IN THE COURT OF APPEAL OF NEW ZEALAND

CA

BETWEEN	**CANTERBURY TRUSTEES LIMITED AND H L J GOVAN AS TRUSTEES OF THE G N MCVICAR NO 1 TRUST**
	Applicant/Appellant
AND	**CHRISTCHURCH CITY COUNCIL**
	Respondent
AND	**CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED**
	Associated Respondent

APPLICATION FOR LEAVE TO BRING APPEAL
Dated 21 March 2017

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CANTERBURY TRUSTEES LIMITED and **H L J GOVAN** as trustees of the **G N MCVICAR NO 1 TRUST**, the Applicant, gives notice that they are applying for leave to appeal to the Court against the judgment of the High Court dated 22 February 2017 in CIV-2016-409-602 (Christchurch Registry), which was an appeal on points of law from Decision 24 of the Independent Hearings Panel (**the Panel**) on the Proposed Replacement District Plan.

The Applicant is seeking to appeal against the whole decision.

The Applicant is making this application for leave under s308(1) of the Resource Management Act 1991 (**RMA**), being an application for leave to appeal a decision of the High Court under s299 of the RMA.

The specific grounds of their appeal are:

Questions of Law

1 The questions of law that the Applicant seeks to have determined on appeal to the Court of Appeal are:

Q1 Did the Panel err in failing to take into account (as a statutory requirement pursuant to s32AA RMA), the implications of s85 RMA in terms of the availability of the s185 RMA/Public Works Act 1981 (**PWA**) route to compensation otherwise able to be pursued by the Applicant due to the restrictive effect of the s168(2)(b) RMA designation?

Q2 Does a territorial authority's ability to have regard to Part 2 RMA in considering a resource consent application justify the imposition of restrictions that marry s168(2)(b) restrictions so as to enable a territorial authority veto of the requiring authority's decision under s176(1)(b) RMA?

Q3 Did the Panel err in failing to also consider whether the underlying zone rules would be justified given that a requiring authority can require removal of a designation without formality pursuant to s182 RMA?

Grounds

<u>Proposed Question 1</u>

2 The Panel has not given proper consideration to the legal effect of s85 RMA and its impact on the availability of the Applicant's s185 RMA/PWA remedies as required to be considered:

2.1 By s32AA RMA, before making changes to the notified proposal; and

2.2 In any event, given that this was a factor put before the Panel in the Applicant's submissions.

3 The Panel did not consider s85 RMA beyond observing that the underlying zone provisions would be 'neutral' in terms of the availability of the s185 RMA/PWA route of compensation and acquisition.

4 In particular, the Panel did not turn its mind to the question of whether a cost is imposed on the Applicant in terms of its loss of a potential s185 RMA/PWA remedy due to the operation of s85 RMA in circumstances where:

4.1 Rules proposed to be introduced to the underlying zone that have more or less the same restrictive effect as those imposed through the s168(2)(b) designation; and

4.2 Such rules are significantly more restrictive than would otherwise apply to the land through the underlying Industrial Zone provisions.

5 This had been a factor that the Panel expressly considered in an earlier decision following an earlier separate hearing, at which the Airport had sought to impose the s168(2)(b) designation over the Applicant's land, as identified in [60] of the High Court judgment.

6 In that decision, the Panel expressly recognised (as a valid consideration) that the designation preserved statutory remedies of acquisition and compensation in contrast to the situation where restrictions were imposed via plan rules.

7 Key findings in relation to the first error of law is found in [66], [70], [73] and [76] of the High Court judgment.

<u>Proposed Question 2</u>

8 The Panel has also failed to consider the justification for the underlying zone restrictions in the event that the Airport no longer requires s168(2)(b) designation, given that:

8.1 Pursuant to s182 RMA, a requiring authority is able to give notice to the relevant territorial authority that it no longer wants a designation;

8.2 Upon receipt of notice under s182(1) RMA, the territorial authority is required to remove the designation from its plan without formality; and

8.3 Once the designation is removed, the underlying zone rules would continue to apply despite no longer being justified.

9 The High Court did not address this aspect of the Applicant's submissions.

Proposed Question 3

10 The s176(1)(b) designation imposed on the Applicant's land was considered by a separate decision of the Panel. In deciding whether to approve the designation, the Panel had regard to Part 2 matters as it was required to by virtue of s171(1) RMA.

11 Insofar as the Panel had been concerned to ensure that matters of safety mustered under "the broad discretionary judgement called for by Part 2 of the RMA" would be addressed in any s176(1)(b) decision, such considerations were already subsumed in the designation.

12 It is also notable that the designation was to attain the objective of aviation safety.

13 These factors were not taken properly into account by the Panel or the High Court in its judgment.

14 Insofar as they were considered, the Panel (and the High Court) misconstrued the nature and extent of the s176(1)(b) power vested in a requiring authority.

15 Key findings of the High Court are contained in [86]-[89] of its judgment.

The Court of Appeal should grant the Applicant leave to appeal because:

1 The proposed questions raise matters of significant public interest, transcending the Applicant's own property interests.

2 There is no authority of the Senior Courts concerning:

2.1 The need for restrictions imposed through s168(2)(b) to marry with underlying zone rules; and/or

2.2 The implications of s85 RMA where underlying zone rules (in effect) marry s176(1)(b) restrictions in terms of the availability of the s185 PWA remedy; and/or

2.3 The question of whether the requiring authority's s176(1)(b) control over what occurs on designated land is limited (by not enabling consideration of Part 2 of the RMA) so as to justify a territorial veto of a requiring authority's designation through the administration of underlying zone rules.

3 The type of designation restriction arising in this case (being a Runway End Protection Area adopting aviation safety standards recommended by International Civil Aviation Organisation (**ICAO**)) are widely used at airports throughout New Zealand. The Panel's decision to duplicate any ICAO based designation restrictions as underlying plan rules has New Zealand wide implications, transcending the Applicant's own interest in relation to this matter.

4 Questions relating to the extent of control able to be exerted by a requiring authority over a landowner's ability to use and subdivide land by s176(1)(b), is a matter of public interest that justifies the Court of Appeal's intervention.

The judgment the Applicant seeks from the Court of Appeal, if leave is granted, is:

A. Allow the appeal;

B. Refer the matter back to the Panel, directing it to reconsider rezoning the land without the REPA related restrictions.

The Applicant is not legally aided.

Dated this 21st day of March 2017.

G K Riach
Solicitor for the Applicant/Appellant

This document is filed by **GRAEME KENNETH RIACH**, Solicitor for the abovenamed Applicant/Appellant of the firm of Harmans. The address for service of the Applicant/Appellant is at the offices of Harmans Lawyers, 485 Papanui Road, Papanui, Christchurch.

Documents for service on the Applicant/Appellant may be left at that address for service, or may be:

1. Posted to the solicitor at PO Box 5496, Christchurch 8053; or

2. Transmitted to the solicitor by facsimile to +64 3 352 2274; or

3. Transmitted to the solicitor by electronic mail addressed to graeme.riach@harmans.co.nz

And in all instances, also copied to Counsel Prudence Steven QC by email: pru@prusteven.co.nz.