IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-00602
[2017] NZHC 237

UNDER THE	Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 and the Resource Management Act 1991
IN THE MATTER	an Appeal under Clause 19 of the Order
BETWEEN	CANTERBURY TRUSTEES LIMITED AND H L J GOVAN AS TRUSTEES OF THE G N MCVICAR NO 1 TRUST Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent
AND	CHRISTCHURCH INTERNATIONAL AIRPORT LIMITED Associated Respondent

Hearing: 20 September 2016

Appearances: P A Stevens QC and A L McGready for appellant
J G A Winchester and S J Scott for respondent
J M Appleyard for associated respondent

Judgment: 22 February 2017

RESERVED JUDGMENT OF CULL J

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Introduction

[1] This appeal concerns the zoning of land, falling within the Runway End Protection Area (Runway Protection Area) of the Christchurch International Airport (the Airport). The appeal is against Decision 24 of the Independent Hearings Panel (the Panel) on the Christchurch Replacement District Plan (the Replacement District Plan).[1] The decision is one of a series made under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (the Order) for the formulation of the Replacement District Plan. The decision in question concerns a private plan change request in relation to a 24 hectare site of land, called the Memorial Avenue Investments Limited (MAIL) land, which is in close proximity to the Airport and falls within the Runway Protection Area. The appellant's land forms part of the MAIL land.

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[1] Independent Hearings Panel "Decision 24 Private Plan Change Request (Memorial Business Park) including Chapter 15 Industrial (Part) and Chapter 6 General Rules and Procedures (Part)", 13 June 2016; from here on this will be referred to as "Decision 24".

[2] Under the existing plan, the land had a rural zoning and has been identified as a Greenfield Priority Area. The problem for the appellant is that the part of its land, which falls within the designation as a Runway Protection Area, restricts its use.

[3] The Panel's earlier decision rezoned the MAIL land as industrial,[2] which was not opposed by either the Airport or the appellant. The Panel noted that in the Airport's closing submissions, it focussed almost entirely on matters concerning the Runway Protection Area. The appellant's involvement was limited to the designation of the Runway Protection Area, because the designation imposes a set of restrictions over the use of identified land.

[4] The issue for the Panel in Decision 24 under appeal was whether the land's designation as Runway Protection Area was sufficient, or whether further rules imposing restrictions on the use and development of the Runway Protection Area land should also be included in the Replacement District Plan and if so, what the nature of those restrictions should be, given that the land was being rezoned as industrial.

[5] The Panel concluded that the designation was not in itself sufficient and that any buildings or activities in the Runway Protection Area, other than walkways associated with vehicle parking areas, should be classified as discretionary activities in the Replacement District Plan.

The Panel's decision

[6] After setting out the issue in dispute,[3] the Panel set out the context for its decision. It explained how designations operate to restrict the use of land under the Resource Management Act 1991 (the RMA). The Runway Protection Area designation, specifically, limits the construction of any new building or utility within the area as well as a range of activities that includes a mass assembly of people, or interferes with aircraft operations.

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2 Independent Hearings Panel "Final Decision – Decision 5: Chapter 10 (Part): Designation D1 Christchurch International Airport Ltd" (Decision 5), 27 August 2015; Independent Hearings Panel "Draft Decision": Chapter 10 (Part): Designation D1 Christchurch International Airport Ltd" (Draft Decision 5), 2 July 2015.

3 Decision 24, above n 1, at [230].

[7] The Panel then noted that the Airport had changed its position during the hearing, a number of times, with its final position being that the Panel should adopt restrictions in the Replacement District Plan but acknowledging that they should not simply repeat Runway Protection Area restrictions. The Panel then recorded that it had received "somewhat tortuous arguments and counter-arguments" between the Airport and the appellant, which did not particularly advance the parties' respective cases. Instead of outlining those arguments in full, the Panel opted to include their central arguments in their discussion.

[8] The Panel then set out the statutory framework for its decision, including Part 2 of the RMA and the "nature of the environment". The physical presence of the Airport was seen as being relevant.

[9] The Panel rejected the Airport's argument that, because the Runway Protection Area was first in time, it should weigh in the consideration of costs and benefits. It also did not accept the Airport's submission that amending the zoning would undermine the designation. The Panel affirmed that designation restrictions operate independently of district plan rules.

[10] The Panel noted that the parties had competing commercial interests. The appellant was concerned that restrictions to the land in the Replacement District Plan could undermine its access to remedies that the RMA provides, where land is subject to a designation. In particular, they were concerned about the ability to make out a case for a land purchase order and receive compensation under s 185 of the RMA. If the Replacement District Plan provided analogous limits to the Runway Protection Area designation, it would be arguable that the designation did not prevent reasonable use of the land, thereby denying a remedy to the appellant under s 185.

[11] The Panel considered whether the Airport as a requiring authority was required to consider Part 2 of the RMA when exercising its powers in relation to the Runway Protection Area. Balanced against that, was the public safety risk and the finding that the designation would not sufficiently manage that risk.

