HIGH COURT OF AUSTRALIA

COURTROOM, LEVEL 23
Law Courts Building, Queen's Square, Sydney

MONDAY, 13 DECEMBER 2010

AT 9:30 AM

BEFORE HER HONOUR JUSTICE BELL

FOR PRONOUNCEMENT OF ORDERS:

IN THE MATTER OF AN APPLICATION FOR LEAVE TO ISSUE PROCESS BY TERRY PATRICK SHARPLES

FOR DIRECTIONS:

NICHOLAS

THE COMMONWEALTH OF AUSTRALIA & ANOR

Deborah Carlsund
Deputy Registrar

Sharples v Minister for Local Government & Ors [2011] HCATrans 217 (12 August 2011)

Last Updated: 18 August 2011

[2011] HCATrans 217

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney No S311 of 2010

B e t w e e n -

TERRY PATRICK SHARPLES

Applicant

and

MINISTER FOR LOCAL GOVERNMENT

First Respondent

DEPARTMENT OF LOCAL GOVERNMENT

Second Respondent

TWEED SHIRE COUNCIL

Third Respondent

Application for special leave to appeal

CRENNAN J
KIEFEL J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 12 AUGUST 2011, AT 2.12 PM

MR A.J. GREINKE: If it please the Court, I appear for the applicant. (instructed by Dr Andrew Greinke)

MR C.W.J. LEGGAT, SC: May it please your Honours, I appear with my learned friend, **MR M. SEYMOUR**, for the third respondent. (instructed by Marsdens Law Group)

CRENNAN J: First of all, you need a significant extension of time, I think, do you not?

MR GREINKE: Yes, your Honour. In part, that is because of a delay caused by the rejection of Mr Sharples' application by the Registry on the ground that he was an undischarged bankrupt. For the reasons that I have outlined in my written submissions, ultimately that involved two submissions of his application and ultimately an application to this Court for leave to issue the process. When one looks at the difference between the date in which it ought to have been filed in the first place and the date of his first submission to this Court, given the interruption that is outlined in the affidavit, it is not as significant an extension as one might think on first reading of the materials.

CRENNAN J: In any event, if you move now to the merits of your application.

MR GREINKE: Yes, your Honours. Tony Fitzgerald, QC famously wrote in a report in 1989:

If the public is not informed, it cannot take part in the political process with any real effect.

Your Honours, in this case, the primary judge found that the ratepayers of the Tweed Shire were not merely uninformed but had been materially misled by the Shire Council in relation to the proposed rates increase.

CRENNAN J: Is this what was called the second limb of the argument so far as the primary judge - - -

MR GREINKE: No, your Honour, this is the first limb. The special leave issues argue the question about whether that - - -

KIEFEL J: This is the guideline requirement of evidence of community support, is that right, that you are referring to?

MR GREINKE: It is. So the issue is whether having been misled by the Council, the rates increase subsequently approved by the Minister is invalid within the proper construction of the Act.

KIEFEL J: The way in which it was approached in the courts below, it was dealt with as a question of the construction of the requirements of the guidelines and whether the guidelines could be said to – whether it could be said to have been intended that a non-compliance of the guidelines would result in invalidity of the determination. That is the question. It is a question of statutory construction.

MR GREINKE: It is, your Honour.

CRENNAN J: That is dealt with, if I may say so, by Justice Tobias at application book 121 to 127, if I may say so, in a very thorough manner, and directing attention particularly perhaps to consideration (l) on application book 125 where his Honour refers to 508A(8) and (9)(b), his Honour has all those considerations, (a) to (p) I think it is, support his Honour's ultimate finding that the construction for which you contend should be rejected.

MR GREINKE: Your Honours, I say that the approach taken was in error because his Honour effectively asked the wrong question in regards to each of the issues at paragraph 93 to which your Honours have referred. To understand that, your Honours need to understand part of what the reason was at first instance in regard to the breach that was found by the primary judge. Your Honours, can I refer you first to paragraph 72 of the reasons at first instance, which is application book page 35. Paragraph 72 was the finding that the public was misled. Your Honours will see about lines 30 to 45 the reasons of his Honour there and, in particular, about line 40 his Honour concludes that the:

Applications were not in accordance with the Guidelines because they did not satisfy the minimum requirement of "Evidence of community support for the proposal" –

Your Honour, then there is - - -

CRENNAN J: There is no doubt the primary judge found the application was flawed, but then he had to go on to determine whether or not the result of a flawed application was invalidity or not.

