IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-683
[2013] NZHC 1346

IN THE MATTER OF	an appeal under s 299 Resource Management Act 1991
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	BULLER DISTRICT COUNCIL AND WEST COAST REGIONAL COUNCIL First Respondents
	BULLER COAL LIMITED Second Respondent
AND	WEST COAST ENVIRONMENTAL NETWORK INCORPORATED Interested Party

Hearing:	27, 28 and 30 May 2013
Appearances:	P D Anderson and S R Gepp for the Appellant J O M Appleyard, B G Williams and T A Lowe for Respondents Q A M Davies for Interested Party
Judgment:	7 June 2013

JUDGMENT OF FOGARTY J

Contents

Introduction ....[1]

The issues ....[17]

Biodiversity offset and compensation as mitigation ....[29]

Proposal to increase protection status of DPPA ....[79]

Security of benefits of offset ....[90]

Offset of significant habitat of indigenous fauna ....[99]

Barren Valley – relevance of cost and viability of the mine ....[111]

Materiality of error ....[120]

Conclusion ....[126]

Introduction

[1] This is an appeal against an interim decision of the Environment Court, delivered on 27 March 2013.[1] In that decision the Environment Court was considering an application by Buller Coal Ltd (BCL) for consents to establish an open cast coal mine (the escarpment mine proposal or EMP) on the Denniston Plateau. The decision did not grant the consents. However, it advised that it considered that consents to the EMP could be achieved, but invited the parties to consider, discuss and negotiate changes to the proffered conditions. Notwithstanding its interim character, the Environment Court made findings which it intends to apply when considering the conditions to be imposed. So there is a decision which can be appealed, see s 299.

[2] This is the second decision by the Environment Court on this application. The first was another interim decision, delivered on 21 March,[2] on a preliminary point as to whether Solid Energy's possible open cast Sullivan Mine adjoining the EMP was part of the "existing environment" that would otherwise trigger a need for assessment of cumulative effects. The Environment Court answered no, and that decision was the subject of a separate appeal. The appeal was dismissed.[3]

[3] The decision on that appeal precedes this decision. The two decisions can be regarded as companion decisions, for the purpose of assimilating and understanding the facts. While there is some overlap in the descriptions of the facts, to enable this decision to be read standing alone, most readers of this decision will also have occasion to read the decision on the Sullivan Mine point. For this reason, this decision assumes a degree of familiarity with the Denniston Plateau setting of the mine and the escarpment mine proposal.

[4] The Denniston Plateau is in the Buller. It has been the subject of coal mining activity in the past. It contains a valuable resource, "coking" coal, which is very suitable for the manufacture of cement and steel. The parent of BCL, Bathurst,

---

1 *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

2 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 42.

3 *Royal Forest and Bird Society of New Zealand Inc v Buller District Council and West Coast Regional Council & Anor* [2013] NZHC 1324.

has exploration licences over most of the Denniston Plateau, except for the possible Sullivan Mine, where a coal mining licence has been granted for 40 years, now held by Solid Energy. The Minister has just altered Solid Energy's licence to allow open cast mining. BCL is seeking consents to operate the escarpment mine to the south of the Denniston Plateau. The intention is that this will be mined as an open cast mine 24 hours/7 days for 5 or 6 years.

[5] BCL's primary mitigation programme is to remove fauna: lizards, snails, etc, before mining, and rehabilitate the site at the end of mining, to create an environment compatible with the natural landscape from which a stable indigenous ecosystem will develop long term. Bathurst will, it is likely, at some stage after that, move on to further mining on the plateau.

[6] BCL accepts its primary mitigation and remediation programme will not completely avoid or mitigate the adverse effects of the mining. So, in addition, BCL offered to carry out a programme of biodiversity enhancement, mainly by predator control, in two different areas:

(a) On an area of the Denniston Plateau and surrounds, termed the Denniston Biodiversity Enhancement Area (DBEA), for 50 years; and

(b) Within the Kahurangi National Park (some 100 kilometres north of the EMP site), termed the Heaphy Biodiversity Enhancement Area (HBEA), for 35 years.

[7] Within the course of the hearing, the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) raised concerns about Bathurst's longer term intention to open cast mine a large part of the DBEA. Recognising this, the Environment Court issued a minute in which it suggested there would need to be a lasting environment enhancement in compensation for unremediated effects. As a result BCL filed a proposal to establish a Denniston Permanent Protection Area (DPPA), an area within the DBEA. BCL proposed a condition that:

> The consent holder shall ensure a form of permanent legal protection from land disturbance of any type within the DPPA.

[8] Because Bathurst does not own the land, which is owned by the Crown, there are unresolved issues as to how Bathurst can make the DPPA promise. The DPPA falls within the DBEA, so will also be part of the biodiversity enhancement programme.

[9] BCL describes the DBEA, the DPPA and the HBEA as a "comprehensive offset mitigation and compensation" package. Overall, together with the primary rehabilitation programme, BCL contends it will provide a "net conservation gain for the escarpment mine proposal, EMP."

[10] The questions of law dividing the parties in this appeal centre on the BCL description of the DBEA, DPPA and HBEA as "offset mitigation".

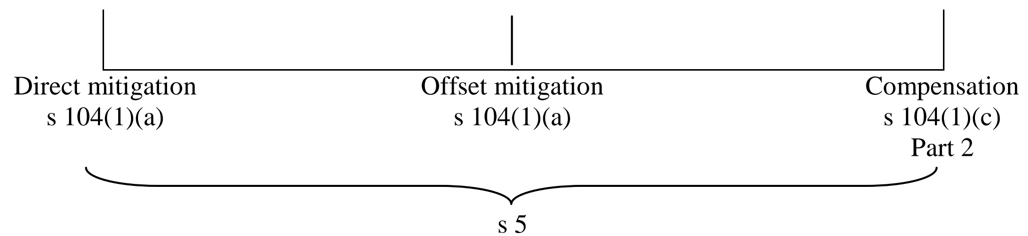
[11] The Environment Court's key conclusions are:

(a) measures within the mine site connected with the manner of mining are direct mitigation;

(b) measures to enhance places on the Denniston Plateau outside the mine site, and species that are displaced from the mine site, may properly be regarded as (offset) mitigation of the adverse effects of the mine, at [212], [227] and [325];

(c) the Court refers to the HBEA as compensation on a number of occasions (rather than a form of hybrid offset/compensation contended by BCL). The Court does however accept that species benefitted by the proposal, which would suffer adverse effects on Denniston, could be compensation in kind (ie, an offset), and necessary, since there is uncertainty about the extent to which Denniston populations will be benefitted by the predator control there, at [213]-[215], and [234]-[235].

