FEDERAL COURT OF AUSTRALIA

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. The summary is intended to assist the public's understanding of the outcome of this proceeding. It is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is the published reasons for judgment, which will be available on the internet at the Court's website. This summary is also available there.

Relying on the law of negligence, the applicants make two claims against the Australian Minister for the Environment (**Minister**). First, the applicants seek a declaration that a duty of care is owed by the Minister. Second, the applicants seek an injunction to restrain an apprehended breach of that duty.

The applicants are eight Australian children. They bring this proceeding on their own behalf and also as a representative proceeding. They seek relief on behalf of themselves and other children who ordinarily reside in Australia. I will refer to the applicants and to the Australian children they represent, collectively, as the **Children**.

The Minister is responsible for administering the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The second respondent (**Vickery**) operates a coal mine near Gunnedah in New South Wales. Vickery proposes to substantially extend its coal mine (**Extension Project**).

One of the purposes of the EPBC Act is to "provide for the protection of the environment". A determination has been made under the EPBC Act which has the effect of prohibiting the extension of Vickery's coal mine unless the Minister approves the Extension Project under s 130 and s 133 of the EPBC Act. The Minister is considering whether to approve the Extension Project. If she approves the Extension Project, it is expected that over the 25 year life of the project, an additional 33 million tonnes of coal will be extracted from Vickery's coal

mine. This would in turn cause 100 million tonnes of carbon dioxide (**CO_2**) to be emitted into the Earth's atmosphere when that coal is burned.

The parties do not dispute that human emissions of CO_2 into the atmosphere are largely responsible for the warming of the Earth's surface temperature since the Industrial Revolution. The Minister accepts that the Earth's surface temperature is increasing and that humans are primarily responsible. She also accepts that average surface temperatures will likely continue to increase and Australia will experience more drought, sea level rises and extremes of heat, rainfall and fire-related weather. The Minister accepts that increases in temperature affect the environment, the economy and society and that the climate exacerbates inherent risks and introduces new risks in the context of heatwaves, droughts, bushfires, floods and tropical cyclones all being part of the Australian climate experience.

The Minister accepts that the projected effects of climate change depend upon the extent of greenhouse gases emitted globally in coming years.

The applicants presented unchallenged scientific evidence on the future trajectory of global average surface temperatures. The evidence was largely based on the climate change modelling of the Intergovernmental Panel on Climate Change and more recent assessments made by Professor William Steffen, an eminent specialist in climate science. The following plausible propositions were demonstrated by that evidence:

(i) The Paris Agreement target of limiting global average surface temperature to well below 2°C, with the ambition to limit temperature to 1.5°C above the pre-industrial level, is now unlikely to be achieved without significant overshoot;

(ii) The best future stabilised global average surface temperature which can be realistically contemplated today, is 2°C above the pre-industrial level;

(iii) If the global average surface temperature increases beyond 2°C, there is a risk, ranging from very small (at about 2°C) to very substantial (at about 3°C), that the Earth's natural systems will propel global surface temperatures into an irreversible 4°C trajectory, resulting in global average surface temperature of about 4°C above the pre-industrial level by about 2100;

(iv) The 100 million tonnes of CO_2 attributable to the burning of coal from the Extension Project is likely to cause a tiny but measurable increase to global average surface temperatures. In doing so, it would increase the risk of global average surface

> temperatures increasing beyond 2°C and the risk of global surface temperatures being propelled into an irreversible 4°C trajectory. In my assessment, that risk is "real", meaning that it may be remote but it is not far-fetched or fanciful.

Furthermore, the evidence has demonstrated that the risk of harm to the Children from climatic hazards brought about by increased global average surface temperatures is on a continuum in which both the degree of risk and the magnitude of the potential harm increases exponentially if the Earth moves beyond a global average surface temperature of 2°C, towards 3°C and then to 4°C above the pre-industrial level.

The nature and extent of the harm that may be experienced by the Children is detailed in sections 5.1 and 5.3 of my reasons. Those potential harms may fairly be described as catastrophic, particularly should global average surface temperatures rise to and exceed 3°C beyond the pre-industrial level. Perhaps the most startling of the potential harms demonstrated by the evidence before the Court, is that one million of today's Australian children are expected to suffer at least one heat-stress episode serious enough to require acute care in a hospital. Many thousands will suffer premature death from heat-stress or bushfire smoke. Substantial economic loss and property damage will be experienced. The Great Barrier Reef and most of Australia's eastern eucalypt forests will no longer exist due to repeated, severe bushfires.

The law of negligence focuses on the foreseeability of future harm and the relationship between the person who has caused or contributed to the harm and the person or persons who may be harmed. The evidence demonstrates that a reasonable person in the position of the Minister would foresee that, by reason of the Extension Project's effect on increased CO_2 in the Earth's atmosphere and the consequential increase in global surface temperatures, each of the Children is exposed to a risk of death or other personal injury. The evidence therefore establishes an essential precondition for the law of negligence to recognise a duty of care owed by the Minister to each of the Children.

There are, however, other matters that need to be considered before a duty of care can be recognised. There are features of the relationship between the Minister and the Children which favour the recognition of a common law duty of care. Those features are the Minister's control over the potential harm in question, the extent of the vulnerability of the Children to that harm and the extent to which the Children rely upon the Minister to avoid the potential harm they face. There are, however, other features of those relations which tend against the recognition of a duty of care. The need for coherence in the law requires that the broad statutory discretion

conferred on the Minister by Parliament not be impermissibly impaired by the imposition of a duty of care. I have determined that there would be such an impairment if the scope of the duty of care which the common law recognises extends beyond a duty to take reasonable care to avoid personal injury to the Children. Other considerations relied upon by the Minister, such as the indeterminacy of potential liability for damages and policy considerations that may favour a duty of care not being recognised, are not determinative.

Having weighed and balanced those considerations, the Court is satisfied that a duty of care should be recognised. Accordingly, the Court has determined the Minister has a duty to take reasonable care not to cause the Children personal injury when exercising her power under s 130 and s 133 of the EPBC Act to approve or not approve the Extension Project.

My reasons then turn to consider the applicants' claim for an injunction. An injunction may be issued by the Court to prevent or restrain an apprehended or threatened breach of a duty of care. The applicants seek an injunction to restrain the Minister from exercising her power under s 130 and s 133 of the EPBC Act in a manner that would permit the extraction of coal from the Extension Project. Before such an injunction can be issued, the Court must be satisfied that there is a reasonable apprehension that the Minister will breach her duty of care and that the grant of an injunction is appropriate in the exercise of the Court's discretion.

I have not been satisfied that a reasonable apprehension of breach of the duty of care by the Minister has been established. Nor have the applicants satisfied the Court that the extent of the restraint they seek is justified.

I will dismiss the applicants' claim for an injunction. However, before making any further orders or declarations, including any orders binding upon those children represented by the applicants, the Court will provide the parties with an opportunity to make further submissions as to the utility of and the terms of the orders and declarations that should now be made reflecting the Court's reasons for judgment.

Finally, the commendable efforts made to assist the Court in its deliberation deserve to be acknowledged. I extend my gratitude to the parties and their legal representatives for providing submissions of the highest quality and for the cooperative and efficient manner in which the proceeding has been conducted.

BROMBERG J
27 MAY 2021
MELBOURNE