MR GREINKE: Indeed, but his Honour makes a further and more important finding at 75, which is on the next page, and this is what he finds in the first two lines at about line 60:

A requirement of consultation with the community in obtaining evidence of community support is embedded in the Guidelines.

This is the issue that is important for the appeal to this Court and where the error lies in the reasonings of the Court of Appeal and that is, at first instance there are effectively two breaches of the guidelines. One is an express breach of the evidentiary requirement which his Honour refers to at paragraph 72. More importantly is that there is an implied requirement of consultation which has to proceed and is prior to that evidence being given as part of the application process and the error in short for the Court of Appeal is that in applying the *Blue Sky* guidelines and the other issues in regards to the application, the Court of Appeal deals with the question in terms of the express requirement, not the implied requirement.

I say that when one looks at those issues, not in the context of the express but in context of what is called the embedded requirement, that was upheld by the Court of Appeal, Justice Tobias refers to it as an implicit requirement, one gets very different answers to the questions that his Honour poses in regards to the *Blue Sky* principles. If I could refer your Honour to the core element of the reasons, and your Honour has noted that that is at paragraph 93 at page 121 of the reasons. If I could, first of all, start with paragraph (c), and really the issue starts over the page. His Honour refers to:

the requirement of the Guidelines was merely for evidence of community support and was not a requirement for evidence of a majority or of any particular level of community support.

His Honour is dealing there with the express requirement of evidence. His Honour is not looking there at the question of the embedded requirement of public consultation and if one asks that, it is not an issue about a particular level or evidence of support. The failure here is that the prior requirement for consultation has miscarried before we even get to the question of the evidence. His Honour's finding, therefore, at paragraph (d) that:

It follows that the requirement implicit in the Guidelines for community consultation was not one intended by the legislature to be critical to the Minister's decision to approve an application or that it was a matter central to the statutory scheme –

is wrong because his Honour has in mind in (c) the express requirement and, again, not the implicit requirement.

CRENNAN J: Now, are you somehow making use of (c) for the purposes of your argument which was referred to as the first limb argument?

MR GREINKE: Yes, your Honour, this is all first limb argument questions. Your Honours, in paragraph (f) the same argument applies. His Honour refers to again – this is about line 54:

evidence of community support for a special variation was just one of the factors to be taken into consideration –

Again his Honour is dealing there with the express requirement and not the implicit requirement that there must be public consultation.

CRENNAN J: Does this not all go to whether or not the application is flawed? If you look a bit earlier from where you are presently looking and go to application book 44, his Honour there is carrying out the *Project Blue Sky* exercise relevant to the first limb of the argument and at 91 he refers to the considerations that are necessary to have regard to in the context of construing section 508A to determine that issue that Justice Kiefel pointed out, which is the issue of whether or not the Minister's determination is valid having regard to the fact that the Council's application was flawed. Then his Honour in 92 goes through a whole number of factors in relation to his preference for the construction that "a guidelines discordant application" does not result in invalidity.

So, I am not sure why you are then taking us into what I will call the misleading limb of your argument, in this context, because really we would be looking for you to identify an error in the Court of Appeal, of course, but this is all tied up with exactly the part of Justice Tobias's judgment to which I referred you, which is paragraph 93. In other words, the same conclusion is reached by both the primary judge and in the Court of Appeal by reference to applying the principles in *Project Blue Sky* to the statutory construction task that had to be undertaken here.

MR GREINKE: Yes, and again the error in both cases is similar, if not the same, which is that both of them focus on the express elements of the guidelines and both of them effectively collapse those two separate elements that I referred your Honours to earlier, that is, evidence of support versus community consultation.

CRENNAN J: It is taken as a given, is it not, in these decisions that what you say is right, that the applications were flawed?

MR GREINKE: Yes, but they are flawed for two different reasons and the error both by the primary judge and the Court of Appeal is to focus on only one of those reasons and not the other reason. One of those reasons is that there was not sufficient evidence of support, but the reason why that did not occur is really incidental to the main issue which is that there was not a proper public consultation process.

If one comes back, for example, to what his Honour Justice Tobias says at page 123 of the application book at paragraph (g), his Honour refers to the requirement to consult. His Honour then refers to the means to achieve that and the nature of that being left to the Council, but that has limits. It cannot be the case that Parliament intended that the Council could decide that there will be no consultation, or in this case that there would be one that included misleading the ratepayers as to the proposed rates increase.

