IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-789
[2013] NZHC 1324

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
B G Williams and R A Lowe for First Respondents
J O M Appleyard for Second Respondent
Q A M Davies for Interested Party

Judgment: 6 June 2013

JUDGMENT OF FOGARTY J

Introduction

[1] The Environment Court has delivered two decisions in relation to an application by Buller Coal Ltd (BCL) for consents required to establish an open cast coal mine on the Denniston Plateau on the West Coast. This proposed open cast coal mine is known as the escarpment mine proposal (EMP).

[2] BCL is a subsidiary of a publicly listed Australian mining company, Bathurst Resources Limited. Bathurst Resources has exploration permits under the Crown Minerals Act 1991 over almost the whole of the Denniston Plateau. Under the Crown Minerals Act exploration permits can progress ultimately to a permit to mine. But by s 9 of that Act, a Crown permit to mine still requires consents under the Resource Management Act 1991. Bathurst has a mining proposal for the Denniston Plateau, called the escarpment mining proposal or the EMP. The initial overburden from the EMP mine will be placed in a narrow valley, known as Barren Valley (because it has no coal). Subsequently, that overburden will be replaced in an engineered landform (ELF) behind the advancing coalface. The EMP mine is expected to have a life of approximately five years. It is that mine for which resource consents are being sought.

[3] Solid Energy has a coal mining licence, originally granted in 1987 under the Coal Mines Act 1979. Under s 107 of the Crown Minerals Act, the rights acquired under the earlier Act are preserved. The parties agree the effect of that protection is that Solid Energy does not require land use activity consents under the RMA, but does require all other consents, particularly for water rights. The Solid Energy proposal is known as the Sullivan Mine proposal or SMP. It is also on the Denniston Plateau.

[4] Because coal mining as a land use activity is permitted in the SMP, the appellant (Forest and Bird) seeks to take advantage of [84] of the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[1] Forest and Bird argue that the potential effects on the environment from the escarpment mine proposal should be assessed cumulative to effects from the Sullivan Mine. They rely upon [84] of *Hawthorn*, to require the Environment Court to treat the mining licence as permitted land uses.

The regulatory context

[5] The Denniston Plateau is a harsh unforgiving environment. It has an average rainfall in excess of 6000 mm per year. This leads to a number of significant surface

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

water catchments, with an extensive network of lower order tributaries across the plateau. In addition to water bodies, the plateau includes an extensive range of unique flora and fauna. Given its unique vegetation assemblages, wet climate and high conservation values, the whole of the plateau has also recently been classified as a wetland of significance for the purposes of the West Coast Regional Council's Land and Riverbed Management Plan. There has been an extensive history of mining across the plateau. The relics of this include significant acid mine drainage, which makes water quality issues complex. The inherent nature of the plateau creates significant issues for anyone wanting to undertake mining on it. Open cast coal mining is a very complex, resource intensive and intrusive process. The EMP will impact on approximately 9 per cent of the Denniston Plateau.

[6] Resource consents are required from both the West Coast Regional Council and the Buller District Council. Broadly, all the activities are described as discretionary. The EMP requires consents under the Proposed Regional Land and Water Plan to mine coal, for associated land disturbance activities, for the coal processing plant and transport facilities. Some of the activities under the Buller District Plan, where the land is zoned rural, are restricted discretionary.

[7] There is a sliding scale in the RMA between permitted activities, controlled activities (both of which must be granted), restricted discretionary activities (being activities which can be declined, but only in respect of matters over which there are restrictions), discretionary activities, non-complying activities, and prohibited activities.[2] As one would expect, the restrictions, and the rules relating to restricted discretionary activities address protection of areas of significant indigenous vegetation, or significant habitats of indigenous fauna.[3]

[8] In the main decision, the Environment Court commented that:[4]

> 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.

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2 Section 87A.

3 Main Environment Court decision, *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [25].

4 At [307].

That is to be expected. The same can be said of s 5(2), the core provision of the RMA. The RMA sets in play criteria enabling the development of natural and physical resources, alongside the protection of natural and physical resources. This is captured in s 5(2), which provides:

> **5 Purpose**
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> ...
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> (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—
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> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
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> (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.

"Sustainable management" is a system of decision-making, which effectively chooses in any particular context which objective, and its values will predominate.

