IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002333
CIV-2016-404-002335
[2018] NZHC 459

UNDER	the Judicature Amendment Act 1972 and the local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991
IN THE MATTER OF	Section 159 Local Government (Auckland Transitional Provisions) Act 2010
BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff/Applicant
AND	AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL First Defendant/Respondent
AND	AUCKLAND COUNCIL Second Defendant/Respondent

Hearing: On the papers

Appearances: S J Ryan and R H Ashton for Appellant/Plaintiff
M J L Dickey and R S Ward for Respondent/Second Defendant
Dr C E Kirman and A K Devine for Housing New Zealand Corporation (Intervenor)
R E Bartlett QC for McConnell Clearmont (Intervenor)
D A Allan for Northcote RD1 Holdings Ltd, W Smale Ltd, Fred Thomas Drive Investments Ltd (Intervenors)

Judgment: 19 March 2018

JUDGMENT OF PAUL DAVISON J
Re: Leave to Appeal

This judgment was delivered by me on 19 March 2018 at 2pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Introduction

[1] Mr Belgiorno-Nettis (the applicant) applies pursuant to s 67 of the Judicature Act 1908[1] for leave to appeal my judgment delivered on 29 September 2017 (the judgment),[2] in which I dismissed his appeal from the recommendation decisions of the Independent Hearings Panel (the Panel) and from the decisions of the Auckland City Council (the Council) in relation to the submissions he had made to the Panel regarding the Proposed Auckland Unitary Plan (the PAUP).

[2] As detailed in the judgment, the Panel was established under the provisions of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act), to hear submissions from the public regarding the contents of the PAUP, and thereafter provide its recommendations to the Council as to the provisions of the PAUP. The applicant had made submissions to the Panel regarding the zoning and appropriate planning controls to be included in the PAUP in connection with certain land and buildings located in the Takapuna area. Following its receipt of the Panel's recommendations, the Council determined whether to accept or reject the recommendations and then publicly notified and released the Auckland Unitary Plan.

[3] The applicant appealed to the High Court pursuant to s 158 of the Act, his primary ground being that the Panel and Council had failed to discharge their statutory and common law duties to provide reasons for rejecting the submissions made to the Panel by the applicant on the provisions of the PAUP. I found that although the Panel had not specifically addressed the applicant's submissions in its reports, it was not necessary for it to do so, and that in accordance with the relevant provisions of the Act, the Panel was entitled to group submissions made to it and express its reasons for either accepting or rejecting submissions by reference to the matters to which they related.[3] I further held that the Panel and the Council had provided clear and sufficient reasons for rejecting the applicant's submissions to the Panel, such reasons being

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1 The application for leave erroneously refers to the application being based on s 67 of the "Judicature Amendment Act 1908". I have nevertheless considered the application for leave on the basis that it is founded on s 67 of the Judicature Act 1908, which is deemed to apply pursuant to sch 5, cl 10 of the Senior Courts Act 2016.

2 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1.

3 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1 at [110]–[116].

apparent from the contents and statements made by the Panel in its recommendation reports to the Council, which were accepted and adopted by the Council.[4] And I further found that the Council had made no error of law by its decision to accept the Panel's recommendations as regards the land, area and matters which were the subject of the applicant's submissions to the Panel.[5]

[4] The primary ground upon which the applicant proposes to appeal to the Court of Appeal challenges those findings and alleges that the Court erred in finding that the Panel had not made any error of law in relation to its obligation to provide reasons for accepting or rejecting submissions on zoning and additional height controls in connection with the specific sites addressed by the applicant's submissions to the Panel. The applicant says that the Court erred in its interpretation and application of s 144(8)(c) of the Act, which conferred a power on the Panel to address submissions in its reports to the Council by grouping them according to the provisions of the PAUP to which they related, or according to the matters to which they related.

[5] The applicant says that the questions of law posed by the proposed appeal are matters of general or public importance, and that they raise important issues relevant to the Auckland area and more generally concerning the Resource Management Act 1991 (RMA).

[6] In my Minute dated 1 November 2017, I directed that the applicant's application for leave be served on the other parties, and that any party wishing to make submissions was to file and serve their submissions in relation to the application by 10 November 2017, and thereafter I would determine whether the matter should be set down for a hearing or alternatively whether it could be dealt with on the papers. Following advice from counsel for Housing New Zealand that it had not received a copy of that Minute, I extended the time for the filing of submissions to 20 November 2017. Having regard to the submissions filed by the parties I consider it appropriate to determine the application for leave to appeal on the papers.

