

Minute from the Hearing Panel – regarding:

Miraka Limited's (Miraka) Block 3 rebuttal evidence. The Panel's Determination.

Miraka lodged three rebuttal statements of evidence. These were from Mr Jackson, Ms Addenbrooke and Ms Hardy¹.

The Hearing Panel (Panel) questioned whether this evidence was in fact rebuttal evidence. The Panel issued a Minute (dated 25 July 2019) requiring Miraka to seek leave for the Panel to determine if this evidence should be accepted as late 'supplementary' primary evidence; or in the alternative, persuade the Panel that the evidence qualifies as rebuttal evidence.

Miraka filed a Memorandum (dated 30 July 2019) setting out its reasons as to why the evidence was rebuttal and should be accepted on that basis. Miraka also sought that leave be granted to accept the evidence as late supplementary primary evidence if the Panel was not persuaded it was rebuttal.

The Panel also issued a Minute (dated 31 July 2019) inviting any party to address the application filed by Miraka (either by a Memorandum or appearing at the hearing on 6 August 2019). No memoranda were filed and no person appeared at the hearing to either support or oppose the leave application.

The Panel heard Miraka's request for the Panel to accept the evidence as rebuttal, or in the alternative accept it as late supplementary primary evidence at the commencement of the hearing on 6 August.

Miraka's key contention was that rebuttal evidence need not be in opposition to evidence in chief. It referred us to section 4.16 of the Environment Court Practice Note and to High Court authority in the intellectual property context that refer to rebuttal (or reply) evidence being a "response" to other evidence. The cases Miraka referred us to also emphasise the need for rebuttal to be focussed on the other party's case rather than using the opportunity to restate the case for the applicant. Miraka's counsel conceded that some elements of the purported rebuttal would not meet the tests they proposed, but argued that the bulk would do so.

We placed limited weight on language used in the High Court authorities referred to us. In the context of an intellectual property dispute between two parties, a "response" to the other party is necessarily contradicting that party's evidence. While the Environment Court Practice Note is equivocal, we note the discussion of the nature of rebuttal in *Latimour and others v Auckland Council*² as follows:

¹These witnesses have also filed evidence-in-chief.

² [2012] NZEnvC 207

“While there was no argument about it, it may be worth confirming just what this argument is about. The *New Zealand Law Dictionary* defines *rebut* as ...*disprove, dispute, defeat, counter, refute or take away the effect of*. It is not necessarily the case that evidence offered for those purposes takes each proposition in the evidence-in-chief and deals with them one by one. It can be more generic than that - there are no hard and fast rules about how it is to be approached.”

Our direction was that rebuttal evidence had to be strictly in rebuttal. Our assessment is that applying the definition of rebuttal in the *Latimour* decision, only one section of Ms Hardy’s evidence qualifies as such.

The Panel made a verbal determination, and this written Minute confirms that verbal determination.

The Panel determined that with the exception of one section of Ms Hardy’s evidence³, the evidence was not rebuttal as it:

- Did not contradict or dispute any other person’s evidence,
- While referencing the evidence of others, it largely supported that evidence,
- The evidence addressed the substantive matters in Miraka's submission (as opposed to rebutting the evidence of others), and
- Ms Addenbrooke and Ms Hardy’s evidence provided detailed 'marked-up' versions of the plan provisions.

While not accepting the evidence as rebuttal, the Panel determined that the evidence would be accepted as late supplementary primary evidence. The reasons for this are those set out in section 5 – “Request for Leave” in Miraka’s Memorandum; and that no person opposed the acceptance of Miraka’s evidence.

Greg Hill



Chairman of the Hearing Panel.

8 August 2019

³ The Panel accepts the section 5 – Allocation in Ms Hardy’s evidence is rebuttal evidence.