[12] BCL submitted that there is a continuum which can be visually represented as:



[13] BCL relies on a distinction, drawn by a Board of Inquiry in the *Transmission Gully* decision:[4]

> What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term *"offsetting"* encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
>
> Offsetting relating to **the values affected by an activity** was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> (Emphasis added)

[14] Forest and Bird argue that the DPPA offer adds nothing. For it is over a site which does not have valuable coal, so that it is never going to be mined. Alternatively, that as there is no resource consent to mine in the DPPA, there is no credible mining threat to protect against; applying [84] of *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[5] Third, in the alternative, that the offer to have a predator control programme over the Denniston Biodiversity Enhancement Area (DBEA) is qualified by the fact that large parts of that area are going to be mined over the course of the biodiversity programme so the benefits are not significant. This argument assumes a mining threat in the future.

[15] Forest and Bird argues there were errors when the Environment Court examined and weighed these offers. That the Court confused "mitigation" of adverse effects with "offset" benefits. It says that these confusions are material because

---

[4] Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072) at [210].

[5] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

mitigation is directly addressed in s 5 (2) of the Resource Management Act 1991 (RMA), and thereby considered when applying s 104. Forest and Bird agree with BCL, that offsets can be offered by applicants and taken into account; but only as a relevant consideration in either s 5(2) or in s 104(1)(a). Forest and Bird argue that as a matter of law offsets are a materially lesser value under the RMA than mitigation. Thereby a confusion between mitigation and offsets is a legal error and can lead to error in weighing the pros and cons of a proposal. Forest and Bird says these errors are material in this decision, for the Environment Court found the case "quite finely balanced".[6]

[16] The proposed open cast mine will produce a lot of surplus material which has to be disposed of on the plateau. There is an area known as Barren Valley, located towards the eastern end of the proposed escarpment mine footprint. It is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge, due to the presence there of the nationally critical umbrella fern *Sticherus tener*. During the hearing, the Environment Court asked for evidence on whether the mine could be developed in such a way to avoid the Barren Valley and the Sticherus Ridge. Otherwise, if the valley was going to be used as an overburden dump, the volumes of overburden were sufficient to overtop the valley and cover the ridge, to the detriment of the umbrella fern habitat. BCL argued that there would be significant economic consequences to avoid the Barren Valley; there being impacts on logistics, including a greater distance for fill to be hauled, and double handling of material. The Court accepted that argument, and allowed the Barren Valley and Sticherus Ridge to be used, citing the logistics and consequent cost as a reason for not protecting that area. Forest and Bird argue that as a matter of law it was an error for the Environment Court to take into account the cost of the condition, and the impact of that cost on the commercial viability of the mine.

---

6 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [335].

The issues

[17] In the notice of motion of appeal, Forest and Bird pleaded eight errors of law. In the course of the hearing, three were abandoned. They were numbers one, four and five; leaving two, three, six, seven and eight.

[18] The remaining pleadings are:

Second error of law – Biodiversity offset and compensation as mitigation

[19] The proposed biodiversity offset and compensation would not mitigate the adverse effects of the activity on the environment in terms of s 104(1), and the Environment Court applied the wrong legal test in finding to the contrary.

Third error of law – proposal to increase protection status of land

[20] Increasing the protection status of land, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1).

Sixth error of law – security of benefits of offsets

[21] The benefits of a biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration under s 104(1).

Seventh error of law – offset of significant habitats of indigenous fauna

[22] When recognising and providing for the protection of significant indigenous vegetation and significant habitats of indigenous fauna, as required by s 6(c), the Environment Court applied a wrong legal test, by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvement to other habitats of these species.

Eighth error of law - mining the Barren Valley and Sticherus Ridge

[23] Forest and Bird sought that, even if consent was granted, conditions be imposed to protect the Barren Valley and Sticherus Ridge. The Barren Valley is

located towards the eastern end of the proposed escarpment mine footprint, and is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge due to the presence of the nationally critical umbrella fern *Sticherus tener*.

[24] In the course of its submissions, particularly in its closing submissions on materiality, Forest and Bird usefully made these intentions as to error of law more concrete.

[25] As to the second error, it is submitted that the Court erred in finding the DBEA (and aspects of the HBEA) constitute mitigation.

[26] In respect of the third error, Forest and Bird submitted that increasing the protection status of the DPPA, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1)(a).

[27] In respect of the sixth error, Forest and Bird submitted that the benefits of the DBEA predator control are dependent on the habitat of the DBEA persisting. The Court accepted that there are proposals afoot to mine parts of the DBEA, but held it could not have regard to those proposals (or impose conditions protecting against the effects of those proposals on the habitat of the DBEA), because that is a matter for future consent authorities. It therefore considered the benefits of the DBEA as if those proposals did not exist. Forest and Bird submits that the Court took into account an irrelevant consideration when it considered the benefits of the DBEA in circumstances where those benefits could not be secured through conditions of consent.

[28] In respect of the seventh error, Forest and Bird submitted that it was an error for the Environment Court to include the HBEA in its consideration of whether granting consent would achieve protection of significant indigenous vegetation and significant habitats of indigenous fauna as required by s 6(c). That it included the HBEA in what it described as "offset mitigation". Given the Court's finding, which was inevitable, that the HBEA constitutes a different habitat to the EMP site (Heaphy

is 100 kilometres north), the HBEA proposal is only relevant to protecting by compensating/offsetting for significant fauna, not the significant habitat.

Second error of law – biodiversity offset and compensation as mitigation

[29] The DBEA covers the whole of the Denniston Plateau and surrounds. The part of the DBEA that is on the plateau mostly covers the same vegetation, habitat and types of species that will be adversely affected by the EMP.

[30] The HBEA covers vegetation, habitat types and (mostly) species that are different to those that will be adversely affected by the EMP.

[31] The Environment Court found that the DBEA would largely (but not completely) mitigate adverse effects on fauna:

> [226] In short, there would be some species that would be lost to the mine site, and there could be some local extinctions.
>
> [227] **The principal offset** offered for these effects on the mine site is a predator and weed control programme over a 4,500 ha area on the Denniston Plateau. It is clear to us that there would be some benefits from this control to a number of threatened or at risk species on the plateau. That is because there is evidence of rats at moderate density in forested areas of the plateau in years when far fewer might reasonably have been expected. And we are satisfied that there were even more rats in areas just off the plateau proper, but at comparatively high altitudes. The evidence is that both riflemen and kiwi use the forested area on and adjacent to the plateau and mine site. We also recall that while no study has been made of fernbird's use of coal measures habitat, they spend much of the time on the ground in thick, but lower, vegetation. Dr Parkes's evidence is that ship rats are major predators of small birds, and take eggs and chicks of both arboreal and ground-nesting species. We have no evidence that this general proposition would not apply in respect of the specific species on the Denniston. Introduced predators also take snails, even if a smaller percentage of *patrickensis* on Denniston than of other species in other habitats.
>
> (Emphasis added)

