

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2012-409-000972

BETWEEN ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Appellant

AND BULLER COAL LIMITED
First Respondent

AND SOLID ENERGY NEW ZEALAND
LIMITED
Second Respondent

**CIV 2012-409-000979
[2012] NZHC 2532**

AND BETWEEN WEST COAST ENT INCORPORATED
Appellant

AND BULLER COAL LIMITED
First Respondent

AND SOLID ENERGY NEW ZEALAND
LIMITED
Second Respondent

Hearing: (On Papers)

Judgment: 1 October 2012

JUDGMENT OF WHATA J

[1] West Coast ENT Incorporated have filed a notice of application for leave to appeal to the Court of Appeal.

[2] Royal Forest and Bird Protection Society of New Zealand Incorporated and Buller Coal Limited and Solid Energy New Zealand Limited have confirmed that leave to appeal is not opposed.

Background

[3] In my judgment of 24 August 2012 I set out the background and issues as follows:¹

[1] Buller Coal Limited (“BCL”) and Solid Energy New Zealand Limited (“Solid Energy”) mine coal. The Royal Forest and Bird Protection Society² and West Coast ENT Incorporated (“West Coast ENT”) are advocates for the environment. They oppose coal mining proposals by Solid Energy and BCL because the coal produced when burnt will omit more than 20 Mt of CO₂ in total. CO₂ is a greenhouse gas. Declarations were sought in the Environment Court as to whether the effect of the combustion of this coal on climate change is a relevant consideration under s 104(1)(a) of the Resource Management Act 1991 (“RMA”). That section states:

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; ...

[2] The Environment Court said, in short, that it was not a relevant consideration, because the Resource Management (Energy and Climate Change) Amendment Act 2004 removed regulation of climate change from local authority control.³ The key issue before me is whether the Environment Court was correct.

The issues

[3] The appellants identified the following questions of law to be resolved:

Whether or not, when considering Buller Coal Limited’s applications for consents for coal mining activities at the Escarpment Mine including applications for land use, the decision maker must:

- a) under section 104(1), consider the contribution that the subsequent discharges into air from the combustion of the coal will have towards climate change; and
- b) under section 7(i) have particular regard to the effects of climate change, including the contribution that the subsequent discharges into air from the combustion of the coal will have towards the effects of climate change.

¹ *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller Coal Limited* [2012] NZHC 2156.

² Royal Forest and Bird Protection Society of New Zealand Incorporated.

³ *Re Buller Coal Ltd* [2012] NZEnvC 80 at [53].

[4] BCL and Solid Energy seek confirmation of the following declaration:⁴

In considering BCL's applications for consents for coal mining activities at the Escarpment Mine including applications for land use and Solid Energy's applications for consents for coal mining activities at the Mt William North mining area including applications for land use, but neither including any applications to discharge contaminants to air from the combustion of coal to be mined, the decision maker cannot have regard to the effects on climate change of discharges into the air of greenhouse gases arising from the subsequent combustion of the coal extracted in reliance on those consents, either where:

- (a) any discharge of greenhouse gases associated with the end use of the coal occurs outside New Zealand territorial boundaries; or
- (b) any discharge of greenhouse gases associated with the end use of coal occurs in New Zealand.

[5] Taken together, the ultimate issue in the case is whether the Resource Management (Energy and Climate Change) Amendment Act 2004 ("the Amendment Act 2004") removed the jurisdiction of consent authorities to consider the effects on climate change of the discharge of greenhouse gas emissions from the end use of coal.

Resolution

[4] In my judgment I resolved as follows:

[56] The Resource Management (Energy and Climate Change) Amendment Act 2004 removed the jurisdiction of local authorities to consider the effects on climate change of the discharge of greenhouse gas emissions from the end use of coal until a national environmental standard addressing those emissions has been produced. Once that standard has been produced it will be for the local authorities to determine whether and in what way policies and rules will be employed to control greenhouse gas emissions in a manner consistent with that standard.

[57] The declarations sought by BCL and Solid Energy are confirmed subject to the factual assumptions recorded at [6].

[58] I leave open the question as to whether diffuse, non point emissions of greenhouse gases are amenable to district level control. Given that such emissions are not normally subject to rules requiring consent, it may be available to contend that the policy of the Amendment Act 2004 is not infringed. But that will depend on the facts of the particular case and the policy framework under consideration. Similarly, whether the beneficial

⁴ Application for declaration, at [1].

effect of land use management might be relevant is something that will need to be determined in light of the facts and policy frame under specific consideration.

[59] Accordingly, the Environment Court was correct and the appeals are dismissed.

Application for leave to appeal

[5] Given that there is no opposition, and that the questions of the declarations are matters of general public interest, I grant leave as sought by the appellants.

A handwritten signature in black ink, appearing to be 'S. J.', written in a cursive style.

Solicitors:

P D Anderson, Christchurch, for Royal Forest & Bird Protection Society of New Zealand Inc
Duncan Cotterill, Christchurch, for West Coast Regional Council & Buller District Council
Chapman Tripp, Christchurch, for First Respondent
Anderson Lloyd, Christchurch, for Second Respondent
Lee Salmon Long, Auckland, for West Coast ENT Incorporated