

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**BETWEEN**

**K I COMMERCIAL LIMITED a  
company duly incorporated  
under the Companies Act 1993**

**Appellant**

**A N D**

**THE CHRISTCHURCH CITY  
COUNCIL a local authority  
constituted under the Local  
Government Act 2002**

**Respondent**

**APPLICATION FOR LEAVE TO BRING CIVIL APPEAL**

**DATED 21 JUNE 2017**

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**K I COMMERCIAL LIMITED** ("KIC"), the applicant, gives notice that it is applying for leave to appeal to the Court against the judgment of the High Court at Christchurch dated 23 May 2017 in the proceeding CIV-2016-409-1004 in which KIC was the appellant and Christchurch City Council the respondent and in which the High Court dismissed an appeal against Decision 42 of The Independent Hearings Panel being the body charged with preparing a replacement district plan for Christchurch.

KIC is seeking to appeal against all of the judgment.

KIC is making its application for leave under clause 19(7) of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, s299, 300 and 308 of the Resource Management Act 1991 and Subpart 8 of Part 6 of the Criminal Procedure Act 2011.

The specific grounds of the appeal by KIC are (recording the grounds of appeal set out in paragraph [20] of the judgment under appeal and then the alleged error(s) of law):-

***Question 1 - alleged failure to address the limited question for Decision 42***

- (i) *Failing to identify and address the limited question before it, following the High Court judgment of 8 June 2016 [2016] NZHC 1218, namely whether the "KI Revised Rule" would reflect better than the "Appealed Rule" both the general benefits and costs previously assessed in Decision 11 and the impact on KIC not previously assessed in Decision 11, in the context of the objectives of the Resource Management Act 1991, the Canterbury Earthquake Recovery Act 2011 (including the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014) and Chapter 15 of the Plan.*

The court erred:-

- (a) in its finding that it did not accept that the effect of the High Court's judgment of 8 June 2016 was to confine the issues the Panel could consider in the way contended for by KIC (para [34] of the judgment), being that the Panel's consideration was limited to addressing KIC's interests in relation to its properties and the necessity of

subjecting those to the existing activity condition of the Appealed Rule and did not involve a consideration of "precedent risk";

- (b) in finding that the question for the Panel was not whether the exception sought by KIC would undermine the broad centres-based approach or framework of the CRDP (para [35] of the judgment);
- (c) in finding that the Panel did not err by addressing the wrong question in Decision 42 (para [37] of the judgment).

**Question 2 - flexibility of Centres-based approach**

- (ii) *Misinterpreting the scope for flexibility within the RMA, the Order's statement of expectations and the Plan's Chapter 15 objectives for the recognition of investment in recovery from earthquake damage which readily allowed for the adoption of the KI Revised Rule given the evidence of material prejudice to KIC, and consequently adopting an erroneously strict interpretation of the principle of supporting the "centres network" contemplated in and/or required by Chapter 15.*

The court erred:-

- (a) in its finding that the Panel did not erroneously misconstrue the relevant objectives of Chapter 15 of the CRDP and constrain the discretion and degree of flexibility lawfully available to it to accommodate the KIC proposal in the CRDP ([para 50] of the judgment);
- (b) in its finding that the decision of the Panel to retain the Appealed Rule and to defer any departure from that to consideration in the resource consent process was not reached because of a misunderstanding as to the degree of flexibility available to it (para [50] of the judgment).

### **Question 3 - site specific KIC proposal**

- (iii) *misinterpreting the nature of the proposed KI Revised Rule, in particular that it was both site specific (including by reference to neighbouring sites' activities) and specific to KIC's circumstances of having invested substantially in rebuilding on its sites to recover from earthquake damage and being in transition to commercial development of the site when Decision 11 was made, and thus involved minimal risk of precedent effect;*

The court erred:-

- (a) in its finding that the Panel's conclusions on the risks of allowing a site specific exception could not be said to be without evidential support or unreasonable (para [59] of the judgment) in circumstances where there was no or inadequate evidential support and/or the conclusions were unreasonable.
- (b) in rejecting KIC's assertion that the Panel erred by misinterpreting the nature of the proposed KI Revised Rule and the fact that it was site specific and therefore involved no real risk of precedent effect (para [60] of the judgment);

### **Questions 4 and 5 - breaches of natural justice**

- (iv) *permitting or requiring Council witnesses to give evidence which was:*
  - (a) *contrary to the agreement reached between KIC and the Council and which was in part reflected in the determination of the earlier appeal; and*
  - (b) *in material part, contrary to the evidence previously before the Panel;*
- (v) *declining to grant the adjournment requested by KIC to address the unanticipated further evidence from Council witnesses, and providing a constrained period for rebuttal evidence;*