[9] The Denniston Plateau is set for change in the foreseeable future. It is not a mature urban environment or rural residential environment replete with permitted activities and existing resource consents, which was the setting of the "existing environment" cases which date from *Bayley v Manukau City Council*[5] through to *Hawthorn*.

[10] The Environment Court identified a preliminary question prior to the substantive hearing on appeals against consents granted to BCL to establish and operate the escarpment mine proposal. This preliminary issue was whether the Sullivan Mine proposal (SMP) of Solid Energy should form part of the "existing environment", such that potential effects on the environment from the EMP should be assessed cumulative to effects from the proposed Sullivan Mine. The parties in this litigation agree that the Sullivan Mine cannot proceed without these water

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5 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).

resource consents. The consents required also extended to include land use consents outside the Sullivan coal mining licence boundary. The status of the majority of the activities is discretionary activity under the relevant plans, in respect of which s 104B provides that the consent authority may grant or refuse such applications.

[11] The Environment Court found:[6]

> **The possible open cast Sullivan mine adjoining the EMP is not, for the reasons recorded, a part of the "existing environment" that would otherwise trigger a need for assessment of cumulative effects.**

The meaning of "existing environment", and the importance of distinguishing contexts

[12] As discussed, BCL's escarpment mine proposal requires resource consents for discretionary activities. All applications requiring resource consents fall to be considered by application of s 104 of the RMA. Section 104(1) 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–
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> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
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> (i) a national environmental standard:
>
> (ii) other regulations:
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> (iii) a national policy statement:
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> (iv) a New Zealand coastal policy statement:
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> (v) a regional policy statement or proposed regional policy statement:
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> (vi) a plan or proposed plan; and
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> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

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

[13] The phrase "existing environment" is found nowhere in the Act. It is shorthand jargon used by practitioners and Judges as a reference to the decisions of the Court of Appeal guiding consent authorities as to the range of activities to be taken into account when examining any actual or potential effects of allowing the activity the subject of the application. The cases distinguish between examining activities which are permitted on the site of the application for a new activity, which analysis is called "permitted baseline", from examination of the activities which can be anticipated in the surrounding environment, which is called the "receiving environment". The proposed Sullivan Mine is in the receiving environment. The leading decision on the extent to which one has regard to possible future activities in the receiving environment is the *Hawthorn* decision.

[14] That decision, on my reading of it, does not encourage perpetuating the use of the jargon "existing environment". Most of the reasoning in the judgment is in support of the conclusion that the word "environment" as appearing in s 104(1)(a) requires a consent authority "to have regard to the future environment".[7]

[15] Paragraph [84] reads:

> [84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

[16] Forest and Bird argue that because the coal mining licence held by Solid Energy for the proposed Sullivan Mine permits the land use activity of coal mining, that land use activity must be taken into account, by reason of the application of [84].

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[7] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [52].

[17] The only time the Court of Appeal in *Hawthorn* refers to the environment as it exists is in a sequence of four paragraphs, which are worth citing, as they are relevant to the Forest and Bird argument:

> [65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:
>
> > Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.
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> [66] Where it applies, therefore, the permitted baseline analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.
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> [67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at 377:
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> > On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.
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> The Court said that it would add to that sentence the words:
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> > …or as it would exist if the land were used in a manner permitted as of right by the plan.
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> [68] However, it must be remembered first, that *Bayley* was the case in which the permitted baseline concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.

[18] I would add that when Salmon J in *Aley*[8] used the phrase "as it exists" as a qualifier of "environment", he did so as part of a real world analysis to exclude taking into account permitted activities on the subject site which were permitted by the plan but which were unlikely to ever exist for commercial reasons. His qualifier "as exists" was intended to exclude an extension to "environment" to include "what might be built as of right" in terms of the district plan, whether or not that was ever likely to happen. That was a material distinction in the context of *Aley*. That case was set in Browns Bay, particularly in the commercial area extending down to the beachfront reserve. Existing development within that area was substantially low-rise – one or two levels. The proposal which was the subject of the proceedings was to have a five level building. The height and bulk of the building created concern. Counsel for the applicant argued that the height and bulk of the building should be disregarded because a building of that height and bulk could be erected as of right as a permitted activity. Salmon J was rejecting that submission. In this regard, Salmon J was reversed in the Court of Appeal, in the case of *Bayley*, as set out above.