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4 At [117]–[129].
5 At [127]–[130].

Housing New Zealand – Application for leave to intervene

[7] Housing New Zealand Corporation (HNZ) applies pursuant to r 7.43A(1)(d) of the High Court Rules and the inherent jurisdiction of the Court for an order that it be granted leave to intervene in this proceeding and make submissions in relation to the applicant's application for leave to appeal. HNZ, which participated as an intervenor party to the applicant's s 158 appeal, is a major landowner in the Auckland region, and currently manages a portfolio comprising approximately 27,400 dwellings in Auckland which include properties located in and around Takapuna. It was extensively involved in making submissions to the Panel in relation to the PAUP.

[8] HNZ seeks to participate in this proceeding on the grounds that its legal rights and liabilities in relation to the subject matter of this proceeding may be directly or indirectly affected by the outcome. It submits that its involvement will improve the quality of information before the Court and assist the resolution of the proceedings.

[9] I am satisfied that it is appropriate to grant HNZ leave to intervene. It has demonstrated in the course of its participation in the applicant's s 158 appeal that it has a legitimate and substantive interest in the issues arising in the proceedings, and I consider that the Court has been and will be assisted by its participation as an intervenor. Having been a party to the s 158 appeal, I consider that it is in the interests of justice that HNZ also be granted leave to intervene and be a party to the present proceeding because of its particular interest in the issues and the potential for it to be affected by the outcome of this proceeding. Its involvement will not expand the issues or delay the resolution of the proceedings, and I do not consider that any other party will be materially prejudiced by its involvement.

[10] Accordingly, I grant HNZ's application and order pursuant to r 7.43A(d) and (e) that it be joined to participate as intervenor in this proceeding.

The grounds of opposition to leave being granted

[11] The Council and HNZ both oppose Mr Belgiorno-Nettis's application for leave to appeal being granted. The Council opposes on the grounds that the applicant has failed to establish that the proposed appeal raises a question of law or fact capable of

bona fide serious argument, or that it involves a matter of private or public interest of sufficient importance to outweigh the cost and the delay involved in a further appeal.

[12] HNZ adopts the submissions made by the Council, and further submits that the applicant has no right of appeal beyond the High Court in respect of appeals lodged in relation to s 158 of the Act. I deal with this matter first.

Is there a right of appeal from the High Court's determination of an appeal under s 158?

The applicant's submissions

[13] Mr Ryan for the applicant submits that subject to leave being obtained, there is a right of appeal from this Court's determination of an appeal brought pursuant to s 158. He acknowledges that in contrast to ss 156 and 157, s 158 makes no reference to s 308 of the RMA which imports Subpart 8 of Part 6 of the Criminal Procedure Act 2011 and its provisions dealing with second appeals with leave to the Court of Appeal. However, he submits that the absence of any reference to s 308 of the RMA in s 158 does not remove the jurisdiction of the Court of Appeal to hear appeals pursuant to s 66 of the Judicature Act 1908, from judgments of the High Court, subject to leave first being obtained pursuant to s 67 of the Judicature Act. Mr Ryan submits that the Panel is an "inferior court" for the purposes of s 67 of the Judicature Act.

[14] Mr Ryan distinguishes the case of *Osborne v Auckland City Council*,[6] where the Court of Appeal found that the specific provisions of the Weathertight Homes Resolution Services Act 2006 relating to determinations under that Act being "final" prevailed over and excluded the rights of appeal created by ss 66 and 67 of the Judicature Act 1908. He submits that by comparison there is no express wording in either ss 155 or 158 of the Act to the effect that an appeal under s 158 to the High Court on the grounds of error of law is final.

[15] Mr Ryan submits that although the Act is silent on the subject of a further appeal from the High Court to the Court of Appeal, there are two aspects of the Act that provide an indication that a right of appeal does exist following the High Court's

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6 *Osborne v Auckland City Council* [2012] NZCA 199, (2012) 21 PRNZ 76.

determination of a s 158 appeal. First, s 154 of the Act provides an objection procedure where the Panel has declined to consider a submission, or has struck out a person's submission. Under that provision a person may lodge a written objection to the Panel's decision declining to consider a submission, and the Panel is then required to consider the objection and hold a hearing before determining the objection. Section 154(5) provides that the Panel's decision on the objection is final and there is no right of appeal against it. Mr Ryan says that this is an example of clear legislative intention that no right of appeal be available from such a decision of the Panel. By comparison, he notes that s 158 contains no wording to indicate that this Court's determination of an appeal is intended to be final.