[12] Finally, in finding the activity classification as "discretionary", the Panel was of the view that such a classification would be neutral so far as the parties' contentions about s 185 of the RMA were concerned. This was not, however an influential consideration in the Panel's determination.

Issues on appeal

[13] The appellant has posed three questions of law to be decided on appeal. They are:

1. Did the Panel err in failing to take into account the implications of ss 85 and 185 of the RMA?

2. Did the Panel err in failing to undertake an evaluation under s 32 of the RMA as to the efficiency and effectiveness of the rules, and as to the benefits and costs?

3. Did the Panel err in its approach to the functions and powers of both a Requiring Authority and the Environment Court and the extent to which, or the manner in which, Part 2 RMA considerations in relation to public safety are subsumed in the Runway Protection Area designation and restrictions, and thus required to be reflected in the exercise of statutory functions and powers?

[14] The appellant submits that in each respect the Panel erred. The Airport opposes the appeal. The Council does not take a position in support or opposition to the appeal but submits that no obvious errors are made.

Background

[15] Each of the parties provided detailed submissions on the background and planning context for this appeal, including the previous decisions of the Panel. Those submissions are not canvassed fully in this decision, because although providing a contextual framework for the Panel's decision under appeal, they are not of particular relevance to the issues to be decided.

[16] From those submissions however, the following observations can be made. In its earlier decision,[4] the Panel confirmed the Runway Protection Area designation, following the notification by the Airport as a "requiring authority" under s 167 of the RMA. The Runway Protection Area designation was extended to include the land east of Russley Road. This included the appellant's land for the purposes of prohibiting certain activities, in particular new buildings.

[17] Separately, MAIL made a separate request to the Council for a private plan change seeking that a 24 hectare site be rezoned from "rural" to "business park". This proposed zone included the appellant's land. The appellant's case is that by extending the length of the existing Runway Protection Area, the appellant's privately owned land has been affected as a consequence of the designation and zoning, because of the land use controls and restricted usage of it.

The appellant's position

[18] The appellant has brought this appeal to preserve its rights to pursue compensation or require acquisition pursuant to s 185 of the RMA. The appellant has addressed the first two errors together.

[19] The appellant argues that its access to the s 185 remedies would be compromised by the inclusion of land use controls imposed on the underlying zoning of the land, because of the effect of s 85 of the RMA. The appellant submits that the immediate consequence of s 85(1) is that the compensation provisions in the Public Works Act 1981 will not apply, because property owners have no right to money in lieu of any interest in property, if those interests are *in effect* taken away or otherwise adversely affected by rules of a plan. If, however, a designation imposes restrictions, the appellant submits that s 85 does not apply, as compensation is "otherwise provided for" in ss 185 and 186 of the RMA. A designation amounts to a taking of an interest in land for which a remedy under the Public Works Act will be available, by way of s 185 or 186.

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4 Decision 5, above n 2; Draft Decision 5, above n 2.

[20] Further, the appellant's case was that the land use controls were not necessary in light of the Runway Protection Area designation restrictions. The appellant submits that these designation restrictions operated to restrict the use of its land as well as allowing the s 176 "veto" power to be exercised by the Airport, as a "requiring authority", in respect of any new land use. It is submitted that the Panel failed to consider the combined consequences of the restrictions under both the terms of the designation and s 176, which will endure on the appellant's interest in its land unless s 185 can be invoked.

[21] The appellant also submits that the Panel failed in its requirement to have "particular regard to" a further s 32 evaluation before including the Runway Protection Area discretionary activity. This evaluation would have required the Panel to take into account considerations within s 32 of the RMA, including:

(a) the scale and significance of various effects anticipated from the implementation of a proposal;

(b) identification of whether other reasonably practicable options were available to achieve the proposal's objectives;

(c) an assessment of the efficiency and effectiveness of the amended provisions; and

(d) identification and assessment of the benefits and costs of various anticipated effects, including social and economic effects.

[22] In respect of the first and second errors, the appellant ultimately submits that the Panel failed to refer to the implications of the rules in s 85 of the RMA (as required by the s 32(1)(b)(ii) purposes) and also failed to assess the consequential social and economic cost to the appellant of implementing these rules in respect of the availability of the s 185 remedy. The appellant's case is that preservation of its s 185 route to compensation is an important consideration, both in terms of s 32 and the enabling aspect of s 5 of the RMA. The failure of the Panel to consider these matters as relevant, the appellant submits, is an error of law.

[23] In respect of the third error, the appellant submits that the Panel erred in its approach to the functions and powers of both a "requiring authority" and the Environment Court, in relation to a designation under Part 2 of the RMA. The appellant's case is that the Panel misconstrued the legal effect of ss 176 and 179 of the RMA by being cautious of the basis of any exercise of statutory powers by the Airport or the Environment Court and stating that neither s 176 nor s 179 were subject to Part 2 of the RMA.

[24] Further, the appellant submits that the Panel failed to adequately consider the extent to which or manner in which public safety or efficiency grounds (reflected in s 5 of the RMA) are subsumed in the designation and required to be reflected in the exercise of these statutory powers. The appellant objects to the Panel's conclusion that, as a result of this statutory scheme, the land use rules were appropriate and should be included as part of the underlying zoning.

