IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2014-485-11204
[2019] NZHC 3305

BETWEEN	HELILOGGING LIMITED (in receivership and liquidation) First Plaintiff
	MARK WAYNE FORD (as trustee of the WESSEX TRUST) Second Plaintiff
AND	CIVIL AVIATION AUTHORITY OF NEW ZEALAND Defendant

Hearing:	13 – 15 August 2018 23 – 27 September 2019 30 September – 4 October 2019 7 – 11 October 2019 14 – 18 October 2019 21 – 25 October 2019 29 – 30 October 2019 4 – 5 November 2019
Counsel:	P J Dale QC, E Telle and L E Steel for Plaintiffs L J Taylor QC, G M Richards and S F Lomaloma for Defendant
Date:	13 December 2019

JUDGMENT OF COOKE J

Table of Contents

[1] The plaintiffs in this proceeding are Mr Mark Ford and his company now in receivership and liquidation. I will refer to them collectively as "Helilogging". On 19 August 2005 the then Director of Civil Aviation, Mr John Jones, made decisions under s 37 of the Civil Aviation Act 1990 (the Act) declining applications made by Helilogging to enable it to engage in helicopter logging activities using a type of former British military helicopter, the Wessex Mk 2, that had been acquired for that purpose. In this proceeding the plaintiffs advance two causes of action associated with this decision. The first is a claim for misfeasance in a public office, and the second is a claim in deceit.

[2] The trial took approximately seven weeks. It was initially scheduled to be a little longer, but by an earlier judgment dated 12 July 2019 I ordered that there would be a split trial, and that any issues relating to damages would be dealt with at a later hearing.[1] This was primarily due to the delays in the plaintiffs formulating their case on damages. The present judgment accordingly deals with liability, and what is described as "regulatory causation" as more precisely outlined in my earlier judgment.

ESSENCE OF THE PLAINTIFFS' CASE

[3] Without wishing to limit the claims as pleaded, it may assist if I summarise the essence of the plaintiffs' case at the outset.

[4] Helilogging wished to engage in heli-logging operations pursuant to which felled logs would be transported as an underslung load by the Wessex Mk 2 helicopter, particularly from more remote locations where road transport was not possible. Helilogging began engaging with the Civil Aviation Authority (the "CAA") in relation to its proposals to be authorised to do so from late 2002, and received advice from senior officials on what the requirements were. It then engaged in a significant exercise involving major expenditure to meet the requirements, and it made the necessary applications. Following successful flight trials using the Wessex it pressed Mr Jones for his decision. Mr Jones advised, however, that he needed further information before he could make a decision.

---

1 *Helilogging Ltd v Civil Aviation Authority of New Zealand* [2019] NZHC 1641.

[5] Judicial review proceedings were commenced by Helilogging in which it sought urgent mandatory orders. By judgment dated 16 December 2004 MacKenzie J did not grant such orders, but rather adjourned the proceedings so that a seven-stage process that Mr Jones had implemented could be followed in order that a decision could be made.[2] That seven-stage process was originally set out in an internal memorandum of Mr Jones dated 19 November 2004 which had been provided to Helilogging.

[6] The plaintiffs now allege that Mr Jones had already made up his mind to decline the application at the time of writing the 19 November memorandum, however. They say that his statements that he needed more time, and more information, including statements made in an affidavit he filed in the judicial review proceedings, were false. They rely on an earlier memorandum dated 9 November 2004 authored by Mr Jones that was not revealed at the time. They say that this memorandum demonstrates that Mr Jones had already decided to decline the application for the reasons he there set out. They say that the failure to disclose this memorandum, and the representations in his affidavit and otherwise that he needed more information to make a decision involved misfeasance and the tort of deceit.

[7] The claims involve further allegations. The seven-stage process took some time to complete, and ultimately led to the decision of Mr Jones on 19 August 2005 to decline the application. Steps taken shortly before the final decision are also alleged to found claims for misfeasance and deceit. In particular before reaching his final decision Mr Jones and Mr John Fogden, the CAA official providing advice to him on the decision, obtained advice from Mr Bernie Lewis, a well-respected and experienced former test pilot who had had flying experience in the Wessex. By letter dated 23 July 2005 Mr Lewis advised that he had grave doubts about the safety of the Wessex for the tasks suggested by Helilogging. This letter was relied on by Mr Fogden in his advice to Mr Jones, and then by Mr Jones when declining the application. Mr Lewis' advice was not disclosed to Helilogging before the final decision was made.

---

2 *Helilogging Ltd v Civil Aviation Authority of New Zealand* CIV-2004-485-2558, 16 December 2004 [*Judicial review decision*].

[8] The plaintiffs allege that Mr Lewis' advice was dishonest, and reliance on the advice by Messrs Jones and Fogden was also dishonest. This dishonesty is said to be manifested in a series of ways:

(a) First, the problems with the Wessex identified in Mr Lewis' letter were all out of date, as they related to the original helicopter of the 1960s rather than the current aircraft. Yet the letter purported to say it related to the current aircraft. The out of date nature of the advice was not only not referred to in it, but was disguised by a hand alteration made to his letter which concealed the fact that he was referring to an obsolete Wessex model.

(b) Secondly, Mr Lewis failed to mention that he had specifically flown, and approved the Wessex Mk 2 aircraft in New Zealand in a 1999 report to the CAA in order for it to obtain an airworthiness certificate. This earlier approval of the current aircraft by Mr Lewis was dishonestly not disclosed.

(c) Thirdly, Mr Lewis later claimed that he was involved in an alarming flight in this aircraft shortly after the 1999 approval when it encountered severe vibration when lifting logs. This occasion either never occurred — and Mr Lewis' evidence on this is untrue — or it represented his true reasons for his safety concerns, which he dishonestly did not reveal in 2005 as he knew that its significance could be readily challenged, and any concerns answered.

(d) Finally, when Helilogging saw Mr Lewis' advice after the Director's decision and Mr Ford contacted him, Mr Lewis further dishonestly misrepresented the true position by stating that his concerns were based on 40 year old fact. This was not true given the more recent events referred to above.

[9] The plaintiffs contend that either Messrs Jones and Fogden knew of Mr Lewis' wrongful conduct and effectively participated in it, or that the CAA is vicariously liable for Mr Lewis' conduct.

[10] The plaintiffs say that as a consequence of the alleged dishonest conduct, they lost the opportunity to have their application considered on its merits. In opening they accepted that it is possible that a reasonable Director of Civil Aviation might still have declined their application, but they said that a reasonable Director could also have granted it. They accordingly opened their case on the basis they sought damages on a "loss of a chance" basis. They invited the Court to assess the chances of the plaintiffs being granted their application, which would then be the starting point for the damages assessment to be made at the later hearing. In closing the case changed, however, and it was argued that a reasonable director would have been required to grant the application.

[11] The key features of the plaintiffs' allegations that I have just summarised were not set out in this way in the plaintiffs' pleadings, or in the opening. After exchanges with Mr Dale QC during his opening, and in a ruling dated 26 September 2019, I not only dealt with applications to amend the pleadings and to allow the plaintiffs to call supplementary witnesses, but I sought to record the essence of the plaintiffs' case as I understood it at that stage, and Mr Dale subsequently confirmed I had accurately captured the position. That summary is similar to the summary I have just provided. I did that so that there was greater clarity in relation to the claims that were being advanced. I note at that stage the plaintiffs had accepted that a reasonable director could have decided to decline the application.

THE ELEMENTS OF THE ALLEGED TORTS

[12] The plaintiffs allege that the defendant is liable for the torts of misfeasance in a public office, and/or deceit. In addressing the elements of those causes of action I deal first with misfeasance in a public office notwithstanding that it is the second pleaded cause of action. That is because it seems to me to be the more obviously relevant tort. Indeed there is an issue whether the tort of deceit is appropriately applied to public law decision-making. I will address this below.

Misfeasance in a public office

[13] There is no dispute between the parties on the elements of the tort of misfeasance in a public office. In *Currie v Clayton* the Court of Appeal summarised them in the following way:[3]

> [40] The elements of the tort of misfeasance in public office can be summarised thus:
>
> (1) *Standing*: The plaintiff must have standing to sue.
>
> (2) *Public office*: The defendant must be a public officer.
>
> (3) *Unlawful conduct*: The defendant must have acted or omitted to act in purported exercise of her public office unlawfully either:
>
> (a) intentionally, that is actually knowing her actions or omission to act were beyond the limits of her public office; or
>
> (b) with reckless indifference as to whether she was acting or omitting to act outside those limits.
>
> (4) *Intention*: The defendant must have so acted or omitted to act either:
>
> (a) with malice towards the plaintiff, that is, with intention to harm the plaintiff; or
>
> (b) knowing her conduct was likely to harm the plaintiff, or people in the general position of the plaintiff; or
>
> (c) with reckless indifference as to whether the plaintiff would be harmed. Subjective recklessness, not objective recklessness, is required.
>
> (Note: (a) is what is often called "targeted malice"; (b) and (c) are often called "non-targeted malice".)
>
> (5) *Resulting loss*: The plaintiff must actually have suffered loss and the defendant's actions must have caused the plaintiff's claimed loss.

[14] In the present case the plaintiffs do not allege targeted malice — that is they do not allege that Mr Jones abused his powers in order to cause harm to the plaintiffs. Mr Dale emphasised that establishing an improper motive was not required to establish liability, and that liability could arise even if Mr Jones was motivated by aviation

---

3 *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 (footnotes omitted).

safety. Rather the plaintiffs allege that the Mr Jones (and Mr Fogden) acted knowingly beyond their powers appreciating that this would cause harm to the plaintiff, or recklessly indifferent to this. This is a legitimate way of advancing the tort.

[15] The reckless indifference alternative still requires a finding of lack of honesty, however. In *Minister of Fisheries v Pranfield Holdings Ltd* the Court of Appeal held:[4]

> [118] In our view the formulation of the test for recklessness in *Garrett* requires more than simply uncertainty on the part of a public official as to the legal position, coupled with a failure to make enquiry. …

And the Court approved of an observation of Lord Hobhouse that the requirement that the defendant acted without honest belief in the lawfulness of the conduct best conveyed the required state of mind.[5] Moreover, as Blanchard J said for the Court of Appeal in relation to alleged misfeasance against a former Director of Civil Aviation:[6]

> [63] The question is not whether the Director's actions were justified as a matter of public law, but whether he was knowingly or recklessly acting beyond his powers. …

[16] Whilst the elements of the tort are not in dispute, the way in which the plaintiffs allege the tort has been committed here involves an allegation of some subtlety. In opening it was not alleged that the decision to decline the application was knowingly beyond the Director's powers. Indeed Mr Dale accepted that a reasonable Director could have declined the plaintiffs' application. It was nevertheless contended that the tort was committed. That is because of the alleged bad faith surrounding the decision that might otherwise have been lawfully made as summarised in paragraphs [6]–[10] above.

[17] That allegation amounts to what might be described as procedural misfeasance. The ultimate decision itself is not alleged to be beyond the powers or functions of the decision-maker, but it is alleged that there was dishonest abuse of public powers in the processes surrounding that decision. I accept that it is theoretically possible to commit the tort even when the ultimate decision is lawfully open to the decision-maker. Ancillary or procedural powers are still public powers exercised by public bodies. If

---

4 *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649.
5 At [120].
6 *Oceania Aviation Ltd v Director of Civil Aviation* CA 163/00, 13 March 2001.

a body exercises such ancillary or procedural functions or powers with targeted malice, or knowing that (or recklessly indifferent to whether) the actions or omissions are beyond the limits of their powers or functions, knowing that it is likely to harm the plaintiff or people in the position of the plaintiff, the elements of the tort could still be satisfied. As Blanchard J observed for the Court of Appeal in *Garrett v Attorney-General* "the purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty".[7] Misfeasance in the exercise of procedural powers could fall within this concept. But it may become a more difficult forensic exercise to establish the tort when the ultimate decision is reasonably open to the decision-maker, and difficult issues may emerge in terms of the loss caused by the wrongdoing.

[18] I also accept Mr Taylor QC's submission in relation to satisfying the burden of proof. The relevant standard remains proving the elements on the balance of probabilities, but the application of that standard requires cogent evidence to establish the dishonesty, or bad faith which is at the heart of the tort.[8] This is also so in relation to the tort of deceit which I turn to next.

Deceit

[19] There is also no dispute between the parties as to the elements required to be satisfied for the tort of deceit. They were set out by the Court of Appeal in *Amaltal Corporation Ltd v Maruha Corporation*.[9] The relevant elements are:[10]

(a) the defendant has made a false representation, knowing it to be untrue, or being reckless as to whether it is true;

(b) the defendant intended that the plaintiff should act in reliance on it;

(c) the plaintiff does in fact rely on it; and

(d) the plaintiff suffers loss as a result.

---

7 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 350.
8 See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
9 *Amaltal Corporation Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [46].
10 As summarised in *A v Attorney-General* [2018] NZHC 986, [2018] 3 NZLR 439 at [22].

[20] Given the essential nature of the plaintiffs' case as summarised in paragraphs [4]–[10] above, the main false representations alleged here would be those made by the Director that he was considering the applications on their merits when he introduced the procedure in November 2004, and that what Mr Lewis had advised in 2005 represented genuine safety concerns on which his decision was based.[11] Both are alleged to have been representations made to the plaintiffs because they were set out in materials provided to the plaintiffs at the time. There is also the further alleged misrepresentation made directly by Mr Lewis to the plaintiffs referred to at [8](d) above, and there are other variations pleaded in the sixth amended statement of claim.

