

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA330/2017
[2017] NZCA 480**

BETWEEN K I COMMERCIAL LIMITED
Appellant

AND CHRISTCHURCH CITY COUNCIL
Respondent

Hearing: 16 October 2017

Court: Kós P, Harrison and Gilbert JJ

Counsel: A C Hughes-Johnson QC for Applicant
J G A Winchester for Respondent

Judgment: 20 October 2017 at 2 pm

JUDGMENT OF THE COURT

- A The application for leave to adduce further evidence is declined.**
- B The application for leave to appeal is declined.**
- C The applicant is ordered to pay the respondent costs for a standard application for leave to appeal on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] KI Commercial Ltd (KIC) owns two commercial properties in Addington, a suburb of Christchurch. Buildings on the properties were damaged in the February 2011 earthquake and are still being repaired. In the wake of the earthquake an Independent Hearings Panel (the Panel) was established by Order in Council to hear submissions and make decisions on a proposed Christchurch Replacement District Plan (the CRDP) for the greater Christchurch area including Addington.¹

[2] The Panel delivered two relevant decisions. The first was on zoning rules under the CRDP which would have the effect of constraining the uses permitted for KIC's buildings compared to the uses permitted before the rule change.² The second, following a rehearing directed by the High Court,³ was a rejection of KIC's request for a site-specific exception to one of the original zoning rules (the Appealed Rule).⁴

[3] KIC appealed to the High Court against the Panel's second decision. The company alleged that the Panel made nine material errors of law. In a comprehensive judgment Dunningham J dismissed KIC's appeal.⁵ The company originally sought leave to appeal against the High Court decision on the same nine questions but later amended and reduced its application by consent to two questions.⁶ It also seeks leave to adduce a range of fresh evidence.

Question 1

[4] The first question arises from what KIC alleged was an agreement with the Council to the effect that the Council would both consent to its application to modify the Appealed Rule and acquiesce in the relief sought at the rehearing. However, irrespective of whether there was any such agreement, by 3 August 2016 — some

¹ Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, made pursuant to s 71 of the Canterbury Earthquake Recovery Act 2011.

² Decision 11 issued on 18 December 2015.

³ *KI Commercial Ltd v Christchurch City Council* [2016] NZHC 1218.

⁴ Decision 42 issued on 9 September 2016.

⁵ *KI Commercial Ltd v Christchurch City Council* [2017] NZHC 1076 [Judgment under appeal].

⁶ The application for leave to bring a second appeal is governed by Canterbury Earthquake (Christchurch Replacement District Plan) Order, cl 19(7); Resource Management Act 1991, s 308; and Criminal Procedure Act 2011, s 303.

three weeks before the rehearing on 24 August 2016 — KIC was on notice of the Council’s advice to the Panel that its expert witnesses did not consider the relief sought by the company was appropriate. As a result the Panel issued a minute on 4 August 2016, setting a timetable for an exchange of evidence and affirming that the principal purpose of the rehearing was to determine relief. About a week before the rehearing the Panel declined KIC’s request for an adjournment but granted the company a short extension of time to file rebuttal expert evidence.

[5] KIC’s complaint before the High Court and repeated in this Court was that the expert evidence led by the Council at the rehearing went further than the company had anticipated and the Panel allowed it an insufficient period of time within which to respond. KIC says that Dunningham J erroneously found that the Panel’s refusal of an adjournment to address the further evidence from the Council witnesses and provide rebuttal evidence was not a breach of the rules of natural justice.⁷ Its counsel, Mr Hughes-Johnson QC, submits that justice miscarried as a result.

[6] Dunningham J considered this issue carefully. She was satisfied that there was no breach of natural justice. The fact that the case against KIC’s application was stronger than anticipated was not a valid ground for complaint. The company must always have known of its positive obligation to present sufficient evidence to satisfy the Panel independently to make a site-specific exemption to the Appealed Rule.⁸ Mr Hughes-Johnson was unable to identify any arguable error of law in the Judge’s fact-specific finding that the Panel’s extension of time to KIC to file additional rebuttal evidence was sufficient to satisfy the requirements of natural justice.

Question 2

[7] The second question of law raised by KIC is based upon Dunningham J’s rejection of its argument that the Panel erred in interpreting a provision of the CRDP.⁹ The relevant Objective 15.1.3 required the Panel to recognise “the existing nature, scale and extent of commercial activities” within the relevant zone. KIC

⁷ Judgment under appeal, above n 5, at [87].

⁸ At [84]–[86].

⁹ At [115].

argued unsuccessfully before the Panel and the High Court that the word “existing” refers to activities existing at the time of the Christchurch earthquake. Both the Panel and Dunningham J agreed with the Council that the word related to circumstances prevailing at the time the Panel made its decision.¹⁰ Mr Hughes-Johnson has not persuaded us that the High Court arguably erred in law, or that if that threshold was breached the question is of sufficient general or public importance to warrant further consideration by this Court.

Result

[8] In these circumstances, the further evidence which KIC applies to adduce, which is principally of an expert nature, is irrelevant to the result. The company’s application for leave to adduce further evidence is declined.

[9] The application for leave to appeal is declined.

[10] KIC is ordered to pay the Council costs for a standard application for leave to appeal on a band A basis together with usual disbursements.

Solicitors:
Adderley Head, Christchurch for Applicant
Simpson Grierson, Wellington for Respondent

¹⁰ At [112].