[32] Naturally enough, the Court did not make similar findings as to flora. Later in the judgment, it repeated its findings as to fauna, and made an observation as to flora:

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation

> in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)
>
> [326] That is not the situation with areas of significant indigenous vegetation.
>
> [327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[33] With respect to the HBEA, the Environment Court found that the Heaphy package offered protection for important fauna in the Heaphy as compensation for loss of significant flora on Denniston:

> [234] Dr Ussher, restoration ecologist called by BCL, opined that the benefits to fauna in the Heaphy Biodiversity Enhancement Area were not needed to offset or compensate for adverse effects on fauna and their habitat on the mine site. That, in his view, was achieved by the predator protection programme on Denniston Plateau. We do not believe the evidence is certain enough to accept that assertion. Dr Ussher added:
>
> > Benefits to plant communities in the Heaphy BEA are the most relevant benefits for comparing against residual losses of plant communities in the EMP footprint; however an exchange ratio would be needed to account for differences between vegetation types at Denniston and the Heaphy.
> >
> > Ultimately broader considerations around sustainable, landscape level management of broad eco-systems and the benefits that this brings beyond a reductionist approach may outweigh the need to engage in biodiversity accounting practices as described here.
>
> We suspect Dr Ussher was offering this justification for the Heaphy package, which he acknowledged was in large measure a "like for unlike" form of compensation. The Heaphy package in our view offers protection for important fauna in the Heaphy as compensation for the loss of significant

> flora on Denniston. That may be important since the extent of benefits to fauna on Denniston from the predator control package is, on the evidence of Dr Parkes, not known.
>
> ...
>
> [237] On the surface, the "desiderata" in ***JFI Limited*** would suggest that we give limited significance to the compensation package in the Heaphy. To the extent that species are benefitted which would suffer adverse effects on Denniston, we consider that to be compensation in kind, and necessary, since there is uncertainty about the extent to which the Denniston populations will be benefitted by the predator control there. But in terms of the Denniston flora, the compensation would be what Dr Ussher acknowledged to be "unlike for like." That could be given weight only on the basis of the much broader approach to the management of eco-systems to which Dr Ussher referred in his initial evidence. We consider the different types of effects at issue in ***JFI Limited*** and this case give us scope to accept as **offset mitigation** benefits to those same species that are adversely affected by the EMP proposal.
>
> (Emphasis added)

[34] The Court had earlier found that the DBEA (and aspects of the HBEA) constituted mitigation of the adverse effects of the EMP on the wider environment.

> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, **as a mitigation of the adverse effects** of the mine on the wider environment.
>
> (Emphasis added)

[35] It then later found that the DBEA proposal was supported by plan provisions favouring mitigation:

> [307] For the reasons we have given, we hold that the proposal is somewhat inconsistent with, rather than contrary to the provisions on wetlands, significant indigenous fauna and significant habitats of indigenous fauna to which Mr Purves referred. But these are provisions of considerable significance to this case. We accept that provisions which enable mining and encourage these types of **mitigation/offsetting** proposed pull in the opposite direction. Overall we find that the provisions of the plans are evenly balanced with respect to the proposal rather than consistent.
>
> (Emphasis added)

[36] Section 104, considered as a whole, confers a discretion on consent authorities (which include the Environment Court) to grant resource consents.

Section 104 gives a number of directions. It is sufficient for this case to focus on s 104(1), which provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[37] Part 2 of the Act contains four sections (ss 5, 6, 7 and 8). The argument of the parties in this Court focussed only on some of these provisions. First on the application of s 5(2)(a) and (c), which provides:

> **5 Purpose**
>
> ...
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> ...
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment

And on s 6(c), which provides

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[38] It is only necessary to consider part of s 104 and these parts of ss 5 and 6, because it is a core characteristic of law that it is the context which makes considerations relevant. This is particularly a characteristic of the RMA, which provides for numerous considerations, not all of which are made relevant in a particular context.

[39] It is common ground in this case that the open cast mining proposal, the EMP, cannot be undertaken avoiding any adverse effects of activities on the environment, or completely protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[40] "Effect" is widely defined. Section 3 of the Act provides:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and

> (f) any potential effect of low probability which has a high potential impact.

[41] It will be seen that the definition includes any positive effect, and enables a forward-looking examination of future effects, whether temporary or permanent.

[42] "Mitigating" is not defined.

[43] "Offset" is used only once in the Act. It appears in s 108(10), which is the section addressing conditions of resource consents. Section 108(9) defines "financial contribution" as meaning a contribution of money or land, or a combination. Subsection 10 then provides:

> **108 Conditions of resource consents**
>
> ...
>
> (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—
>
> (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
>
> (b) the level of contribution is determined in the manner described in the plan or proposed plan.

[44] The consequence of subsection 10 is that financial contributions can only be made in accordance with purposes specified in the plan or proposed plan. No such purposes are specified in the plans before this authority.

[45] There is competing jurisprudence on how regulatory statutes should be interpreted and applied. One school is that, where the terms of the statute allow, Judges can develop policy within the boundaries allowed by the language of the statute. The other school argues that Judges should take the text in regulatory statutes and apply it to the facts without adding new criteria, or elaborating on the language in the statute.

[46] In New Zealand, I think the law is that additional criteria can only be taken into account in the application of regulatory statutes when the text of the statute, read

in the light of its purpose, applying to a particular context, implicitly makes relevant a consideration. The authority for this proposition is the decision of the Privy Council in *Mercury Energy Ltd v ECNZ*.[7] This was a judicial review application, but it was concerned, as I am in this case, to identify whether or not an authority has contravened the law. The Privy Council re-endorsed the relevance of Lord Green MR's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[8] That judgment includes this proposition:[9]

> If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters...

[47] The use of the term "compensation" dates back to the decision of the Environment Court in *J F Investments Ltd v Queenstown Lakes District Council*.[10] In that judgment, J F Investments Ltd applied to the council for a subdivision consent to make a boundary adjustment, and for a land use consent to identify a building platform/build a house on its land. As part of the package, the applicant offered to spend up to $100,000 removing wilding pines which marred the outstanding natural landscape. The Court was considering the application of s 6(a), which provides:

> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

---

7 *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 (PC). See also *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HL), which also applies the *Wednesbury* case, and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (The *Wednesbury* case).

9 See *Mercury* at 389.

10 *J F Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch C48/2006, 27 April 2006.

[48] The Court recognised that s 6 does not function to ensure the preservation of matters of national importance, citing *New Zealand Rail Ltd v Marlborough District Council*.[11] The Court reasoned:[12]

> [27] We conclude that, since activities which meet other agendas of national importance are allowable under the RMA even though they create permanent adverse effects on nationally important natural resources, it is inconsistent to suggest that environmental compensation is outside the scope of the Act. If adverse effects on the environment can be justified as providing a net benefit because they are in the national interest, then adverse effects offset by a net *conservation* benefit allowed by enhancement or the remedying of other adverse effects on the relevant environment, landscape or area must logically be justifiable also. They are certainly relevant under both s 5(2)(c) and s 7 of the RMA.