[19] The Court of Appeal in *Hawthorn* at [84] continues the extended meaning of "environment" established by the dictum in *Bayley*, cited above, changing the words slightly, but not their meaning, to "as it might be modified by the utilisation of rights to carry out permitted activity under a district plan". As I have explained, this notion of "might" applies only to permitted uses and has nothing to do with "likelihood". Likelihood only applies to whether existing resource consents, which are for activities not permitted, will be implemented.

[20] In the recent *Queenstown Central Ltd v Queenstown Lakes District Council Foodstuffs*[9] decision, I have reasoned that [84] should be understood for what it is, a summary. It is a summary of an extensive argument in favour of reading the reference to have regard to the environment in s 104 as to have regard to the future environment. Second, it should also be read in the context of the arguments being presented to the Court by Mr Wylie QC, as he then was, in the context of to what extent there might be future applications for resource consents in a rural residentially

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8 *Aley v North Shore City Council* [1998] NZRMA 361 (HC).

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

zoned environment of the Queenstown Lakes District Plan. The detail of the reasoning was set into context.

[21] The Court of Appeal in *Hawthorn* appreciated the importance of context. The Court discussed my decision in *Wilson v Selwyn District Council*.[10] The setting here was in the context of a proposed change, where subdivision was a controlled activity, but there were submissions challenging the right to erect dwellings. The Court of Appeal in *Hawthorn* considered that the context in *Wilson* made it too speculative to consider whether or not building consents might be granted:[11]

> [74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the "permitted baseline" cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at [26], where it was used to rule out of consideration, for the purposes of the "permitted baseline" test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.

[22] By contrast, the Court of Appeal in *Hawthorn* distinguished the context:

> [75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.

[23] For these reasons, I do not perpetuate the summation of this line of authority as guidance as to examination of the "existing environment". Second, I do not read the Court of Appeal in *Hawthorn* as intending [84] to be read like a statute, to be applied in any context.

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10 *Wilson v Selwyn District Council* (2004) 11 ELRNZ 79 (HC).

11 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [74]-[75].

"Analogising" [84] of *Hawthorn*

[24] As counsel before me recognised, the Courts are increasingly finding themselves asked to analogise a resource management problem to fit into the text of [84]. And this case is another example of it; as we will see, counsel could not agree on how the Environment Court was applying *Hawthorn*.

[25] Forest and Bird argue that Solid Energy's existing licence under the Coal Mines Act 1979, removing, as all parties agree, the need for land use consents under the RMA, requires the Court to treat the land use of open cast mining on the Sullivan site in the receiving environment as analogous to "rights to carry out permitted activity under a district plan", as appearing in [84]. Therefore, the adverse effects of such land use need to be taken into account cumulative to the effects of the EMP. It can now be understood that the formal order of the Environment Court, set out above, was a finding against Forest and Bird.

[26] Counsel before this Court disagreed as to exactly how the Environment Court got to this conclusion. Forest and Bird submitted that the Court found that the effects authorised by the coal mining licence did not comprise part of the existing environment because further water and offsite land consents were required, which might or might not be granted. Second, that the Environment Court also erred by saying that there has to be a judgment that the activities causing those effects, being activities authorised by the coal mining licence must be proved to be likely to be implemented.

[27] BCL argued that what the Environment Court did was determine that the Sullivan Mine should not form part of the existing environment because of the need for the additional consents before the mine could operate. But if it was wrong, went on to find that it would be speculative to assume that, if granted, those resource consents would be implemented. Counsel for BCL argued further that it was a fair reading of the decision that the Environment Court found that there would be insurmountable difficulties in the way of establishing the Sullivan open cast mining system.

[28] BCL argued that the Environment Court's analysis of the evidence was effectively finding that the Sullivan Mine would never get underway.

[29] The principal reason for this conclusion was the vast quantities of water required, and the fact that it was agreed that under the *Fleetwing Farms Ltd v Marlborough District Council/Central Plains Water Trust v Synlait Ltd*[12] principles, BCL's escarpment mining proposal had priority for the purposes of applying for water takes and water discharges, so that essentially there would not be enough water left to enable both open cast mines to proceed.

[30] The Environment Court never found that the potential Sullivan Mine could not ever start up with all the appropriate consents.

