circumstances of the case.

13 Generally speaking, these principles apply in the same way to an incorporated association as they do to a company.⁷ However, it may be relevant that the former is an association of members who support the objectives of the association, and who, unlike the shareholders of a company, do not usually stand to benefit financially from a proceeding brought by the association.⁸

14 VicForests contended that a further relevant consideration was the fact that neither plaintiff had applied for a protective costs order under s 65C(2A) of the *Civil Procedure Act 2010* (Vic). It is convenient to consider that argument first, before turning to the discretionary factors in each proceeding.

Security for costs and protective costs orders

15 Section 65C of the Civil Procedure Act provides, relevantly:

(1) In addition to any other power a court may have in relation to costs, a court may make any order as to costs it considers appropriate to further the overarching purpose.

(2) Without limiting subsection (1), the order may –

...

(d) fix or cap recoverable costs in advance.

(2A) In making an order under subsection (1) to fix or cap recoverable costs in advance, the court may consider the following matters –

(a) the timing of the application;

(b) the complexity of the factual or legal issues raised in the

⁷ *Byron Shire Businesses for the Future Inc v Byron Shire Council and Holiday Villages (Byron Bay) Pty Ltd* (1994) 83 LGERA 59, 63; *Friends of Hinchinbrook Society Inc v Minister for Environment (No 1)* (1996) 69 FCR 1, 21.

⁸ *Friends of Hinchinbrook*, 21–2; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588, [10].

proceeding;

- (c) whether the party seeking the order claims damages or other form of financial compensation;
- (d) whether the claim of the party seeking the order has a proper basis and is not frivolous or vexatious;
- (e) the undesirability of the party seeking the order abandoning the proceeding if the order is not made;
- (f) whether there is a public interest element to the proceeding;
- (g) the costs likely to be incurred by the parties;
- (h) whether the other party has been uncooperative or delayed the proceeding;
- (i) the ability of the party seeking the order to pay costs;
- (j) whether a significant number of members of the public may be affected by the outcome of the proceeding;
- (k) whether the claim of the party seeking the order raises significant issues as to the interpretation and application of statutory provisions.

16 Section 65C(2A) was inserted into the Civil Procedure Act by the *Justice Legislation Amendment (Access to Justice) Act 2018 (Vic) (Access to Justice Act)*, with effect from 1 July 2018. It codified the factors relevant to an application for a protective costs order identified in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry*⁹ and applied in Victoria by the Court of Appeal in *Bare v Small*.¹⁰

17 VicForests acknowledged that stifling public interest litigation has previously been recognised as a significant factor weighing against granting security for costs.¹¹ However, it submitted that the weight to be given to that factor was diminished by the advent of a statutory regime for protective costs orders under the Civil Procedure

⁹ [2005] 1 WLR 2600, [74]–[75].

¹⁰ (2013) 47 VR 255, [37].

¹¹ Referring to *Lawyers for Forests; Fitzroy Football Club Ltd v Brisbane Bears-Fitzroy Football Club Ltd* [2010] VSC 180; *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607; *Barrett-Peacock v Tasmania* [1995] TASSC 157; *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322, [34] (McLeish JA, with whom Santamaria JA agreed) citing *Smail v Burton* [1975] VR 776, 778, 780 (Gillard J, with whom Newton J and Norris J agreed) and *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169, [14] (McLeish JA, with whom Tate JA agreed).

Act, at least in circumstances where:

- (a) the Court's power to order security for costs is enlivened because there is reason to believe that a plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
- (b) the plaintiff contends that there is a public interest in the maintenance of a proceeding that it has instituted and that the proceeding will be stifled if it is ordered to pay security for the defendant's costs;
- (c) the plaintiff has not applied for a costs-capping order under s 65C of the Civil Procedure Act; and
- (d) the plaintiff's failure to apply for such an order is unexplained or otherwise adjudged as inadequate.

18 VicForests argued that, by enacting s 65C(2A) of the Civil Procedure Act, Parliament both acknowledged the importance of public interest litigation and provided a mechanism for balancing the opportunity for the law to clarify an important legal point against a successful party's usual right to payment of its legal costs. A plaintiff who seeks a protective costs order must persuade the Court that the order is appropriate, having regard to all of the circumstances of the case, including the factors set out in s 65C(2A). In light of that nuanced statutory mechanism, VicForests submitted, it is no longer appropriate for the Court to conduct the same balancing exercise within the unstructured discretion to grant security for costs. The appropriate course for an impecunious plaintiff who seeks to avoid the usual strictures of costs because of a claimed public interest in the proceeding is to apply for a protective costs order. Where – as here – the plaintiff has not done so, the Court ought not find that the public interest weighs against granting of security for costs.