[16] Secondly, he refers to s 152 of the Act which provides for the PAUP to be deemed approved or adopted from certain dates. Mr Ryan notes that s 152(2)(b)(ii) of the Act provides that the proposed plan is deemed to have been approved by the Council on and from the date on which the time for appeals provided for in s 155 expires, including:

> (ii) the date on which all appeals, including further appeals, relating to that part of the proposed plan are determined, if appeals are made under that section.

[17] Mr Ryan submits that the reference to *further appeals* relates to the appeals referred to in s 155, and therefore implies that appeals brought under s 158 are subject to further appeals.

[18] Finally, Mr Ryan submits that the observation of Whata J in *Albany North Landowners v Auckland Council*, in which he doubted that there was any right of appeal to the Court of Appeal from a decision of the High Court on an appeal pursuant to s 158,[7] appears to have overlooked ss 66 and 67 of the Judicature Act 1908, which, notwithstanding that the Act has been repealed, continue to apply as if not repealed pursuant to the transitional provisions of the Senior Courts Act.[8]

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7 *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [86].
8 Senior Courts Act 2016, sch 5, cl 10(1).

HNZ's submissions

[19] Dr Kirman for HNZ submits that there is no right of appeal from the judgment of 29 September 2017 dismissing the applicant's s 158 appeal.

[20] Dr Kirman refers to s 155 of the Act and says that it clearly provides that the only appeal rights available in relation to the Auckland Unitary Plan (AUP) are the rights of appeal to the Environment Court under ss 156 and 157, and the right of appeal to the High Court contained in s 158.

[21] Dr Kirman submits that there is a clear distinction drawn by the Act between appeal rights that are available following appeals to the Environment Court pursuant to ss 156 and 157, and the absence of any further right of appeal from the determination of an appeal to the High Court under s 158. She points out that s 156 confers a right of appeal to the Environment Court on any decision of the Council accepting a recommendation of the Panel that was beyond the scope of the submissions made to the Panel on the PAUP, and where the person was unduly prejudiced by the decision.[9] The section also confers a right of appeal to the Environment Court where the Council rejected a recommendation of the Panel and decided upon an alternative solution resulting in a provision being included in the PAUP or a matter being excluded from the PAUP.[10] Such an appeal is limited to the effect of the differences between the alternative solution and the Panel's recommendation.[11]

[22] Dr Kirman also refers to the provisions of s 156(4) which sets out the provisions of the RMA that shall be applicable to an appeal to the Environment Court, including s 308 of the RMA which imports Subpart 8 of Part 6 of the Criminal Procedure Act 2011 and its provisions providing for second appeals with leave to the Court of Appeal. Dr Kirman further notes that s 157, which provides for a right of appeal to the Environment Court in relation to designation and heritage orders, also provides for such an appeal to be treated as if it were an appeal under certain sections of the RMA, including s 308.

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9 Section 156(3).
10 Section 156(1).
11 Section 156(2).

[23] In contrast, s 158, which confers a right of appeal to the High Court on a question of law, contains no equivalent reference to s 308 of the RMA. Dr Kirman submits that the absence of a reference to s 308 as being applicable to appeals brought under s 158 reflects the legislative intention to bring finality to disputes over the provisions and contents of the AUP in cases where the Council had accepted the Panel's recommendations and following the High Court's consideration and determination of any possible errors of law made by the Panel or the Council in the course of their decision process. Dr Kirman submits that the distinction is explicable, as appeals to the Environment Court under ss 156 and 157 result in that Court undertaking a de novo hearing, and following such a determination the usual rights of appeal under the RMA apply.

[24] Dr Kirman submits that the legislature has purposely restricted appeal rights from those normally available under the RMA in those circumstances where the Panel and the Council were aligned in terms of the planning outcomes, allowing only limited rights of appeal on points of law to the High Court.

[25] Dr Kirman further submits that the Act's omission of any further right of appeal from a determination of an appeal under s158 is consistent with the legislative purpose of the Act, which is to provide a tailored and expeditious process for the development of Auckland's first Unitary Plan. She submits that it cannot have been the legislative intention to afford a dissatisfied submitter a further right of appeal and by so doing delay the ability of other persons to commence the process of intensification of the use of their land in accordance with the AUP.

Discussion

[26] Sections 66 and 67 of the Judicature Act 1908 provide for appeals from decisions of the High Court to the Court of Appeal as of right or with leave. Sections 66 and 67 provide:

> **66 Court may hear appeals from judgments and orders of the High Court**
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> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the High Court, subject to the provisions of this Act and to such rules and

orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.