[25] On the basis of these three errors of law, the appellant seeks an order that the decision be remitted back to the Panel for reconsideration in light of this Court's determination.

The Airport's position

[26] The Airport is a requiring authority under s 166 of the RMA and is empowered to seek a designation of land, where it is necessary for the safe or efficient functioning of its work.[5] The Airport sought the designation for a Primary End Protection Area, to reduce risk and limit the consequences of runway-related accidents.[6]

[27] The Airport submits that the Panel had considerable information on ss 85 and 185 of the RMA, which it did take into account but gave it little weight appropriately.

[28] Further, the Airport submits that the Panel acknowledged the uncertainty regarding the Part 2 statutory functions and powers of the Council and the Airport,

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5 Resource Management Act 1991, s 168(2).
6 Draft Decision 5, above n 2, at [39].

and that the Panel was not required to resolve this uncertainty as the appellant suggests. It was not an error of law, in the Airport's case, for the Panel to ensure that the Council carries out its obligation to provide for public safety, even if the Airport had the same or similar function.

[29] The Airport's case is that no errors of law arise.

The Council's position

[30] Similarly, the Council submits that the Panel clearly did take ss 85 and 185 into account. In finding that the debate was a "distraction", the Panel was indicating that it had considered the issue, but that it was given little weight in its overall assessment. The Council disagrees with the appellant's argument regarding the failure to assess social and economic costs when the appellant did not provide any evidence of such costs. The appellant's argument that the Panel's s 32 evaluation was insufficient is rejected by the Council as a challenge to the weight or merits of the Panel's decision.

[31] Further, the Council submits that the appellant's approach incorrectly suggests that Council consideration of Part 2 of the RMA would be subsumed by the Airport's public safety and efficient airport operations considerations. The Council's statutory powers and functions are submitted as far broader than the appellant discusses, and consideration of public safety and efficient matters in respect of a resource consent application is open to the Council.

[32] The Council agrees with the Airport that no errors of law arise.

Court's approach on appeal

[33] The right of appeal from the Panel's decision is limited to questions of law only.[7]

[34] To determine whether there is an error of law, Lord Radcliffe's speech in *Edwards v Bairstow* enunciates the guiding principles on the two manifestations of

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7 Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, cl 19.

an error of law.[8] The first is where a decision contains a wrong statement of principle or law, which bears upon the ultimate determination and the second is where there is no evidence to support the determination or where the true and only reasonable conclusion on the facts contradicts the determination, which is a "very high hurdle" for an appellant.[9] The Supreme Court in *Bryson v Three Foot Six Ltd* adopted Lord Radcliffe's formulation and said:[10]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of [a statutory provision] – to misdirect itself on the section … that would certainly be an error of law which could be corrected on appeal …
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> [25] An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case… Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.
>
> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable - so clearly untenable - as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".

[35] The issue of whether a decision-maker had misinterpreted the language of a statute in choosing one of two available interpretations was considered by the Supreme Court in *Vodafone NZ Ltd v Telecom NZ Ltd.*[11] In finding that the Commission had not misinterpreted the language of the statute in choosing one of the available options, Blanchard J for the majority expressed the two bases for a finding of error of law in the following way:[12]

> So there are two stages. First, whether the Commissioner has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment … in a way that contradicts the true and only reasonable conclusion available on the

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8 *Edwards v Bairstow* [1956] AC 14 (HL).
9 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [27].
10 At [24] – [26].
11 *Vodafone NZ Ltd v Telecom NZ Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [58].
12 At [58].

> facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[36] The *Vodafone* decision reinforces the point that it is not an error of law to use and apply one of two or more possible constructions or interpretations of relevant language in an enactment or instrument. The Court also advised caution for an appeal court when assessing whether the decision-maker has reached an untenable conclusion on the facts. Blanchard J for the Supreme Court, referring to the observation of Lord Donaldson MR,[13] which was adopted by the Supreme Court in *Bryson*,[14] repeated that:[15]

> It does not matter whether, with whatever degree of certainty, the appellate court considers it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option.

[37] Those observations relate to the first manifestation of error of law.

[38] The nature of the second type of error of law, namely where there is no evidence to support the determination, is explained further in *Chorus v Commerce Commission*, where White J for the Court of Appeal said:[16]

> ... It is well established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "bench marking" exercise and in weighing up the relevant facts in that context. It will therefore have erred only if there is no evidence to support the factual findings it made in reaching its determination.
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> In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. ...

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13 *Piggott Brothers and Co Ltd v Jackson* [1992] IRC 85 (CA) at 92.

14 *Bryson*, above n 9, at [27] [referring to Lord Donaldson MR's speech in *Piggott Brothers and Co Ltd v Jackson*.]

15 *Vodafone v Telecom*, above n 11, at [53].

16 *Chorus v Commerce Commission* [2014] NZCA 440 at [111] and [112].