[31] Against this disputation background, it is appropriate then to set out now the detailed findings of the Environment Court:[13]

> **Does the potential Sullivan Mine comprise part of the legal "existing environment"?**
>
> [43] Returning to the findings of the Court of Appeal in ***Hawthorn***, we have already noted that the Coal Mines Act licence for the Sullivan block is not a permitted activity under a District Plan. Neither is it a resource consent. Nevertheless, for present purposes, we are prepared to find that a legal consent under other legislation, authorising mining activity with no further consents or permissions necessary (particularly under the Resource Management Act), could constitute another manifestation of the "existing environment" which would trigger the need to take account of cumulative effects potentially arising from another proposal such as the EMP. This would be analogous to findings of the Courts in relation to designations not yet given effect to, and the presence of existing use rights.
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> [44] Importantly on this occasion, we find on the unchallenged evidence discussed above that there are a number of further consents and authorisations that would undoubtedly be required, including land use consents outside the Sullivan CML boundary, land use consents from the regional council in relation to s 13 RMA matters both inside and outside the Sullivan CML boundary; diversions and discharges to water (regional council); water takes and a number of other activities associated with water such as damming, use and diversion (regional council); and discharges to air (regional council). In a little more detail, it is beyond question that at least one of the following would be triggered:

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12 *Fleetwing Farms Ltd v Marlborough District Council* [1997] NZRMA 385 (CA); *Central Plains Water Trust v Synlait Ltd* [2010] NZRMA 237 (CA).

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

- disturbance of ground within 20 metres of any creek, stream, river or lake;

- diversion of water within the complex wetland environment that is present, involving any waterway that is either a creek, stream, river or lake, or within 20 metres thereof;

- any activity that initiates or accelerates watercourse bank slumping or erosion;

- the taking and damming of water, inside or outside the Sullivan CML area; and

- discharge of any contaminant to water and/or land in circumstances where they may enter water - with a particular likelihood of the presence of considerable quantities of mine-influenced water.

[45] The status of the majority of these activities is discretionary activity, in respect of which there could be either refusal or consent.

[46] In case we are wrong in any of these findings, we turn finally to consider the phrase from ***Hawthorn*** *"where it appears likely that those resource consents will be implemented."*

[47] The appellants submitted, amongst other things, that the fact of the change in the coal mining licence to include open-cast mining, indicated an intention by Solid Energy to exercise it. That is too much of a leap of faith, even for an inference, and would amount to speculation that we simply cannot undertake.

...

Conclusions

[49] The possible open-cast Sullivan mine adjoining the EMP is not, for the reasons recorded, a part of the "existing environment" such as to trigger a need for assessment of cumulative effects.

Application of *Hawthorn* to this case

[32] As already noted, Forest and Bird pursued the argument that the Environment Court was required by *Hawthorn*, at [84], to take into account the activities permitted by the existing coal mining licence, as being analogous to a permitted activity under a plan. By contrast, counsel for BCL were happy to be guided by my recent judgment, *Queenstown Central Ltd v Queenstown Lakes District Council*, arguing that [84] should not be read out of context, but rather consent authorities should pursue a real world analysis of the future environment. BCL's counsel submitted that that approach fitted with the conclusions of the Environment Court, which were

essentially to the effect that it was unrealistic now to presume that the Sullivan Mine would ever be developed, and so inappropriate to embark on assessment of cumulative effects.

[33] BCL also argued that, in any event, they had priority, particularly over the use of the nearby water resources, and in accordance with *Fleetwing* and *Synlait*, they were entitled to have their application considered first, and independently of the prospects of success of any subsequent applications. That argument too leads to the conclusion that there is no basis for a cumulative effects analysis, bringing into the picture adverse effects that would be caused by the Sullivan Mine.

[34] Forest and Bird did not wholly rely on applying [84] of *Hawthorn*. They submitted that s 104(1)(a), requiring to have regard to any actual or potential effects on the environment, is not wholly determinative by some definition of "future environment". They advocated for a broad definition of effects to be considered when determining which cumulative effects are relevant considerations. They emphasised the fact that the whole of s 104 is "subject to Part 2". Counsel submitted that relevant Part 2 provisions support having regard to effects authorised by the Sullivan proposal. Counsel emphasised that the cumulative effects of two open cast mines, the Sullivan and the EMP, "will not ever be considered if they are not taken into account when deciding whether to consent the EMP, which has significant implications for Part 2 matters."

