IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-683
[2013] NZHC 1766

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 Respondent
	BULLER COAL LIMITED Second Respondent
	WEST COAST ENVIRONMENTAL NETWORK INCORPORATED Non Party

Hearing:	12 July 2013 (By way of telephone conference)
Appearances:	P D Anderson for Appellant B G Williams for First Respondent J Appleyard for Second Respondent Q A M Davies for Non Party
Judgment:	12 July 2013

JUDGMENT OF FOGARTY J

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[1] The applicant applies for leave to appeal to the Court of Appeal against the whole of the decision of the High Court, delivered by myself on 6 June 2013, dismissing the applicant's appeal from a decision of the Environment Court. This was one of two judgments, the second being delivered the next day. The first judgment related to a preliminary legal issue which arose in considering an

application by Buller Coal, a subsidiary of Bathurst Mines, for resource consents for an open cast mine, known as the Escarpment Mine, on the Denniston Plateau, on the West Coast. The preliminary legal issue related to whether, when assessing the effects of the Escarpment Mine, regard must be had to the effects of a permitted use under s 107 of the Crown Minerals Act 1991; specifically, an unimplemented coal mining licence for the Sullivan Block which adjoins the Escarpment Mine. Forest and Bird contends that the effects of the permitted but unimplemented coal mining licence for the Sullivan Block on indigenous vegetation and habitats of indigenous fauna are part of the receiving environment, against which the effects of the Escarpment Mine must be assessed, and are relevant cumulatively with the effects of the Escarpment Mine.

[2] The question now is whether this Court is of the opinion that the question of law involved in the appeal is one which, by reason of its general or public importance, or for any other reason, ought to be submitted to the Court of Appeal for decision. The case law provides there must be a question of law capable of serious argument, involving a public or private interest which is sufficient in its importance to outweigh the costs and delay to the parties of permitting another appeal.

[3] Forest and Bird have four questions which they wish to take to the Court of Appeal:

> (a) To what extent, if any, does the Escarpment Mine application [Buller/Bathurst] have priority over the permitted use [coal mining licence/Solid Energy]?
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> (b) What is the relevance of such priority (if any) to the determination of whether effects authorised by the permitted use are part of the receiving environment and/or relevant cumulative effects?
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> (c) Do the effects of the permitted use form part of the receiving environment against which the Escarpment Mine application is assessed under section 104(1)(a)?
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> (d) Are the effects authorised by the permitted use relevant cumulatively with the effects of the Escarpment Mine application under section 104(1)(a)?

[4] These points on appeal can be compared with the amended notice of appeal of Forest and Bird before the High Court. The amended notice of appeal alleged three errors of law:

> (a) The adoption of a test that required the proposed Sullivan Mine (Solid Energy) to have all consents or approvals before effects authorised by the coal mining licence could be considered to be part of the existing environment, or as relevant cumulative effects.
>
> (b) In finding that for the effects authorised by the coal mining licence of Solid Energy to be taken into account cumulatively, that coal mining licence must be proved to be likely to be implemented.
>
> (c) In applying the high standard of probability (rather than a lower standard of "not shown to be unlikely, feasible or plausible") when determining that the coal mining licence was not likely to be implemented.

[5] The legal context of the analysis in the Environment Court was the application of [84] of *Hawthorn*, which provides:[1]

> [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.

[6] Although it is not clear from either the four questions sought to be taken to the Court of Appeal and the three questions examined in the High Court, these are all [84] *Hawthorn*[2] points. Forest and Bird are arguing that, because the coal mining licence is equivalent to a permitted use under the Resource Management Act 1991, it should be treated as part of the existing environment, subject only to its development being fanciful. So that so long as the Sullivan Mine is plausible, it adverse effects should be taken into account in the assessment of the merits of the Buller Coal Mine.

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

The Forest and Bird criticism was also that the Environment Court treated the coal mining licence like a resource consent rather than a permitted use, therefore, wrongly applied the likely to be implemented test in [84].

[7] The questions of law sought to be resolved in the amended notice of motion before the High Court were:

> (a) When must effects authorised by an unimplemented coal mining licence issued under the Coal Mines Act 1979 be taken into account as a part of the existing environment, or as relevant cumulative effects?
>
> (b) Must effects authorised by the coal mining licence for the proposed Sullivan Mine be taken into account as part of the existing environment, or cumulatively with the effects of the Escarpment Mine Proposal?

[8] It can be seen that at the core of its case Forest and Bird submits that the Buller application for resource consent, for the Escarpment Mine, should be analysed under s 104(1)(a) and (2), so that when taking into account the effects on the environment, the Environment Court should have assumed the coal mining licence will be implemented, as the Sullivan Mine. Sections 104(1)(a) and (2) provide:

> **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
>
> ...
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.
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> ...

