IN THE COURT OF APPEAL OF NEW ZEALAND

CA514/2013
[2013] NZCA 496

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Applicant
AND	BULLER DISTRICT COUNCIL First Respondent
	BULLER COAL LTD Second Respondent

Hearing:	2 October 2013
Court:	O'Regan P, Panckhurst and MacKenzie JJ
Counsel:	D M Salmon and S R Gepp for Applicant J M van der Wal for First Respondent J E Hodder QC and B G Williams for Second Respondent
Judgment:	17 October 2013 at 11.30 am

JUDGMENT OF THE COURT

A The application for special leave to appeal is dismissed.

B Costs are reserved.

REASONS OF THE COURT

(Given by O'Regan P)

Introduction

[1] The applicant, the Royal Forest and Bird Protection Society of New Zealand Inc, applies for special leave to appeal to this court against a decision of the High

Court[1] dismissing its appeal against an earlier decision of the Environment Court.[2] The application is made under s 308 of the Resource Management Act 1991, which, at the relevant time, provided that s 144 of the Summary Proceedings Act 1957 applied in relation to appeals against decisions of the High Court made under s 299 of the Resource Management Act.

[2] Under s 144(3) of the Summary Proceedings Act, a party wishing to appeal to this Court must first seek leave from the High Court. The applicant did so in this case, but leave was refused.[3] Section 144(3) provides that where the High Court refuses leave, application may be made to this Court for special leave. This Court may grant special leave if, in its opinion, "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".

Proposed questions on which leave sought

[3] The applicant seeks leave to appeal on two questions, which it says are questions of law. These questions are:

(a) Do the effects of the permitted use form part of the receiving environment against which the Escarpment Mine application is assessed under s 104(1)(a)?

(b) Are the effects authorised by the permitted use relevant cumulatively with the effects of the Escarpment Mine application under s 104(1)(a)?

"Permitted use"

[4] The term "permitted use" is somewhat confusing in this context. Some background explanation is required.

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1 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324, [2013] NZRMA 275 [High Court substantive judgment].

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

3 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1766 [High Court leave judgment].

[5] The High Court substantive judgment dealt with an appeal against a decision of the Environment Court on a preliminary issue which arose in the course of proceedings dealing with an application by the second respondent, Buller Coal Ltd, for resource consents for an open cast coalmine (referred to in the judgments below and in this judgment as the Escarpment Mine) on the Denniston Plateau on the West Coast of the South Island. A third party, Solid Energy Ltd, holds a coal mining licence for an area known as the Sullivan Block, which adjoins the site of the proposed Escarpment Mine. The applicant and another appellant in the Environment Court, West Coast Environmental Network Inc, argued that the effects of the proposed Sullivan Mine should form part of the "existing environment" for the purposes of the consideration of the Escarpment Mine proposal. The apparent objective of this was so that the potential effects on the environment from the Escarpment Mine should be assessed on a cumulative basis with the effects that would arise if the Sullivan Mine were developed.

[6] The applicant argued in the Environment Court that the coal mining licence was similar in nature to a permitted activity under a District Plan, and should be treated as such for the analysis of what constitutes the environment in terms of s 104(1)(a) of the Resource Management Act. Consistently with that thesis, it referred to the coal mining licence as "the permitted use". That is the terminology used in the first question of law now before us. Its use in that context is somewhat question begging, but we will interpret it as referring to, and not extending beyond, the coal mining licence held by Solid Energy in relation to the Sullivan Mine.

Further background

[7] Solid Energy's coal mining licence for the Sullivan Block was granted in 1987. The rights acquired under it were preserved when the Coal Mines Act 1979 was replaced by the Crown Minerals Act 1991.[4] As the holder of a coal mining licence, Solid Energy will not need to obtain resource consents for land use activity within the Sullivan Block under the Resource Management Act for the Sullivan Mine. The Environment Court found, however, that it would require additional consents, particularly relating to water rights.

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4 Crown Minerals Act 1991, s 107.

[8] As mentioned earlier the preliminary question before the Environment Court was whether the coal mining licence was part of the "existing environment", so that the effects arising from a future operation of the Sullivan Mine had to be considered cumulatively with the effects from the proposed Escarpment Mine. Again, some explanation of terminology is required here. The term "existing environment" is not used in the Resource Management Act.