[21] Whilst there is agreement about the elements of the tort, there is a dispute as to whether the tort of deceit can be applied to an exercise of public powers. There is authority that the tort of deceit is a commercial tort which is not available in the public law arena.[12] In *A v Attorney-General* Ellis J concluded, however that such a limitation could not be gleaned from the case law, or be regarded as settled law.[13]

[22] It seems to me that the respective elements of the tort of misfeasance and of deceit significantly overlap in a case such as the present one. It may prove to be a distraction to introduce, and then seek to apply a clear commercial/public divide, which may be illusory in some cases. If a plaintiff is able to demonstrate that the elements of the tort of deceit are established, it would be surprising that a defendant were able to avoid liability simply because the defendant was exercising public functions. If anything such a status may enhance rather than eliminate wrongdoing. Equally it may be possible to apply, and if necessary extend, the tort of misfeasance to address such alleged conduct. Both torts are candidates for where such wrongdoing can be properly housed. As I say the torts seem to me to overlap.

[23] Apart from making those observations I take this issue no further. For the reasons I address in greater detail below, I do not think it is necessary to decide this point in order to determine the present case.

---

11 More detailed allegations are set out in the sixth amended statement of claim dated 26 September 2019.

12 *Clayton v Currie* [2012] NZHC 1475 at [73] per Osborne AJ; and *Clayton v Currie* [2018] NZHC 1898 at [145]–[153] per Churchman J.

13 *A v Attorney-General*, above n 10, at [28].

THE REGULATORY FRAMEWORK

[24] Before addressing the relevant facts, and the allegations made by the plaintiffs, it is appropriate to explain the regulatory background to the decisions required of the Director in connection with the applications made by Helilogging.

The civil aviation system

[25] New Zealand is a party to the 1944 Convention on International Civil Aviation (the Chicago Convention).[14] The International Civil Aviation Organisation (ICAO) was established under the Chicago Convention. The Chicago Convention introduced an overall international framework for civil aviation to be implemented by States. There are a number of articles in the Convention itself, as well as standards and recommended practices in the Annexes to it which are overseen by ICAO and are to be implemented by, or which are to guide the regulation of civil aviation in each of the States.

[26] The Chicago Convention deals with particular topics that affect civil aviation in its various Annexes. When interpreting and applying New Zealand's domestic legislation within those areas, it is appropriate to take into account what is set out in the Annexes. There are two leading authorities on the approach:

(a) In *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* the Court of Appeal dealt with arguments concerning the interpretation of domestic legislation in light of the provisions of Annex 13 of the Chicago Convention.[15] Annex 13 deals with the responsibility of States to conduct independent investigations into significant aviation accidents and incidents, with the reports of the investigation bodies then available as part of the overall system.[16] The particular issue addressed in that case concerned the use of cockpit voice recorders, but the decision generally explains the relevance of the international materials

---

14 Convention on International Civil Aviation 15 UNTS 295 (open for signature 7 December 1944, entered into force 4 April 1947).

15 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

16 In New Zealand this function is performed by the Transport Accident Investigation Commission established under the Transport Accident Investigation Commission Act 1990.

to the interpretation and application of the Act, and the Civil Aviation Rules (the Rules) made under the Act.

(b) More recently in *Wellington International Airport Ltd v New Zealand Air Line Pilots' Assoc Inc* the Supreme Court dealt with the interpretation and application of provisions in the Rules in light of the provisions of Annex 14 of the Convention relating to runway end safety areas. The issue arose because of proposals to extend Wellington airport, and involved a successful challenge to the decision of the Director of Civil Aviation under the Rules in that connection.[17] Again the judgment addressed how the international standards and recommended practices affect the interpretation of the Rules.

[27] The present case involves a decision by the Director under s 37 to issue an exemption from a requirement of the Rules. The content of those Rules is similarly understood by reference to an Annex to the Chicago Convention, in this case Annex 8, which deals with the airworthiness of aircraft. There is no interpretation issue of the kind that arose in either of the above authorities, but the overall system for civil aviation regulation internationally, and therefore domestically, remains relevant to the application of s 37. I will explain this in greater detail below.

[28] I note that, as emphasised by the Court of Appeal in *New Zealand Air Line Pilots' Assoc Inc*, there is a degree of latitude exercised by States in the implementation of the provisions of the Chicago Convention as well as the standards and recommended practices.[18] That is reflected in the terms of Annex 8 which contemplate States having their own "national codes of airworthiness containing the extent of detail necessary for the certification of individual aircraft".[19]

---

17 *Wellington International Airport Ltd v New Zealand Air Line Pilots' Assoc Inc* [2017] NZSC 199, [2018] 1 NZLR 780.

18 See *New Zealand Air Line Pilots' Assoc Inc*, above n 15, at 278 and 284-285 per Keith J.

19 David McClean (ed) Shawcross and Beaumont Air Law (Issue 168, 4th ed, NexisNexis, London, 2019) at [43].

[29] A key philosophy of the overall system is that it involves an integrated system of devolved responsibilities.[20] Under the system various entities involved in civil aviation are charged with undertaking specific responsibilities, and it is through observance of those responsibilities by each of those entities that the overall system of civil aviation operates both effectively, and safely. This generally involves each of those entities being certified by a domestic civil aviation authority to engage in the relevant activities in question. In the present context the case involves an intention to operate a particular helicopter in a particular way within New Zealand.

[30] Under the civil aviation system there will generally be a particular entity that has designed an aircraft intended for civil aviation use. This entity will be a certified designer, with the relevant authority within that State being responsible for certification of the designer. The Wessex Mk 2 aircraft in issue in this case was originally manufactured by Westland Helicopters Ltd in the United Kingdom for military use, but was later certified for civilian use. Often aircraft are designed and/or manufactured by more than one entity. For example, the entity that manufactured the engine for the aircraft may be different from that which designed/manufactured the aircraft itself. Each entity will have been certified to perform its function. Sometimes the entities who design, and the entities who manufacture, will be different, and the State of design may be different from the State of manufacture. Under cl 1.4 of Annex 8 of the Chicago Convention the State of design issues a "Type Certificate" in relation to aircraft of a particular type once it has met appropriate airworthiness requirements.

[31] The system also flows through to where an aircraft is actually operated. The certified designer/manufacturer will retain responsibility for ongoing safety, overseen by their domestic authority. Each operator of a civil aviation aircraft will need to be certified as an approved operator of that aircraft in the State of operation. That certification will be granted by the relevant authority in that State. In the present case the proposed State of operation was New Zealand, the relevant proposed operator was the plaintiffs, and the relevant authority certifying the operator was the CAA under the Act and Rules.

---

[20] For a detailed description of the international regime see Shawcross and Beaumont Air Law, ibid, div II "Administration of Civil Aviation".

[32] This integrated and devolved system extends further down the system. The only persons who may fly the duly certified aircraft are pilots who are duly certified to fly them, and the only persons who may be responsible for maintenance will again be persons duly certified to undertake the maintenance on those particular aircraft (referred to as Licensed Aircraft Maintenance Engineers or LAME) using certified parts from certified suppliers.

[33] An important part of this system is that each of the entities performing functions are required to do so in accordance with prescribed standards. Standards and recommended practices are set out in the Annexes, and are amended over time by processes managed by ICAO. New Zealand's implementation of the standards and recommended practices can sometimes be found in the Act, but are more commonly found in the Rules which are promulgated by the Minister under Part 3 of the Act. It is then the participants themselves that have the responsibility for adhering to the Rules as certified entities, although the Rules contemplate various levels of oversight of these responsibilities by the CAA.

[34] There are detailed requirements and procedures for making and amending the Rules by the Minister of Transport under Part 3. This involves industry consultation, and such amendments normally take a long period of time.

[35] One of the features of this overall regime is that the CAA as regulator under the Act does not police compliance in an exhaustive way. To some extent the system is designed to be self-regulating, or self-checking, with the certified entities having oversight and checking responsibilities within the system. That is why it can be described as an integrated system of devolved responsibilities. Even a pilot of an individual aircraft, for example, can be thought of as having responsibilities for the continuing operation of the safety system. Realistically, given the detail involved in a safe civil aviation system, that is the only way the system can be effective. The CAA could not police everything by itself — responsibilities need to be devolved. And it is integrated as the basic structure, and the general content of the requirements, all derive from the Chicago Convention and the standards and recommendations developed under it through ICAO. Given the international dimension of civil aviation, everyone is singing from the same hymn book, or at least their own translation of it.

The Westland Wessex

[36] The Westland Wessex series helicopters were produced in the United Kingdom between 1958 and 1970. The original Wessex Mark 1 was developed for the Royal Navy to perform anti-submarine duties. The first Wessex Mk 2 flew in January 1961. The Wessex Mk 5 was developed for the Royal Airforce. The only essential difference between the Mk 2 and the Mk 5 was that the Mk 2 was used by the military, and the Mk 5 the air force. They were essentially the same aircraft. There is also evidence of a small number of Wessex used by the Iraqi Airforce, and flown by Mr Bernie Lewis in that connection. They were called the Wessex Mk 52.

[37] It is apparent that the Wessex was a well-respected helicopter. There is evidence of some problems particularly with the initial version, but those who flew it appear universally to admire it. Indeed it obtained reputation by being used for the Queen's Flight, meaning that it was used for transporting the Royal Family on any occasion when such helicopter transport was required.

[38] Westland also produced a civil variant of the military aircraft called the Wessex 60. It was designed to carry 10 passengers for air transport standards. It was issued with what was effectively a type certificate under the civil aviation system by the UK Air Registration Board in September 1965. It accordingly became part of the civil aviation system I have described. The aircraft was manufactured and delivered to a sole operator, Bristol Helicopters. The Westland Wessex 60 was used for passenger transport for North Sea oil rigs.

[39] There was, however, a significant accident in the North Sea involving 13 fatalities in 1981. Later in 1990 the United Kingdom Civil Aviation Authority (UKCAA) withdrew the type certification. A letter dated 15 October 1999 from Mr D W Blackwell, Head of Aircraft Certification section of the UKCCA to Mr P Gill of the CAA advised as follows:[21]

> I confirm that the Wessex 60 no longer has a status of a type certified product.

---

[21] Mr Grainger of GKN (formerly Westland Helicopters) suggested that this letter was misleading in suggesting there was a connection between the 1981 accident and the 1990 decision, and in the suggestion that the accident was not investigated.

> The status was withdrawn at the request of Westland Helicopters Ltd (WHL), the type design organisation at the time.
>
> A Wessex 60 suffered a fatal accident in the North Sea in August 1981 which, because of decisions by the operator to discontinue operating the type and WHL to discontinue support was never fully investigated for cause. The wreckage was not recovered from the sea.
>
> This uninvestigated element of the type's continued airworthiness record would come back on the table where any re-instatement of support proposed. It is difficult to see how any investigation would be meaningful considering the time that has passed.
>
> With no cause identified and therefore no solution possible it is doubtful the type certificate status would ever be restored.

[40] Two of the Wessex helicopters were registered for operation in New Zealand prior to the plaintiffs' application. A company called Metro Air Ltd of Christchurch operated by a Mr O'Malley imported a Wessex Mk 5 in 1998. In 1999 it also imported a Westland Wessex 60.

[41] The first of these helicopters was inspected by CAA and issued an airworthiness certificate on 18 January 1999 after flight tests were conducted. The flight test pilot, and the certifier, was Mr Lewis. His report of the flight inspections recommended certification in the Restricted category, but it was ultimately registered in the Special category given that there was no type certificate for this aircraft. I will explain these categories in greater detail below.

[42] Metro Air then used this aircraft for helilogging. Such use was controversial given that aircraft within the Special category were not to be used for "hire or reward". Mr O'Malley was subsequently prosecuted for using the aircraft in that way. Again I will explain this issue in greater detail below.

[43] In any event on 12 February 2001 this aircraft was involved in an accident which totally destroyed the aircraft, including because of a subsequent fire. The pilot was killed. The accident was not investigated by the Transport Accident Investigation Commission under the procedures contemplated by Annex 13 of the Chicago Convention, but the CAA conducted its own investigation.[22] The CAA investigation

---

[22] TAIC does not conduct all accident investigations, but only those that give rise to significant safety issues – see s 13(1) of the Transport Accident Investigation Commission Act 1990.

report identified that the aircraft was operating on only one of its two engines prior to the crash. It could not be established why that was the case, and accordingly the initiating cause of the accident was not established. The manufacturer responsible for the engine, Rolls Royce, conducted its own investigation which was also inconclusive. The CAA investigation nevertheless found that the pilot was primarily focused on log lifting activity, and probably did not detect that the second engine was not operative, that the helicopter rpm could not be sustained with a single engine given the weight of the log, and that the pilot most likely attempted to lower the nose and descend in an unsuccessful attempt to increase the rpm when he crashed. The findings were, however, inconclusive.

[44] Following the accident the Director of Civil Aviation, Mr Jones, introduced a limitation on the use that could be made of the Wessex, in particular by imposing a condition which prevented the external hook fitted to the aircraft being used for carrying loads. This had the effect of preventing the Wessex from being used for helilogging.

[45] Metro Air also attempted to register the other Wessex 60 aircraft it had acquired under a Standard category, but this was declined by the CAA. Metro Air also imported two further ex-military Wessex aircraft, but they were also not certified.

The requirements of the Rules

[46] Under the Rules there are detailed requirements before an aircraft can be operated for civil aviation.[23] In particular Part 21 of the Rules deals with the certification of products and parts, which includes the certification of the aircraft. At the relevant time there were three relevant categories of certification referred to in cl 21.173:

(a) Standard category aircraft.