67 Appeals against decisions of the High Court on appeal

(1) The decision of the High Court on appeal from an inferior court is final, unless a party, on application, obtains leave to appeal against that decision–

(a) to the Court of Appeal; or

(b) directly to the Supreme Court (in exceptional circumstances as provided for in section 14 of the Supreme Court Act 2003).

(2) An application under subsection (1) for leave to appeal to the Court of Appeal must be made to the High Court or, if the High Court refuses leave, of the Court of Appeal.

(3) An application under subsection (1) for leave to appeal directly to the Supreme Court must be made to the Supreme Court.

(4) If leave to appeal referred to in subsection (1)(a) is obtained, the decision of the Court of Appeal on appeal from the High Court is final unless a party, on application, obtains leave to appeal against that decision to the Supreme Court.

(5) Subsections (1), (3), and (4) are subject to the Supreme Court Act 2003.

[27] The Supreme Court in *Siemer v Heron* observed that s 66 of the Judicature Act confers an appeal as of right against decisions of all kinds made by the High Court.[12] However, it is subject to s 67 which provides that appeals against decisions of the High Court on appeal from a lower court require leave.

[28] Sections 66 and 67 of the Judicature Act are general provisions that apply in all contexts unless overridden by the wording of a specific statute.[13] Section 67 of the Judicature Act therefore prima facie applies in the present case, giving the applicant a right to seek leave to appeal the judgment of this Court to the Court of Appeal. The question is whether a right of further appeal from a decision under s 158 of the Act has been excluded by the specific wording of the Act. As Dr Kirman accepts, the starting point must be that access to the courts (including on appeal) is a fundamental right and

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12 *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 at [2] and [31].

13 See *Osborne v Auckland City Council* [2012] NZCA 199, (2012) 21 PRNZ 76 at [23]–[26] and [32].

may only be excluded expressly by clear words, or by necessary implication.[14] A necessary implication has been described as "one which necessarily follows from the express provisions of the statute construed in their context".[15]

[29] In *Osborne v Auckland City Council*, the Court of Appeal observed:

> [35] Whether in any particular case a specific statute has precluded a further right of appeal will therefore depend on the language of the particular provision; its text and purpose in the context of the particular statute …

[30] This statement echoes s 5(1) of the Interpretation Act 1999, which states that the meaning of an enactment must be ascertained from its text and in the light of its purpose. The Supreme Court has noted that:[16]

> Even if the meaning of the text may appear plain in isolation of purpose, that meaning must always be cross-checked against purpose in order to observe the dual requirements of s 5.

[31] Here Dr Kirman relies both on the language of the Act and upon its legislative purpose. As regards the statutory language, she places particular emphasis on Parliament's use of the phrase "the only appeal rights available" in s 155:

> **155 Appeal rights**
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> The only appeal rights available in respect of the proposed plan are as follows:
>
> (a) the right of appeal to the Environment Court under section 156 or 157:
>
> (b) the right of appeal to the High Court under section 158.

[32] Read on its own, the phrase "the only appeal rights available" on its face may be seen as encompassing both first and second appeals; however, I consider that when s 155 is read as a whole it is apparent that it must be intended to refer only to the rights of first appeal in relation to the PAUP. This interpretation is supported by the words "to the Environment Court" and "to the High Court", which in my view, limit any first appeals to those specifically provided for and allowed by ss 156 to 158. Significantly,

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14 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [140].

15 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45], cited in *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [141].

16 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

the language of s 155 does not go so far as to expressly abrogate any further rights of appeal that might then apply to decisions made by either the Environment Court or the High Court on appeals brought under ss 156-158. I consider that s 155 cannot be interpreted as expansively as Dr Kirman suggests, namely to say that second appeals in respect of the PAUP are only permitted if specifically and expressly provided for in ss 156, 157 and 158.

[33] Dr Kirman then argues that there is a distinction of significance between ss 156 and 157 of the Act on the one hand and s 158 on the other, because ss 156 and 157 refer to s 308 of the RMA, which imports the appeal provisions in Subpart 8 of Part 6 of the Criminal Procedure Act 2011, while s 158 does not. She contends that this was a deliberate move by the legislature intended to remove any right of second appeal in respect of decisions under s 158. I agree it is unusual that s 158(5) incorporates ss 300 to 307 of the RMA and stops short of incorporating s 308, in contrast to ss 156(4) and 157(5). However, I do not consider that the absence of any reference in s 158(5) of the Act to s 308 of the RMA indicates that the legislature intended there to be no possibility of a second appeal in respect of s 158. In my view, such an inference is too great a leap. It does not amount to an express extinguishment of a right of second appeal; nor is it a "necessary implication" from the absence of a reference to s 308 that s 67 of the Judicature Act will also not apply.