[39] In respect of appeals under s 299 of the RMA specifically,[17] appellate intervention from the High Court has been confirmed as justified if the initial decision can be shown to have:[18]

(a) applied a wrong legal test; or,

(b) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or,

(c) taken into account matters which it should not have taken into account; or,

(d) failed to take into account matters which it should have taken into account.

[40] In relation to such appeals, French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* also stated that the question of the weight to be given to relevant considerations is not for reconsideration by the High Court as a point of law.[19] French J further stated that not only must there have been an error of law, but that error must have been a "material" error, in the sense that it "materially affected the result" of the decision.[20]

[41] In summary, therefore to find an error of law, one of the following must be present:

(a) A decision must contain a wrong statement of principle or law or have applied a wrong legal test.

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17 The present appeal is made under cl 19 of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, which states under sub-cl (6) that except as otherwise provided, sections 299(2) and 300 to 307 of the RMA apply to an appeal made under this clause. The relevant authorities considering an appeal on a point of law only as under s 299 of the RMA are therefore applicable to this appeal also.

18 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735 at [34]; *Hill Country Corp Ltd v Hastings District Council* [2010] NZRMA 539 at [9] – [10]; *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

19 *Ayrburn Farm Estates Ltd*, above n 18, at [35].

20 At [36].

(b) The determination is unsupportable on the evidence i.e. the decision contradicts the true and only reasonable conclusion on the facts.

(c) Relevant considerations have not been taken into account or irrelevant considerations have been taken into account, in the proper application of the law.

The purpose of the Independent Hearings Panel

[42] Before addressing the questions of law on appeal, it is relevant to consider the purpose of the Panel.

[43] The Panel was established under cl 8 of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (OIC).[21] Clause 6(1) specifies that one of the primary tasks of the Christchurch City Council under the Order is to undertake a full review of existing district plans and prepare a replacement district plan.

[44] The functions and powers of the Panel are outlined in cl 10 of the Order. In particular, the principal functions of the Panel are to:

(a) hold hearings on submissions on proposals that have been notified under cl 5 of Schedule 1 of the Order;[22] and

(b) make decisions in relation to those proposals as required by cls 12 to 14.[23]

[45] Clause 9 of the Order specifies that terms of reference must be set for the Panel. These terms of reference can be found on the Panel's website.[24] In relation to

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21 Under s 71 of the Canterbury Earthquake Recovery Act 2011, the Governor-General was given the power to make Orders in Council, such as this one, to fulfil the purposes of s 3 of that Act.

22 Clause 5 of Schedule 1 details the process for public notification of proposals by the Christchurch City Council.

23 Clauses 12 to 14 of the Order detail the jurisdiction of the Hearings Panel, the Panel's process of making decisions on proposals and specifies considerations relevant to the Panel's decision making.

24 Independent Hearings Panel "Terms of Reference", 8 September 2014.

the purpose and matters to be considered by the Panel, the terms of reference specify:

(a) The Panel will hold hearings and make decisions on proposals that will comprise the Replacement District Plan.

(b) A number of matters for decisions to be made by the Panel were given priority, including designations.[25]

(c) The Panel shall also consider the scheduling of all proposals related to the achievement of Action 24 (viii) of the Land Use Recovery Plan and an integrated approach to land uses located near the Airport.

Question one: Did the Panel err in failing to take into account the implications of ss 85 and 185 of the RMA?

[46] The appellant has stated clearly that the "single motive" for bringing this appeal is the preservation of its rights under s 185 of the RMA. This provision empowers the Environment Court to make orders, direct acquisition of designated land and provide a remedy, namely the amount of compensation for the interest in land order to be taken under the section. Section 185 provides:

> **185 Environment Court may order taking of land**
>
> (1) An owner of an estate or interest in land (including a leasehold estate or interest) that is subject to a designation or requirement under this Part may apply at any time to the Environment Court for an order obliging the requiring authority responsible for the designation or requirement to acquire or lease all or part of the owner's estate or interest in the land under the Public Works Act 1981.
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> ...
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> (3) The Environment Court may make an order applied for under subsection (1) if it is satisfied that—
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> (a) the owner has tried but been unable to enter into an agreement for the sale of the estate or interest in the land subject to the designation or requirement at a price not less than the market value that the land

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[25] These priority matters also included the Strategic Directions proposal, temporary activities related to earthquake recovery, such as house lifting activities, provisions for repair and rebuilding of multi-unit residential complexes, the Natural Hazards proposal, the Residential proposal, the Commercial proposal and any other discrete matter identified by the panel resulting from the submissions process that is an impediment to recovery.

would have had if it had not been subject to the designation or requirement; and

(b) either—

(i) the designation or requirement prevents reasonable use of the owner's estate or interest in the land; or

(ii) the applicant was the owner, or the spouse, civil union partner, or de facto partner of the owner, of the estate or interest in the land when the designation or requirement was created.

...

(7) The amount of compensation payable for an estate or interest in land ordered to be taken under this section shall be assessed as if the designation or requirement had not been created.