[49] To my mind, that paragraph would read the same if, instead of the phrase "environmental compensation" one replaced it with the phrase "environmental offset". "Offset" is used in the next sentence. Both in that paragraph and in this case, I have noticed that counsel and the Court seem to use the term "offset" and "compensation" as synonyms.

[50] Offsets also fit into the formulation expressed in the House of Lords in *Newbury District Council v Secretary of State for the Environment*, endorsed by the Court of Appeal in *Housing New Zealand Ltd v Waitakere City Council*,[13] being:[14]

> (a) For a resource management purpose.
>
> (b) Fairly and reasonably related to the proposal.

[51] I think it is particularly important when applying the RMA, to exercise a discretion, to conform with that principle. This is because the history of the enactment of this Act reveals that it has borrowed some international concepts, particularly sustainable management. Secondly, it has selected numerous criteria, all contained in Part 2, giving them different scales of importance. These criteria reflect the New Zealand-ness of the RMA. For example, s 6 starts with the preservation of the natural character of the coastal environment. New Zealand is an island nation.

---

[11] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at [86], Greig J.

[12] *J F Investments Ltd v Queenstown Lakes District Council* at [27].

[13] *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

[14] *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 at 739.

Section 7(a) requires particular regard to kaitiakitanga. Section 6(e) provides for the recognition of and provision for the relationship with Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. In short, at a glance, it can be seen that Parliament has given particular and careful attention to the values and goals that should be pursued in the application of the RMA.

[52] It is clear that Parliament did not intend the RMA to be a zero sum game, in the sense that all adverse effects which were unavoidable had to be mitigated or compensated. Section 17 contains a duty to avoid, remedy or mitigate adverse effects, gives power to the Environment Court to grant enforcement orders, but is qualified in s 319 so that the Environment Court cannot make an enforcement order against a person if the person is acting in accordance with a rule in a plan, a resource consent or a designation, the adverse effects of which were recognised at the time of the granting of the consent, unless the Court considers it is appropriate to do so because of an elapse of time and change of circumstances.[15]

[53] Sections 17 and 319 reinforce the natural inference that s 5(2) envisages that sustainable management will, from time to time, make choices which may prefer the development of natural and physical resources over their protection, including the special protection "required" in s 6.

[54] As already noted, the RMA does refer to the concept of offset. Furthermore, it uses the concept of offset where there may be a financial contribution of land, clearly being land other than the site upon which the activity is sought to be pursued. Nor is there any qualification in s 108(10) confining offset to situations where it operates as mitigation of the adverse effect. The term "offset" naturally has a different normal usage from the term "mitigate". The term "offset" carries within it the assumption that what it is offsetting remains. So, for example, if there is an adverse effect that continues, but those adverse effects can be seen as being offset by some positive effects.

---

15 Sections 17(4), 319(2) and (3).

[55] For these reasons, I am satisfied that, where an applicant offers an offset providing positive effects, depending on the nature of the offset and the context, the consent authority can by implication decide it ought to have regard to them, in an appropriate context, made relevant by s 5(2).

[56] There was no contest between counsel before me that the Environment Court ought to have had regard to the DBEA and the HBEA. The argument of Forest and Bird was not as to the relevance of consideration, but to the classification of the consideration. This was because implicitly Forest and Bird was arguing that mitigation deserves a greater weighting in the scheme of the Act than an offset.

[57] Both BCL and Forest and Bird used compensation as a synonym for offset. So does the Environment Court in a number of authorities, starting with *J F Investments*, as already noted above. I have not heard full argument as to the justification for using the term "compensation". In principle, High Court Judges should confine themselves to resolving disputes that are brought to the Court. However, I do not find it possible to use the word "compensation".

[58] The RMA has numerous provisions which use the word compensation. But no provisions which provide for compensation if adverse effects are not completely avoided, remedied or mitigated. The compensation provisions are directed, as one would expect for constitutional reasons, to addressing the extent of compensation payable if property rights are taken.[16] To compensate can be limited to counterbalancing, but it frequently is used in a way which carries the value that there ought to be the making of amends. That value has been addressed in the RMA but given limited functionality in the provisions that have just been footnoted. It is not deployed in Part 2 or in s 104.

[59] However, I am satisfied that it is sufficient in this case to resolve whether or not offsets can be regarded as a form of mitigation, sometimes called "offset mitigation".

---

[16] Sections 85, 86, 116A, 150F, 185, 186, 198, 237E, 237F, 237G, 237H, 331, 414, 416 and 429.

[60] There was general agreement between counsel, and the Court, that s 104(1)(a) allows the taking into account of positive effects on the environment proffered by the applicant in consideration for allowing the activity. In short, offsets can be had regard to when exercising the discretion in s 104.

[61] The core problem set for resolution in these proceedings is whether or not the concept of "offset mitigation" is relevant, or whether the two concepts should be kept apart. BCL argues for the utilisation of offset mitigation. Forest and Bird opposes it. Forest and Bird's point is that mitigating adverse activity warrants greater weighting in deliberations than offsetting.

[62] I agree that that offset is not "mitigation" as the word is used in s 5(2)(c). There is no reason to go beyond the normal meaning of the term mitigate, particularly as it occurs in a phrase, "avoiding, remedying or mitigating".

[63] Counsel for Forest and Bird's main submission was that two other decisions overlook the distinction between actions that address effects of the activity for which consent is sought (which can be mitigation), and actions that address the effects of other activities (offsets), and so are not correct. These are the Board of Inquiry's decision in *Transmission Gully*[17] and *Mainpower NZ Ltd v Hurunui District Council*.[18]

[64] In *Transmission Gully*, the Board of Inquiry found that:

> ...offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[65] In *Mainpower*, the Environment Court noted that the terminology associated with offsets was becoming loosely employed and confusing. The Court in *Mainpower* applied the *Transmission Gully* approach to offsetting. It found that:[19]

---

[17] Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072).

[18] *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384.

[19] *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at 463.

> The offsetting for Mt Cass clearly relates to the values being affected, and secondly, it is being undertaken on the same site. Therefore we consider it to be a "form of remedy or mitigation of adverse effects" rather than environmental compensation.

