

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

CIV:

IN THE MATTER OF

Canterbury Earthquake Recovery Act 2011, the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, and the Resource Management Act 1991

AND

IN THE MATTER OF

an appeal under clause 19 of the Order in relation to Decision 42 of the Independent Hearings Panel on the Commercial (Part) and Industrial (Part) Chapters of the Proposed Christchurch Replacement District Plan concerning the KI Commercial sites at Addington

BETWEEN

KI COMMERCIAL LIMITED a company duly incorporated under the Companies Act 1993

Appellant

AND

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

Respondent

**NOTICE OF APPEAL
14 OCTOBER 2016**

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To: The Registrar of the High Court at Christchurch

And to: Christchurch City Council

**And to: the Independent Hearings Panel for the Christchurch
Replacement District Plan**

TAKE NOTICE that KI Commercial Limited (**the Appellant**) hereby appeals against Decision 42 of the Independent Hearings Panel (**the Panel**), dated 9 September 2016, on the Commercial (Part) and Industrial (Part) Chapters of the Proposed Christchurch Replacement District Plan (**Plan**) notified by the Council on 9 September 2016, in relation to the Appellant's sites at Addington, together with the Panel's decision on procedural matters, as recorded in the Minute of the Deputy Chair of the Panel dated 16 August 2016 (together, **Decision**).

QUESTIONS OF LAW

1. The Appellant appeals on the following questions of law, namely whether the Panel in the Decision erred in law by:
 - 1.1. 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 KI 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;
 - 1.2. 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 KI, and consequently adopting an erroneously strict interpretation of the principle of supporting the “centres network” contemplated in and/or required by Chapter 15.

- 1.3. 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 KI’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 sites when Decision 11 was made, and thus involved minimal risk of precedent effect.
- 1.4. permitting or requiring Council witnesses to give evidence which was:
 - a. contrary to the agreement reached between KI 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.
- 1.5. declining to grant the adjournment requested by KI to address the unanticipated further evidence from Council witnesses, and providing a constrained period for rebuttal evidence.
- 1.6. reaching the untenable conclusion that the proposed KI Revised Rule would of itself create a material risk to the Chapter 15 objective of 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.
- 1.7. concluding that, under the Appealed Rule, KI 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.

- 1.8. 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 earthquake damage.
- 1.9. assessing adversely the additional evidence relied on by KI, by reason of the errors set out in 1-8, above.

PROCEDURAL CONTEXT

2. The Appellant lodged submissions in opposition to the Notified Version of the proposed Plan. The Panel issued a decision, entitled Decision 11 (dated 18 December 2015), as to Chapter 15 (Commercial) of the proposed Plan. Decision 11 pertained to the permitted activity rule (Rule 15.7.2.1 P2, P9 and P10) of the Plan, among other matters.
2. Following the Panel's issuing of Decision 11, the Appellant appealed to the High Court in respect of that decision. The appeal was allowed by consent (**Appeal**). The High Court:
 - a. determined that the Panel had made errors of law by failing to carry out the further evaluation that was required under s 32AA and failing to take relevant matters into account; and
 - b. made specific orders at [21] that the Panel provide the Appellant with an opportunity to make further submissions and provide further evidence on its interests in relation to its properties.
3. The Appeal orders were by consent between the Appellant and the Council. This consent was the outcome of a settlement agreement between the parties, which formed the basis for an agreement as to the error of law, and confined the issues for the subsequent Panel hearing, following the High Court's direction to rehear the matter.
4. The Council agreed that it would not oppose the specific relief proposed by Appellant, would not call any further evidence, and would abide by the decision of the Panel. The specific relief that was the subject of the settlement agreement is the same as the relief that was subsequently promoted by the Appellant to the Panel.

5. In pre-hearing directions culminating in its Minute dated 16 August 2016 the Panel made a number of determinations which adversely affected the Appellant and affected the Decision.
6. In the substantive Decision the Panel confirmed its previous Decision 11, upholding the version of the Rule 15.7.2.1 it had adopted.