[47] The critical issue for the appellant is whether the compensation provisions in the Public Works Act 1981, triggered by s 185, will apply to its land where the designation prevents reasonable use of its land, or whether s 85 of the RMA applies. If s 85 of the RMA applies, compensation is not payable in respect of controls on land, even though they render the land incapable of reasonable use. The same test of "reasonable use" applies to both ss 185 and 85. Section 85(1) provides:

(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.

(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—

(a) in a submission made under Part 1 of Schedule 1 in respect of a proposed plan or change to a plan; or

(b) in an application to change a plan made under clause 21 of Schedule 1.

...

(5) In subsections (2) and (3), a provision of a plan or proposed plan does not include a designation or a heritage order or a requirement for a designation or heritage order.

[48] The appellant contends that the Panel failed to take into account the implications of ss 85 and 185 of the RMA, with the Panel making no reference to s 85 in its decision, and that these failures amount to an error of law.

[49] I will deal with the appellant's submission by addressing the following issues.

Did the Panel give consideration to ss 85 and 185 of the RMA?

[50] The Panel received submissions from the appellant on the implications of ss 85 and 185, at two hearings. The first was during the hearing of the Panel's earlier designation hearing, when the appellant raised property rights issues arising by way of agreement or compulsory acquisition under the Public Works Act and the implications on ss 85 and 185 of the RMA. The Panel referred to these specifically,[26] observing that relief under s 185 appears to be available "at any time", as long as the matters in paras (a) and (b)(i) or (b)(ii) of that section apply.[27]

[51] During the hearing in respect of the decision under appeal (Decision 24), the divergent positions of the Airport and the appellant, and their competing commercial interests, "particularly as to the potential for compensation for any Public Works Act 1981 purchase of the [appellant's] land" was at the forefront of the Panel's consideration.[28] This was reflected clearly in the Panel's decision, where it canvassed the issues as follows:[29]

> [249] As Ms Steven put it, the [appellant's] "central ground of opposition" to [the Airport's] relief was that it could potentially undermine the [appellant's] access to "remedies" that the RMA provides for where land is subject to a designation. She referred in particular to the fact that, to secure a land purchase order under s 185, the [appellant] would have to show that the Designation prevented reasonable use of the [appellant's] land. She explained that rules that were effectively as restrictive as the Designation would undermine the [appellant's] capacity to argue that it was the Designation that gave rise to that consequence. She noted the [appellant's] related concern was that overly onerous rules could incentivise [the Airport] to uplift the Designation, thereby denying the [appellant] any access to a s 185 order. This is why she described [the Airport's] approach as one of "zone and take".
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> [250] In effect, [the Airport] presented the counter-view, raising concern that the [appellant's] approach (i.e. of seeking no restrictions) could be a "springboard" for its s 185 argument that the Designation was hampering reasonable use of land.
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> [251] We found these competing commercial agendas an unhelpful distraction from our task of determining the most appropriate plan regime. In essence, they have led to complex, and ultimately spurious, legal arguments.
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> ...

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26 Draft Decision 5, above n 2, at [97], [98], [113] and [114].
27 At [114].
28 Decision 24, above n 1, at [248].
29 Decision 24, above n 1, footnotes omitted.

> [255] Ms Steven was correct to point out that the Panel considered alternative planning approaches when it considered [the Airport's] Designation requirement. It did so according to the requirements of s 171, rather than s 32 RMA. In confirming the Designation at that time, the Panel recognised that as a mechanism for restricting usage of land, a "valid point of difference" that a designation offered, as compared to plan rules for instance, was that it gave recourse to the remedies of acquisition and compensation under the Public Works Act. The Designation will remain for the life of the [Replacement District Plan] (and can then be carried forward for consideration in any subsequent review) unless [the Airport] elects to withdraw it.
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> ...
>
> [264] We are satisfied that this activity classification would be essentially neutral insofar as any application of s 185 RMA is concerned. However, we record that was not an influential consideration in our determination. Rather, we have reached our decision on the basis of the relevant statutory considerations we have earlier noted, and in view of the evidence we have considered, for the reasons we have given.

[52] The Panel summarised the appellant's submissions on the implications of s 185 remedies in detail, contrasting it with the Airport's arguments. The Panel stated specifically that s 185 RMA considerations were not an influential consideration in its determination. However, in reaching its conclusion that discretionary activity classification was the most appropriate for the Runway Protection Area, the Panel was satisfied that the activity classification "**would be essentially neutral**" as far as any application of s 185 of the RMA was concerned.[30]

Section 85

[53] The appellant contends that the Panel did not refer to the implications of s 85 of the RMA and its decision falls well short of demonstrating that the appellant's social and economic costs of having the controls imposed on the appellant's land, by virtue of the discretionary activity classification, were identified and evaluated. Because the Panel's decision does not contain any reference to the implications of including the rules associated with the classification in terms of s 85 of the RMA, the appellant submits that the Panel has failed to engage with the arguments and did not take into account a relevant matter.