(b) Restricted category aircraft.

---

[23] Except as otherwise indicated, this section describes the Rules as they stood in 2004–2005.

(c) Special category aircraft.

[47] Under cl 21.191(2) any Standard or Restricted category airworthiness certificates were required to conform with the type acceptance requirements set out earlier in the Rules. For example under cl 21.43(a) an applicant had to provide the Director with:

> (1) Evidence that the type design has been approved by an ICAO contracting state by the issue of a Type Certificate or an equivalent document;

[48] So both Standard and Restricted category aircraft were required to be issued with a type certificate under the international framework described above. The difference between Standard and Restricted categories is not material in the present case. Restricted category was appropriate when there is some restriction on the operations of a particular aircraft, for example because it has been modified for a different use from its original design.

[49] Clause 21.173 identified a third category, being the "Special category airworthiness certificate" which involved either an experimental certificate or a special flight permit. The special flight permit under cl 21.195 appeared to only contemplate a particular flight being authorised. Notwithstanding its name, an experimental certificate under cl 21.193 could be issued for other than experimental reasons, provided the standards in cl 21.193(c) were met, which broadly involved the aircraft being subject to flight evaluation and that it met certain safety standards.

[50] There were, however, prescribed operating limitations on an aircraft obtaining certification in the Special category. Clause 91.105 provided:

> **91.105 Special category airworthiness certificates – Operating limitations**
>
> (a) Except as provided in paragraph (b), no person may operate an aircraft that has a special category airworthiness certificate for the carriage of persons or goods for hire or reward.
>
> (b) Paragraph (a) does not apply to a person operating an aircraft for the carriage of persons for hire or reward where the person being carried is-
>
> (1) the holder of a flight instructor rating issued under Part 61; and

(2) giving conversion instruction to the operator.

(c) Except in the case of take-off and landing, no person may operate an aircraft that has a special category airworthiness certificate over a congested area of a city or town unless the aircraft has been authorised to do so by the Director in writing.

(d) A person operating an aircraft that has a special category airworthiness certificate must advise each person carried in the aircraft of the category of airworthiness certificate held.

[51] In addition, and as identified above, following the Wessex accident under the operation by Metro Air the Director of Civil Aviation had decided to impose a limitation on the airworthiness certificates. Under cl 21.173(b) the Director was empowered to prescribe operating conditions and limitations on any airworthiness certificates.

[52] There were other former military aircraft in New Zealand undertaking helilogging. A number of former US military helicopters known as the UH-1 Iroquois were so used. They operated in the Restricted category. The reason for this was a little unusual. The Federal Aviation Authority of the United States of America (the FAA) had issued the equivalent of a type certificate for this aircraft. Earlier assessment by the CAA had held that these aircraft did not meet the type certificate requirements, but they were later seen by CAA as meeting them. In addition a company called Heli Harvest Limited used Russian built Mi-8mtv-1 and Mi-17 helicopters for such helilogging activities. Again this proceeded on the basis that the helicopters were type certified. In addition there were other operators using non-ex-military helicopters for such activities. Such helicopters are type certified and usually more expensive than ex-military helicopters.

The Director's exemption power

[53] The detailed requirements of the Rules described above prevented the plaintiffs from operating the Wessex for helilogging activities. The limitation on external load lifting was implemented by a discretionary decision, and accordingly could be addressed by the discretion exercised by the Director on the issuing of the certificate. But the other requirements of the Rules identified above would prevent the proposed activity.

[54] There was, however, a power in the Act that enabled the Director to grant an exemption from the requirement of the Rules. At the relevant time s 37 provided:

> **37 Exemption power of Director**
>
> (1) The Director may, if he or she considers it appropriate and upon such conditions as he or she considers appropriate, exempt any person, aircraft, aeronautical product, aerodrome, or aviation related service from any specified requirement under section 28 or section 29 or section 30 of this Act.
>
> (2) Before granting an exemption under subsection (1), the Director shall be satisfied in the circumstances of each case that—
>
> (a) the requirement has been substantially complied with and that further compliance is unnecessary; or
>
> (b) the action taken or provision made in respect of the matter to which the requirement relates is as effective or more effective than actual compliance with the requirement; or
>
> (c) the prescribed requirements are clearly unreasonable or inappropriate in the particular case; or
>
> (d) events have occurred that make the prescribed requirements unnecessary or inappropriate in the particular case,—
>
> and that the risk to safety will not be significantly increased by the granting of the exemption.
>
> (3) The number and nature of exemptions granted under subsection (1) shall be notified as soon as practicable in the Gazette.
>
> (4) Nothing in this section shall apply in any case where any rule specifically provides that no exemptions are to be granted.

[55] There were three steps in the grant of an exemption under this section:

(a) First one of the pre-requisites set out in s 37(2)(a)-(d) needed to be satisfied. Each of the matters set out in paragraphs (a) through to (d) are alternatives, but one of them must exist to the Director's satisfaction.

(b) Secondly the Director must be satisfied that the risk to safety will not be significantly increased by the granting of the exemption in accordance with the concluding words of s 37(2).

(c) The Director then has a discretion under s 37(1) to grant an exemption if he or she thinks that appropriate, and on such conditions he or she considers appropriate.

[56] At the time of the events of this case, a specific Rule existed in relation to s 37 exemption applications — Rule 11.503. The additional procedural matters it outlined do not appear material.[24]

[57] There are two relevant interpretation issues worthy of note. The first is that the ability to issue an exemption subject to conditions under s 37(1) seems to me to have enabled the Director to impose conditions in order that he or she can be satisfied of the matters set out in s 37(2). In particular, if a Director is not satisfied that the exemption without conditions would not significantly increase risk, but would be so satisfied if the exemption was granted subject to conditions, it seems to me that the pre-requisites in s 37(2) could be satisfied by imposing the conditions.

[58] Secondly it is apparent that the Director ultimately exercised a discretionary power under s 37(1). It is plain that an applicant for an exemption is not entitled to an exemption simply because the s 37(2) requirements are satisfied. In *Land Transport Safety Authority v Casey* the Court of Appeal held that to be so in relation to a very similarly worded provision set out in s 166 of the Land Transport Act 1998 dealing with land transport issues.[25] The exemption power in relation to civil aviation is exercised in a different context, however, given the very elaborate Rules regulating civil aviation. But it is undoubtedly correct that the Director exercises a discretion and cannot be compelled to grant an exemption simply because the s 37(2) pre-requisites have been satisfied.

[59] This sets the scene for the issues that were central to the present case. The plaintiffs acquired Wessex helicopters from Metro Air, and then went about seeking to have them certified under the Rules to enable helilogging activities. That necessarily included applications to the Director that the exemption power under s 37 be

---

[24] One of the plaintiffs' expert witnesses, Mr Stevens, raised an issue about a publication requirement, but I do not regard it as material to this case. I also note the Director's s 37 power could be delegated – s 23A.

[25] *Land Transport Safety Authority v Casey* CA 14401, 26 February 2002, especially at [32].

exercised. The applications were for exemptions to the Rules preventing entry into the Restricted category (particularly the need for type certification) or alternatively into the Special category (particularly the limitation on hire or reward). The discretionary limitation on load lifting also needed to be lifted. The allegations of misfeasance and deceit arise in connection with the manner in which the Director and certain advisers dealt with these applications.

FACTUAL BACKGROUND

[60] In order to address the plaintiffs' claims I must first examine the background to the Director's actions surrounding the judicial review proceedings in November and December 2004, and his ultimate decision in August 2005.

Evidentiary issues

[61] Before addressing the facts, and making factual findings, it is appropriate to record some initial matters concerning the evidence.

[62] First, the events in question occurred between 2002 and 2005, approximately 15 years ago. Whilst it was clear that the witnesses recalled some of those events, it seems to me that it is particularly important to assess oral evidence in light of the documentary record, and to give the documentary record significance in making factual findings.[26]

[63] Secondly, some of the relevant witnesses have since died. This includes Mr Jim Barclay who was the plaintiffs' aviation consultant who dealt with the application in 2005, and the plaintiffs' solicitor at the time, Mr Graham Takarangi. Given his advanced years, there were also concerns about the availability of Mr Lewis, who was a central witness, for a trial this year. In those circumstances I heard his evidence over three days in August 2018. At that stage he was 90 years of age. I am advised that he is still with us.

[64] I also record that Mr Jones was able to give some evidence, but for reasons that do not need to be elaborated on in this judgment, but which are outlined in reports

---

[26] See *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC (Comm) at [15]–[22].

admitted by consent from his general practitioner and a consultant, he had considerable difficulty in recalling the events. He read his brief of evidence, and was cross-examined for more than half a day, but counsel then agreed that his cross-examination should be abandoned. The reality was that his evidence had little or no probative value given his inability to recall events. I set out the basis upon which I would assess his evidence, and more information of the circumstances in a minute dated 30 October 2019.

[65] Finally it is appropriate to record that the plaintiffs called a large number of witnesses that dealt with many of the issues that were relevant to the underlying applications made by the plaintiffs at the time in an extensive way. There were objections to some of this evidence, including on the ground of relevance, which I have recorded in rulings and minutes. Much of the evidence that was called by the plaintiffs was only of marginal relevance, but for the reasons I explained in my rulings and minutes it was not inadmissible on that ground.

CAA concerns regarding helicopter safety

[66] Former military helicopters had been in use in New Zealand for heli-logging activities from about 2001. The former Soviet helicopter, the Mi-8/Mi-17 had been in operation as a type-certified aircraft, with the State of Moldova (formerly part of the Soviet Union) as the national authority. In addition the former US military helicopter, the Iroquois UH-1 (known as the "Huey") was also in use. It was type certified by the FAA notwithstanding the aircraft was no longer supported by the manufacturer, Bell Helicopters.

[67] In the period leading up to the plaintiffs' first approach to the CAA in relation to obtaining its exemptions, the CAA had a growing concern relating to the safety standards involved in the operation of ex-military helicopters in New Zealand. Two reports from Mr Jeremy Remacha, the Manager of the Aircraft Certification Unit of the CAA are significant in that respect.

[68] On 27 June 2001 Mr John Lanham, the General Manager at General Aviation had commissioned a review into the operation of ex-military helicopters by the CAA.

The following year, by memorandum dated 8 August 2002 Mr Remacha provided Mr Jones with a report in response to the review. It stated in its overview:

> The application of ex-military helicopters to a variety of roles in New Zealand over the last decade has raised a number of key issues surrounding the level of safety for particularly external load operations. A number of key issues have arisen which indicate current level of safety is inadequate and both short term and long-term action is required to address the situation. As more and more operators in the industry are keen to continue sourcing ex-military aircraft for external lifting operations, particularly heli-logging, the CAA must ensure that it formulates a plan to address the immediate safety issues in a rational and logical approach, whilst making strategic plans to address the wider regulatory issues raised by this type of operation with these aircraft.

[69] The report made a number of recommendations designed to increase safety. They included a recommendation that any future importation of new ex-military helicopters would require type acceptance certification, and that all Special category helicopters would have limitations placed on the type certificates for external load and agricultural operations until the level of safety of the intended operation had been assessed as adequate.

[70] In an earlier report of 22 May 2002 Mr Remacha specifically addressed the Westland Wessex. That report was prepared because of the applications that had been made by Metro Air, together with the consequences of the Wessex accident described above. This was a detailed analysis of the issues relating to this aircraft. This report said:

> The current level of [the original equipment manufacturer] and continued airworthiness support from the State of Design for either the Wessex Mk 2 or Mk 5 series ex-military helicopters does not provide sufficient confidence that the level of safety is adequate for anything other than a general purpose operation conducted under CAR 91 to a basic military maintenance programme. Any approvals or airworthiness certificates issued should therefore limit the operation appropriately.

[71] The report then went on to recommend a series of steps that would be required to be taken before the Westland Wessex could obtain authority beyond this basic ability to operate. This report ultimately led to a decision of the Director, set out in his letter to Mr O'Malley of 27 May 2002, that the Special category registration would be subject to conditions, including the condition that the helicopter could not be used for external load operations.

[72] In September 2002 the views of the CAA arising from the 8 August memorandum concerning ex-military helicopters were presented to the Aviation Industry Association conference. The presentation was then reported in a publication entitled "CAA News" for September and October 2002. It occupied the cover page article for that edition with an article entitled "Lifting the safety record – ex-military helicopters". This set out the essence of Mr Remacha's report. This included the statement that:

> All special category helicopters will have limitations imposed on external load and agricultural operations until the level of safety is assessed as adequate for the intended purpose.

[73] And then in respect of future imports that:

- Imports of new types must meet the type acceptance certification.
- Type certificates must address maintenance and continued airworthiness.

[74] The publication also referred to a review of Restricted and Special airworthiness categories under Part 21 of the Rules.

[75] Some witnesses called by the defendant denied what was stated in Mr Remacha's reports, and this publication, was CAA policy. It appears that Mr Remacha's August report may not have gone through formal policy approval channels within the CAA. But the advice given to the industry nevertheless reflected CAA policy that had been effectively approved by senior managers, and provided to the Director himself.[27]

[76] The plaintiffs contend that this publication by itself gave them reason to believe the Westland Wessex could now be operated for helilogging. I do not accept this. The report, and the publication, were not directed to the topic of any required s 37 exemption, and the matter of hire and reward in particular. But I accept that the plaintiffs could reasonably believe that permission might be a possibility if the increased standard of safety generally described was demonstrated to CAA's satisfaction. In other words, a potential pathway for approval was identified.

---

[27] There is also some evidence that the 8 August 2002 memorandum was only a draft, but as its substance was presented at the Conference, and in the CAA News, nothing would appear to turn on that.