[34] Also significantly, the legislature has not employed the word "final" in relation to decisions of the High Court on appeals brought pursuant to s 158. The language used in ss 155 and 158 of the Act can be contrasted with examples in other enactments where Parliament's intention to abrogate further appeal rights has been clearly expressed. The Court of Appeal in *Osborne* referred to a number of examples of statutes where Parliament has excluded rights of appeal using clear language:

> [27] When Parliament decides in a particular statutory context that there should be no further right of appeal from the High Court, the statute will usually contain a provision simply describing the decision of the High Court as "final". Examples of statutes containing such provisions are the Broadcasting Act 1989, the Citizenship Act 1977, the Motor Vehicle Sales Act 2003, and the Tuberculosis Act 1948. Under these specific statutory provisions, notwithstanding the general provisions of s 66 and s 67 of the Judicature Act, there is no further right of appeal from the High Court to this Court. A similar approach is usually adopted when Parliament decides that a

> District Court decision should be "final" and there should be no further right of appeal.

[35] In *Osborne*, the Court of Appeal concluded that s 95 of the Weathertight Homes Resolution Services Act 2006 (the WHRSA) removed any further right of appeal to the Court of Appeal. Section 95(2)(b) of the WHRSA stated that a determination of an appeal from the Tribunal by the High Court (or by the District Court) was "a final determination of the claim". The Court of Appeal considered that the meaning of s 95(2)(b) was:[17]

> … clear and consistent with the provisions in those statutes where Parliament has decided there should be no further appeal from the High Court (or the District Court).

[36] While the statutory language employed in s 95(2)(b) of the WHRSA makes the legislative intention quite clear, the language used in ss 155 and 158 of the Act, by contrast, is entirely silent as regards further appeals. It is also significant that s 154(5) of the Act (which deals with objection rights) contains a clearly worded provision excluding any right of further appeal:

> A decision of the Hearings Panel under this section is final and there is no right of appeal against it.

[37] It was open to the legislature to include a similarly worded provision in relation to decisions of the High Court under s 158, but it did not do so.

[38] I therefore consider that the text of ss 155 and 158 of the Act does not exclude or abrogate the right to bring an appeal to the Court of Appeal where leave is granted. My conclusion on this point respectfully differs from the view of Whata J in *Albany North Landowners v Auckland Council*. He commented:

> [86] Any decision of the Environment Court may be appealed to the senior courts in the usual way under the appeal provisions of the RMA pursuant to s 308. By contrast, appeals to the Court of Appeal are not available pursuant to s 158.
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> (footnotes omitted)

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17 At [45].

[39] His Honour's observation appears to have been made in passing, and his comment was not accompanied by any detailed consideration of the point. Nor, it seems, did Whata J have submissions that dealt with this issue in any depth. The Judge did not address the general rights of appeal available under ss 66 and 67 of the Judicature Act or whether or not those rights were excluded by clear words or necessary implication.

[40] It is necessary to cross-check my interpretation by reference to the legislative purpose. The purpose of the Act is set out in s 3 which relevantly provides:

> **3 Purpose of this Act**
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> (1) The purpose of this Act is to resolve further matters relating to the reorganisation of local government in Auckland begun under the Local Government (Tamaki Makaurau Reorganisation) Act 2009 and continued under the Local Government (Auckland Council) Act 2009.
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> (2) To this end, this Act –
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> …
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> (d) provides a process for the development of the first combined planning document for Auckland Council under the Resource Management Act 1991.

[41] The clear purpose of Part 4 of the Act, within which ss 155 and 158 are located, was to facilitate the preparation of the first Auckland combined plan by means of a streamlined set of procedures and processes that would enable the AUP to be produced within a comparatively short time. However, that streamlined process does not in my view require an interpretation of ss 155 and 158 such as would abrogate any right of appeal with leave from a decision of the High Court.