19 There are a number of difficulties with this argument.

20 First, as the plaintiffs pointed out, they have not sought a protective costs order, and

are clearly not going to abandon the proceedings if they do not obtain one. Both EEG and KFF have demonstrated their determination to continue the litigation without the benefit of a protective costs order. As a result, neither of them could satisfy one of the important factors that might favour such an order being made.¹² In those circumstances, it is difficult to see how the existence of s 65C(2A) of the Civil Procedure Act could have any bearing on the exercise of the Court's discretion to order security for costs.

21 Second, and relatedly, I have been unable to find any instance of a corporate plaintiff seeking, let alone obtaining, a protective costs order under s 65C of the Civil Procedure Act. All of the published decisions of this Court concern individual plaintiffs.¹³ The practical reality is that a corporate plaintiff with limited liability is less likely to be deterred by the prospect of an adverse costs order than an individual plaintiff who stands to lose the family home. This is sufficient to explain why EEG and KFF have not applied for protective costs orders in these proceedings.

22 Third, the extrinsic materials for the Access to Justice Act confirm that s 65C(2A) was added to the Civil Procedure Act in order to enhance access to justice and facilitate public interest litigation. The Attorney-General explained the rationale for the amendment as follows:¹⁴

The Bill amends the *Civil Procedure Act 2010* to set out the matters that a Court may have regard to when considering whether to make a protective costs order. Such orders fix or cap a party's liability for costs in advance to protect the party from an adverse costs outcome, and are often made in public interest cases that are designed to test and clarify important points of law, particularly for marginalised and disadvantaged people.

The courts already have the power to make protective costs orders, and,

¹² *Civil Procedure Act 2010* (Vic), s 65C(2A)(e).

¹³ *Michos v Eastbrooke Medical Centre Pty Ltd (Ruling No 2)* [2019] VSC 13; *Michos v Eastbrooke Medical Centre Pty Ltd (No 2)* [2019] VSC 437; *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140; *IJW v Swinburne University of Technology* [2021] VSC 846; *Markiewicz v Crnjac* [2021] VSCA 290, [133]–[135]. See also *Bare v Small* (2013) 47 VR 255 and *Aitken v State of Victoria* (2013) 46 VR 676, decided before the commencement of s 65C(2A).

¹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 921 (Martin Pakula, Attorney-General). See also Victorian Government Department of Justice and Regulation, *Access to Justice Review* (Report and Recommendations, August 2016) vol 2, 449–51, 463–4.

traditionally, have relied upon a list of criteria identified by the Court of Appeal. Setting out the common law criteria for protective costs orders in legislation will provide clarity and guidance on the circumstances in which such orders will be considered appropriate.

- 23 The statement of compatibility for the Justice Legislation Amendment (Access to Justice) Bill 2018, tabled in accordance with s 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), advised that the amendment would promote the right to a fair hearing under s 24(1) of the Charter, as it sought to reduce financial barriers to people being able to access and have their matters heard in the Courts:¹⁵

Part 4 of the Bill will amend the *Civil Procedure Act 2010* to set out the factors that a court may have regard to when considering whether to make a protective costs order (that is, an order to fix or cap recoverable costs in advance). Consistent with the common law approach, the factors will include: an applicant's ability to pay costs; the undesirability of forcing the applicant to abandon the proceedings; and whether there is a public interest element to the case. This amendment will provide clarity and guidance on the circumstances in which such orders are appropriate, and will facilitate public interest cases that test and clarify important points of law that a person might not have continued due to the risk of an adverse costs order.

- 24 There is no suggestion in any of the extrinsic materials that Parliament was concerned to protect the interests of a successful defendant in recovering its costs from an impecunious plaintiff. The amendment simply codified the existing common law criteria for making a protective costs order.
- 25 I am not persuaded that the addition of s 65C(2A) to the Civil Procedure Act had anything to do with the Court's power to order security for costs in an appropriate case. It does not change the range of factors to be considered in exercising the discretion, or diminish the weight to be given to the undesirability of stifling a reasonably arguable claim, or to public interest considerations.