Development of Mr Ford's proposals

[77] Mr Ford explained his personal background in evidence. He had been inspired by his grandfather who had worked in the logging industry, and he wanted to be a pioneer like him. He began his early working life in the logging industry, but was also a pilot, and later developed proposals for helilogging. He acquired helicopters, and also made innovations to assist that activity, including the development of a portable saw mill, and alternative log carrying techniques.

[78] He initially used Hughes helicopters, and then subsequently other types for helilogging. This included a Westland Scout helicopter which he acquired from Mr O'Malley of Metro Air in about 1998. It was smaller than the Wessex. He explained that no issue was raised by the CAA in relation to these activities. I note, however that there was a fatal accident in the Scout while it was being used for helilogging.

[79] From about November 2002, after seeing the article in the CAA News referred to above, Mr Ford made efforts to acquire the Wessex helicopters operated by Mr O'Malley. This was after the Wessex accident, and the prosecution of Mr O'Malley, and there was accordingly a potential opportunity to acquire the aircraft given that Mr O'Malley's endeavours were proving unsuccessful.

[80] Initial contact was made on his behalf with the CAA in December 2002 after which Mr Ford agreed to acquire two Westland Wessex helicopters that were originally owned by Mr O'Malley, and a Wessex 60 which was not registered. He also purchased some spare parts.

[81] By letter dated 21 January 2003 to Mr Remacha of CAA, Mr Ford advised that he had purchased the aircraft and asked for a meeting to discuss a proposal for a helilogging trial. At about this time he involved Mr Maurice Gordon, a well-respected aircraft engineer in the project. He also involved Mr Ronald Potts who was an aircraft engineer certified to maintain the Wessex.

[82] After further exchanges in correspondence a meeting was arranged with the CAA in February 2003.

Meeting February 2003

[83] On 10 February 2003 Messrs Ford and Gordon and one other representative (Mr Paul Miller) met with CAA representatives (Messrs Lanham, Remacha, Fogden and Pearson). The purpose of the meeting was for the plaintiffs to obtain advice as to what would be necessary for them to be authorised to conduct helilogging activities using the Wessex.

[84] I broadly accept that at that meeting the CAA representatives outlined the requirements for obtaining such permission. Mr Lanham and Mr Remacha were both called as witnesses for the plaintiffs notwithstanding that they were former senior CAA employees. Mr Gordon also gave evidence. Mr Fogden was called by the defendant. Mr Lanham referred to the plaintiffs providing a "whole concept" proposal that would involve CAA approving:

(a) the aircraft's airworthiness;

(b) a maintenance programme; and

(c) an operations programme.

[85] The CAA personnel particularly emphasised at the meeting the need for design authority support as part of such approvals. The plaintiffs referred to their understanding that this was a reference to the support of the original designer/manufacturer, which was now GKN in the United Kingdom.

[86] I accept that the plaintiffs reasonably believed that if they satisfied the CAA on the three broad categories identified above that permission to operate the Wessex for helilogging would be forthcoming in the Special category. The plaintiffs were provided with a copy of Mr Remacha's report into the Wessex of May 2002, and at the meeting Mr Remacha went through the recommendations in it. So it was understood that there were many detailed issues to address. But all the issues in relation to the Wessex identified in Mr Remacha's report are legitimately seen as subsumed within the three broad topics identified at the meeting.

[87] There were no guarantees that permission would be granted, however. Behind each of the three categories of requirement there were a series of detailed issues, and the plaintiffs could not guarantee success in obtaining the CAA's approval in those three areas. It was also expressly pointed out that the CAA would not lead the proposal, and would simply assess what the plaintiffs put to the CAA. I note that the need for a s 37 exemption was not specifically discussed at the meeting.

[88] But I do not accept that it was expressly stated, or even implicit, that if the plaintiffs satisfied CAA on the three matters the CAA had outlined, it might still not grant approval. That would be inconsistent with the purpose of the meeting, which was to obtain the CAA's advice on what was required, and the response of the CAA representatives which was intended to explain what the requirements were. I accordingly accept the evidence of Messrs Ford and Gordon that they were encouraged by this meeting, and they went about committing time and resources to meet the requirements of these three areas in light of that encouragement.

[89] Mr Ford said that he completed the purchase of the Wessex aircraft only after this meeting. There does not appear to have been a formal contract, but the agreement to purchase seems to me to have been formed at the end of the previous year, although potentially not completed until after this meeting.

[90] I will deal with the consequences of this advice, and the reasonable expectations of the plaintiffs in more detail below. Ultimately a legitimate complaint arising from any breach of legitimate expectation does not mean the plaintiffs are able to succeed in their actions in tort which they advance. But it provides relevant background to the events as they unfolded.

The Director's May 2003 letter

[91] Following the meeting the plaintiffs made progress, including by contacting GKN, and Air and Ground Aviation Ltd (AGA), a company that now owned remaining Wessex helicopters and parts in the United Kingdom.

[92] By email to Mr Remacha dated 22 April 2003 Mr Gordon advised that GKN had indicated a cost of £114,285 for the analysis and maintenance document work,

and there were flight test costs of approximately $85,000. Mr Gordon stated that Mr Ford required confidence that "on satisfactory completion of the test and analysis" CAA would remove the current prohibition on logging, and that it would then permit commercial use of the Westland Wessex helicopters for logging operations. He asked CAA to provide that confirmation.

[93] CAA addressed that request at an internal meeting involving not only Messrs Remacha and Lanham, but Mr Jones, Mr Fogden and the CAA chief legal counsel Ms MacIntosh. After debating the issues at the meeting it was decided that Mr Remacha would draft a letter for Mr Jones' consideration to be sent in response.

[94] By letter dated 7 May 2003 Mr Jones wrote to Mr Ford. He referred to Mr Gordon's email and stated that the request had been reviewed and "… CAA … has identified the following issues". The letter then identified the current condition preventing external load operations. It advised that given the Wessex was not a type certified aircraft it could only be considered in the Special category. It said to remove the external load restriction would involve "two key elements". First was an assessment of the aircraft's airworthiness, with the letter stating that "your current approach to GKN Westland is very appropriate in working towards meeting this requirement". The second involved operational considerations, with the letter advising that the draft operations manual was "appropriate and suitable for further development".

[95] The letter then addressed the restriction on hire and reward involved in the Special category. It advised that the CAA's view was that such helilogging activities did involve hire and reward and that:

> To address this rule prohibition, you may apply to the CAA under CAR 11.503 for an exemption against this requirement. The CAA will consider this application in conjunction with the supporting evidence provided.

[96] The Director and the CAA later contended that this letter stated that there were no assurances. Equally the plaintiffs later contended that it provided such assurances. The letter expressly does neither, and in that respect it is unfortunately ambiguous. If the CAA wanted to tell the plaintiffs that there were no assurances, and that even if the matters it had outlined were met to its satisfaction it may not grant approval, then this

should have been stated in this letter. After all that was what Mr Gordon's letter sought. Equally, given that the letter did not actually provide the express assurance that was sought, it was apparent to the plaintiffs that the CAA were not prepared to give any such express assurances. From the plaintiffs' point of view that necessarily meant there was a risk.

[97] But given the background described above it would be fair to say that the letter provided further encouragement to the plaintiffs. More specifically the plaintiffs could reasonably expect that if they met the prerequisites for gaining approval that had been explained by the CAA approval would be forthcoming. They could not be sure, however, that they would meet CAA's requirements. In the letter the Director advised they were on-track to doing so, however. The final reference to CAR 11.503 is a reference to s 37 (to which CAR 11.503 cross-referenced) but there was no suggestion that this would involve any additional unarticulated requirements — rather it was raised as a means to "address this rule prohibition". I do not think that could reasonably be understood to suggest that there were potentially additional requirements that had not been explained.

Meeting May 2003

[98] A further meeting was then held at GKN's premises at Cowes on the Isle of Wight in the United Kingdom on 21 May 2003. GKN was represented by Messrs Gladdis and Grainger and other Wessex specialists. The plaintiffs were represented by Mr Gordon. The CAA also attended through Mr Remacha and Mr Geoff Connor. Mr Remacha explained that he was in Europe for another purpose, and took the opportunity to attend the meeting.

[99] Mr Remacha generally accepted the evidence of Mr Grainger and Mr Gordon in relation to this meeting, although he did not accept Mr Gordon's evidence that the impression was given as a consequence of the discussions that his 22 May 2002 report was "no longer quite so relevant". I agree that the issues in the report remained relevant. The key feature of the meeting was, however, that GKN were supportive, was prepared to back the plaintiffs' proposals. This had been one of the key requirements mentioned at the February 2003 meeting.

[100] This was Mr Remacha's last real involvement in this issue. He was seconded from CAA to Air New Zealand in July 2003 and left the CAA for the private sector in September 2003. He now resides in Zurich working in the private sector and returned to New Zealand to give evidence.

[101] One of the points of discussion at this meeting was the programme to engage in test flight trials in New Zealand, and GKN agreed to oversee those trials so that the airworthiness of the Wessex could be established to CAA's satisfaction.

[102] I note, however, as Mr Grainger explained when he gave evidence, that GKN had no expertise in relation to the engines used in the Wessex and the concept of "engine lifing" — which refers to when components of the engine must be replaced given their usage. When the Wessex was being used for activities for which it was not expressly designed — ie repetitive heavy lifting operations — the "lifing" of components of the engine could significantly change. GKN's stance was that the plaintiffs would need to liaise directly with the engine manufacturer, Rolls Royce. GKN were nevertheless experts on the "lifing" of the non-engine components of the Wessex, and this was a matter that would be expressly addressed during the anticipated flight trials.

The 2004 flight trials

[103] Between June 2003 and June 2004 the plaintiffs progressed their plans, including by dealing with the flight trials. This took longer than the plaintiffs were expecting. In part that was due to delays at GKN.

[104] Mr Ford explained that during the period leading up to the trials he purchased a further five Wessex aircraft and spare parts from AGA for a total of £225,000. AGA had obtained much of the residual Westland Wessex fleet in the UK. Mr Ian Dodds of AGA gave evidence and explained the steps he had taken in the UK, in conjunction with GKN and the UKCAA to maintain the viability of the Wessex for active use, particularly as a civil aircraft.

[105] A draft petition for exemption from the hire and reward limitation for Special category registration had been submitted by the plaintiffs in October 2003. The

following year a petition was lodged seeking an exemption from the type certification requirement in the Restricted category. Both petitions were treated as alive when the Director of Civil Aviation was asked to make decisions in 2005. I accept that it was the CAA that raised with the plaintiffs the possibility of using the Restricted category as an alternative to the Special category during this period.

[106] Ultimately the flight trials took place in June 2004 under GKN's supervision. Representatives of GKN and the CAA were present during part of the trials. They can be described as a success. A document described as the "green book" was produced as a consequence. This involved a detailed assessment of the airworthiness of the aircraft for its helilogging operations, and formed the basis for maintenance and operational procedures.

[107] Some issues emerged during the flight trials. Both of the main pilots gave evidence. The pilots reported some vibration during the early flights, but this appears to have been addressed by further flying experience. On one occasion the helicopter would not start, but this issue was remedied. Initially GKN had intended for a frame to be attached to the aircraft for lifting purposes, and that never occurred, probably because of delays at the GKN end. But these issues did not prevent the flight trials being successful.

[108] During the process of seeking approval for conducting the flight trials, including by letter to the CAA dated 7 May 2004 Mr Ford sought further hours of trials. In Mr Lanham's email response the same day the CAA declined the additional hours involved. When doing so Mr Lanham explicitly addressed, for the first time, the question whether there would be approval following the processes the plaintiffs were going through. He stated:

> I regret if there has been any misunderstanding and I emphasise that there has been no change in thinking or little 'policy' with respect to your long term goals. We also appreciate the considerable investment you have made, we commend the professional approach you are taking and we wish you every success in the outcomes. However, as we agreed, this project was/is always going to be a steady process through to the end of carefully planned and approved stages, with no guarantee necessarily of technical, operational or financial viability at the end of it.

[109] As I have already said, however, the plaintiffs could readily accept this point. The plaintiffs could not guarantee that they would meet CAA's requirements in each of the three areas CAA had outlined. But what the plaintiffs could reasonably expect was that the CAA had told them what the requirements were, and that if they met those requirements to CAA's satisfaction, approval would be forthcoming. Mr Lanham's email is consistent with that understanding.

[110] The trials themselves were completed by August 2004. From the plaintiffs' perspective, however, the delays in progressing its applications were placing it under financial pressure. On 26 July 2004 the formal petition for exemption from Rule 21.43 was filed. This was an application for registration in the Restricted category. In 2003 an application had been sent in relation to Rule 91.105(a), the restriction on carriage of persons or goods for hire or reward, in relation to the Special category.[28] Soon after presenting the results of the trials and making the application Mr Ford began pressurising the Director to grant his applications. When this was not immediately forthcoming he also communicated with the Minister of Transport, and began media contact. He also sought the assistance of the New Zealand First Party. All of this provided the backdrop to the circumstances that presented themselves to the Director in the following months.

[111] It is appropriate to record that the following year Mr Ford was charged with an offence of using the aircraft during the flight trials for "hire and reward" activities. Whilst the plaintiffs had been given approval to conduct the trials under the Special category, and the restriction on external loads had been lifted for that purpose, there was no exemption from prohibition against hire and reward. Mr Ford had arranged contracts to lift logs in association with the trials. The prosecution was unsuccessful, however, with the District Court concluding that the purpose of these activities was not "hire or reward" but testing the aircraft under the trials, which had been authorised.[29] That approach was upheld by the High Court on appeal.[30]

---

28 It was technically only a draft when sent, but nothing turns on that.

29 *Civil Aviation Authority v Heli Logging Ltd* DC New Plymouth CRI-2005-043-2361, 12 April 2006 at [42] and [47].

