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

**CA140/2017**
**[2017] NZCA 262**

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| BETWEEN | CANTERBURY TRUSTEES LIMITED AND H L J GOVAN AS TRUSTEES OF THE G N MCVICAR NO 1 TRUST<br>Applicants |
| AND | CHRISTCHURCH CITY COUNCIL<br>First Respondent |
| | CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED<br>Second Respondent |

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| Hearing: | 12 June 2017 |
| Court: | Harrison, French and Winkelmann JJ |
| Counsel: | P A Steven QC for Applicants<br>J G A Winchester for First Respondent<br>J M Appleyard for Second Respondent |
| Judgment: | 26 June 2017 at 11.30 am |

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**JUDGMENT OF THE COURT**

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**A** **The application for leave to appeal under s 308(1) of the Resource Management Act 1991 is declined.**

**B** **The applicants must pay the first and second respondents costs as for a standard application on a band A basis together with usual disbursements.**

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## REASONS OF THE COURT

(Given by French J)

### Introduction

[1] The applicant trustees seek leave to bring an appeal under s 308(1) of the Resource Management Act 1991 (the Act) against a decision of Cull J in the High Court.[1]

### Background

[2] Under an Order in Council, the Christchurch City Council has been required to develop a replacement district plan.[2] The process involves a review of the operative provisions of the existing District Plan and the notification of proposals for the replacement plan which are then determined by the Independent Hearings Panel (the Panel).

[3] As part of that process, the Panel issued a decision in August 2015 confirming an existing "airport purposes" designation over land in the vicinity of Christchurch airport, but extending it to include land owned by the trustees. The change had been sought by the second respondent, Christchurch International Airport Ltd (the airport company).

[4] By virtue of s 185 of the Act, the owner of land subject to a designation may apply to the Environment Court for an order obliging the requiring authority (in this case the airport company) to acquire the land under the Public Works Act 1981. Section 185(7) states that the amount of compensation payable is to be assessed as if the designation had not been created.

[5] In a later decision at the centre of this appeal (Decision 24), the Panel was asked to consider whether the restrictions on land use imposed by the designation were sufficient for resource management purposes including public safety, or whether further restrictions should be imposed under s 76 of the Act as part of the

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1 *Canterbury Trustees Ltd v Christchurch City Council* [2017] NZHC 237.

2 Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

plan rules attaching to the underlying zone which was now industrial.[3] The Panel concluded the designation was not sufficient and that any buildings or activities in the relevant area should be classified as discretionary activity with the exception of car park walkways. For convenience, we refer to the additional land controls imposed by Decision 24 as the s 76 rules.

[6] The trustees appealed Decision 24 to the High Court. Justice Cull found the Panel had not made any material error of law and dismissed the appeal.

[7] Dissatisfied with that outcome, the trustees wish to bring what would be a second appeal in this Court.

**Grounds of the proposed appeal**

[8] It would be fair to say that we had some difficulty in grasping exactly what were the proposed grounds of appeal.

[9] However as we understand it, the trustees' chief complaint relates to the effect of Decision 24 on the compensation that it is said would otherwise be available to the trust under s 185. The Panel and Cull J held that the effect of Decision 24 on the trustees' ability to apply for compensation under s 185 was "neutral".[4] The trustees say that was wrong.

[10] As mentioned, s 185 confers a right on the owner of land affected by a designation to apply to the Environment Court for compensation, the amount of which is to be assessed as if the designation had not been created. However, when it comes to the injurious effect of the additional land controls imposed by Decision 24 on the land, s 85 of the Act states that this is not compensable.

[11] The trustees contend the s 76 rules replicate the designation restrictions. Accordingly, what s 185 gave with one hand, Decision 24 is said to have taken away with the other. The effect of Decision 24 was therefore not neutral.

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3 The land had previously been zoned rural in the existing plan. The trustees did not oppose the change from rural to industrial.

4 *Canterbury Trustees Ltd v Christchurch City Council*, above n 1, at [76(a)] and [90].

[12] The trustees further argue that the effect of Decision 24 on its compensation rights was a factor the Panel was required to take into account and give some weight to when making its decision, but which it did not. The reason the Panel is said to have been required to take these compensation issues into account is because in promulgating plan rules, the Panel was required by s 32(2) of the Act to engage in a cost/benefit analysis. The financial impact of the new plan rules on the trust was relevant to a cost/benefit analysis.

[13] Another argument advanced by the trustees was that there was no justification for imposing additional land controls on the basis of public safety when the airport company as the requiring authority under the designation was already required to take public safety into account.

[14] When asked to identify the questions of law arising out of these various arguments, counsel for the trustees Ms Steven QC suggested the questions were:[5]

(a) Whether the High Court erred in finding that plan rules promulgated under s 76 of the Act that mirror restrictions imposed on land under s 186(2)(b) do not preclude an affected landowner from being able to obtain compensation under s 185?

(b) If the s 76 rules do preclude an affected landowner from being able to obtain compensation under s 185, whether that was a factor the Panel was required to take into account when deciding whether to impose additional land controls?

(c) Whether a local authority carries a wider obligation as to public safety pursuant to s 5 of the Act than a requiring authority for a s 168(2)(b) designation for runway end protection areas purposes so as to justify s 76 rules attaching to an underlying zone?

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[5] The respondents argued that the trustees' complaints are really complaints against the Panel decision and not the High Court decision. However, the High Court endorsed all of the Panel's reasoning, so if the Panel did make an error of law, so too did the High Court.

**Analysis**

[15] In order to obtain leave, the trustees must satisfy us that the appeal involves a seriously arguable error of law that is a matter of general or public importance, or that has led or may lead to a serious miscarriage of justice if left uncorrected.[6]

[16] It is debatable whether the questions identified are truly questions of law or whether what is being argued is essentially a merits based challenge. But even if they are questions of law, we are satisfied they are not seriously arguable and therefore do not satisfy the test. Our reasons for reaching that conclusion are:

(a) Contrary to the premise underlying all the arguments, the s 76 rules do not in fact mirror the designation restrictions.

(b) It is beyond argument that the Panel had jurisdiction to promulgate rule plans attaching to the underlying zone. The happenstance that the designation ruling was made earlier in time cannot deprive it of that jurisdiction.

(c) Ms Steven argued that when considering the zoning rules to be applied to the land, the Panel had to take into account the impact of those rules on the economic interests of the landowners and that included the impact on rights to compensation under s 185. But the trustees chose not to adduce any evidence about the possible impact of the proposed s 76 rules on the value of its land. There was thus no evidence before the Panel that the rules would adversely impact on the trustees' statutory right to apply for compensation. In those circumstances a complaint that the Panel did not consider the issue or did not consider it sufficiently is untenable. Ms Steven herself accepted the trustees retained the right to apply under s 185 for compensation. It follows the argument was essentially a quantum argument necessitating evidence.

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[6] This is the effect of s 308 of the Resource Management Act 1991 and relevant case law: *Palmerston North City Council v New Zealand Windfarms Ltd* [2013] NZHC 2654 at [4]; and *Genesis Power Ltd v Manawatu-Wanganui Regional Council* HC Wellington CIV-2004-485-1139, 22 May 2007 at [6].

(d) The rules put in place in the interests of public safety were based on evidence the Panel heard about the need for such restrictions.

[17] The application for leave to appeal is accordingly declined.

[18] As regards costs on the application, there is no reason why costs should not follow the event. We therefore order the unsuccessful applicants to pay the costs of the first and second respondents as for a standard application on a band A basis together with usual disbursements.

Solicitors:
Harmans, Christchurch for Applicants
Chapman Tripp, Christchurch for Respondents