[35] So in short, I heard Forest and Bird's argument as appealing to [84] of *Hawthorn*, but also arguing to be released from any shackles in that paragraph there, by the Court reading the problem raised in this context against relevant Part 2 provisions. By contrast, for the most part, BCL were pursuing an argument that the coal mining licence was not analogous to a permitted use, so [84] should not apply, and that the evidence showed that the possible Sullivan Mine would not be part of the future environment.

General evaluation of the arguments of the appellant and the respondents

[36] Forest and Bird submitted it was beyond contention that the wider Denniston Plateau comprised "significant indigenous vegetation" and "significant habitats of indigenous fauna". Thereby appealing to Part 2 provision, s 6(c):

> **6 Matters of national importance**
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> 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:
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> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[37] The second material fact is that Solid Energy holds a coal mining licence which was granted in 1987 and has a life of 40 years. It has been recently amended by the Minister to allow open cast mining. As a third material fact, Forest and Bird relied on the fact that implementation of the coal mining licence will have inevitable adverse effects on the vegetation and habitat of the Sullivan footprint in the wider Denniston Plateau. That is obvious. There is ample evidence in support of it, and no need to go through that in this judgment. There was evidence that 133.9 hectares of the Sullivan block could be feasibly mined, coming from BCL.

[38] Forest and Bird relied upon the fact that, in June 2011, Solid Energy issued a media release which indicated that it and Bathurst Resources, the owner of BCL, were to cooperate on developing their energy resources on the Denniston Plateau. BCL's chief executive officer, Mr Bohannan, gave evidence that on 21 June 2011 Bathurst Resources and Solid Energy entered into an agreement that sets a framework for their ongoing relationship on the plateau. This includes, for example, "ensuring their respective interests are developed in an integrated way, and various provisions around the possible joint use of any coal conveyance infrastructure to ensure better overall efficiency". There was further confirmation of this in his cross-examination. Solid Energy's 2011 Annual Report advises that the Sullivan Mine is in the feasibility stage, while Forest and Bird argued it had passed the conceptual and

pre-feasibility stages, with the next stage being the detailed design. The variation to the licence to allow open cast mining was granted on 8 October 2012. The Bathurst/BCL executive's (Mr Bohannan's) evidence included the statement:

> We fully intend to extract, as does Solid Energy adjacent...

[39] All these pieces of evidence were assembled by Forest and Bird to argue that the development of the Sullivan Mine is for real, countering the proposition that this is all window dressing to ready Solid Energy for sale.

[40] It hardly needs to be added that the timeframe of excavation of the coal is essentially irrelevant to the values engaged on the long term despoliation of land by open cast mining. So the examination of future environment in this context invites a long term view. Yet there is some lingering concern amongst counsel as to the potential timeframe, again because of the terms of the *Hawthorn* judgment. It will be recalled that in *Hawthorn* resource consents can only be taken into account if they are likely to be implemented. It was pointed out by counsel that the resource consents also have a life for only two years if they are not going to be implemented.

[41] I observed in the *Queenstown Central Ltd v Queenstown Lakes District Council* judgment that all the authorities examined by the Court of Appeal in *Hawthorn* were dealing with relatively mature environments, either already built up commercial areas, such as in *Aley*, or established towns with residential subdivisions. In *Queenstown Central* the context was quite different, because a large area of land zoned rural had been earmarked in the operative plan for intensive development for residential, commercial and industrial use.

[42] Here, the context is different again. We are dealing with a remote area on the West Coast. The EMP mining is intended to take five or six years, the rehabilitation years after that. Bathurst holds exploration permits over all of the plateau, except for the possible Sullivan mine. Other open cast mining by Bathurst is likely to follow.

[43] BCL's response to Forest and Bird began with the submission that determining before the Environment Court what the future environment is likely to be is primarily a factual enquiry. This is an appeal which depends on proof of error

of law to succeed. BCL counsel modified "*Hawthorn* orthodoxy" in order to have a "real world" approach to analysis without artificial assumptions, creating an artificial environment.[14] In that context, they submitted as an adaptation of the orthodoxy:

> It will then be necessary to consider whether there is evidence around the certainty of any future activities that might properly form part of the "existing environment". In the case of unimplemented resource consents it is submitted that will only be appropriate where, for example:
>
> > There is some degree of certainty over:
> >
> > (a) What the terms of the resource consents will be;
> >
> > (b) Whether those resource consents will be granted; and
> >
> > (c) The likelihood of those resource consents being implemented; and
> >
> > In the case of limited resources, there is no impact on the rights and legitimate expectations (ie, priority) of any first-in-time applicant – in this respect the Court needs to be mindful of the long line of authorities that require a decision-maker to consider an application for resource consent without having regard to later-in-time applications.[15]

They then submitted:

> If a possible future proposal fails any of those requirements, then it will not form part of the existing environment for the purposes of assessing the effects of the proposal...