[9] After my judgment of 6 June 2013, on 11 June 2013, the Court of Appeal released its decision *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu*.[3]

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[3] *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu* [2013] NZCA 221, also known as *Carrington*.

In that decision, the Court of Appeal clarified that [84] is not to be interpreted as allowing all permitted uses to be taken into account when examining the receiving environment, but only when examining the environment of the site of the application for consent:[4]

> [88] We do not accept this distinction. The qualification noted by this Court in *Hawthorn* was in the context of pointing out the limitation of the permitted baseline test to the site itself where the appellant had attempted to give it a more expansive application. What is decisive is the exclusionary nature of the permitted baseline test. In essence, as this Court observed in *Arrigato*:
>
> > [29] Thus the permitted baseline ... is the existing environment overlaid with such relevant activity ... as is permitted by the plan. 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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> [89] As Mr Brabant submits, the permitted baseline was irrelevant to the Environment Court's decision. The current codification of the concept in s 104(2) allows a consent authority when forming its threshold opinion under s 104(1)(a) to "... disregard an adverse effect of the activity on the environment if the *plan* permits an activity with that effect" (emphasis added). The statutory purpose is to vest a consent authority with a discretion to ignore the permitted baseline where previously it had been a mandatory consideration.
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> ...
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> [92] As this Court pointed out in *Hawthorn*:
>
> > [27] ... the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[10] In my decision, I found that there was no need for the Environment Court to frame its analysis around the parameters of [84] of *Hawthorn*, as distinct from the preceding paragraphs of *Hawthorn*, which explain the need to look at the future

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4 At [88] and [89].

receiving environment.[5] I noted that the Environment Court did so because that was the way the case was presented by Forest and Bird.

[11] I then concluded that it was my interpretation of the Environment Court's decision that they did not consider the permitted land uses under the Coal Mines Act licence were equivalent to a permitted activity under a district plan. This was because they had found that the Coal Mines Act licence could not be utilised without significant other resource consents, particularly for the taking, use and discharge of water. Accordingly, they found that the permitted land uses under the Coal Mines Act were not equivalent to a permitted activity under a district plan. This is contained in the Environment Court's [43], of which the key sentence is quoted in the High Court judgment at [61]:[6]

> [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)

[12] The Environment Court then went on in the alternative to treat the permitted land use under the Coal Mining Act licence as equivalent to a resource consent, and to examine whether or not it appears likely that resource consent will be implemented. The judgment under appeal sets out the relevant reasoning from the Environment Court's [46] in [65]:

> [65] Then we have the reasoning from [46]:
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> > 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"*.

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5 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [59].

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

[13] The Environment Court then went on to make a finding of fact, which I think is critical to the question of whether or not leave should be granted or not. It is set out in [66] of the High Court judgment:

> [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:
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> > [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.

[14] In the High Court judgment, I then went on to say:

> [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. <u>It is not a function of this Court to revisit such findings of fact</u>.
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> [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]. <u>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</u>. This is because the submissions of BCL set out in [43] are applicable, given this finding of fact.
>
> (Emphasis added)
>
> [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.

[15] As the judgment of the High Court endeavours to express in [68], set out above, the factual finding that the future of the Sullivan Mine is speculative rules out as a matter of law cumulative effect analysis.

[16] Mr Davies, supported by Mr Anderson, relies on the definition of effect in s 3 of the Act, particularly s 3(f). Section 3 provides:

> **3 Meaning of effect**
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> In this Act, unless the context otherwise requires, the term effect includes—
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> (a) any positive or adverse effect; and
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> (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.

[17] My judgment in the High Court said:

> [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.

[18] Given the finding of fact of the Environment Court at [47], I do not think there is any basis upon which to explore in the Court of Appeal the law on cumulative effect analysis, as sought in questions (b) and (d), set out in [3] above. I regard question (c) as rendered otiose by the Court of Appeal's decision in *Far North District Council v Te Runanga-O-Iwi O Ngati Kahu*.

[19] That leaves question (a). The relevant High Court paragraphs are:

> [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.
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> [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.
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> [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*.
>
> [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.
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> ...
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> [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 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.
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> [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.

[20] Depending on how the Environment Court found likelihood of the Solid Energy mining licence being implemented, there might have been a basis for embarking upon cumulative effect analysis. But again, its finding of fact now rules out such analysis. Therefore there is no basis for question (a) to go to the Court of Appeal.

[21] For these reasons this application for leave to appeal is dismissed. Costs are reserved.

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