Australian Speleological Federation Inc V. Minister For Environment And Natural Resources And State Heritage Authority And Southern Quarries Pty Ltd (1994) 177 Lsjs 296[1]

This case involved judicial review of a decision made by the Minister for Environment and Natural Resources, Mr David Wotton on 18 March 1994 wherein he directed the State Heritage Authority to remove the Sellicks Hill Quarry Cave ("the Cave") from the State Heritage Register. The court proceedings were brought by the Australian Speleological Federation Inc ("ASF"), which is Australia's national speleological body, against the Minister, the Authority and Southern Quarries Pty Ltd. The relevant section under which the Minister made his direction was Section 18(5), which reads as follows:

> "If the Minister is of the opinion that the confirmation of a provisional entry in the Register would be contrary to the public interest, the Minister may, after consultation with the Authority, direct that the entry be removed from the Register."

The background to this case was that Southern Quarries Pty Ltd had been conducting mining for stone in a quarry known as "Sellicks Hill Quarry" for many years. Planning consent to establish a quarry to extract bluestone from the land had been granted on 10 October 1973 for a period of 75 years. Later the relevant portions of the land were declared a private mine under the Mines Act.

In early 1991 members of The Cave Exploration Group of South Australia Inc ("CEGSA"), a corporate member of ASF, were approached by Southern Quarries to explore and provide expert advice on a cave which had been intersected during mining operations in the Quarry. Initial exploration of the Cave was undertaken by CEGSA, who then advised Southern Quarries that further visits would be necessary to undertake a systematic investigation. Prior to allowing CEGSA further access, Southern Quarries required CEGSA to enter into a non-disclosure agreement. CEGSA agreed to do so on the basis of verbal assurances received from officers of Southern Quarries that the cave would be safe from quarrying.

During September, October and November 1991 CEGSA spent over 53 hours exploring and investigating the Cave, at the end of which Southern Quarries closed access to the Cave by burying the opening. On 10 December 1993 Southern Quarries blasted a dome at one end of part of the Cave known as "the Big Room".

CEGSA immediately made representations to the Government. The Government's response was to commission a report on the Cave. This report was undertaken by a geomorphologist called Mr Grimes. The terms of reference for the report were to provide the Government with advice on the likely condition of the cave system before and after the blasting on 10 December 1993. The report was therefore mainly concerned with the safety of the Cave. A second report was commissioned by the Department of Mines and Energy and this one was undertaken by an engineer employed by a company called Terrock Pty Ltd. This report examined the structural aspects of the Cave. Neither of the reports were given terms of reference which enabled heritage considerations to be taken into account.

On 25 January 1994, prior to the presentation of the reports to the relevant government departments, ASF wrote to the State Heritage Authority requesting that the Cave be placed on the State Heritage Register and that a "Stop Order" be issued.

On 11 March 1994 a Press Release was issued by the Minister for Mines and Energy and the Minister for Environment and Natural Resources, which stated

> "The State Government today decided that it would not stop the Sellicks Hill Quarry from continuing to operate.
>
> In reaching its decision the Government took into account the reports of two independent assessors concerning the calibre, stability and safety of the caves for either tourists or mine operators, the opinions and reports of other interested groups including cavers, as well as additional information provided to it on economic, tourist and environment issues.
>
> The Government recognised that the caves contained some impressive features but did not regard them as being exceptional.
>
> In all of the circumstances, the Government did not consider that the abandonment or limiting of quarrying operations in the area could be justified."

On 16 March 1994 the solicitors acting on behalf of ASF wrote to the presiding member of the State Heritage Authority, requesting that a "stop-work" order be issued whilst the Authority considered whether the Cave

should be protected under the Heritage Act. The Authority dealt with the issue of the Cave at its meeting on 17 March 1994 by issuing a "stop order" and provisionally listing the Cave on the Register.