Here, BCL counsel relied both on the Court of Appeal in *Hawthorn* and on my earlier decision in *Wilson*, and on the *Fleetwing/Synlait* priority authorities.

[44] Obviously, the BCL argument before this Court was adapted to its audience. Nonetheless it is, I think, a strong counterpoint to the argument of Forest and Bird. It led to the conclusion by counsel for BCL that there was insufficient certainty as to the future environment to undertake cumulative effect analysis.

[45] It needs to be kept in mind that the issue here is whether or not the Environment Court should embark on a cumulative effects analysis when considering the merits of the escarpment proposal. It is certainly impossible at the

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[14] See *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [85].
[15] From *Fleetwing* to *Synlait*.

present time to do that in detail, in the absence of the detailed design of the proposed Sullivan Mine and information as to its timing and/or staging relative to the EMP mine. Counsel for BCL submitted to do cumulative effect analysis would effectively require the consent authority and the Court on appeal to embark on the speculative exercise of considering what the Sullivan Mine might look like in terms of size, conditions, and time of operation. The decision-maker would then need to go on to consider the even more speculative hypothetical or contingent effects that may or may not arise in the event that other consents are both applied for and then granted. Counsel submitted:

> This is hardly consistent with the "*real world*" determination of the existing environment as espoused by the "modified *Hawthorn*" line of cases.

[46] BCL further submitted that the requirement in s 104(1)(a) to have regard to "any actual and potential effects on the environment of allowing the activity" cannot have been intended to require having regard to hypothetical or contingent effects. Such effects do not readily fall within the definition of effects under the Act.

[47] The definition of effects in s 3 of the RMA is very broad. That is why BCL's submission is qualified. It includes "any potential effect of low probability which has a high potential impact". There is another question as to how contingent that potential effect must be.

[48] The cumulative effect part of the definition is as follows:

> (d) Any cumulative effect which arises over time or in combination with other effects -

The word "potential" is not there as a qualifier of "effect". "Arises" is present tense.

[49] There is no doubt the cumulative effect analysis can often be very valuable. But it is particularly difficult to do here, when the current environment is relatively natural and is undeveloped currently, as it has not been mined for a long time. What the consent authorities are facing are one detailed application ready for processing and the stated intentions to activate a longstanding coal mining licence recently modified for open cast mining.

[50] It is a feature of the RMA that it does not provide for applications, which are potentially rivalrous in some respects, to be heard together. This was perceived as a gap or want in the Act which the Court of Appeal filled in the *Fleetwing* decision, by glossing the Act with a first in time policy. This feature of the Act is the source of the hard answer to the otherwise very powerful proposition of Forest and Bird, that if cumulative effects are not considered now, they never will be. In this case, this is a consequence of the fact that the RMA does not provide for comparative or joint hearings of applications which generate cumulative effects.

[51] The Court of Appeal identified in *Fleetwing* a policy position which essentially lets private market forces dictate the timing and order of hearing applications. So if one rival gets in ahead of the other, that rival's application is heard first. It is heard and considered without taking into account the adverse effects likely to be generated by the second rival, whose application will be heard later.

[52] It is plain that the Supreme Court has been, in the past, ready to revisit the *Fleetwing* line of authorities. It gave leave to appeal in *Synlait Ltd v Central Plains Water Trust*.[16]

[53] But at the present time, the "first come, first served" policy is the law. Both as a matter of fact, and I am told from the bar it has been accepted, BCL is first in time for its RMA consents, ahead of Solid Energy on the Denniston Plateau.

[54] Like the parties, I have found it difficult to interpret the Environment Court decision. It certainly is speculative to forecast the terms of any water rights for the Sullivan Mine. It is possible, as BCL argues, that water rights will not be granted. But the evidence falls far short of proving that, and the Environment Court did not make that decision. Indeed, it clearly said that consents that the Sullivan Mine required might be granted or might not be granted.