[9] Under s 104(1)(a), a consent authority considering an application for a resource consent is required to have regard to "any actual and potential effects on the environment of allowing the activity", among a number of other matters. The "activity" refers to the activity for which resource consent is being sought, in this case the Escarpment Mine. The key word in that provision is "environment" which has been interpreted as referring not only to the physical environment as it stands at the time of the application, but also the future state of the environment.

[10] Much of the focus on the argument before us was on the decision of this Court in *Queenstown Lakes District Council v Hawthorn*, in which this Court considered the extent to which consent authorities should have regard to possible future activities in defining the environment against which the effects referred to in s 104(1)(a) must be measured.[5] After an extensive discussion, the Court summarised its views as follows:

> [84] ... In our view, the word "environment" embraces the future state of the environment as it may be modified by the utilisation of rights to carry out a 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. ...

Environment Court decision

[11] The Environment Court was asked to treat the coal mining licence held by Solid Energy as if it were a right to carry out a permitted activity under a District Plan. Applying *Hawthorn,* that would mean the coal mining licence was part of the "environment" for the purposes of s 104(1)(a). The Environment Court rejected that contention, essentially because the coal mining licence would exempt the holder

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

only from the need to obtain a land use resource consent. A number of consents would still be required for ancillary activities which would be necessary in order to conduct coal mining operations in the Sullivan Block. The Environment Court found that the majority of the activities for which consents would be required would be discretionary activities, in respect of which consent could be granted or refused.[6]

[12] The Environment Court having made those important findings of fact, determined that the coal mining licence for the Sullivan Block was not a permitted activity under a District Plan and nor was it a resource consent. On the face of it, that meant that the observations made by this Court about the future environment in *Hawthorn* at [84] did not apply, because those observations applied only to permitted activities and resource consents.

[13] The Environment Court said it was prepared to find that a legal consent under other legislation which authorised mining activity with no further consents or permissions necessary could constitute another manifestation of the "existing environment" for the purposes of s 104(1)(a).[7] But, as the coal mining licence in this case did not meet that description, that observation was of no practical significance in the present case.

[14] Having made that conclusion, which largely depended on the findings of fact made about the nature of the coal mining activities that would be carried on in the Sullivan Block if Solid Energy decided to act on its coal mining licence, the Court then did a further analysis "in case we are wrong in any of [those] findings".[8] That analysis involved considering how this Court's observations in *Hawthorn* at [84] would apply if the coal mining licence were treated as if it were a resource consent (or, perhaps more correctly, as being analogous to a resource consent). In *Hawthorn*, this Court said that the word "environment" includes the environment as it might be modified by the implementation of resource consents which have been granted, "where it appears likely that those resource consents would be implemented".

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6 Environment Court judgment at [44]–[45].
7 At [43].
8 At [46].

[15] In the present case, the Environment Court considered that it could not, as a matter of fact, find that the coal mining licence was "likely" to be activated by Solid Energy. It described that possibility as "too much of a leap of faith, even for an inference, and would amount to speculation that we simply cannot undertake".[9] Again, that was a finding of fact on the Environment Court's part.

High Court decision

[16] As noted earlier, the High Court dismissed the applicant's appeal from the Environment Court. The High Court Judge, Fogarty J, warned against treating the observation of this Court in *Hawthorn* at [84] as if it were legislation, and highlighted the need to consider the whole of the decision in *Hawthorn*, rather than just the summary contained at [84].[10] He determined that the Environment Court had concluded that a coal mining licence was not equivalent to a permitted activity under a District Plan.[11] We agree that that is the case. He also concluded that the Environment Court's alternative analysis based on *Hawthorn* turned on its finding of fact that the possibility of Solid Energy using its coal mining licence at the Sullivan Block was speculative. He found, correctly in our view, that that was a finding of fact that was not amenable to appeal in a jurisdiction in which the appellate court is limited to revisiting only matters of law.[12] He found no error by the Environment Court in its application for *Hawthorn*, and determined that its findings of fact were not amenable to appeal.