[54] The appellant submits that the immediate consequence of s 85(1), from its perspective, is that the compensation provisions in the Public Works Act will not

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30 Decision 24, above n 1, at [264], emphasis added.

apply and property owners have no right to money in lieu of any interest in property, if those interests are "*in effect* taken away or otherwise adversely affected by rules of a plan."

[55] As set out above,[31] the consequences of s 85 are that no compensation is payable in respect of the controls or rules, imposed by the discretionary activity classification.

[56] The gravamen of the appellant's concern is that the s 168(2)(b) designation of Runway Protection Area imposes restrictions on the use of the appellant's land. This can be contrasted with authorising the use of, or protecting the land for, development of a public work, for instance. Here, the appellant submits that its land is not needed by the Airport for the construction of any physical works for as long as the designation remains in place, but the restrictive effect of the terms of the designation on the appellant's land will endure, unless s 185 is able to be invoked. The appellant says that the Panel did not comprehend that, by virtue of s 176(2), the designation restrictions will override any underlying zone provisions, such as a discretionary activity classification, in relation to the same range of activities already restricted by that designation.

[57] Section 176 of the RMA governs the use of land, subject to a designation, and contains the power for a requiring authority (the Airport) to give land use consent. Section 176 provides:

> (1) If a designation is included in a district plan, then—
>
> (a) section 9(3) does not apply to a public work or project or work undertaken by a requiring authority under the designation; and
>
> (b) no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including—
>
> (i) undertaking any use of the land; and
>
> (ii) subdividing the land; and

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[31] At [47].

(iii) changing the character, intensity, or scale of the use of the land.

(2) The provisions of a district plan or proposed district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.

...

[58] The appellant argues that despite s 176(2), the Panel has included controls or rules that require a discretionary activity resource consent from the Council under s 87A(4) for the same range of activities that are already restricted by the Runway Protection Area designation and in circumstances where the grant of any resource consent is able to be vetoed by the Airport under s 176(1)(b). Under s 176(1)(b) a person may not do anything in relation to land, the subject of a designation, without the prior written consent of the requiring authority, which in this case is the Airport.

[59] The Panel rejected the Airport's requests to categorise activities on the Runway Protection Area land as non-complying activity, because the Panel considered it was "unnecessarily restrictive".[32] The Panel was not satisfied on the evidence that there was any value in requiring the s 104D RMA threshold test to be satisfied before resource consent could be granted.

[60] The Panel considered the difference between the effects on land of a designation, compared to the implications of rules under the Replacement District Plan. In referring to its prior designation decision,[33] it noted that the alternative planning approaches were considered according to the requirements of s 171, rather than s 32 of the RMA. The Panel specifically observed that:[34]

> A "valid point of difference" that a designation offered, as compared to plan rules for instance, was that it gave recourse to the remedies of acquisition and compensation under the Public Works Act.

[61] The Panel also had regard to the relevant RMA responsibilities of the Airport and its wider accountabilities under the Civil Aviation Act 1990. What was not clear to the Panel, however, was whether the Airport must exercise its various requiring authority decision-making responsibilities having regard to Part 2 of the RMA. The

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32 Decision 24, above n 1, at [260].
33 Draft Decision 5, above n 2.
34 Decision 24, above n 1, at [255].

Panel drew the distinction between ss 104 and 171 of the RMA, where the decision-maker must have regard to Part 2 of the RMA, in comparison to s 176 of the RMA, which governs the Airport's decisions on consent for land use and is not expressly subject to Part 2 of the RMA. The uncertainty of the requirement to make decisions subject to Part 2 of the RMA was one of the factors that lead the Panel to conclude that district plan rules have a valid resource management purpose, in addition to the designation. The other factor weighing with the Panel was the acknowledged public safety risk pertaining to the Runway Protection Area land, which warranted associated RMA management of any risk. This meant the assessment of public safety risk was not solely reliant on the actions of the Airport.

[62] The Panel was not satisfied, therefore, that the designation on its own was a sufficient method for public safety risk management, as the Airport's consent decisions under s 176 of the RMA may not necessarily serve the wider community interests reflected in Part 2 of the RMA. The Panel specifically took into account public safety, being a matter that may go beyond the interests of a landowner seeking s 176 land use consent from the Airport and may be beyond the Airport's interests in making its decisions under s 176 only.[35]

[63] It was for those reasons that the Panel determined that the Replacement District Plan should include land use restrictions requiring resource consent.[36]

[64] In undertaking its balancing exercise, not only between the competing interests of the appellant and the Airport, but also the wider requirements of the resource management issues, the Panel rejected the Airport's application for "controlled activity" and "restricted discretionary activity" classifications. The Panel considered it was important that any activity classification should enable resource consent to be declined and on a basis that allows for the broad discretionary judgment of a decision-maker, including Part 2 of the RMA.[37]

[65] Noting that the land is zoned industrial and that usage of industrial land is generally "in keeping with the higher order documents", the Panel found the

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35 Decision 24, above n 1, at [257].
36 At [258].
37 At [261].

significant controls on land use imposed through the designation did not warrant a s 104D threshold test for resource consent.[38] The Panel paid particular regard to the need for "the broad discretionary judgment called for by Part 2 of the RMA" and, given the Panel's uncertainty on whether the Airport has an obligation to make its decisions as the "requiring authority" subject to Part 2 of the RMA, the Panel considered it important that the resource consent decision-maker had broad discretion to consider Part 2 matters.[39] The Panel was also concerned that Part 2 RMA discretions were involved in resource consent decisions, to ensure higher order documents are taken into account.