30 *Civil Aviation Authority v Heli Logging Ltd* HC New Plymouth CRI-2005-043-2361, 19 September 2006 at [91]–[93].

CAA assessment

[112] Following the trials there was a further meeting with CAA on 7 September 2004. Messrs Ford and Gordon were accompanied by Mr Gladdis from GKN and Mr Lee, one of the test pilots. CAA were represented by Messrs Lanham, Fogden and Gill. Messrs Ford and Gordon both gave evidence that at this meeting there appeared to be a change of attitude by the CAA representatives and that they were now more negative towards the proposal. I accept that such an impression may have been given. As I explain below Messrs Gill and Fogden both had reservations, and Mr Lanham left the meeting early. Mr Gordon also referred to a passing comment that Mr Stephen Douglas of the CAA had made to him outside the meeting in which Mr Douglas indicated that he was not agreeable to the plaintiffs' application, and that there was no precedent for granting it. This is also consistent with the evidence of a slightly earlier internal CAA meeting on 30 August involving Mr Jones, Mr Lanham, the chief legal counsel Ms MacIntosh and others where the applications were raised. Mr Jones is recorded as saying at that meeting that he was "not comfortable with the idea of an exemption given the history of the aircraft operating in New Zealand".

[113] I accept that at this point the plaintiffs became aware for the first time that there was a real prospect that their applications might be declined notwithstanding the success of the trials and the apparent CAA approval of the maintenance and operations procedures.

[114] Mr Ford gave evidence of an exchange that he had with Mr Gill at the end of the meeting on 7 September. Mr Ford asked why CAA did not lift the restriction on external lifting to allow the plaintiffs to commence helilogging straight away. The reply was that to do so would be an offence as this would involve hire and reward activities. Mr Ford said he was shocked by the reply, and that this was the first time this issue was raised and that he would not have sought to meet the three criteria had he been told this. This is clearly not correct as the Director's letter of 7 May 2003 had expressly made the point that the proposed activities were hire and reward activities. That was the very reason for an exemption petition in relation to the Special category.

[115] Following the meeting, by letter dated 9 September Mr Ford wrote to the Associate Minister of Transport, the Hon Harry Duynhoven. Mr Ford indicated that the CAA had advised him that it could not grant the application, and he asked for Mr Duynhoven's assistance. From this point Mr Ford engaged in an active campaign involving politicians and the media directed to obtaining a positive decision from Mr Jones.

[116] Prior to receiving the formal advice on the application in September and October Mr Jones had had limited involvement in dealing with the plaintiffs' proposals, however. The preceding year he had met with his advisers in April in connection with the request from Mr Gordon that the CAA provided an assurance in connection with the proposal, and this had led to the letter of 7 May 2003 provided by him in response. The applications were then raised with him again for the first time at the 30 August 2004 meeting.

[117] It was not until 16 September 2004 that he directly became involved again in detail. On that day he met with Messrs Lanham, Fogden and Gill and Ms MacIntosh to discuss the applications. The Director's affidavit in the 2004 proceedings records that he indicated at this meeting that he had safety concerns, including because of the poor safety record of ex-military helicopters.

Advice to the Director

[118] Following evaluation of the material supplied to the CAA by the plaintiffs, formal advice was then provided to the Director in the form of memoranda from the relevant CAA staff. In essence that advice was that he should grant one or other of the applications.

[119] In memoranda dated 21 September 2004 and 11 October 2004 Mr Gill, the team leader of the Aircraft Certification Unit advised that the Unit was satisfied with the level of airworthiness demonstrated, and he recommended approval in the Restricted category. In a report from Mr Fogden to Mr Lanham dated 11 October Mr Fogden addressed the three areas under which the proposal was being assessed. In terms of airworthiness he confirmed that the Aircraft Certification Unit was "satisfied with the level of airworthiness demonstrated by the Wessex". In terms of the

maintenance programme he advised that there were "no outstanding issues", and in terms of the operations manual he advised that "Heli-logging Ltd has produced a manual over and above the [requirements]".

[120] By memorandum dated 11 October 2004 to Mr Jones, Mr Lanham then made the formal recommendations for a decision. He assessed the history of the applications, and the three areas under which they were to be assessed in light of those reports. He advised:

> There are no aircraft certification, flight operations and/or maintenance concerns which would prevent or inhibit CAA approval of the Helilogging proposal.
>
> The aircraft should be retained in the Special category, with the prohibition on external loads removed, with an Exemption granted from the prohibition on use for hire or reward operations …

[121] He then outlined the conditions that he suggested should be granted on that exemption, one of which involved a review of the approval when the proposed amendments to the Rules then in train was completed.

[122] On the basis of this advice I accept that the CAA had assessed the plaintiffs' application in accordance with the three areas originally outlined to the plaintiffs in the February 2003 meeting, and had met what had been outlined to CAA's satisfaction. On that basis the recommendation to Mr Jones was to approve the application.

[123] The recommendations were not without complications, however. First, both Mr Gill and Mr Fogden explained when they gave evidence that their memoranda did not reflect their view that the application should be granted, but were confined to the more technical issues that they each had been asked to assess. I accept their evidence that they were not being asked for their opinion on whether granting these applications was a good idea. A reservation was expressly referred to in Mr Gill's memorandum to the Director of 21 September 2004, however, where he stated:

> In my personal view the CAA should never have started the process of allowing a non-certified aircraft to be used for commercial operations. However now the CAA has allowed the trials and investigations to go so far and the applicant has committed a substantial sum of money, it would be very difficult to refuse the application except on purely technical grounds.

[124] I accept Mr Gill's evidence that he did not think the granting of the applications was a good idea. Mr Fogden later recommended that the applications not be granted. By contrast both Messrs Lanham and Remacha were in favour.

[125] Secondly there was a significant difference of view between Mr Lanham and Mr Gill in relation to the category that should be used to grant the application if it was to be granted. In the 21 September 2004 memorandum Mr Gill advised that it should be approved in the Restricted category. This was because he was of the view that allowing non-type certified aircraft to obtain approval for commercial operation in the Special category would create a precedent which would undermine the basis of approving aircraft operations within New Zealand. As he put in his memorandum in relation to the requirements of s 37:

> In fact I find it difficult to see on what ground an exemption could be given, other than that the requirements were unreasonable. As stated above this would be calling into question the whole need for type certification. Any other grounds would effectively not be an exemption, but would be de facto rule-making.

[126] He did not see that as being such difficulty with the Restricted category because it could be identified as arising from the particular circumstances relating to the Wessex which could be regarded as being a better standard aircraft than others that had obtained type certification (particularly the Iroquois aircraft).

[127] Mr Lanham had the opposite view. In his memorandum to the Director of 11 October he recommended the issue of the certificate in the Special category for very similar reasons. He advised:

> Accordingly, it is considered that [the option of approving in the Restricted category] would set an undesirable precedent and place the CAA at risk in the long term. The two categories of Standard and Restricted are limited to type certified aircraft and to accept an ex-military helicopter into even the latter would open the door to almost any aircraft that could demonstrate a similar standard to the Helilogging proposal. It will be a Trojan horse.

[128] Although they had come to different conclusions, the reasons Messrs Lanham and Gill advanced were very similar. Both were identifying a significant issue. The exemption applications were directed to fundamental aspects of the Rules applicable to each category. It was fundamental to the Restricted category that an aircraft be type

certified — that was a key mechanism by which coordinated international aviation regulation was managed. The only exception from the requirement for type certification was the Special category, which existed only for special aircraft such as experimental aircraft. The prohibition on hire or reward activities existed to prevent aircraft in this category being used for commercial operations. That was the subject of the exemption application in the Special category. So the applications went to an essential feature of the Rules overall, and effectively the same underlying point.

[129] As Mr Gill had advised, granting such an exemption to the Rules could be seen as precedent setting, and more consistent with a change to the Rules than a discretionary departure for special circumstances. Accordingly such a change could be seen to be more appropriately dealt with by Rule amendment, notwithstanding that that was a much longer process involving industry consultation. There was a review of the Rules in train at the time. Indeed Mr Lanham's recommendation to grant the application proceeded on the basis that the position would need to be reviewed after the rule amendment process had been completed.

[130] Having said that, this did not mean that the application could not be granted for one or other category if the requirements of s 37 were met. If the application demonstrated equivalence to meeting those standards, and there was no decrease in safety, it was open to the Director to grant the approvals. The Wessex application could have been treated as a special case, with equivalent or better safety standards than other existing helilogging applications using type certified aircraft, such as those using the Iroquois aircraft. When CAA had advised the industry of the relevant policy at the September 2002 AIA conference it had been explained that all new imports would need to be type certified. So the implications of granting the Wessex application were limited as it had already been imported and certified.

[131] On 30 September Mr Lanham rang Mr Gordon to say that the aircraft certification, operations manual and maintenance programme would be signed off by the end of the week, and he also said that Mr Gill had commented that the test reports were probably to the very highest standard he had seen. He said the Director would now make a decision. He warned, however, that there was a view that the grant of an

exemption might cause a precedent, and that some in the CAA were concerned about that.

The Director's response

[132] When Mr Jones subsequently received the memoranda providing formal advice to him, particularly Mr Lanham's 11 October memorandum, it is clear that he was not in agreement. His 2004 affidavit in the judicial review proceedings records that he met with Messrs Lanham, Gill and Fogden on 13 October and following discussions with them decided that further work was required before he could make a decision. Mr Lanham advised Mr Ford of this by email.

[133] Mr Gill explained that he had attended that meeting in the expectation that it would deal with the debate about which category would be used to approve the application, but at the meeting Mr Jones raised a third option — that the application be declined. Mr Gill said that this was the first occasion he was aware that the application might be declined.

[134] The following day Mr Gill provided Mr Jones with a further report indicating that if the application was to be granted it needed to be placed in the Restricted category. He advised that conditions could be imposed to increase the safety of the operation. He observed:

> There is no question that logging operations are inherently dangerous. This has been shown here in New Zealand in the case of the Iroquois and SH-3A accidents, and overseas in several studies. The only Westland Wessex operating in New Zealand crashed fatally while logging, after only a few months in service. Therefore the safety history of the Wessex in NZ is poor, although the small sample size makes any statistics meaningless.

[135] At this stage Mr Jones went overseas to the Directors General of Civil Aviation conference in Hong Kong between 30 October and 8 November 2004. The Director's 2004 affidavit records that at that conference he had discussions with officials from the United States National Transportation Safety Board — the body responsible for aircraft accident investigation in the United States — in relation to safety concerns regarding ex-military aircraft.

[136] While he was away Mr Ford was pressing the CAA, and specifically Mr Jones, for a decision. Mr Ford explained he was becoming financially stretched. Eventually Mr Jones rang Mr Ford from Hong Kong and advised him that he would have a decision for him by Monday 15 November, a few days after his intended return to New Zealand. I note Mr Ford's evidence that he purchased another three Wessex helicopters and spare parts from AGA in November 2004.

[137] Mr Jones then turned to the matter on his return to New Zealand. There is no evidence of any further work done by CAA officials in the meantime beyond the additional memorandum for Mr Gill dated 14 October. But it is apparent that Mr Jones did not believe that the application should be granted on the basis of the advice he had been given.

[138] At that stage he drafted a memorandum dated 9 November. The listed recipients were Messrs Lanham, Fogden, Gill, Ms MacIntosh and two other senior CAA managers. That memorandum began:

> I have considered carefully the possibility of an Exemption to allow the Wessex helicopter to undertake logging operations. At this stage I have not been convinced that it would be safe to grant the Exemption. My reasons are listed below:

[139] Then after setting out 18 reasons, and the two options for the grant of the exemption, the memo then stated:

> Both these are Exemptions to the Safety Rules and I am not prepared to accept the responsibility nor do I feel it would be wise.
>
> Mr Ford has undertaken a significant amount of work to show these aircraft are safe. However, I am not prepared to allow this precedent of ex-military aircraft to continue being added to the New Zealand register for Hire and Reward operations.
>
> It is my recommendation that no additional "Ex-Military" helicopters be added to the New Zealand register unless for only private use on the "Special Experimental" category and not available for logging operations. Also a prohibition of logging operations should be placed on all existing "Restricted" category UH1 aircraft.

[140] This memorandum was not sent to the intended recipients, however. Rather Mr Jones sent it in draft form to Ms MacIntosh as chief legal counsel for advice. There is a further marked-up version of this memorandum also bearing the 9 November date.

Ms MacIntosh accepted when she gave evidence that she would have made the marked-up changes and comments in this version.[31]

[141] Ms MacIntosh made a number of significant proposed alterations to the draft memorandum. For example she re-formulated it around s 37 of the Act. She also added in references to Mr Remacha's 8 August 2002 memorandum concerning ex-military aircraft. She changed the proposed conclusion so that it now read:

> I have not considered whether the grounds specified in 37(2)(a) to (d) exist in this particular case. I am of the view that it would be very difficult for these to apply. However, regardless of whether they do, I am of the view the risk to safety would be significantly increased if the Wessex operated in the type of operations proposed by Helilogging Ltd. I cannot exercise my discretion and grant an exemption.

[142] It is also apparent that a version of the draft memorandum was provided to Mr Gill. In an email from Mr Gill to Mr Jones of Monday 15 November he provided comments on one of the versions. It is apparent that the version that he provided comments on is a version following the changes made following Ms MacIntosh's input. For example he asked for a paragraph that had been inserted in her marked-up version to be deleted, and commented that the reason for the deletion was "as discussed". This suggests that he discussed the matter with Mr Jones.