GROUND OF APPEAL

7. Question 1.1: The Panel erred in law in failing to identify and address the limited question before it, as directed by the High Court. Rather, the Panel addressed the question of the most appropriate permitted activity regime for the relevant Rule, and did not focus on the assessment of the incremental impacts of the KI Revised Rule. The Panel was required to, and did not consider the confined question of the costs and benefits of KI's proposed alternative, in comparison to the costs and benefits of the Appealed Rule resulting from Decision 11. Refer Decision [22], [24]-[29].
8. Question 1.2: The Panel adopted a strict approach to the centres-based principle of Chapter 15 of the CRDP. This caused the Panel to reject KI's Revised Rule following the High Court's decision on appeal, despite the fact this proposal accorded with the flexibility within the recovery regime contemplated in the RMA and Plan framework. Refer Decision [67]-[71], [91]-[94].
9. Question 1.3: The Panel misinterpreted the nature of the proposed KI Revised Rule. It failed to appreciate and address the site-specific, and transitional nature of the Appellant's proposal, and thus erroneously identified and magnified an unsubstantiated "precedent risk". Refer Decision [78]-[89], [123]-[128], [154]-[157].
10. Question 1.4: The Panel erred in permitting or requiring the Council to adduce further expert evidence in circumstances where that evidence was a breach of the parties' settlement agreement and the Appellant's expectations as to a fair process. Refer August 16th Minute [4]-[9].
11. Question 1.5: The Panel further erred in failing to adjourn the hearing date to permit timetabling orders for filing evidence which would have enabled the Appellant to file evidence to respond to the unanticipated

new evidence from Council witnesses. Refer August 16th Minute [10]-[11].

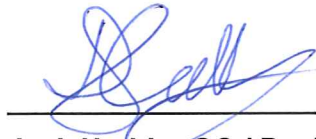
12. Question 1.6: The Panel concluded that the Appellant's Revised Rule would of itself constitute a risk to the Chapter 15 objective of redevelopment of the City Centre, despite no credible evidence supporting such an untenable conclusion. Refer Decision [85]-[92].
13. Question 1.7: The Panel wrongly determined that the likely costs to the Appellant, were its proposal to be denied, could be significantly discounted due to the prospect that it could obtain a resource consent for the activities it sought to conduct on the property when the Panel's own (erroneous) strict approach to protection of the central network effectively negates that prospect. Refer Decision [57]-[64].
14. Question 1.8: The Panel determined that reference to "existing activities" in the CRDP's Objective 15.1 meant as at the date of the Panel's decision when, properly and constructively construed, this refers to the pre-earthquake damage period. Refer Decision [109]-[111].
15. Question 1.9: The errors identified in Questions 1-8 caused the Panel to assess adversely and wrongly repeal the evidence adduced by the Appellant in support of the KI Revised Rule. Refer Decision [53]-[59], [65]-[72], [85]-[91], and [97]-[109].

RELIEF SOUGHT

16. The Appellant seeks the following relief:
 - a. that the appeal is allowed and the questions of law answered in favour of the Appellant;
 - b. that the High Court, in light of its decision on the questions of law, correct the Decision by adding the KI Revised Rule;
 - c. that the High Court require any consequential or related changes that are required to the objectives and policies of the Plan be made;
 - d. such further and/or other relief as may be appropriate to address the Appellant's concerns;

17. the costs of and incidental to these proceedings.

Dated this 14th day of October 2016



Jack Hodder QC / David Pedley
Counsel for the K I Commercial Limited

This document is filed by **David Owen Pedley**, solicitor for the Appellant of the firm Adderley Head. The address for service of the Appellant is the offices of Adderley Head at 15 Worcester Boulevard, Christchurch.

Documents for service may be left at that address for service or may be:

- posted to the solicitor at PO Box 16, Christchurch 8140; or
- emailed to the solicitor at david.pedley@adderleyhead.co.nz