[66] Although it is correct that the Panel does not specifically refer to s 85 of the RMA in its decision, the "valid point of difference" between a designation compared to plan rules as mechanisms for restricting usage of land make it abundantly clear that the Panel was seized of the issues and gave consideration to the differences in remedies for acquisition and compensation under the Public Works Act.[40]

Was the Panel's decision consistent with its purpose?

[67] During both the earlier designation hearing and the hearing for Decision 24, the Panel received submissions regarding the implications of ss 85 and 185 of the RMA respectively and took those submissions into account. The Panel however, did not consider them to be influential in its decision or accord them significant weight, because its functions and powers require the Panel to decide on the appropriate provisions for the Replacement District Plan.

[68] As set out above,[41] the principle function of the Panel is to make decisions on the Replacement District Plan and consider the appropriate Plan regime. The Panel alluded to this, when it referred to the s 185 RMA remedies as "an unhelpful distraction".[42]

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38 Decision 24, above n 1, at [260].
39 At [261].
40 At [255].
41 At [42] - [45] of this judgment.
42 Decision 24, above n 1, at [251].

[69] Despite the recognition that such property issues and arguments were outside its function and purpose, the Panel nevertheless reached its conclusion that discretionary activity classification was the most appropriate. Importantly, the Panel was also satisfied "that this activity classification would be essentially neutral insofar as any application of s 185 of the RMA is concerned."[43] The Panel then recorded that s 185 was not an influential consideration, because its decision was made on the basis of the relevant statutory considerations and the evidence which it heard.

[70] The Panel's decision was consistent with its function and purpose. It took into account the implications of ss 85 and 185, but considered they were not influential considerations, which was appropriate.

Is the jurisdiction of the Environment Court ousted?

[71] Section 185 is a jurisdiction exercised by the Environment Court, not the Panel or the Council. When the Panel recorded that it was satisfied that its decision on activity classification would be "essentially neutral insofar as any application of s 185 [of the] RMA is concerned" the Panel was indicating that in its view s 185 RMA remedies would still be available to the appellant.[44]

[72] The Airport agreed with the Panel's indication. To that end, the Airport made an offer to the appellant to purchase its land at full market value, as if no Runway Protection Area related designation was in place. This was done to obviate the need for the owners to make an application to the Environment Court for an Order under s 185, where the appellant would have to show it had tried to sell its land for market value and had been unable to.

[73] As Counsel for the Airport explained in this hearing the effect of this proposal was to remove any uncertainty as to whether the appellant had recourse to remedies available to it. With the Panel's indication and the Airport's concession that s 185 of the RMA is still available to the appellant, I can find no reason to interfere with the Panel's decision and further, the jurisdiction of the Environment Court is not ousted.

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43 At [264].
44 At [264].

Did the Panel make a legal error?

[74] Turning then to consider the basis for appellate intervention on an error of law, I must be satisfied that either the Panel's decision contains a wrong statement of principle or law, which bears upon the ultimate determination, or that there is no evidence to support the determination.

[75] I am unable to find error in the Panel's approach and consider that the Panel's careful consideration of the property issues and its ultimate determination was appropriate to its jurisdiction, according to its objectives and purpose. The Panel also acted fairly in indicating to the appellant that its property and/or compensation remedies were still available, despite the Panel's decision.

Conclusion on question one

[76] I am unable to uphold the appellant's submission, for the following reasons:

(a) The Panel did consider the appellant's submissions on ss 85 and 185 of the RMA and made a decision that was "neutral" in relation to the application of s 185 of the RMA.

(b) It was not part of the purpose of the Panel to focus on compensation issues in making its decisions on the Replacement District Plan proposals and the weight it attached to compensation considerations was appropriate.

(c) The Panel's decision does not oust the Environment Court jurisdiction, to which the appellant can make application in respect of its property issues.

(d) The Panel made no legal error, such that there should be appellate intervention.

[77] The answer to question one, therefore, is no.

Question two: Did the Panel err in failing to undertake an evaluation under s 32 of the RMA, as to the efficiency and effectiveness of the rules, and as to the benefits and costs?

[78] The appellant addressed the second question of law in combination with the first, noting that the grounds overlap. The appellant's complaint in relation to the second question is that the Panel did not weigh the cost and benefit of the zoning restrictions or rules under its s 32 RMA evaluation. The appellant acknowledges that the Panel was correct in law to find that s 171(1)(b) of the RMA did not apply, but s 32 did. Section 32 of the RMA governs the requirements for preparing and publishing an evaluation report. The appellant says that the Panel's s 32 evaluation however "did not go far enough."