Kinglake proceeding

- 26 In the Kinglake proceeding, the factors set out at [12] above weigh against ordering KFF to give security for VicForests' costs.

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 917.

27 The application for security for costs was made on 17 February 2022, at a relatively late stage of the proceeding.¹⁶ Although the proceeding was only commenced on 9 November 2021, it was the subject of several contested interlocutory hearings in November and December 2021, in relation to KFF’s claim for interlocutory injunctions. By the time the application for security for costs was filed, the pleadings had closed, and the proceeding was listed for trial commencing on 9 May 2022. KFF had filed substantial evidence in relation to the survey issue, including expert evidence, and the discovery process was underway.

28 The strengths and bona fides of the plaintiff’s case are more apparent than is usual before the trial of a proceeding. KFF has now satisfied three different judges of the Court that there is a serious question to be tried in relation to the application of the precautionary principle under cl 2.2.2.2 of the *Code of Practice for Timber Production 2014*, in coupes in the Central Highlands in which greater gliders have been detected.¹⁷ It has also succeeded in establishing that the balance of convenience favoured the grant of wide-ranging interlocutory injunctions, despite the likely impact of those injunctions on VicForests and third parties.¹⁸ VicForests did not dispute that KFF’s claims are made in good faith, and submitted that the Court should proceed on the basis that it has reasonable prospects of success.

29 KFF freely conceded that it has insufficient assets in Victoria to pay the costs of VicForests, if ordered to do so. Its only asset of note is a bank account which, as at 19 February 2022, had a balance of \$9,531.46. VicForests’ future costs to the first day of trial have been estimated at more than \$400,000. Even allowing for the possibility that this is a generous estimate, the quantum of the risk that a costs order against KFF would not be satisfied is substantial.

¹⁶ In the course of the interlocutory hearing on 17 December 2021, senior counsel for VicForests indicated that his instructors intended to write to KFF’s solicitors ‘on the topic of security and/or a protective costs order’. The letter was sent on 20 January 2022, and a reply was received on 2 February 2022.

¹⁷ The reasons of Incerti J and McDonald J for granting interlocutory injunctions are summarised in the December Reasons at [13]–[20]. My reasons for being satisfied that there is a serious question to be tried are set out at [33]–[45] of the December Reasons.

¹⁸ December Reasons, [54]–[58].

30 The evidence is clear that KFF is not able to provide security for costs in the amount sought by VicForests, or even half of that amount. An order that it give security for costs would plainly have the effect of stifling KFF's claim for declarations and permanent injunctions, in a proceeding where it has made out a serious question to be tried. For the reasons already given, I do not accept VicForests' submission that this consideration ought not be given weight because KFF has not applied for a protective costs order.

31 KFF's impecuniosity is not the result of any conduct on the part of VicForests.

32 KFF brings the proceeding in what it maintains is the public interest in securing VicForests' observance of cls 2.2.2.2 and 2.2.2.4 of the Code in its timber harvesting operations in the Central Highlands. KFF's claim to have a special interest in the preservation of the State forests of the Central Highlands has been accepted by this Court in another proceeding against VicForests.¹⁹ In this proceeding, KFF is seeking equitable remedies to prevent VicForests from harvesting timber in those forests in a way that, on KFF's case, poses a risk of permanent and irreversible harm to greater gliders, a threatened species, and yellow-bellied gliders. There is a public interest in the resolution of the issues in dispute in the Kinglake proceeding.

33 Neither party raised any other particular discretionary matter that it submitted should be taken into account.

34 Taking all of these matters together, the balance is against ordering KFF to give security for VicForests' costs. I accept that KFF will probably not be able to meet a costs order in VicForests' favour, and that VicForests' costs of the proceeding will be substantial. However, it is clear that ordering KFF to provide security would bring an end to the litigation, which involves issues of considerable public importance. KFF has made out a serious question to be tried in relation to those issues, and it would be

¹⁹ *Kinglake Friends of the Forest Inc v VicForests (No 4)* [2021] VSC 70; *VicForests v Kinglake Friends of the Forest Inc* (2021) 395 ALR 367. VicForests' application for special leave to appeal to the High Court is listed for hearing in April 2022.

oppressive to order security for costs in the circumstances of the Kinglake proceeding.

East Gippsland proceeding

35 The relevant considerations in the East Gippsland proceeding differ in three ways from those in the Kinglake proceeding.