[42] Dr Kirman submits that the Act could not have been intended to enable a dissatisfied submitter to hold up the process of the completion of the preparation of the PAUP by challenging planning outcomes determined by the Panel and Council by means of further appeals from decisions of the High Court. However, that submission fails to sufficiently recognise that an appeal to the High Court under s 158 is restricted to a question of law, and that prior leave to bring a further appeal is required before an appeal from the High Court's decision can be brought. The requirement of obtaining leave is an effective filter to restrict any further appeal being taken on the question of

law decided by the High Court. Before leave will be granted, the appeal must be shown to raise a question of law capable of serious argument and involve issues of either private or public interest of sufficient importance to outweigh the cost and delay involved in another appeal. As noted by the Court of Appeal in *Waller v Hider*[18] and repeated by the Court in *Snee v Snee*:[19]

> [22] To summarise, for leave to be granted pursuant to s 67, the appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost, both to the Court system and to the parties, and the delay involved in the further appeal. Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled on by a Court.

[43] Accordingly, the prerequisite of obtaining leave will ensure that a dissatisfied submitter to the Panel cannot hold up the process of completion of the PAUP by means of bringing another appeal unless it can be shown to raise a question of law of sufficient importance to justify the cost and delay caused by a further appeal.

[44] For these reasons, and having regard to both the language of ss 155 and 158 and to the legislative purpose of the Act, I consider that Parliament has not abrogated the right to appeal with leave conferred by s 67 of the Judicature Act.

Does the proposed question of law raise an issue of sufficient importance to warrant leave to appeal?

The applicant's submissions

[45] As I have already noted, the applicant contends that the primary error in the judgment is the finding that it was lawful and adequate for the Panel to provide reasons for accepting or rejecting submissions on the zoning and additional height controls of the sites in respect of which the applicant had made submissions by grouping them together with all zoning and additional height control related matters across the Auckland region. The applicant says that the legislative purpose of s 144(8)(c) of the

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18 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413–414.
19 *Snee v Snee* (1999) 13 PRNZ 609 (CA).

Act is to require the Panel to provide adequate reasons for accepting or rejecting submissions. The applicant submits that while it was open to the Panel to provide an overview of its approach to urban growth, the approach of grouping all zoning and height-related submissions across the whole Auckland region did not engage with site-specific submissions as to how individual sites should be zoned, or in relation to the application of additional height controls. The applicant submits that the Court erred by conflating the Panel's recommendations to the Auckland Council with reasons, and by failing to address how a submitter's right of appeal to the High Court on questions of law is to be given effect to by the provision of high-level and inferred reasons.

[46] In his notice of application for leave to appeal, the applicant also included a question as to whether the Court erred in finding that the nature and extent of the statutory obligation upon the Panel to give reasons for its recommendations also defines the nature and extent of the common law obligation as regards the observance of the requirements of natural justice. However, the applicant has subsequently filed a memorandum with the Court withdrawing that ground.[20]

[47] The applicant has also appealed this Court's dismissal of his judicial review proceeding pursuant to s 11 of the Judicature Amendment Act 1972,[21] upon grounds that are substantially the same as are relied upon in the application for leave to appeal. The applicant says that both proceedings raise essentially the same interpretive question as to whether adequate reasons can be found from reasons expressed by the Panel at a high and broad level in respect of submissions to the Panel which sought site-specific zoning and additional height control outcomes. In the judicial review proceedings, the applicant seeks relief in respect of two sites (the Promenade Block and the Lake Road sites).

[48] The applicant submits that the questions of law to be posed by his appeal are matters of general and public importance. Mr Ryan submits that the questions of law raise important questions which are applicable in the Auckland context, and also more generally under the Resource Management Act.

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20 Memorandum dated 19 December 2017.

21 Although the Judicature Amendment Act 1972 has been repealed, it remains applicable to these proceedings under the transitional provision in s 23 of the Judicial Review Procedure Act 2016.

[49] The applicant says that there have been several decisions of the High Court in which the adequacy of the Panel's reasons as regards site-specific submissions have been considered and determined.[22] Comparing and contrasting these decisions, Mr Ryan notes that in *Hollander*, in which the appellant had challenged the Panel's approach to the grouping of all re-zoning submissions, Heath J rejected the criticism of the Panel's approach by grouping all zoning issues, saying that the Panel's approach to grouping "means that its reasoning must be assessed by reference to the collective, rather than the individual."[23] By way of contrast, Mr Ryan refers to three decisions of Whata J, which he says raised the issue of the adequacy of reasons given by the Panel in the context of site-specific issues and considerations. Mr Ryan submits that the High Court's decisions are at variance and give rise to the appearance of "uneven jurisprudence".

The Council's submissions

[50] Ms Dickey for the Council submits that the proposed appeal does not raise a question of law capable of bona fide and serious argument, and that the issues to be raised by the proposed appeal are not of such importance as to justify a second appeal having regard to the cost and delay involved in such a further appeal.