[143] There are no further versions of the draft memorandum available. But it is apparent that the Mr Jones did not feel in a position to send the memorandum with the decision it recorded, including because of the responses he was getting on the draft which involved significant proposed changes and comments. He had, however, told Mr Ford that he would make a decision by Monday 15 November. By email dated Tuesday 16 November he emailed Mr Ford to say that he was not in a position to make a decision. He also advised Mr Ford that he would be given the opportunity to comment on his decision or make further submissions before it was made.

[144] On the same day he also emailed Mr Kris Faafoi, who at that stage was a reporter with the TVNZ Close Up television programme.[32] As part of Mr Ford's endeavours to get a positive decision, that programme was creating a story on

---

31 She gave evidence by video link from Canada, although she now lives in Geneva.

32 Now the Hon Kris Faafoi, a Minister of the Crown.

Mr Ford's case, and Mr Faafoi had contacted Mr Jones for comment. In the email Mr Jones said:

> I have not yet completed my consideration of the exemption petition, the material submitted by Mr Ford and information from technical specialists. Accordingly, I have not made a decision regarding Helilogging's application.
>
> It would be inappropriate for me to discuss the applications before I have had a chance to fully consider the significant safety issues raised by the operation of ex-military helicopters in hire or reward helilogging activities in New Zealand. These issues include the past history of ex-military helicopters involved in operations in New Zealand. Over the past six years, 40% of the New Zealand fleet has been destroyed in accidents, and there have been seven fatalities involved in those accidents.

[145] Mr Jones also sent an email to all CAA staff given the media publicity the matter was generating. Mr Jones said that all communication with the media and the industry should be directed to him and that:

> I have not yet made a decision on the application and am carefully considering the safety issues involved. It is important that my decision is not compromised by comments or statements, even if unintentionally made, by staff on the subject.

[146] Mr Jones nevertheless decided not to accept Mr Lanham's recommendation to approve the application, and that further steps were required in order to deal with it. By memorandum dated 19 November to Mr Lanham he set out the shortcomings with the information provided as he saw it, and the process to address these issues. It is apparent that some of the content of that memorandum, although not much, can be found in the original draft 9 November memorandum and the comments upon it. I conclude that the 19 November memorandum was the finalised version of a document Mr Jones started drafting on 9 November. But it was now much longer, and it included a chronology of CAA's previous dealings with the plaintiffs.

[147] A further substantial change from the 9 November draft is that Mr Jones now referred to Mr Remacha's 22 May 2002 memorandum concerning the Wessex aircraft which he had sent to Mr O'Malley a little over two years earlier. The memorandum drew heavily on this earlier analysis by Mr Remacha. Mr Jones stated:

> Concerns have been raised about the use of ex-military aircraft and I am not prepared to consider exercising my exemption power until I am properly

> advised directly by CAA technical staff of the risks and the action taken to mitigate those risks.
>
> I require a comprehensive recommendation report, in accordance with CAA policy and procedures relating to the processing of exemption petitions. The report must cover the grounds upon which I could exercise my power. I expect the report to include a detailed chronology of CAA's dealings with the Westland helicopters, reference to the previous CAA work on Westland Wessex helicopters and ex-military helicopters and an analysis on how Helilogging Ltd addresses the safety concerns and risks identified in those documents.

[148] Mr Jones advised he had decided that a process would now be followed for addressing the exemption applications. By way of summary this involved the following steps which came to be known as the seven-stage process:

(a) obtaining a more detailed report from CAA staff on the issues;

(b) requesting Helilogging to provide more information (including the contractual arrangement with GKN);

(c) obtaining CAA advice on the new information;

(d) consideration of the advice and the formulation of a preliminary decision by the Director;

(e) provision of the preliminary decision to Helilogging for comment;

(f) consideration of comments from Helilogging on the preliminary decision with technical advice as needed; and

(g) making a final decision.

[149] The memorandum concluded:

> You will have noted Helilogging is now applying pressure on my decision-making process through the media, please put this pressure to one side as it is most important the decision is made properly and fairly.
>
> In the interests of fairness to the operator, priority must be given to progress these issues expeditiously. If at any stage matters become delayed please let

> me know immediately. If there are any resource limitations please also bring this to my addition as soon as possible.

[150] By memorandum in response dated 21 November 2004 Mr Lanham acknowledged receipt of the memorandum, noting he was currently appearing for the CAA at a significant Coroner's inquest, but stating that an immediate response was appropriate given the implied criticisms of his actions.

[151] By memorandum dated 25 November 2004 Mr Jones responded to him indicating that his paper was not intended to be a personal criticism. He said, however, that Mr Fogden would manage the Helilogging matter from now on and report directly to him on this issue. Although there was some reference to this being partly motivated by the constraints on Mr Lanham's time arising from the inquest, it is plain that Mr Jones did not agree with Mr Lanham's advice. Moving Mr Lanham off dealing with the application was primarily because of this factor. Indeed to the limited extent that Mr Jones was able to give evidence of probative value before me he effectively confirmed that he did not have confidence in Mr Lanham, but had considerable confidence in Mr Fogden.

The judicial review challenge

[152] At this stage the plaintiffs decided that given the delays and their previous interaction with the CAA they would take legal advice in relation to a proposed challenge to the Director's stance. The plaintiffs' solicitor, Mr Takarangi, was instructed, and Mr Timothy Castle was instructed as counsel.

[153] I note Mr Ford's evidence that during a consultation with Mr Castle, Mr Castle rang Mr Jones, and that Mr Jones told Mr Castle that he should tell Mr Ford that he was not going to get the exemption "that easy". Mr Castle did not recall that conversation when he gave evidence. Assuming something of that kind was said I do not think there is any significance in it. On any view of it an exemption decision under s 37 was not an easy exercise.

[154] Proceedings were commenced on 25 November 2004.[33] This included an application for an interim mandatory injunction directing that a certificate of airworthiness and applicable exemptions necessary to enable the plaintiffs to immediately commence helilogging be issued. After initial procedural hearings the application for interim relief was given a substantive hearing on 16 December. Several documents, including affidavits, were filed by both sides leading up to this hearing. That included a detailed affidavit from Mr Jones sworn 10 December 2004.

[155] Mr Jones' affidavit provided a description of the regulatory regime, and also addressed the advice he had received from his officials, and it exhibited that advice. That included the 19 November memorandum referred to above. It did not include any version of the draft 9 November memorandum.

[156] Mr Jones explained in his affidavit that he had become increasingly concerned about the operation of ex-military aircraft in the civil aviation system, including his concerns in relation to the Westland Wessex. He gave detailed background of what had happened in relation to the plaintiffs' applications, and he described the memoranda he had provided from Mr Lanham recommending the grant of the exemption. He said:

> 109. After reading Mr Lanham's report, I was not satisfied that the safety issues relating to the operation of the Westland Wessex helicopter on hire or reward operations had been fully considered. However, due to other CAA work commitments, I was unable to formulate my concerns in writing immediately. At that time, I was required to attend the Directors General of Civil Aviation (DGCA) conference in Hong Kong from 30 October until 8 November 2004.

[157] He also explained the different recommendations he had been given about the appropriate category for granting the exemption application. He then said:

> 116. I was unable to give Mark Ford my decision by 15 November because once I had time to fully consider and review the information presented by my technical staff, I realised that the issues involved in assessing that material were not as straightforward as I had originally thought. In fact, I determined that I had not yet been provided with an appropriate assessment of the plaintiffs' proposal in the context of Mr Remacha's May 2002 report and I believed it would be unreasonable and a breach of my statutory obligations

[33] In closing the plaintiffs argued that this was not a judicial review proceeding. I do not see that the jurisdictional categorisation matters, but in any event the proceeding were in the nature of judicial review. What was sought was a remedy in relation to a statutory power of decision.

> for me to make any decision without fully considering the matters raised in that report and being provided with a thorough and comprehensive review of the concerns enumerated in the report.

[158] He then explained the process for the decision-making set out in his 19 November memorandum. He concluded:

> 151. Safety considerations require that my decision be made with the benefit of all the information and proper advice. I have told my staff to give this matter priority. My staff and I are engaged in the process of identifying the proper nature and scope of the decision and preparing (with the assistance of the Plaintiff) the information required for that decision properly to be made. However, I will only be in a position to make that decision when I have all the relevant information required for me properly to exercise my statutory discretion.

[159] The matter was argued before MacKenzie J on 16 December, and he gave an oral judgment that day.[34] In the judgment MacKenzie J recorded Mr Castle's concession that the plaintiffs did not press for a mandatory order granting the exemption, noting that the concession was rightly made. MacKenzie J also declined the application for order in the nature of mandamus. He then considered whether to make procedural orders in relation to the decision and held:

> [11] I do not consider that the Court should impose directions as to process unless that is clearly necessary in the facts of the particular case. I am not satisfied that that stage has been reached in this case. The Court would expect that the Director will do his best to action the matter with priority and expeditiously, as he has indicated he proposes. It is to be hoped that his timetable can be met. However, I am not prepared to make an order which will impose that timetable on the Director. …

[160] MacKenzie J recognised, however, that the plaintiffs' ability to come back to the Court to apply for an order to compel a decision should be preserved. Accordingly he determined that the appropriate course was to adjourn the plaintiffs' application to allow the seven-stage process set out in the Director's 19 November memorandum to be completed.[35]

---

34 *Judicial review decision*, above n 2.

35 At [12].

PLAINTIFFS' FIRST MAIN ALLEGATION: MISFEASANCE SURROUNDING NOVEMBER MEMORANDUM

[161] The plaintiffs' first key allegation is that the Director engaged in misfeasance and deceit because he dishonestly concealed that he had made a decision to decline the plaintiffs' application as evidenced by the 9 November memorandum. He did not disclose that he had done so, and did not disclose the memorandum. Rather he dishonestly represented to the plaintiffs and the High Court that he had not yet made up his mind, that he had an open mind, and that a procedure needed to be followed in order for him to make a decision.

[162] For a number of related reasons I conclude that the plaintiffs' claims in this respect fail on the facts.

Views in 9 November memorandum

[163] First I find that Mr Jones had not made a decision to decline the plaintiffs' application as evidenced by the 9 November memorandum. I accept Ms MacIntosh's evidence that the document was only a draft.[36] In particular:

(a) The document is not signed as with other memoranda Mr Jones sent (including the 19 November memorandum). Two of the named recipients who gave evidence, Mr Lanham and Mr Fogden, did not recall receiving it, but Mr Lanham did recall receiving the 19 November memorandum.

(b) Both Ms MacIntosh and Mr Gill made detailed comments, deletions and suggestions on the memorandum. It is unlikely that they would be making detailed changes, or suggested amendments, to a memorandum that had already been finalised and sent recording a decision that had been made.

---

[36] She did not actually recall that it was a draft, but explained that that was her view now looking at it in light of the circumstances. As previously indicated, Mr Jones was not able to give any relevant evidence of probative value.

(c) In a contemporaneous document created by Ms MacIntosh setting out the chronology of the events for the purposes of drafting Mr Jones' affidavit for the judicial review proceedings, she described Mr Gill's emailed comments on the memorandum on 15 November as "comments on draft memo to [Mr Lanham]".

(d) The apparent decision made in the 9 November decision is inconsistent with the decision actually made as recorded in the 19 November memorandum. The 19 November memorandum was undoubtedly sent, and the decision recorded in that memorandum was acted on. There is no reference in the 19 November memorandum to the 9 November memorandum or the apparent decision it recorded. This confirms that the earlier memorandum, or a version of, was not sent, and the intended decisions recorded in it were not made and then reversed.

[164] The 9 November document described what the Director proposed to decide, but was provided in draft form to the Director's principle legal adviser, the CAA's chief legal counsel, Ms MacIntosh for advice. Comments on that proposal were provided by Ms MacIntosh. They were also provided by Mr Gill and possibly others as well. No final decision was made at this stage. The only actual decision made by Mr Jones was that outlined in the final 19 November memorandum. He decided not to accept Mr Lanham's recommendation, but rather introduce the seven-stage process.

[165] I accept that the draft 9 November memorandum evidences views that were adverse to the application expressed in conclusory language. That is also true of Ms MacIntosh's revision of it. But it is equally apparent that Mr Jones received advice on his views from both Ms MacIntosh and Mr Gill that suggested significant changes to what he had drafted. In that process Mr Remacha's detailed memorandum of 22 May 2002 concerning the Wessex — which was not mentioned in Mr Lanham's advice to Mr Jones (or in any of the underlying memoranda on which it was based) — was identified as a source of relevant considerations. Mr Remacha's memorandum set out a number of issues that needed to be addressed before either of the exemptions could be properly assessed. Mr Jones decided against immediately declining the

application, but instead proceed in the way set out in the 19 November memorandum. I do not regard that as inappropriate.

[166] Neither was anything hidden. The original draft was intended to be sent to a number of persons, but after consulting with Ms MacIntosh and Mr Gill, Mr Jones decided not to send it in this form, or to send it to all these people. In his 19 November memorandum to Mr Lanham, Mr Jones recorded that before he could grant the application he had to be satisfied that the risk to safety would not be significantly increased. He then recorded that Mr Remacha's memorandum covered "a number of safety concerns" which he listed, to which he added the lack of oversight of GKN, lifing of and traceability of components and parts, and that he was "not confident the company is able to comply with the manufacturers restrictions". He also identified the more general concerns about the use of ex-military helicopters, including that the accident record was "atrocious", before saying he was "not prepared to consider exercising the exemption power" until properly advised. This memorandum was provided to the plaintiffs on 30 November. That did not hide views adverse to the plaintiffs, but rather set them out in a clear way.