[66] The decision of the Environment Court in *Day v Manawatu-Wanganui Regional Council*[20] is in contrast. That case was concerned with the appropriate wording in the policy framework for considering the resource consents in the proposed One Plan. The Court was specifically considering whether offsetting should be required by the plan for residual adverse effects following appropriate avoidance, remedy and mitigation. The decision states:

> [3-61] An argument was made that a biodiversity offset is a subset of remediation or mitigation (and even, potentially, avoidance) and should not be specifically referred to or required.
>
> [3-62] Meridian submitted that the Final Decision and Report of the Board of Inquiry into New Zealand Transport Agency Transmission Gully Plan Change Request has close parallels with the matter considered by the Court and that it had taken this approach. The appeal to the High Court against this decision did not deal with this particular matter.
>
> [3-63] With respect to the Board of Inquiry, we do not consider that offsetting is a response that should be subsumed under the terms remediation or mitigation in the POP in such a way. We agree with the Minister that in developing a planning framework, **there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation – at the point of impact.**

[67] Counsel for BCL supported the *Transmission Gully* reasoning. Although it modified the reasoning by saying there was a continuum. Counsel submitted:

> At one end of the continuum are offsets. They are regarded as actions which are most directly related to avoiding, remedying or mitigating an adverse effect, in this case works on Denniston Plateau; and
>
> At the other end of the continuum is compensation – ie, positive effects which although they might be less to do with actual mitigating, remedying or avoiding a particular adverse effect arising from a proposal – ie, involve an unlike trade, are nevertheless positive effects that should be incorporated into the wider balancing process under s 5.

[20] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

[68] Counsel for BCL argued that the Environment Court in this case was taking a similar approach as that in *Transmission Gully*. Counsel particularly referred to [211] and [212], which provide:[21]

> [211] These desiderata were applied and developed in ***Director-General of Conservation v Wairoa District Council***, and ***Royal Forest and Bird Protection Society Inc v The Gisborne District Council***. Particularly in more recent cases, the Court and Boards of Inquiry (presided over by Environment Judges) have tended to draw a distinction between various types of offsetting, some of which they tend to include in the category of remedy and mitigation, and some to be regarded as compensation. The Board of Inquiry into the proposed Transmission Gully Plan Change expressed it like this:
>
> > What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term "offsetting" encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
> >
> > Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, as a mitigation of the adverse effects of the mine on the wider environment.

[69] I agree that the Environment Court in this case was directly applying *Transmission Gully* and adopting the proposition, cited above, that:

> Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[70] That explains why the Environment Court in this case did refer to offset mitigation.

[71] There is obviously an attraction to give greater weight to offsetting, where the offsetting relates to the values adversely affected by an activity for which resource

---

21 *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

consent is being granted. That can be done without calling the offset "mitigation" or "offset mitigation".

[72] I am of the view that counsel for Forest and Bird are correct, that such offsets do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, for example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was on the environment that is being destroyed was lifted and placed in the new environment. Merely to say that the positive benefit offered relates to the values affected by an adverse effect is, in my view, applying mitigating outside the normal usage of that term. And the normal usage would appear to apply when reading s 5(2). The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

[73] This reasoning is supported by the helpful submissions I received from Mr Davies, counsel for West Coast Environmental Network Inc. He submitted that "mitigation" by definition must be at the point of impact. He invited this Court to follow the Environment Court in *Day v Manawatu-Wanganui Regional Council*.[22]

[74] Like the other counsel, Mr Davies agreed that offsetting is a positive benefit and may be taken into account, he said, under s 104(1)(a). He submitted that in order for an adverse effect on the environment to be mitigated, that effect must be mitigated both at an ecosystem level and at the level of their constituent parts. That submission was drawing upon the definition of intrinsic values which appears in the statute. Intrinsic values is defined:

> **2 Interpretation**
>
> ...
>
> **intrinsic values,** in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—

[22] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

> (a) their biological and genetic diversity; and
>
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience:
>
> ...

I agree. I accept his submissions, that offsets best operate at the ecosystem level. (This is not to say they cannot be wider.) They are not mitigating, in that they do not address effects at the point of impact, they are better viewed as a positive environmental effect to be taken into account, pursuant to s 104(1)(a) and (c), and s 5(2).

[75] Coming back to the context, I am referring here to the DBEA, which is improving other parts of the same ecosystem, part of which is lost by the open cast mining. That can be distinguished from the ecosystem in the Heaphy, 100 kilometres away. Then again, perhaps if one wants to, one can refer to the ecosystem of the Buller. It is, in one natural use of the term, the same environment.

[76] But overall, I think there was an error of law in the Environment Court, in its interim decision, treating the DBEA, and possibly the HBEA, as offset mitigation. Neither mitigate the adverse effects of the loss of the flora and the habitat and fauna caused by the open cast mining and associated activities in the EMP.

[77] The next question is whether or not this is a material error of law warranting any reconsideration of the reasoning so far by the Environment Court. I deal with materiality of error at the end of this judgment.

[78] This analysis resolves the first error of law. The proposed biodiversity offsets in the DBEA and the HBEA do not mitigate the adverse effects of the activity on the environment. They cannot also be characterised as offset mitigation. They are offsets and are relevant considerations to be weighed in favour of the application by reason of s 104(1)(a) and (c), and s 5(2).

Third error of law – proposal to increase protection status of DPPA

[79] The Environment Court discussed the DPPA:

[247] The appellants' objections relate not only to the legality of condition 145, but to its merits. They rely on a statement in the evidence of Dr Ussher **that land offered as an offset must have a credible threat against it**, and contend that the condition as proposed by BCL does not require the DPPA to contain coal and be under such threat.

[248] After its closing submissions were written, BCL defined more precisely the area for which it proposed to suggest further legal protection. In the last two days of the hearing it produced a map which purported to show that the area does contain coal. It accepted that the vast majority of the DPPA, as mapped in coal values, shows very low values, and if there is coal of any value in it the vast majority of it is of low value. **Mr Welsh could not tell us whether or not mining it was a practical proposition. This is all rather speculative, and might not advance matters greatly.**

[249] We remind ourselves however that the purpose of additional protection is not to deny potential miners coal, but to provide the best possible conditions for indigenous eco-systems with indigenous flora and fauna to flourish. We are not persuaded by BCL's submission that only open-cast mining could damage the ecosystems of the DPPA. We accept that the phrase "land disturbance" could capture minor activities. **But the purpose of an offset is to mitigate adverse effects on one site by enabling improved environmental values on, in this case, another site in the vicinity.**

[250] We have not reached the point of forming fixed views about the precise form of protection that would be desirable. We consider it desirable that mechanisms be explored and active steps taken to bring the separate but parallel consenting processes to greater consistency if at all possible. We stress that the Court has no part to play in the processes that are not before it, but would hope that all concerned would be assisted if a co-operative approach were to be taken. As we have said, we do not as yet have fixed views about mechanisms, but we urge BCL to think carefully about the purpose of the DPPA, and what is necessary to secure the achievement of that, rather than simply concerning the effects of open-cast mining. **As we indicate later, it is at least possible that the question of whether consent is able to be granted could turn on this issue.**

...