[51] In relation to the findings in the judgment regarding the Panel's grouping of submissions, Ms Dickey submits that such findings are entirely consistent with ss 144(8)(c) and 144(10) of the Act and the High Court's decisions in *Hollander* and *Albany North Landowners.*

[52] As regards the applicant's allegation that the Court erred in finding that adequate reasons for the acceptance or rejection of the applicant's submissions to the Panel could be inferred from the Panel's reports "regarding the precinct provisions at Takapuna on which the appellant did not submit and where the sites are not located within the Takapuna precinct provisions",[24] Ms Dickey says that the applicant had

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22 *Hollander v Auckland Council* [2017] NZHC 2487 (Heath J); *Bunnings v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2141 (Whata J); *Arena Living Ltd v Auckland Council* [2017] NZHC 2311 (Whata J); *Auckland Presbyterian Hospital Trustees Inc v Auckland Council* [2017] NZHC 2158 (Whata J).

23 At [60]–[61].

24 Application for leave to appeal at [11](b)(i).

made both a primary and further submission to the Panel on the Takapuna 1 and 2 precincts. Ms Dickey submits that in any event the Court's reference in the judgment[25] to relevant passages in the two Takapuna precinct reports was appropriate, and would have been appropriate even if the applicant had not made submissions affecting the Takapuna 1 and 2 precincts, as the rationale for the Panel's zoning and height control recommendations is evident from the contents of those precinct reports, which indicate the Panel's awareness of the issues concerning the effects of intensification, height of development and the effect upon privacy, sunlight and shadow due to the heights permitted under the PAUP.

[53] Ms Dickey says that the applicant's analysis of the discussion in the judgment as to the Panel's reasons is selective and, while referring to passages relating to the Takapuna 1 and 2 precincts, has ignored the references to the reasons contained in the Panel's Overview Report for adopting an approach to both zoning and height controls that would enable intensification of development in and around metropolitan and town centres and transport corridors.

[54] Ms Dickey further submits that there was no error of law capable of bona fide serious argument in relation to the Panel's recommended maps and their relevance to the Panel's reasons in relation to zoning and height controls. She says that there was no error in the Court's findings that individual submitters must look to the Panel's reasons as expressed in general terms, and apply that reasoning to the zoning and height controls as appear in the Panel's versions of the planning maps in order to determine the Panel's reasons.

[55] Ms Dickey submits that the applicant was not denied an effective right of appeal from the Panel's recommendations. She says that the reasoning behind the Panel's zoning and height recommendations relevant to the applicant's submissions was clear, and it was open to the applicant to appeal to the High Court in relation to any alleged error of law in that reasoning.

[56] Furthermore, Ms Dickey disputes the applicant's contention that the appeal raises issues more generally under the Resource Management Act. She says that the

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[25] At [121]–[123].

Act established a tailored statutory process for the preparation of the first AUP, in substitution of the usual provisions of the RMA applicable to the preparation of planning documents. The High Court's decisions relate to and reflect the specific AUP context and the special statutory regime that is applicable to it.

[57] Ms Dickey also notes that the questions of law that the applicant wishes to pursue do not have a broad application to the Auckland area, but relate only to two small areas of land located within the Takapuna area, and to insignificant differences between the zoning and height provisions in the AUP and those which were sought by the applicant. Ms Dickey says that in contrast to the specific interest of the applicant in relation to the properties and height issue he made submissions on, there is a broad public interest in the provisions of the AUP being made operative as soon as possible. She notes that pursuant to s 86F of the RMA, provisions of the AUP cannot be treated as operative until all appeals are determined, and submits the questions of law and scope of the issues that would arise from the proposed appeal should be contrasted with the considerable public interest in the AUP being treated as operative.

[58] In response to Mr Ryan's submissions regarding the recent High Court decisions which he says have given the appearance of "uneven jurisprudence", Ms Dickey says that all three of the judgments of Whata J involved settlements reached by the parties which were brought before the Court by way of consent memoranda in which the parties had agreed on the existence of an error of law. Ms Dickey notes that while the grounds of appeal in those three cases included allegations of errors of law based on insufficiency of the Panel's reasons, none of the three cases was decided by Whata J on the basis of the law relating to the giving of reasons. Ms Dickey submits that accordingly the precedent value of those three judgments is limited, and no issue as to uneven jurisprudence arises. She points out that in both *Hollander* and the instant case the sufficiency of reasons was squarely addressed, and submits that these two decisions were aligned as regards the Panel's obligation to give reasons accepting or rejecting submissions and for its recommendations to the Council.