After receiving notification of the decision made by the Authority, ASF's solicitors immediately wrote to Mr Wotton and advised him that ASF wished to have the opportunity to address the Minister before he made a decision pursuant to S.18(5) of the Act. No reply was received by either ASF or its solicitors to this correspondence. Instead, on 18 March 1994 the Minister decided to overturn the order of the Authority and made an order as follows:

> "I, DAVID CHARLES WOTTON, the Minister for the Environment and Natural Resources, the Minister to whom the administration of the *Heritage Act 1993* is committed, being of the opinion that the confirmation of the provisional entry in the State Heritage Register of the place described in that entry as 'Cave-Sellicks Hill Quarry Cave, Main South Road, Sellicks Beach, 5174, Item Number: 04294' would be contrary to the public interest, and after consultation with the State Heritage Authority DIRECT that entry of that place be removed from the Register.
>
> DATED the 18th day of March, 1994"

The consultation with the Authority referred to in the order took the form of a meeting between the Minister, his Chief of Staff, the Director of Community Education and Policy from the Department, the Manager of State Heritage from the Department, the Minister's solicitor and five members of the State Heritage Authority. The Minister chaired the meeting and commenced by quoting part of S 18 of the Act. He then asked the Authority why the cave had been entered on the Register, and what factors had been taken into account by the Authority with particular reference to S 16, in reaching its decision. The members of the Authority offered the following reasons:

* there was sufficient evidence presented at the meeting held on 17 March to support the view that further evaluation of the cave should be made, the Authority would like the opportunity to further investigate the cave and it was felt that further time should be provided for this investigation;

* after reading the independent reports, the Authority had reached the view that the cave should be further assessed;

* the only people who had been inside the cave were the cavers - a further look should be taken before losing the cave completely;

* the cave was under immediate threat, therefore further assessment should be made of its significance.

The Minister invited further comment. None was forthcoming. He then stated that pursuant to S 18(5) of the Act, he as Minister had the opportunity to consider the public interest as well as the heritage value of the Cave which went beyond the criteria that the Authority was required to consider. He stated that he had considered the heritage value of the Cave, broader environmental issues, economic issues and tourism issues, he had received reports from a number of interested parties, he had consulted with a number of people, including colleagues from Premier and Cabinet, officers of the Departments of Mines and Energy, his own Department and Tourism, he had held lengthy discussions with the owners, he had visited the quarry site, he had viewed a video tape provided by the cavers and he had attended at least two meetings with the Speleological Society.

The Minister then stated that pursuant to S 18 of the Act he could make a direction and he immediately directed that the entry be removed from the Register. This was the decision that ASF asked the Court to review.

What ASF sought from the Court was a declaration that the Minister's direction was invalid, void and of no effect for the following reasons:

* the Minister made the direction to the Authority before it had considered written and oral representations pursuant to s18 of the Act;

* the Minister took into account irrelevant considerations and denied ASF procedural fairness because he did not give ASF an opportunity to be heard before he gave his direction;

* the Minister failed to properly consult with the Authority in relation to the Cave pursuant to ss 5(d) and 18(5) of the Act.

ASF wanted orders quashing the direction of the Minister, quashing the decision of the Authority to remove the Cave from the Register and requiring the Authority to provisionally enter the Cave in the Register. It also

wanted an order prohibiting Southern Quarries from conducting any drilling, blasting excavation or other mining operations within 30 metres of any of the known chambers or passages of the Cave.

Justice Bollen of the Supreme Court heard the case which ran for two days over 30 and 31 May 1994 and his reasons were delivered on 30 June 1994. In short, his Honour dismissed the summons and refused to make any orders or grant any relief to ASF. His Honour found that the Minister had properly consulted with the Authority, the Minister was not required to hear submissions from ASF, and the Minister had the power of veto, albeit limited by the requirement that he must consult with the Authority.

> "..he (the Minister) has the final say. He must consult. He is not bound to defer to the Authority ... Had Parliament wanted the Minister to hear anybody or any organisation it would in my opinion have said so. In the scheme of this legislation its failure to do so must mean that it did not intend it." [2]

The argument that had been put by counsel acting on behalf of ASF was that ASF had been denied "procedural fairness" by the Minister, because it was not given any opportunity to address the Minister. Despite the fact that the Act does not state that the Minister must hear any person, people or class of people interested in the matter, ASF's counsel argued that the common law provides that the Minister must do so. The principle elicited by Justice Bollen from the authorities presented to him on the 'Right to be Heard' was that the Minister should give any interested party a hearing unless the relevant Statute denies or negates that right.

Counsel for the Minister argued that the Act did not provide for the Minister to consult or to hear from anyone, except the Authority, before exercising the power under s 18(5) and this was an indication that Parliament was contemplating that there was no statutory right other than for the Authority to consult or make representations to the Minister. "We say there is no express or implied right on the construction of the Act for anyone, other than the State Heritage Authority itself, to have any input into the Minister's decision."[3] Justice Bollen agreed with the submissions of the Minister's counsel and stated

> "A reading of the statute and of s 18 in particular leads me to think that the Minister was not required to hear the plaintiff. If that be a denial of procedural fairness then I say that that was what Parliament contemplated in passing s 18(5)."