[55] BCL argued there were insufficient water resources available for the two mines in the Denniston Plateau. They relied on [42] of the judgment, where the Environment Court heard evidence that the capacity of a sump and water treatment

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16 *Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32.

plant for the Sullivan Mine would likely be of the order of 176,000 m^3 and 310 litres per second. Together with this paragraph and other paragraphs, they argued that there would be insufficient water to operate the Sullivan Mine, in conjunction with the operation of the Buller EMP. Therefore, the Sullivan Mine was at best a near possibility and, for practical purposes, should be discounted, and certainly should not be taken into account as a permitted activity for the purposes of applying the *Hawthorn* test.

[56] As already recorded above in [38], Forest and Bird relied on the fact that there is an agreement to cooperate between Solid Energy and Bathurst Resources. After discussion with counsel, it appears likely that the two companies would stage their mining on the plateau with Buller's mine going first, and thus recognise the fact there probably are not enough water resources or it is inefficient to run two mines at the same time. For these reasons, it cannot be argued, and was not, that Sullivan Mine is fanciful. It should be understood that [84] of the *Hawthorn* decision leaves intact the qualification on taking into account permitted uses where the activity is only a very remote possibility, so long as it is not fanciful.[17]

[57] I do not think it can be said with confidence that the Court of Appeal in *Hawthorn* ever envisaged [84] being deployed in this sort of context, where the activities over a large locality are going to change. A similar distinction was taken by me in the *Queenstown Central Ltd* case.

[58] I do not think that the uses permitted by a coal mining licence are in any way equivalent to the permitted use aspect of [84]. The fact of the matter is that the activities permitted on the land cannot be done without water rights, and water rights can only be obtained by resource consent, and are not likely to be obtained in the short term.

Resolution of the issue

[59] I distinguish *Hawthorn's* [84], but rely on the earlier paragraphs, as I did in *Queenstown Central Ltd*. There was no need for the Environment Court to frame the

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[17] See [17]-[19] above and *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA) at [26].

issues around the parameters of [84] of *Hawthorn*, as distinct from the preceding paragraphs which explain the need to look at the future receiving environment.

[60] I note, however, that the Environment Court did so because it was responding to the way the case was presented by Forest and Bird.[18]

[61] It is my interpretation of the Environment Court's decision that it did not find that the permitted land uses under the Coal Mines Act licence were equivalent to a permitted activity under a district plan. Their finding was the other way. It is contained in [43]. I emphasise the key sentence:

> ...Nevertheless, for present purposes, we are prepared to find that a legal consent under other legislation, authorising mining activity **with no further consents or permissions necessary (particularly under the Resource Management Act)**, could constitute another manifestation of the "existing environment"...
>
> (Emphasis added)

That, of course, is not the case.

[62] The Court then goes on in [44] to say:

> ...we find on the unchallenged evidence discussed above that there are a number of further consents and authorisations that would undoubtedly be required...

[63] In [45] they say:

> The status of the majority of these activities is discretionary activity, in respect of which there could be either refusal or consent.

[64] Although the Environment Court does not say so then expressly, those findings are rejecting the application of [84] of *Hawthorn* by analogy to apply to permitted uses under the Crown Minerals Act, s 107.

[65] Then we have the reasoning from [46]:

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[18] See [11].

> In case we are wrong in any of these findings, we turn finally to consider the phrase from ***Hawthorn*** *"where it appears likely that those resource consents will be implemented"*.

[66] This appears to be treating the mining licence not as a permitted use, but as a resource consent, as another alternative application of *Hawthorn* at [84]. The Court then goes on to make the finding of fact:

> [47] The appellants submitted, amongst other things, that the fact of the change in the coal mining licence to include open-cast mining, indicated an intention by Solid Energy to exercise it. That is too much of a leap of faith, even for an inference, and would amount to speculation that we simply cannot undertake.

[67] That finding of fact appears to be a finding that it amounts to speculation as to whether or not Solid Energy intend to exercise the coal mining licence. It is not a function of this Court to revisit such findings of fact.

[68] While I consider that in the context before it, the Environment Court could have distinguished [84], but not the preceding reasoning, particularly [34] to [83], the Environment Court did not err in the way it applied [84]. Second, its factual finding of "speculative" as to the future implementation of the Sullivan Mine proposal ruled out, as a matter of law, cumulative effect analysis. This is because the submissions of BCL set out in [43] are applicable, given this finding of fact.

[69] It follows that there is no material error of law in this decision not to embark upon cumulative effect analysis. This appeal is dismissed. Costs are reserved.

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