[167] I also conclude that Mr Jones was of the view that it would be necessary to give the plaintiffs an opportunity to make submissions on any proposed decision to decline the applications. He advised Mr Ford of this on 16 November before he finalised the process in the memorandum of 19 November. Those two steps — obtaining further information, and the provision of a preliminary decision allowing the plaintiffs to comment — were key components of the seven-stage process he decided to implement. I accept that these were proper steps to take before making a decision.

Accuracy of Director's affidavit

[168] Given the above conclusions, I conclude that neither Mr Jones' 10 December affidavit, nor the content of the 19 November memorandum can be found to be dishonest.

[169] The affidavit stated that Mr Jones was not satisfied that the safety issues he identified in relation to the Wessex had been fully considered in Mr Lanham's advice (at paragraph 109). He said that neither Mr Lanham's or Mr Gill's recommendations

"appeared to have appropriately considered the issues of safety that would arise assuming the plaintiffs' proposal be implemented" (at paragraph 111). He said that he considered the issues were not as straightforward as he originally thought when he had informed Mr Ford of when he would make a decision, and that he had not been provided an appropriate assessment in the context of Mr Remacha's May 2002 report (at paragraph 116). He said he thought it would be unreasonable and in breach of his statutory obligations to reach a decision without addressing the issues in that report and without receiving a thorough and comprehensive review (at paragraph 116). I accept that these were honestly expressed views that he properly informed the Court of his approach.

[170] He did not say in the affidavit that he was against granting the applications. But it was clear that he had decided he could not properly grant them on the basis of what he had before him. He did not say whether he thought the plaintiffs were likely to be able to address all the concerns he raised. But reading Mr Jones' 19 November memorandum and his affidavit together it would have been apparent that the plaintiffs had much work to do to persuade him. I cannot see anything in his affidavit that can properly be described as inaccurate or misleading.

[171] Moreover the plaintiffs' case is that Mr Jones misled both them, and the Court, in both his affidavit and the 19 November memorandum. Yet Ms MacIntosh was closely involved in the Director's views evidenced by the 9 November draft, and she formed a chronology of events that a CAA solicitor, Mr Wellik then used to formulate the affidavit for Mr Jones. The chronology did not include the 9 November draft. It is not, and could not be suggested that either Ms MacIntosh or Mr Wellik were acting dishonestly. But Ms MacIntosh and Mr Gill at least knew the Director's thinking in his 9 November draft, and Ms MacIntosh was involved in the formulation of the affidavit.

Non-disclosure

[172] The plaintiffs also contend that the 9 November memorandum was improperly withheld from them at the time as there was an arrangement for discovery that

encompassed this memorandum. For a number of reasons I do not accept that contention. In particular:

(a) Whilst the plaintiffs' barrister, Mr Castle gave evidence that he believed he had agreed with Ms MacIntosh that the plaintiffs would be provided with informal discovery, Ms MacIntosh gave evidence she did not think that was the case. I accept Mr Castle's recollection that following discussions with Ms MacIntosh relevant information would be provided. But I do not accept from that that there was an arrangement to provide the equivalent to discovery. There was no discovery order or contemporaneous documents showing that was the arrangement.[37] Rather there are letters from the plaintiffs' solicitors asking for specific information, which was then provided. This is more consistent with a process of providing relevant material in the affidavits, with additional material on request. Neither was there time in these proceedings to engage in a discovery exercise — the claim was filed on 25 November and was heard on 16 December, with judgment delivered orally that day.

(b) The 9 November memorandum would not normally have been discovered as a consequence of an arrangement to provide relevant documents precisely because it was a draft, and was superseded by the 19 November memorandum (which was duly provided).

(c) In any event the draft 9 November memorandum seems to me to have been subject to legal professional privilege. It was formulated by Mr Jones and provided to Ms MacIntosh for her advice. Ms MacIntosh duly provided advice in the marked-up version, which included (for example) effective advice that any such memorandum needed to be reformulated around s 37 of the Act. It may be less clear that Mr Gill's

---

[37] There is one email where Mr Gill forwards his comments on the 9 November draft for the purpose of discovery, but this does not satisfy me that there was such an arrangement in the context of the other evidence.

comments on the memorandum are privileged, but the original memorandum and Ms MacIntosh's comments on it would have been.

[173] I accordingly do not accept that the failure to disclose the 9 November memorandum was inconsistent with an arrangement made with the plaintiffs, or any requirement, or that it evidences dishonesty.

Decision making integrity

[174] The plaintiffs' more general point appears to be that the 9 November memorandum evidences that the Director was firmly against the grant of an exemption, and his failure to say so openly was improper. This is an unrealistic assessment of statutory decision-making processes of this kind.

[175] A person or body charged with a decision-making function is entitled to form views during a decision-making process, even very strong views, without this involving impropriety. They must remain faithful to the decision-making function which includes considering submissions with an open mind.[38] But it would be difficult to engage in a decision-making process without forming opinions along the way. Formulating and then assessing or re-assessing views, particularly with the input of others, is simply part of a deliberative process. That is particularly true of decisions by a statutory officer such as the Director of Civil Aviation. The Director is appointed to this role with the expectation that he will have knowledge and experience of the civil aviation sector. It can be expected that he or she will have views, and is entitled to bring them to bear when exercising his statutory decision-making functions. Against that background, to take a snapshot of the Director's thinking, which is essentially what the draft 9 November memorandum does, and then argue that this represented his only true views, with any subsequent views part of a dishonest concealment of the truth is unrealistic.

[176] An unfortunate potential side effect of the greater sophistication of judicial review, and structured statutory decision making, is that there is a greater risk of steps

---

[38] See the principles summarised in *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC) at [48]–[52].

being taken by bodies subject to potential judicial review challenges to prevent such challenge rather than to enhance good decision-making. Procedural steps, such as consultation, are sometimes seen to have been followed simply to deflect a judicial review challenge. It is important that bodies who engage in those processes resist adopting an adversarial stance, and that they approach such steps in good faith. Here I do not accept that Mr Jones introduced the seven-stage process in bad faith. His view that further information was required to address the complex issues was genuine, as was his view that the seven-stage process (which included submissions by the plaintiffs) was an appropriate procedure.

[177] Moreover the process which Mr Jones introduced in the 19 November memorandum involved him making a preliminary decision, and providing the plaintiffs the opportunity to make submissions upon it before a final decision. During the seven-stage process, by letter dated 13 May 2005 Mr Jones wrote to Mr Ford enclosing a 10 May 2005 report from Mr Fogden recommending the applications be declined. Mr Jones advised that under s 37 of the Act he had decided to make a preliminary decision to decline the applications and that the reasons were in this report. He gave the plaintiffs the opportunity to provide further submissions. The chronology could have been faster, but the delay is primarily attributable to the plaintiffs — the responses to a letter of 24 December 2004 setting out CAA's information requests were delayed. In any event the plaintiffs knew by 13 May 2005 that the Director's opinion was that the application should be declined. So it is not clear to me what significance there is in the suggestion that he earlier held that view on 9 November 2004.

Procedural misfeasance

[178] The plaintiffs do not, and could not contend that the Director did not believe he had the power to decline the applications (ie that he knowingly, or recklessly, acted beyond his s 37 power). Their attack is on the honesty of the processes and procedures surrounding the decision. As I have already held, it is possible to conceive of a successful claim for misfeasance based on the exercise of ancillary or procedural powers in bad faith either with targeted malice, or with knowledge or reckless indifference to whether the decision maker is authorised to so exercise those powers.

[179] Here there was no statutory requirement for a submission/consultation process. To say the Director engaged in misfeasance by introducing one would require a finding that Mr Jones knew he did not have, or was recklessly indifferent to whether he had, power to introduce the seven-stage process. It is difficult to conceive how that could be established. Mr Jones' view on 9 November was based on the information he had then been provided at that time. It would not be an abuse of power for him to provide the plaintiffs a properly formulated preliminary decision and invite submissions upon it. Neither could it be an abuse to ask for further information as part of the process of formulating the preliminary decision, or to state that he needed that information to satisfy him of certain matters before he could grant the application in accordance with the statute. That is essentially what Mr Jones did. Even if I were to accept that his view was the application should be declined on 9 November, I do not accept that the introduction of the seven-stage process was knowingly beyond the powers of the Director. I accept he would be obliged to consider further submissions on his preliminary decision in good faith, but it would not be misfeasance to give the plaintiffs a further opportunity to address his concerns before those views were formally reflected in a statutory decision.

[180] In his oral closing Mr Dale contended that a reasonable director would have been required to grant the exemption application. To the extent that submission encompasses an allegation that Mr Jones knew he was obliged to grant the exemption application, or that it was beyond his powers not to grant it (or that he was recklessly indifferent to this) I do not accept it. He clearly believed the application should not be granted at that stage. There is no basis to say that he was knowingly acting beyond his powers (or recklessly indifferent to this) by not granting the application. For reasons I will outline in greater detail below, in my view it was open for a reasonable director to decline the application in August 2005.[39] As at November 2004 there were also a number of categories of information that a reasonable director could properly have asked to be provided before the application could be granted. Many of those were later set out by the CAA by letter dated 24 December 2004. To take one example, at that stage the Director had no confirmation that the plaintiffs had put in place the necessary ongoing support from the engine manufacturer, Rolls Royce, including the

---

[39] See [277] below.

appropriate assessment of the "lifing" of components that was appropriate when the Wessex was being used for logging operations.

Other allegations

[181] There are two other matters that the plaintiffs rely on at this stage.

[182] First, the plaintiffs say that Mr Lanham was improperly removed from the decision-making process, and that other CAA staff were told not to consult with him about it. It is clear that this did occur, and I find that the reason for it was that Mr Jones disagreed with Mr Lanham's advice. But I do not accept that to remove him from the process was improper. It was open to the Director to choose the personnel that he wished to receive advice from, and to exclude those whose advice he disagreed with. There can be advantage in receiving contestable views, and different opinions, but there is no impropriety in not doing so. I conclude that there was no dishonesty, or impropriety, in Mr Jones deciding to rely on the advice of Mr Fogden and not Mr Lanham.

[183] Secondly, the plaintiffs raise a particular matter in connection with the Close Up television programme that was televised on 17 November. In it the reporter, Mr Faafoi, now a Minister of the Crown, is reported as saying that Mr Jones had advised him that a decision had not been made because he had received new information. When the Hon Kris Faafoi gave evidence he said he could not now recall Mr Jones saying this so many years later, but that if he said this in the programme that this would have been the truth.

[184] I conclude that it is likely Mr Jones did make a comment along these lines to Mr Faafoi. But I do not accept such a comment is evidence of dishonesty. The Director had been receiving or identifying further information continuously during the process. For example the May 2002 Remacha report had not been referred to in Mr Lanham's advice to him or the underlying memoranda. It had been two years since the Director had sent this report to Mr O'Malley, so I doubt Mr Jones would have remembered all of its contents. He had also received advice from Ms MacIntosh and Mr Gill, and had received a comment from a representative of the National Transportation Safety Board in Hong Kong at the conference. It can be argued that

this material was not "new information". But whether any point can be made about that depends on the precise words used, which neither Mr Faafoi or Mr Jones can now remember. The point reduces to a matter of semantics. The defendant also argues that the new information may also have been a reference to information CAA had received about a change of GKN ownership or the quality of parts held by the plaintiffs, and I accept that this is possible. The key point is that there is nothing before me to provide any proper basis for finding that an oral comment made some 15 years ago to a reporter who cannot now recall it shows dishonesty.

Conclusion on 2004 allegations

[185] For these reasons I do not accept that the elements required to establish misfeasance at this time are established. In particular there was no dishonesty, or action by the Director in bad faith. More specifically the Director did not act with targeted malice towards the plaintiffs, and neither did he take steps knowing that he was acting beyond his powers, or recklessly indifferent to whether he was doing so.

[186] For similar reasons the action in deceit based on the events at this time fails. The short point is that there was no dishonest misrepresentation made by the defendant. I find there were no misrepresentations at all. The plaintiffs rely on misrepresentations in the 19 November memorandum and the Director's affidavit, but I conclude that there were no misrepresentations in those documents, or otherwise.

[187] In reaching these conclusions I am conscious that the other key elements of the plaintiffs' claims are still to be addressed, and that the key elements of the plaintiffs' claims involve inter-related matters. It will accordingly be appropriate to review all those matters before reaching final conclusions on the plaintiffs' claims. I do that further below.

THE SEVEN-STAGE PROCESS

[188] In late 2004 and 2005 the seven-stage process was then followed. This led to the Director's decision on 19 August 2005.

Further information

[189] On 23 December 2004 Mr Fogden provided the Director with a 15 page report. This drew on Mr Remacha's earlier report, but also detailed what further information was needed to properly assess the application. It provided no recommendation on the decision to be made by the Director.

[190] By letter dated 24 December 2004 Mr Jones then wrote to Mr Ford. In that letter Mr Jones sought confirmation that the plaintiffs were seeking to progress both exemption applications — relating to the Special category as well as the Restricted category. He then set out eight requests for information arising from Mr Fogden's report which were broadly:

(a) Identification of the exact relationship between the plaintiffs and GKN (including a copy of any contract, and the duration of support).

(b) Clarification of how Helilogging had described GKN's role to GKN itself in order for CAA to understand the role GKN was agreeing to.