The first question

[17] With that background, we now turn to the first question for which leave is sought.

[18] For convenience we set out the wording of the question again:

> Do the effects of the permitted use form part of the receiving environment against which the Escarpment Mine application is assessed under s 104(1)(a)?

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9 At [47].
10 High Court substantive judgment at [20] and [23].
11 At [61].
12 At [67].

[19] We were initially under the impression that this question was directed at the Environment Court's refusal to treat the coal mining licence as if it were a permitted activity under a District Plan. That would have been problematic because the Environment Court's refusal to do that was based on various findings of fact which were not amenable to appeal.

[20] However, during the oral argument, counsel for the applicant, Mr Salmon, said that the essential point of the question was directed at the treatment in *Hawthorn* at [84] of resource consents. In particular the its conclusion that the environment could be treated as if modified by the implementation of resource consents which were "likely" to be implemented.

[21] The difficulty with that argument is that the Environment Court also made factual findings that the coal mining licence was not analogous to a resource consent. The Environment Court applied the analysis from *Hawthorn* only as a cross-check, in case its earlier finding that the coal mining licence was not a resource consent was wrong.

[22] Mr Salmon's argument focused in particular on the use of the term "likely". He argued that this set too high a benchmark, and argued that it purported to modify the statutory definition of "effect" in s 3 of the Resource Management Act. He referred in particular to s 3(f), which says that an "effect" includes "any potential effect of low probability which has a high potential impact".

[23] We agree with Fogarty J that it is inappropriate to treat [84] of *Hawthorn* as if it were legislation, and it should be seen as a summary of the careful analysis that proceeds it. But putting that to one side, we cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed towards the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and, applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as

included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on that environment.

[24] Mr Salmon attempted to bring s 3 into play by using the word "effect" in his formulation of the first question of law put to this Court for decision. But that was an inapt expression, because where the term "effect" is used in s 104(1)(a), it is referring to the effects of allowing the activity for which resource consent is sought (in this case of allowing the development of the Escarpment Mine), not anything else. It is clear from this Court's decision in *Hawthorn* that the determination of what constitutes the environment is a prior step to the determination of the effect of the development for which resource consent is sought, because the determination required by s 104(1)(a) involves comparing the environment without the proposed activity to the environment with the proposed activity.

[25] Essentially, we consider that the argument put to us confuses concepts of "environment" and "effect".

[26] We determine, therefore, that the question as put to us does not involve any question of law requiring further appeal to this Court. The Environment Court's decision was based on its factual conclusions which are not amenable to appeal and its application of *Hawthorn* was peripheral to its finding that the existence of a coal mining licence was not analogous with a permitted activity under a District Plan or a resource consent. We do not consider that the proposed question of law is one which really engages the decision under appeal. To the extent that it calls into question the decision of this Court in *Hawthorn*, we see no reason to revisit that decision, which has recently been confirmed.[13] We do not see this case as providing an appropriate factual basis for any revisiting of that decision in any event.

[27] In these circumstances we do not believe that there is any proper basis for a further appeal on the question now put before the Court. Even if we accepted that the question raised a matter that engaged the facts of this case, we would not have given leave because we do not consider that the question itself is a matter of public

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[13] *Far North District Council v Te Runanga-a-Iwi o Ngati Kahu* [2013] NZCA 221.

importance. While we accept that the Escarpment Mine proposal itself is a matter of public importance and acknowledge the submissions by all parties to that effect, the focus of the test set out in s 144 of the Summary Proceedings Act is on the public importance of the question of law, rather than the public importance of the case itself.

[28] We decline special leave to appeal on the first question.

The second question

[29] As the second question comes into play only if leave is given in the first question, we do not need to say anything more about it.

Result

[30] We decline special leave to appeal.

Costs

[31] Costs were reserved in the High Court and we did not hear from counsel on that subject in the hearing before us. We therefore reserve costs in this Court as well. If the respondents (or either of them) wish to claim costs, they should do so by memorandum within 14 days. We will then set a timetable for further submissions.

Solicitors:
Lee Salmon Long, Auckland for Applicant
Duncan Cotterill, Christchurch for First Respondents
Chapman Tripp, Christchurch for Second Respondent