[79] Further, the appellant challenges the Panel's failure to consider the economic implications for the appellant, if the designation is lifted in respect of the designation. In that case, the appellant says, even though the designation is lifted, it would not result in the District Plan classification and controls on land use being removed.

[80] Again, the appellant refers to its s 185 remedy being unavailable, because of the legal effect of s 85 and the inclusion of the plan-based rules forming part of the underlying zone provisions for the appellant's land. The economic cost to the appellant, it says, was not considered by the Panel.

[81] In light of my finding in respect of question one, where both the Panel and the Airport agree that s 185 of the RMA is still available to the appellant to redress issues of compensation, much of the appellant's submissions in relation to this second question, about future economic loss to the appellant, has already been addressed.

[82] In relation to the appellant's complaint that the Panel does not set out the economic cost to the appellant as a result of the discretionary activity classification, I observe that the appellant called no evidence on the costs likely to be incurred by the appellant, as Counsel for the Airport submits. The Airport called a significant amount of evidence as to the benefits of having the designation to ensure a safe and

efficient Airport. The absence of discussion about economic cost to the appellant in the Panel's decision appears to arise from the vacuum in the evidence before it. In any event, as I have found above,[45] the Panel did pay consideration to the fact that any adverse land use consequences to the appellant could be pursued through s 185 of the RMA, as the Panel's decision was neutral in this respect.

Conclusion on question two

[83] The challenge to the inadequate s 32 evaluation is one which challenges the weight placed by the Panel on the submissions before it, including the evidence, and represents a challenge to the merits. As noted earlier,[46] using the terminology from *Chorus v Commerce Commission*,[47] in the absence of a general right of appeal, it is not the role of this Court on an appeal regarding a question of law to undertake a broad reappraisal of the Panel's factual findings or the exercise of its evaluative judgments.

[84] The answer to question two is no, the Panel did not err in undertaking its evaluation under s 32 of the RMA.

Question three: Did the Panel err in its approach to the functions and powers of both a Requiring Authority and the Environment Court and the extent to which, or the manner in which, Part 2 RMA considerations in relation to public safety are subsumed in the Runway Protection Area designation and restrictions, and thus required to be reflected in the exercise of statutory functions and powers?

[85] This question of law challenges the Panel's conclusion that the land use classification and/or rules were appropriate, because of the Panel's uncertainty that the Airport, as a requiring authority, exercising its consent powers under s 176, was subject to Part 2 of the RMA. The appellant says that this view misinterprets ss 176 and 179 (the appeal provision) of the RMA. Any concern about public safety, which concerned the Panel, and was co ntrary to the RMA's s 5 purpose, it says, would be addressed by the recognition that the purposes of the Runway Protection Area designation include public safety.

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45 At [71] and [76].
46 At [38].
47 *Chorus*, above n 16, at [111] and [112].

[86] I accept the Council's submission that its statutory powers and functions are broader than the relevant interests of the Airport relating to the Runway Protection Area. I concur, respectfully, with the Panel that it is appropriate for the Council to have oversight, for the reasons canvassed by the Panel.[48] Similarly, the Airport submits that public safety should not rest solely on the Airport, because the Council carries a wider obligation as to public safety.

[87] I also accept the Airport's submission that the Panel did not seek to resolve the uncertainty, but found it was uncertain whether the Airport would be bound by the RMA provisions in dealing with requests for building consents within the Runway Protection Area.

[88] The Council submits that its statutory powers and functions are far broader than the relevant interests relating to the Runway Protection Area, and it is appropriate for it to have oversight.

Conclusion on question three

[89] I can find no error in the Panel's approach to its decision on why it imposed the discretionary activity classification for resource consent and nor do I accept the submission that the Panel misinterpreted ss 176 and 179 of the RMA. The answer to question three, therefore, is no.

Conclusion

[90] The appeal is dismissed. The answers to the three questions are as follows:

Question 1 – Did the Panel err in failing to take into account the implications of ss 85 and 185 of the RMA?

No, because the Panel did take into account ss 85 and 185 of the RMA and made a decision neutral to the appellant's s 185 rights, which can still be exercised in the Environment Court jurisdiction.

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[48] Decision 24, above n 1, at [257].

Question 2 – Did the Panel err in failing to undertake an evaluation under s 32 as to the efficiency and effectiveness of the rules, and as to the benefits and costs?

No, the Panel did not err in undertaking its evaluation under s 32 of the RMA.

Question 3 – Did the Panel err in its approach to the functions and powers of both a Requiring Authority and the Environmental Court and the extent to which, or the manner in which, Part 2 RMA considerations in relation to public safety are subsumed in the Runway Protection Area designation and restrictions, and thus required to be reflected in the exercise of statutory functions and powers?

No, the Panel did not err in its approach to the imposition of the discretionary activity classification for resource consent activities on the appellant's land and nor did it misinterpret ss 176 and 179 of the RMA.

Cull J

Solicitors:
Harmans for appellant
Chapman Tripp for Christchurch International Airport
Simpson Grierson for respondent