CRENNAN J: His Honour then deals with that over the page, I think, at about line 30:

Although I accept that the relevant requirement calls for evidence of community support for the proposal, I do not regard that requirement as having a rule-like quality which, in accordance with the approach in *Project Blue Sky*, results in invalidity due to a flawed compliance with that

requirement.

So his Honour does take into account.

MR GREINKE: Again the issue that his Honour refers to again:

I accept that the relevant requirement calls for evidence of community support –

That is the express requirement again in relation to evidence, and the core element is that one might have some uncertainty about what is sufficient evidence or what is not sufficient evidence. Certainly that is a matter for the Minister, but the real issue is that the guidelines themselves and the express requirement presuppose and embed, in the words of the trial judge, a requirement for public consultation. His Honour found that that had been, effectively, miscarried because of the misleading comment to the Council. So, in short, the error from the reasons of the Court of Appeal is that if one applies the *Blue Sky* principles with respect to the embedded requirement, one gets very different answers as to the intention of Parliament as to the extent of invalidity.

Your Honours, that also carries in relation to paragraph (l) which your Honour referred to earlier on page 125, in relation to sections 508A(8) and (9)(b), which give the Minister power to deal with cases where there has been breaches of the guidelines. The difficulty, again, is that if one looks not at the express guidelines but the implicit or embedded requirement for public consultation, one can characterise both of those sections as dealing with breaches of the express guidelines, and both of them presuppose and assume that there has, in fact, been a process of public consultation that has actually taken place. In short, and if one is looking for questions such as his Honour refers to and - - -

CRENNAN J: Well, there was consultation, was there not? Is not your complaint that it was not sufficient? There was a survey undertaken, was there not, and questions received?

MR GREINKE: Yes, it was, but his Honour found at first instance that that was in the context of the public being misled as to the extent of the rates increase and therefore that process was entirely flawed within the meaning of the guidelines. In other words, one does not even get to the evidence before one has a proper consultation process. When one looks at what his Honour refers to as whether the requirement is an "essential condition" or a - - -

CRENNAN J: Where are you looking now?

MR GREINKE: I am looking now at what his Honour says at page 126 at paragraph (n). Again, his Honour refers to not the question of the public being misled, but what he calls "flawed survey results". It is not just a question of flawed survey results, which his Honour refers to about line 5, but it is the fact that the survey results were effectively meaningless, not because of a difficulty with the process of the survey but because the Council itself misled the ratepayers as to the extent of the rates increase.

KIEFEL J: No, the misleading effect is not on ratepayers, the relevant impact is whether the misleading nature of the survey results impact upon the Minister who had to make the determination. That is the area you need to focus upon.

MR GREINKE: It is, your Honour, but the issue is that if one asks the question, as his Honour does at paragraph (n), whether the requirement was an essential condition or a condition precedent, the guidelines themselves assume and presuppose that the Council has, in fact, carried out a process of public consultation. Given that that was vitiated by the misleading conduct is a case as if there was in fact no consultation at all and therefore the approach of the Court of Appeal to deal with the express requirement and not the prior embedded requirement was an error in reasoning and an error which is important in relation to how one construes the Act and applies the *Blue Sky* principles. Your Honour, that is all I wish to say about those grounds of appeal and I am happy to rely on my written outline in regards to the other grounds of appeal, if it please your Honours.

CRENNAN J: Thank you. Justice Kiefel will give the reasons of the Court.

KIEFEL J: This application for special leave concerns the validity of determinations made by the Minister for Local Government under section 508A of the *Local Government Act* 1993 (NSW) and an order for partial costs under the Land and Environment Court Rules 2007. The Court of Appeal of the Supreme Court of New South Wales unanimously dismissed an appeal from the decision of the primary judge. There is no reason to doubt the correctness of the conclusions reached by the Court of Appeal below both as to the construction of section 508A and as to the exercise of the primary judge's discretion in relation to costs.

The appellants' case was essentially that a Guideline requirement of evidence of community support had not been met, with the consequence that the determination was invalid. The Court of Appeal held that such a result could not be said to have been intended to follow upon non-compliance with the Guidelines. The process of construction undertaken followed settled principles and no new question of construction is raised by the application. The applicants' reliance upon the misleading nature of survey results proffered by the council to the Minister is a question of fact and met by the finding that the Minister was aware of their deficiency.

An extension of time is required. That extension should not be granted for the reasons given and because an appeal would not enjoy any real prospects of success. Accordingly, the application is refused.

MR LEGGAT: The third respondent seeks its costs.

KIEFEL J: The application will be refused with costs.

AT 2.34 PM THE MATTER WAS CONCLUDED