36 First, VicForests' application for security for costs was made at an even later stage of the East Gippsland proceeding, which was commenced on 11 May 2021. By November 2021, there had been four hearings in the Practice Court in relation to interlocutory injunctions sought by EEG, and a pleadings dispute that was resolved by consent orders made by Keith JR on 15 October 2021. The proceeding was initially listed for trial in late March 2022, and the parties later agreed to move the trial to October 2022. A comprehensive interlocutory timetable was in place by, at the latest, 15 October 2021.

37 From December 2021, the East Gippsland proceeding has been managed together with the Kinglake proceeding. By the time VicForests filed its application for security for costs on 17 February 2022, both proceedings were listed for trial commencing on 9 May 2022. EEG had also filed substantial evidence in relation to the survey question, and the discovery process had commenced.

38 Second, and more significantly, EEG's financial position was different from that of KFF. As at 30 January 2022, EEG had two bank accounts which were in credit to a total of \$30,825.22. These were its only assets of note at that time. However, less than a year earlier, it had net assets of more than \$300,000.

39 Jill Redwood, the co-ordinator of EEG, made an affidavit in which she gave the following explanation of this decline in EEG's net assets:

12. I have in recent times been considering retiring from my work as co-ordinator of EEG. I have spent about 40 years in a leadership role with the organisation, and having reached pension age I am considering retiring as co-ordinator and devoting more attention to my other work. This role has been particularly demanding since the bushfires, and I have also been subjected to death threats.

13. In the absence of anyone prepared to take over my position, the EEG committee considered a succession plan, whereby EEG would donate its funds to a trusted and secure entity, which would ensure the funds were used to benefit Gippsland's forests and wildlife.

14. The committee determined to donate the bulk of EEG's funds to the Australian Communities Foundation (ACF), a not-for-profit organisation which acts as trustee for a wide range of charitable funds. Donors can establish sub-funds for particular purposes. ...

15. On 4 May 2021, EEG established the Gippsland Forest Keepers sub fund, with an initial donation of \$45,000. Its purpose is *"Supporting the protection of Gippsland's forests, natural environments and wildlife"*.

16. On 28 June 2021, a further \$275,000 which had been held in a solicitor's account on term deposit was paid into the sub fund.

17. It is my understanding that EEG no longer has any control over the donated funds. It is up to the trustees – that is, ACF – to determine who will receive grants from the fund, in accordance with the Gippsland Forest Keepers purpose.

40 This evidence was the subject of cross-examination, during which VicForests tendered a number of documents produced by EEG in answer to a notice to produce. Based on all of that evidence, I make the following findings.

- (a) The EEG working group – as the committee is known – had been discussing a succession plan since as long ago as 2014. After the bushfires in the summer of 2019-20 the issue became more pressing, as Ms Redwood decided to step back from her role as co-ordinator and it became clear that no-one else was willing to take on the role.
- (b) At some stage an approach was made to the Australian Communities **Foundation**. The Foundation provided information about not-for-profit future funds on 6 April 2021.
- (c) On 9 April 2021, EEG's treasurer, Trevor Coon, applied to the Foundation to establish the 'Gippsland Forest Keepers' sub-fund. The fund category selected on the application form was a not-for-profit (internal granting) 'future' sub-fund, which can only grant back to the establishing not-for-profit organisation once per year. Ms Redwood, Mr Coon and Linda Parlane were nominated as

- the initial sub-fund holders.
- (d) The Foundation advised on 20 April 2021 that the Gippsland Forest Keepers sub-fund had been established, and that donations could be made to the sub-fund.
 - (e) The purpose of the Gippsland Forest Keepers sub-fund is to support the protection of Gippsland's forests, natural environments and wildlife.
 - (f) On 20 April 2021, the EEG working group resolved that EEG would immediately donate \$60,000 to the Gippsland Forest Keepers sub-fund, and that a further \$275,500 held on term deposit would be donated in June 2021. Those funds were donated on 4 May 2021 and 28 June 2021 respectively. They were unconditional donations.
 - (g) In July 2021, Ms Redwood, Mr Coon and Ms Parlane appointed two new people to replace them as sub-fund holders. Neither of them is a member of EEG's working group, and neither holds any office within EEG.
 - (h) EEG first contacted lawyers at Environment Justice Australia about taking legal action in late March 2021. The East Gippsland proceeding was commenced on 11 May 2021.
 - (i) A consequence of EEG paying about \$336,000 to the Gippsland Forest Keepers sub-fund was that the money would not be available to pay VicForests' costs of the litigation if, ultimately, EEG lost and a costs order was made in favour of VicForests. Ms Redwood acknowledged that she knew this to be a consequence at the time. However, she did not recall any discussion to that effect within the working group. Establishing the sub-fund was something they had been planning to do for a long time before, as Ms Redwood put it, EEG was 'virtually forced' into the litigation in an attempt to prevent logging in unburnt, high quality glider habitat. She disagreed that it was done because the litigation was

imminent. I accept this evidence.