The comments made by his Honour become extremely interesting when one does actually examine what Parliament intended, or rather debated, in the passing of this section. Initially in the first draft of the Bill, consultation with the Authority was not required and the only prerequisite for the Minister to direct that an entry be removed from the Register was the formation of the opinion that the confirmation of the listing was contrary to the public interest. The Opposition was concerned however that the Minister should not have unfettered power to require the removal of a provisional entry from the Register and it believed that such power would only "throw open the door to opportunistic or corrupt actions".[4]

When this section was considered in the Legislative Council it was argued by the Democrat Minister that the subsection should be amended, so that the Minister's direction would be subject to Parliamentary scrutiny. The amendment proposed was:

> "(5a) A direction by the Minister under subsection (5) must be laid before Parliament and is subject to disallowance in the same way as a regulation.
>
> (5b) If the Minister directs the removal of a provisional entry from the Register, the authority must remove the provisional entry on the expiry of the period during which the regulation directing the removal may be disallowed."[5]

This amendment was opposed by the Government on the basis that it would turn a simple procedure into a very complicated one and that in any event, Ministers were publicly accountable through Parliament. This argument was met by the following comments:

> "The Minister in fact has a very powerful discretion to intervene at any time and just haul something off the register and there is no answerability to anybody for that decision..."
>
> "What I object to is that, despite this excellent process they go through and despite the fact that we are trying to put people with great integrity onto the authority, under subclause (5) as it now stands the Minster can just intervene roughshod over the whole authority and say, 'This place has to come off.' The Minister has to consult with but does not have to do what the authority recommends."

"Ultimately, I believe that the authority is the body that should be making these decisions. If, in exceptional circumstances, the Minister intervenes, there needs to be some check and balance in relation to the Minister carrying out this unusual action - and it should be an unusual action."[6]

Despite the validity of all these comments, in the end, the proposed amendment was rejected and the clause was passed in its current form. It is interesting to note, however, that what was anticipated by the Government in the operation of this subsection was a situation where agreement was reached that an item should be removed with the authority being happy that it be removed. "The idea of provisionally placing items on the register is to make sure that they are protected while the proper examinations occur. When the full examinations have occurred then the decision is made that, either, yes, it is a heritage item which should stay there permanently, or, no, it is not a heritage item and can be taken off."[7]

This interpretation of how the section was to operate becomes even clearer when one considers the exact words of the section. The section provides "if the Minister is of the opinion that the confirmation of a provisional entry in the Register...". This implies that the Authority has decided to confirm the provisional entry, but that the Minster decides that it is not appropriate on the ground of public interest to do so. The fact is that in the Cave case the Authority had not even begun to consider whether confirmation of the entry should occur. It had not sent out any of the requisite notices or advertised the provisional entry nor had it received any written or oral submissions in respect of the entry. In reality, it had made the provisional entry on the basis that further investigations were required. None were able to be undertaken due to the Minister's action.

The end result for ASF was that the Minister's direction was upheld, the Cave was taken off the Register and the Cave can now be subject to any action Southern Quarries decides to take. A somewhat sad result considering "the cave is considered to have had considerable significance. It was the largest and most complex cave in the region, with geomorphological and mineralogical features of scientific interest, definite recreational significance, and good potential for development as a show cave."[8]

Conclusion

It could be said that what this case illustrates is that despite Parliament's best intentions to give the Minster less power in the new Act, the power actually given to him is in reality very broad indeed.
Heritage conservation will always be subject to competing pressures and interests. Meeting the needs of development, on the one hand and heritage and conservation, on the other hand, is a fine balancing act, where often one party will be seen to be the winner and the other party, the loser.

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1 References to pages in this judgement are taken from the judgement itself and not the reported text.
2 Ibid., at 34
3 Ibid., at 27
4 Hansard, House of Assembly (1992-93) Vol 4, Forty-Seventh Parliament, Fourth Session p 3272. These comments were made by the Honourable D.C Wotton!
5 Hansard, Legislative Council (1992-93) Vol 2, Forty-Seventh Parliament, Fourth Session, p 2415
6 Ibid., at 2416
7 Ibid., at 2415-2416
8 Supra,n. 30 at