[312] We have read carefully the thorough decision of the commissioners at the first instance hearing. However, we do not interpret the Buller District Plan in quite the same way as them with respect to its approach to mining. Further, there have been a number of quite significant changes to the proposal since the first instance hearing. The area over which weed and predator control is proposed has increased, and there is a proposal to establish a DPPA**, presumably with greater security against open-cast mining than presently** exists. Moreover, both applicants and appellants have carried out significant research between the two hearings, so that the Court has before it much better evidence than did the original commissioners, along with the benefits of cross-examination. As we have indicated, the commissioners' decision is very considered, and we have had quite considerable regard to it, but ultimately it is the evidence before us that is more important.

...

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)

[80] Forest and Bird argued that the DPPA was a legally irrelevant consideration. Counsel relied upon an expert witness, Dr Ussher, who argued that to be a valid averted loss offset, the proposal must avert a "credible threat" – which he considered could only be achieved in this case if *"BCL ...[identified] land with coal under it that is currently economically recoverable and set aside that land such that vegetation is protected from the effects of mining."* Forest and Bird submitted that there was no valid threat for the offset to qualify as a positive effect. There needed to be an unimplemented resource consent to mine in the DPPA, otherwise mining is not part of the existing environment. This reasoning relies upon [84] of *Hawthorn*, discussed in the first decision.

[81] In reply, BCL pointed out that the DPPA is proposed to be a minimum of 745 hectares. That it will have a 500 hectare offset mitigation area, 30% by land area of pakihi, 30% by land area of manuka shrubland, 30% by land area of forest, and 10% by land area of sandstone pavement, of which at least 200 hectares will be within the known current distribution range of the snail *Powelliphanta patrickensis*. That within the DBEA, of which the DPPA is part, BCL will be required to have a biodiversity enhancement programme, with a goal of achieving and sustaining improvements and key biodiversity attributes. That it is intended to offset the residual effects on biodiversity values from the EMP to achieve and sustain statistically significant improvements and abundance for certain named species, including the great spotted kiwi, *Powelliphanta patrickensis*, the South Island fern bird, rifleman, forest gecko and West Coast green gecko. BCL argue that the DPPA offer is of permanent protection of at least 500 hectares of land.

[82] The fact that the DPPA comes with an offer of permanent protection invites consideration of the long term implications of the offer. There is no suggestion that this area at present is under threat of mining, because of the low quality of the coal reserves under that land. The Denniston Plateau, however, has been mined before. The mining history goes back for a long time. Permanent protection of the DPPA land protects it not only against mining but, as the Environment Court noted, any use for ancillary operations of mining.

[83] As noted, it was argued that, when considering the benefits of a condition like this, [84] of *Hawthorn* again applies, and one cannot take into account anything other than the environment as it exists, permitted uses and existing resource consents. In this context, I disagree. It is a fact that Bathurst holds an exploration permit over the DPPA. The subject of environment protection by way of conditions was not before the Court in *Hawthorn*, and [84] of *Hawthorn* should not be read out of context. I will not burden this judgment with my past reasoning in *Queenstown Central Ltd v Queenstown Lakes District Council*,[23] which argues that the Court of Appeal in *Hawthorn* held environment is the future environment, and that [84] is a summary that should not be read out of context, let alone be applied like a statutory provision to any context. I do not repeat my reasoning in the first and companion judgment, but it applies here.

[84] Section 104(1) is expressed to be subject to Part 2. Part 2 includes the all important s 5, particularly s 5(2):

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

---

[23] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[85] "Sustainable management" requires long term thinking. It is usually reflected in the plans, which are themselves applications of s 5. Section 104 is expressly subject to Part 2. Long term thinking must be intended to be carried over in s 104 analysis, as to apply short term thinking would be inconsistent with s 5.

[86] Here the relevant plans provide for mining, and as restricted discretionary or discretionary activities, over the whole of the Denniston Plateau. Because of the scale of the plateau, and the need for copious quantities of water to be taken and discharged, it is of the nature of things that mining of the valuable coking coal on the plateau will be staged over time. Bathurst and Solid Energy have an understanding. The terms are confidential. But before me, counsel agreed it is about staging exploration of the Denniston Plateau resource.

[87] In order to take into account intrinsic ecosystem values of the Denniston Plateau, s 5(2)(b), the values have to be examined against a long timeframe. This must include the uncertainty of the commercial value, in the future, of the coal under the DPPA.

[88] I think there is no doubt that a condition providing for the DPPA can be taken into account as a relevant consideration by the Environment Court, in s 104 analysis, as a Part 2, s 5(2) consideration. The weight that it gives to that consideration is for the Environment Court.

[89] For reasons I develop further in analysis of the next issue, the proposed DPPA does not mitigate any actual or potential effects on the environment of allowing the Buller Coal escarpment proposal. It does not fall directly within s 5(2)(c). Forest and Bird submitted that s 104(1)(a) makes relevant offers of environmental compensation, which will be an actual and potential positive effect on the environment of allowing the activity. I agree, if that proposition is read as

"offset" rather than compensation. It is accordingly a relevant condition under s 104(1), and sustainable management in s 5(2)..

Sixth error of law – security of benefits of offset

[90] This contention, arguing that the benefits of biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration, addresses the efficacy of the promise of permanently setting aside the area in the DPPA, and the prospect of further mining elsewhere in the DBEA.

[91] The Environment Court is currently seeking conditions designed to lock in place the DPPA. It needs to be understood that the land is Crown land. I think that Forest and Bird, wittingly or unwittingly, are trying to draw this Court into a merit judgment, which is the responsibility of the Environment Court. The Environment Court may well be faced with a set of terms relating to the DPPA which fall short of legally binding locking up of the DPPA. That may have to be done by statute. But there is nothing to stop the Environment Court forming a judgment on the merits as to the utility of the DPPA.

[92] The DBEA covers all of the Denniston Plateau except the Sullivan Mine licence area, and some areas adjacent to the plateau. The DBEA is a proposal to enhance the habitat for fauna by reducing pest numbers across the whole area.

[93] The Environment Court found, applying [84] of *Hawthorn*, that it could not consider the possibility of future applications for mining that might be undertaken within the DBEA.[24] The primary submission of Forest and Bird is that the Sullivan coal mining licence forms part of the existing environment in the *Hawthorn* sense, in [84]. That submission has been rejected. It will be recalled that the Environment Court called for the setting aside of some land because of the prospect of further mines. Forest and Bird submit there is no logical basis for the Environment Court excluding consideration of prospective mines in Whareatea West and Coalbrookdale in the Denniston Plateau because they do not have consent, but giving weight to the

[24] *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [230].

proffering of the DPPA. Mining in the DBEA is more likely to occur on those other sites than within the DPPA. Forest and Bird submit the same test should apply to each of these circumstances. I agree.