- (j) The money held in the Gippsland Forest Keepers sub-fund is not under EEG's control. At most, EEG could ask the sub-fund holders for a grant from the sub-fund, who in turn could make a request to the Foundation's trustee. Grant requests of under \$50,000 are determined administratively, typically within two to three weeks. Grant requests of over \$50,000 are considered by the Foundation's Philanthropy & Impact Committee, and may take longer to process. It is uncertain whether a grant would be requested by the sub-fund holders, or made by the Foundation, either to provide security for VicForests' costs of the proceeding, or to meet a costs order in its favour.
- (k) Neither the Foundation nor the sub-fund holders can be said to be standing behind EEG, in the way that shareholders stand behind a private company. They have no financial stake in the outcome of the litigation. At most, EEG's purpose in bringing the proceeding aligns with the purpose of the sub-fund: to support the protection of Gippsland's forests, natural environments and wildlife.

41 As a result, I find that ordering EEG to provide security for costs would most likely have the effect of stultifying the litigation. If I were to order security for costs, it would be for considerably more than \$50,000. EEG does not have those funds itself, and cannot direct that money in the sub-fund be made available for that purpose. While it might ask for some funds, it would be a matter for the sub-fund holders whether to request a grant, and any grant request would have to be considered by the Foundation's Philanthropy & Impact Committee. That process would likely take some weeks, with no expectation that the grant request would ultimately be approved. In the meantime, the trial of the proceeding is less than two months away, and there are many interlocutory steps yet to be completed.

42 Third, an additional discretionary factor is that EEG's impecuniosity arises, not from

any conduct of VicForests, but from EEG's decision to donate most of its funds to the Gippsland Forest Keepers sub-fund. While I do not consider that EEG alienated those funds in anticipation of the litigation, the fact remains that a consequence of its actions is that it will be unable to meet a costs order in VicForests' favour if it loses the proceeding.

43 Otherwise, the relevant factors are the same as in the Kinglake proceeding.

- (a) The quantum of the risk that a costs order would not be satisfied is similar in both proceedings.
- (b) EEG has established serious questions to be tried in relation to VicForests' obligations under the Code to detect and protect greater gliders and yellow-bellied gliders in its timber harvesting activities in State forests in East Gippsland.²⁰ It has also established that the balance of convenience favours granting interlocutory injunctions that restrict VicForests from logging a number of coupes in East Gippsland.
- (c) VicForests does not dispute that the proceeding is brought in good faith. This Court has previously recognised that EEG has a special interest in the preservation of the State forests of East Gippsland and hence standing to seek equitable remedies to enforce compliance with laws that regulate logging in those forests.²¹
- (d) EEG brings the proceeding to protect what it contends is the public interest in VicForests complying with those laws, including the precautionary principle applied by cl 2.2.2.2 of the Code. There is a public interest in the resolution of the issues in dispute in the East Gippsland proceeding.

44 The discretionary considerations are more finely balanced in the East Gippsland

²⁰ *Environment East Gippsland Inc v VicForests* [2021] VSC 406, [17]; *Environment East Gippsland Inc v VicForests* [2021] VSC 569, [31]–[38]; December Reasons, [14], [33]–[45].

²¹ *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, [80]–[88].

proceeding than in the Kinglake proceeding, because EEG brought about its own impecuniosity by donating almost all its funds to the Gippsland Forest Keepers sub-fund. Nevertheless, taking all of the matters set out above into account, I have concluded that I should not order EEG to provide security for costs. I consider that doing so would probably have the effect of bringing the litigation to an end, and that this would be oppressive given the stage the litigation has reached, the issues in dispute, and the public interest in their resolution.

Disposition

45 In each proceeding, I will order that VicForests' summons filed 17 February 2022 is dismissed. I will hear the parties on the question of the costs of the summonses.

CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 23 March 2022.

DATED this twenty third day of March 2022.



.....
Associate