In relation to (iv) and (v) above, the court erred:-

- (a) in finding in the light of the agreement that there could be no legitimate expectation by KIC that the Council could refuse to certify that the relief

sought by KIC accorded with the Resource Management Act 1991 (paras [81] and [82] of the judgment), given the evidence on behalf of the Council already before the Panel;

- (b) in finding that there was no legitimate expectation that the Council could refuse to make its expert witnesses available, given the position of neutrality previously initiated by the Council (para [82] of the judgment);
- (c) in finding that the Panel did not err in law when it refused a further adjournment for KIC to enable the production of more detailed evidence in support of its proposal (para [87] of the judgment) which resulted in KIC having an unreasonably short period of time to prepare rebuttal evidence, which in turn severely constrained the ability of the witnesses on behalf of KIC to adequately respond to the evidence of the Christchurch City Council;

**Question 6 - centre city risk conclusion**

- (vi) *reaching the untenable conclusion that the proposed KI Revised Rule would of itself create a material risk to the Chapter 15 objective redevelopment of the City Centre, in the absence of any credible evidence that the incremental impact of the proposed permitted activities for the Appellant's created any such risk;*

The court erred in finding that this was not a case where the conclusion reached by the Panel was made in the absence of probative evidence or was simply irrational, given the lack of evidence suggestive that there would be any direct impact if the KI Revised Rule were to come into effect;

**Question 7 - irrelevance of any subsequent resource consent application**

- (vii) *concluding that, under the Appealed Rule, KIC would have a meaningful opportunity to obtain a resource consent with similar scope as would be provided for under the KI Revised Rule when the Panel's strict approach to protection of the*

*"centres network" would undermine any such consent application;*

The court erred in finding that a specific proposal could still be advanced through the resource consent regime, ameliorating the rigour of the Appealed Rule (para [101] of the judgment) when the approach of the Panel to protection of "centres network" would undermine any such application.

**Question 8 - Panel's approach to existing activities**

- (viii) *misinterpreting the point of reference in the Plan's Objective 15.1 for "existing" activities as being the date of Decision 11 rather than the dates preceding the occurrence of the earthquake damage;*

The court erred in finding that the Panel's interpretation of the term "existing", in objective 15.1.3, which was that the term related to those commercial activities that were occurring on the ground at the time the zones came into effect rather than at an earlier date at or before the Canterbury earthquakes, (para [112] of the judgment) was correct in that the approach of the Court:-

(a) was overly literal;

(b) did not reflect a purposive approach.

**Question 9 - adversely assessing KIC's additional evidence by reason of the above errors**

- (ix) *assessing adversely the additional evidence relied on by KIC, by reason of the errors set out above.*

The failure to deal with this ground of appeal (which is dependent and consequential upon the findings referred to above.)

- (x) Appearing in and by the affidavit of Paul Keung to be filed in support.

The Court of Appeal should grant KIC leave to appeal because:-

- (i) the judgment contains demonstrable errors of law;
- (ii) the appeal involves a matter of general or public importance, namely the legitimate interest of the public in the proper consideration and formulation of district plans where changes in such plans give rise to the loss of land use rights or opportunities previously enjoyed;
- (iii) a miscarriage of justice may have occurred, or may occur unless the appeal is heard, by reason of the following:-
  - (a) the judgment contains demonstrable errors of law;
  - (b) the application of the decision of the Panel, upheld by the High Court, and reflected in the Appealed Rule, is likely to result in significant economic disadvantage to KIC by reason of the following:-
    - (aa) the likely inability to use the subject properties for uses which were conducted on the properties in question prior to the zone coming into effect;
    - (bb) the present lack of any viable alternative uses to which the buildings will be able to be put;
    - (cc) the lack of any statutory or other vehicle to provide compensation for the losses

which may flow from the restriction in uses referred to above.

- (c) the Panel did not accord KIC a proper opportunity to respond to the unanticipated further evidence filed by the Council and which conveyed a position which was contrary to the agreement reached between KIC and the Council and was accordingly prejudiced in its ability to properly consider and fully respond to the evidence filed on behalf of the Council.

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

- (i) that the appeal be allowed and the questions of law answered in favour of KIC;
- (ii) that the Panel be directed to reconsider its decision in relation to the appropriateness of adding the KI Revised Rule and associated matters in the light of the findings made by this court;
- (iii) alternatively, that this court, in light of its decision on the questions of law, correct the decision of the Panel by adding the KI Revised Rule;
- (iv) in addition that this court require that any consequential or related changes that are required to the objectives and policies of the Plan be made;
- (v) such further and/or other relief as may be appropriate;



- (vi) that KIC be awarded the costs of and incidental to these proceedings.

**DATED** this 21st day of June 2017.



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**A C HUGHES-JOHNSON QC  
COUNSEL FOR APPELLANT**

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