[94] For the reasoning already given, it follows that this Court is of the view that it is open to the Environment Court to find as a matter of fact that Bathurst is likely to achieve the resource consents for mining elsewhere in the DBEA, and indeed in the DPPA.

[95] It is a matter of fact for the Environment Court to judge whether the prospect of future mining in the DBEA affects the weight that it gives to the benefits of the DBEA.

[96] Forest and Bird then submitted that in that case the purported benefits of the DBEA are not able to be secured through consent conditions, because those conditions cannot prevent destruction of the habitat that is to be enhanced. Therefore, it is submitted that the benefits of the DBEA were an irrelevant consideration.

[97] I do not agree. The DBEA is a very large area. Future open cast mining on the plateau is likely to follow the same mode of operation as the EMP, namely opening up a particular part of the Denniston Plateau, taking out the coal, then rehabilitating the site. It does not follow that there is not continued efficacy in the continuation of the biodiversity programme elsewhere on the plateau. It is a fanciful criterion that the whole of the huge area of the Denniston Plateau is going to be one open cast coal mine.

While Forest and Bird may have identified an error of law in the Environment Court's reasoning, by applying [84] in a completely different context to that in which it was set in *Hawthorn*, it is another question as to whether the error is material and/or cannot be re-addressed in the upcoming resumed hearing of the Environment Court on 12 June 2013. That is a hearing to examine the conditions being proposed. It is also a hearing to make the final decision as to whether or not to grant consent.

Seventh error of law – offset of significant habitat of indigenous fauna

[98] Forest and Bird alleges that the Court applied the wrong legal test by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvements to other habitats of the same species for the purpose of s 6(c).

[99] Section 6(c) of the RMA provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[100] The Heaphy predator control area (the HBEA) contains a few species in common with the EMP footprint, but it consists of a very different habitat. The Court found that the HBEA "comprises some 24,000 ha of forest and other vegetation types that differ from those on the Denniston Plateau".[25]

[101] In terms of s 6(c), the Court found that where there was an adverse effect on the significant habitat of indigenous species, it could take into account improvements to other habitats of that species.[26]

[102] Forest and Bird were submitting that in considering whether s 6(c) was met, the Court had regard to the HBEA. Forest and Bird particularly focussed on [325]. I think, however, it is important to read [325]-[335].

> [325] Offset mitigation for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form

---

25 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [232].

26 At [214].

of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.

[326] That is not the situation with areas of significant indigenous vegetation.

[327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[328] That qualifier is included in s 6(a) which requires us to recognise and provide for the preservation of the natural character of (inter alia) wetlands and lakes and rivers and their margins. As we have indicated, there will be adverse effects on pakihi wetlands, seepages and a small area of *Chionochloa rubra* wetland which would be removed entirely during the mining operation. Likewise, 6.7km of streams would be removed during mining, to be replaced by 4km of streams on the ELF. It is acknowledged that the natural character of the reinstated streams would for some time be less than that now existing. Recolonisation by bryophytes is expected to be slow, and Dr Stark, while confident that invertebrates would re-establish, does not have the evidence to suggest a likely timeframe.

[329] For the sake of completeness we add that some of the affected tributaries of the Whareatea River are ephemeral, and it is unlikely that the loss of stream length would have any effect on water quality and quantity further downstream. Further, the take proposed from the Waimangaroa would in our view leave the natural character of that river intact.

[330] We return to the question of whether the adverse effects on wetlands result in the development of the mine being "inappropriate." The adjective calls for a value judgement. Ms Bodmin's evidence that both pakihi and seepages would remain well represented on the plateau and the efforts BCL has taken to reduce the extent of *chionochloa rubra* fenland affected, considerably reduce the degree to which the proposal constitutes development from which wetlands require preservation.

[331] Overall, in terms of s 6, we find that the requirement to protect areas of significant indigenous vegetation tells against the proposal. The requirement to recognise and provide for the preservation of wetlands from inappropriate development also does so, but not as strongly.

[332] Buller Coal properly referred us to the judgement of the High Court in ***NZ Rail v Marlborough District Council*** citing the following passages:

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose ... It is certainly not the case that the preservation of natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs must all play their part within the overall consideration and discussion.

The same considerations apply when considering wetlands under s 6(a) and significant indigenous vegetation under s 6(c).

[333] In turning to s 5 of the Act, we remind ourselves from that decision that:

> ... the application of s 5 involves an overall broad judgement of whether a proposal will promote the sustainable management of natural and physical resources., that approach recognises that the RMA has a single purpose, and such a judgement allows for comparison of conflicting considerations, and the scale and degree of them and their relative significance or proportion in the final outcome.

In this case we find the task more than usually complex. The proposal provides significant enablement in the form of high quality employment in the Buller District. It provides enablement to the New Zealand economy by stimulating a "shuffling upwards" in the labour market. These benefits are not to be underestimated.

[334] Alongside this enablement, the proposal, if implemented, will have adverse effects of some proportion on areas of significant indigenous vegetation, including locally and nationally endangered plant species and ecosystem. Together with these effects there are effects on wetlands, perhaps of lesser significance because of what will remain on the plateau, and a considerable reduction for some time in the amenity of the mine site and its surrounds. In addition to these adverse effects which are not avoided, remedied or mitigated, the life that the rehabilitated ecosystems support on the mine site will be less fit, rich and diverse than those presently existing. We hold that to be a relevant matter under s 5(2)(b).

[335] Overall this case is quite finely balanced, rather as was found by the first instance hearing commissioners. So finely balanced indeed that while our present inclination is to grant consent, much will ultimately turn on whether appropriate conditions can be worked out and whether some others can be offered by the applicant on an *Augier* (volunteered) basis. These matters have been discussed extensively throughout this decision. Our preliminary view as just said is that with such conditions appropriately framed, consent is likely. But we share the view of the respondent that the conditions presently offered to the Court would not alone satisfactorily underpin consent to the application. For the guidance of the parties, we set out our concerns.

[103] Forest and Bird submitted that in [326] the Court found that s 6(c) was not met for significant indigenous vegetation. Forest and Bird then submitted that the implication of singling out that part of s 6(c) is that the Court must have concluded that a decision to grant consent would recognise and provide for the remainder of s 6(c), the protection of significant habitats of indigenous fauna, and that this appears to be its conclusion in [325].

[104] I do not agree. Reading all the paragraphs, and in the context of the whole case, it is clear that the open cast mining entailed in the EMP would remove some of the significant habitat of indigenous fauna. Second, I do not read these paragraphs as intending to provide for the protection of significant habitats which were inevitably going to be partly removed.

[105] Rather the Environment Court recognised, when citing *New Zealand Rail and Marlborough District Council*, that notwithstanding the strong language of s 6(c), the preservation of significant indigenous flora and significant habitats of fauna might have to bow to the promotion of the mine as part of the promotion of sustainable management of natural and physical resources, applying s 5(2).