Discussion and conclusion

[59] The applicant seeks leave to appeal on a question of law principally relating to the adequacy of the Panel's reasons for accepting or rejecting submissions regarding the zoning and additional height restrictions with particular application to properties and matters on which he made submissions to the Panel. His submissions related principally to two properties located in Takapuna, and to the application of the additional height restrictions contained in the PAUP.

[60] The applicant is one of literally thousands of submitters who presented submissions to the Panel on the contents of the PAUP. As I noted in the judgment, the Council initially received 9,400 primary submissions, later a further 3,800 submissions, and identified 1,400,000 submission points. The Council received over 20,000 rezoning requests relating to 80,000 properties. By comparison to the vast number of issues arising from submission points and the number of individual properties which were the subject of submissions to the Panel, the issues the applicant wishes to raise relating to the Takapuna properties and additional height restrictions are of little significance.

[61] I do not consider that there is in fact any "uneven jurisprudence" arising from a comparison of the findings of Whata J in the three cases he decided, and the *Hollander* decision and the present case. I agree with the submission of the Council that the Whata J decisions can be readily distinguished, as in each case they were before the Court as appeals under s 158 on the basis of agreement between the parties as to the occurrence of an error of law, and were decided without the issue of the adequacy of the Panel's reasons being contested or fully examined by the Court. The High Court's decisions in *Hollander* and the present case are consistent and aligned in their findings as to the Panel's reasons.

[62] I further find that the applicant has failed to demonstrate that the proposed question or questions of law he wishes to raise in his proposed appeal involve matters of sufficient importance to outweigh the public interest in the provisions of the AUP being treated as operative, which would be held up and further delayed by such an appeal.

[63] For these reasons I dismiss the application for leave to appeal.

Two further intervener applications

[64] Two further parties who made submissions to the Panel have applied to be joined as interveners in this proceeding.[26] Emerald Group Limited (Emerald) owns or has an interest in several Takapuna properties which it intends to develop in accordance with the new zoning provided for in the AUP, including one property situated within a block of land in respect of which the applicant is challenging the zoning. Metro Property Limited (Metro) is also the owner of property situated in Takapuna, located within one of the blocks affected by the applicant's challenge to zoning, and which it also intends to develop in accordance with the new zoning provided for in the AUP.

[65] Both Emerald and Metro submit that there is no apparent rationale for focussing upon the two blocks of land identified by the applicant as relevant to his proposed appeal as requiring any different treatment from the generality of sites subject to the AUP. They say that in the event of the applicant refining his pleadings to focus on site-specific arguments, they wish to be able to respond and make submissions to the Court. They both say that they had no difficulty understanding the reasons provided by the Panel and the Council for the rezoning recommendations and decisions regarding the Takapuna properties. They submit that their involvement in the proceedings is necessary as it would be unjust for a determination to be made on the matters in dispute without them being heard, and furthermore their involvement has the potential to improve the quality of the information before the Court and will not significantly or unnecessarily expand the issues raised in the proceedings or extend the duration of the hearing. They further submit that while the Auckland and region-wide issues are expected to be addressed by the Council and HNZ, the participation of landowners directly affected by the zoning of the two blocks would assist the Court by ensuring that a more complete picture of the issues arising is presented.

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[26] The applications are made in reliance on r 7.43A(1)(d) and (e) of the High Court Rules 2016, and the Court's inherent jurisdiction to grant leave to a non-party to intervene: *Seales v Attorney – General* [2015] NZHC 828; *McClintock v Attorney-General* [2015] NZHC 1280.

[66] While I consider both of these applications to be well-founded, it is premature to determine them at this stage when the immediate issue is whether the application for leave to appeal is to be granted. Accordingly, both the Emerald and the Metro applications for leave to intervene are simply adjourned, and may be addressed again should the applicant pursue this proceeding by means of a further application or appeal.

Costs

[67] The Auckland Council and HNZ, having succeeded in their opposition to the application for leave to appeal, are entitled to costs. I direct that memoranda as to costs on behalf of the Council and HNZ be filed and served upon the applicant within ten working days of the delivery of this judgment, and that the applicant is to file and serve a memorandum in reply as to costs within a further period of ten working days. No memorandum is to exceed three pages in length (annexures excepted). Upon receipt of the memoranda to be filed, I shall determine costs on the papers.

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Paul Davison J

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