[106] Having recognised that, the Environment Court then turned not to protecting what was going to be lost, s 6(c), but intending addressing the issue of the partial loss of the ecosystem, in the conditions, [335]. They were not just confined to addressing plant species, they refer to the ecosystem. I am not persuaded that the Environment Court lost sight of the terms of s 6(c). More pertinently, they recognised that s 6(c) may have to bow to sustainable management under s 5(2), in this case. That is a decision on the merits, yet to be completed by the Environment Court.

[107] Forest and Bird submitted that the HBEA is not relevant to s 6(c), as it does not contain a common habitat with the EMP footprint. This is not a proposition of law. It is, at best, a merit argument. Once it is acknowledged that it is not possible to maintain protection of habitat within the EMP footprint, then it is not possible to apply s 6(c) as requiring protection of the habitat, let alone of significant fauna. They will go, habitat and fauna.

[108] It is, however, a relevant consideration for the Environment Court to consider the positive effects of the HBEA when considering the implications of not being able to protect habitat and fauna in the EMP footprint.

[109] For these reasons, I do not think there is an error of law in these paragraphs of the decision.

Eighth error of law – Barren Valley – relevance of cost and viability of the mine

[110] The Environment Court found that the mine footprint was significant indigenous vegetation in terms of s 6(c) and the applicable plan criteria, and that Sticherus Ridge was outstanding, following agreed evidence from witnesses from both parties. This was due to the presence of a number of threatened and at risk plants. The mining proposal will result in the destruction of the Barren Valley and the Sticherus Ridge, as it is to be used as an overburden dump, with the volumes of overburden sufficient to overtop the valley and cover Sticherus Ridge.

[111] During the course of the hearing, the Court asked for evidence on whether the mine could be developed in such a way as to avoid the Barren Valley and Sticherus Ridge. Mr McCracken prepared a brief of evidence on behalf of BCL, in which he advised that the Barren Valley could be avoided, but this would have impacts on logistics, including greater distance for fill to be hauled and double-handling of material. Mr McCracken concluded there would be a number of consequences of avoiding the Barren Valley, including in relation to costs and minable coal and rehabilitation, which would have an overall impact on project economics.

[112] The Environment Court refused to impose conditions protecting the Barren Valley and the Sticherus Ridge:

> [339] We have come to the conclusion that the logistics and likely consequent cost of endeavouring to preserve these features, which are essentially just off centre in the mine footprint, would on balance be too great.

[113] Included in that analysis was a judgment that the likelihood of successful transplantation is low, so that in the event of a consent the most probable outcome is that these rare plants would be lost.[27]

[114] Forest and Bird submitted that it was long established in a number of Environment Court decisions that cost and economic viability, or profitability of a project, are not matters for the Environment Court. Rather, they are decisions for the promoter of the project. Otherwise the Environment Court would be drawn into making, or at least second guessing, business decisions.[28]

[115] All of these decisions are addressing the big question as to whether or not a project will be economically viable. The leading decision is that of the High Court in *NZ Rail Ltd v Marlborough District Council*, Greig J. It concerned the proposals and plans of Port Marlborough to develop and expand the port of Picton into the neighbouring Shakespeare Bay, and to construct and establish there a port facility to service the export of bulk products, including timber and coal. The local authorities concerned gave approval to the development, so far as it related to the expansion of the port for the purpose of export of timber, and refusal to approve the extension/expansion of the port as a coal export service. There were appeals and cross-appeals to the Planning Tribunal.

[116] One of the planks of NZ Rail's challenge of the proposed development was a claim that the cost of the whole development was likely to be significantly greater than had been estimated. The result of this would mean that, in order to service the cost, port fees would have to be increased, but because, for competitive reasons, it would be necessary to hold costs to the users of the timber and the coal berths, the costs would therefore fall on other port users, and in particular on NZ Rail as the predominant principal user of the port. Counsel for NZ Rail, Mr Cavanagh submitted that financial viability was a relevant consideration under Part 2 of the RMA.

---

[27] At [340]-[341].

[28] See *NZ Rail v Marlborough District Council* [1994] NZRMA 70 (HC); *Re Queenstown Airport Ltd* [2012] NZEnvC 206 at [211]; *Friends of Community of Nhawha Inc v Minister of Corrections* High Court Wellington AP 110/02, 20 June 2002 at [20]; *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC).

[117] Greig J found:[29]

> Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic wellbeing is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual or potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

[118] The scope of the remarks of Greig J, which are appropriate to that context, have no application to the discrete issue being examined by the Environment Court in this case: the proposal to shift the place for the overburden to be placed in order to protect some rare plants. This latter issue is a mitigation of one adverse effect in a complex project. There is nothing in the Act which prevents a consent authority from making a proportionate decision assessing the cost of a particular proposed condition. This is quite a different exercise from embarking on judging the merit of an application against the financial viability of the project. The Environment Court's treatment of this issue does not disclose any error of law.

Materiality of error

[119] The High Court sitting on appeal on questions of law will only intervene in the decision making of the Environment Court if an error of law has been identified and, as a matter of judgment, the Court considers the error is of materiality to the decisions being made by the Court.[30]

[120] In this case, the appeal is against an interim decision. The Environment Court is sitting again on 12 June 2013 to consider the efficacy of submissions. The Environment Court has not yet made a decision whether or not to grant the application.

---

29 At 88.

30 *Manos v Waitakere City Council* [1996] NZRMA 145 (CA).

[121] Had this been an appeal against the final determination of the Environment Court to grant a decision, then a real issue of whether the errors identified are of sufficient materiality would confront the Court. This is not the case, because of the interim character of the Environment Court decision.

[122] The most important aspect of this judgment is the view of this Court that the RMA keeps separate the relevant consideration of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.

[123] Forest and Bird wanted also a clear finding that mitigation considerations should get a greater weighting than offset considerations. I have not made that finding. This is because it all depends on the context, including the degree of mitigation and the scale and qualities of the offset.

[124] While I have disagreed with the Environment Court's use of the concept of "offset mitigation", and of using "offset" and "compensation" interchangeably, I have no basis to judge whether refining the use of these terms, on the basis of this judgment, will materially affect the deliberations of the Environment Court.

Conclusion

[125] That said, given that the Environment Court has not yet finally decided the case, I think it is appropriate that I do refer this decision back to be considered by the Environment Court, who, as a result, are required to keep mitigation considerations separate from offset considerations.

[126] I do not make a formal finding against the use of the term "compensation" or "environmental compensation", because it was not directly put in issue.

[127] Costs are reserved. Forest and Bird has been partially successful.

Solicitors:
Royal Forest and Bird Protection Society of New Zealand, Christchurch
Chapman Tripp, Christchurch
Gascoigne Wicks, Blenheim