(c) Details about the state of the spare parts held by the plaintiffs, including their certification and storage conditions.

(d) Confirmation that GKN had taken into account repeated cycle heavy lifting impacts on the Rolls Royce engine, that GKN had confirmed the suitability of the engine, and that there was ongoing Rolls Royce support for the engine.

(e) The provision of revised "Quick Reference Cards", which were needed as part of operational requirements.

(f) Clarification on which exemption petitions were being persued, and what other regulatory requirements were the subject of the application.

(g) Identification of the aircraft the applications were made in respect of (ie whether it was for more than a single helicopter).

(h) Clarification on who was performing the role of chief pilot, as CAA understood that Mr Cranleigh Lee was no longer holding that position.

[191] In January 2005 the plaintiffs then retained the services of Mr Jim Barclay and his company, Aaleda Systems Ltd. Mr Barclay was a well-known aviation consultant, and former CAA employee. He became tasked with dealing with the requests for information, and did so by providing a report to CAA. The first version of his report was not provided until 8 March 2005, however. Mr Barclay also said when it was provided that this was a draft report that would be updated after discussions with the CAA.

[192] In the meantime the plaintiffs pressured the CAA to allow the plaintiffs to go helilogging. In particular their solicitor wrote a number of letters requesting that the external load prohibition be removed. These were declined by the CAA. The plaintiffs also sought political assistance, including by seeking an inquiry by the Transport Industrial Relations Select Committee.

[193] By letter dated 15 March the Director responded to the first Barclay report inquiring whether the report encompassed all the information that was to be provided in response to the December 2004 request. Mr Jones advised:

> I note from Aaleda Systems draft report that it appears that Helilogging Limited is under the impression that the New Zealand CAA will be the international regulatory authority for the ex-military Westland Wessex. This is not the case, and the CAA has at no stage advised Helilogging Limited that the CAA would be willing to accept such responsibility.
>
> Finally, I need to reiterate that there can be no guarantee that Helilogging Limited's application for commercial heli-logging will be approved.
>
> As has been previously stated to Helilogging Limited, there is also present a general policy issue regarding both safety concerns and the legal and policy applications for the commercial use of aircraft that have not been shown to meet a comprehensive code of airworthiness.
>
> If Helilogging Limited satisfies me with respect to all technical considerations, I must still consider the broader policy issue of whether ex-military helicopters should be operated for purposes other than those for which the aircraft was designed, especially when such operations placed high level of stress on the aircraft.

[194] On 4 April 2005 CAA sent Mr Ford a letter revoking a certificate held by him to enable him to operate an agricultural aircraft. The reason for this was the absence of a response on the identity of the chief pilot. This action has been included within the plaintiffs' complaints, although I do not understand that the plaintiffs were actually engaged in any agricultural aviation activities at the time.

[195] Also at around this time the Select Committee agreed to, and duly conducted an inquiry into the matter. At the trial I indicated to the parties that I did not think it appropriate for this Court to make any inquiries into the matters that were canvassed during the inquiry by the Select Committee, and as a consequence the parties did not lead evidence directed to that issue. I accept that the Court can refer to the Select Committee inquiry as part of the background to the Director's decisions. It is relevant to the context in which the parties were interacting with each other. But the Court should not inquire into what was said by the parties in that inquiry, and any criticisms of it. In the same way statements that were made in Parliament are also protected by Parliamentary privilege and I do not address them, although they remain part of the relevant background.

[196] On 4 April 2005 Mr Barclay sent the CAA a revised report in support of the application. That report was soon superseded by a third version dated 14 April.

Assessment and Preliminary decision

[197] The information provided by Mr Barclay in his reports was then assessed by Mr Fogden and Mr Gill. On 10 May 2005 Mr Fogden completed a report to the Director recommending a preliminary decision declining the applications.

[198] The report raised a number of issues, including observations that the plaintiffs had not provided sufficient information in accordance with the requests made on 24 December 2004. In particular Mr Fogden advised:

(a) There was no contract with GKN, and there appeared to be an assumption in the contractual proposals that the CAA would assume the role of National Airworthiness Authority (NAA). Mr Fogden's report

said that the CAA did not have the capability to act as the NAA for an overseas aircraft such as the Wessex.

(b) The plaintiffs' responses did not adequately address the safety issues concerning the traceability of ex-military components, and that the response "seriously underestimates the significance of the question to your statutory obligation to be satisfied that the risk to aviation safety would not be significantly increased".

(c) That there appeared to be no manufacturers support from Rolls Royce, with the response referring to a letter that the CAA itself had received from Rolls Royce in 2002. This did not adequately respond to the issue. Mr Fogden noted that the Wessex fatal crash in New Zealand whilst helilogging was attributed to an undetermined engine failure.

(d) Mr Fogden advised that the plaintiffs had not adequately answered other questions, although they had clarified that priority should be given to the application for the Restricted category.

[199] In light of the answers Mr Fogden advised that the pre-requisites for granting an exemption under s 37 were not met as the Director could not be satisfied that the risk to safety would not be significantly increased by granting the exemption. He accordingly recommended that the preliminary decision should be that it be declined.

[200] On 13 May 2005 Mr Jones wrote to the plaintiffs with his preliminary decision declining the exemption applications. He enclosed Mr Fogden's report. Mr Jones stated in his letter:

> In exercising my discretion under section 37 of the Civil Aviation Act 1990, I have decided that my preliminary decision is to decline your exemption applications. My preliminary decision constitutes Stage 4 of my decision-making process. The reasons for my preliminary decision are set out in the attached report.
>
> However, I wish to emphasis one technical matter. I have stated to you earlier that the NZ CAA will not be the "regulating authority"' for the ex-military Westland Wessex. For the avoidance of any doubt, I advise you that by the term "regulating authority" I mean the National Airworthiness Authority (NAA), as referred to in Mr Fogden's report.

> I also advise that the CAA is currently developing its policy regarding the operation of ex-military and non-Type Certified rotary wing aircraft.
>
> With regard to my decision-making process, I stated to you earlier that I would provide my preliminary decision regarding your exemption applications for your comment. The provision of my preliminary decision to you for your comment constitutes Stage 5 of my seven-stage decision-making process.

First involvement of Mr Lewis

[201] It was at approximately this stage of the process that CAA first involved Mr Lewis in the decision making process.

[202] Mr Lewis was operating as an aviation consultant, and was a very experienced test pilot. He had worked for the Royal Airforce in the United Kingdom and had attended the Empire Test Pilot School. He was, however, a New Zealander.

[203] At that stage Mr Lewis was assisting the CAA with work on a review of the Rules concerning the overloading of agricultural aircraft. Whilst he was present doing that work Mr Fogden had asked him whether he had experience with a Wessex, and Mr Lewis said that he had. At that stage Mr Fogden gave Mr Lewis a copy of the Aaleda report and asked him for his comments. He was not instructed in any formal way to provide advice on the report or the plaintiffs' application, but in my view a request that he look at Mr Barclay's report still meant that he was engaged by the CAA on the applications.

[204] It is apparent that Mr Lewis and Mr Barclay met on 19 May 2005. There is a dispute as to whether Mr Lewis was invited to a meeting by Mr Barclay or not. The minutes of a later meeting of the plaintiffs' representatives of 23 August 2005 record that it was Mr Barclay that contacted Mr Lewis. The plaintiffs complain that Mr Lewis attended the meeting with Mr Barclay without revealing that he had been instructed for the CAA. They do so without being able to call Mr Barclay as a witness. I am satisfied that Mr Barclay was aware that the CAA had contacted Mr Lewis in relation to the applications as Mr Lewis had a copy of Mr Barclay's report. That is evidenced by Mr Barclay's email to the plaintiffs' representatives that day about the meeting which stated about Mr Lewis:

> His medical has lapsed, but he is still passionate about the Wessex. He still does the odd bit of expert advice, which may be why CAA has sent him a copy of my latest report. He described it as superb, which if he told them that, may mean they don't contact him again … However it does mean we now have a solid benchmark for the report.

[205] Mr Lewis accepted he had described Mr Barclay's report in these terms. Having been asked by the CAA to review the report, it is surprising that Mr Lewis would attend a meeting with Mr Barclay and then say to him that his report was superb. It is hardly surprising that Mr Barclay saw Mr Lewis as a potential ally. It would also appear that Mr Barclay gave him some key documents, and I accept it was at least implicit that the plaintiffs might be wanting his assistance.

[206] Mr Fogden explained that he had not been given any notice of Mr Lewis' meeting with Mr Barclay. Mr Lewis contacted Mr Fogden after his meeting with Mr Barclay to tell him it had happened. Mr Fogden advised him that if he were further approached by the plaintiffs Mr Lewis should tell Mr Barclay that he could not assist because of a conflict of interest arising from consultation for CAA.

[207] I also note that Mr Quilton Beale was also at the meeting between Mr Barclay and Mr Lewis. He emailed the plaintiffs after the meeting reporting that Mr Lewis had suggested that water contamination may have been the cause of the fatal accident involving Mr O'Malley's Wessex. That appears to be a reference to the fuel drain issue subsequently raised in Mr Lewis' July 2005 report. So Mr Lewis had openly raised at least one of his concerns at this time.

Plaintiffs' representations

[208] In response to the preliminary decision the plaintiffs sought meetings with the CAA. The first meeting was between Messrs Barclay and Fogden on 16 May. Mr Gill was supposed to attend but could not attend, and given it was focused on airworthiness issues not much was achieved in the meeting. It was agreed that a meeting attended by the Director would be appropriate.

[209] A meeting with the Director was then scheduled on 13 June to enable the plaintiffs to make a presentation to the Director and other CAA representatives. At that meeting Mr Barclay made a powerpoint presentation. This formed part of the

plaintiffs submissions on the preliminary decision. During the course of that presentation, Mr Lewis was identified as a person who was an adviser to the plaintiffs. That took Mr Fogden by surprise. He had told Mr Lewis that he should say he was conflicted. But I do not believe Mr Lewis had contacted Mr Barclay to say that, and given that Mr Lewis had met with Mr Barclay and described Mr Barclay's support as superb it is perhaps not surprising that Mr Lewis was mentioned by the plaintiffs.

[210] After the meeting a further version of Mr Barclay's report was provided to the CAA on 20 June 2005. In that report Mr Barclay stated:

> [The company] will be drawing on the expertise of both M Gordon, and B Lewis. B Lewis was involved in the original test flying of the Gnome powered Wessex helicopter, and also had line flying experience with the aircraft Bristow's North Sea Operations.

[211] Mr Fogden then contacted Mr Lewis and asked if he supported the plaintiffs' application, and Mr Lewis advised that he did not. This ultimately led to a meeting between Messrs Lewis, Fogden and the Director to obtain Mr Lewis' advice. That meeting occurred on 20 July. There are no notes of the meeting, but it would appear that following it Mr Jones asked Mr Lewis to provide his advice in writing, which is what led to Mr Lewis' letter of 23 July.

[212] The plaintiffs also, at this time, sought a more confined application to have the external load lifting restriction lifted to allow the Wessex to be used for helilogging activities. This was on the basis that doing so in relation to logs over which it obtained ownership did not involve inconsistency with the limitation on the use of the helicopter under its Special categorisation for hire or reward. A legal opinion was supplied in support of that argument from the plaintiffs' solicitor, Mr Takarangi. That more limited application was declined by letter from the Director dated 29 June 2005. Although it is not directly in issue in this proceeding, in my view any commercial arrangements for helilogging would be inconsistent with this "hire or reward" limitation in the Rules even if legal title passed to the plaintiffs before the logs were

carried by helicopter. Obtaining such title would simply be part of the commercial arrangements which were not permitted by the hire or reward limitation.[40]

Final advice and decision

[213] The submissions made by the plaintiffs on the preliminary decision were then assessed. By report dated 9 August 2005 Mr Fogden then advised Mr Jones that the applications should be declined.

[214] The report involved a detailed analysis addressing a number of matters, including the plaintiffs' submissions. It advised that whilst s 37(2)(b) of the Act could be satisfied if the application was granted subject to conditions, the Director could not be satisfied that the risk to safety would not be significantly increased under the proviso in s 37(2). Mr Fogden further advised that even if the Director could be so satisfied, there were reasons why granting the application would not be appropriate under s 37(1) including the precedent effect that would be created.

[215] In terms of the proposed conditions allowing s 37(2)(b) to be satisfied, one was that an ICAO State accepted responsibility as the NAA. This would apply if an exemption to the Restricted category was being considered. In terms of the safety risk, Mr Fogden identified the New Zealand accident record and Mr Lewis' advice as two independent reasons why the requirement in the proviso in s 37(2) could not be satisfied.

[216] On 19 August 2005 the Director accepted Mr Fogden's recommendations and declined the applications. The reasons for doing so are recorded in a file note of 19 August and a letter to Helilogging of the same date. His reasons were broader than those in Mr Fogden's advice. He concluded that none of the s 37(2)(a)–(d) pre-requisites had been met, the safety risk proviso in s 37(2) had not been satisfied, and that he regarded the grant of an exemption as inappropriate under s 37(1). His file note records the following conclusions:

---

[40] This approach is consistent with *Transport Minister v Keith Hay Ltd* [1974] 1 NZLR 103 (SC) and *Gill v Laird* [1940] NZLR 540 (SC) – both decisions emphasise the contextual significance of the hire or reward question.

> Serious concern exists with this operation. The following are some reasons detailing my concerns:-
>
> - The aircraft is not in compliance with ICAO responsibilities in terms of compliance with the comprehensive code of airworthiness, or in having the oversight of a NAA.
>
> - No firm contract exists between GKN Westland and Heli-logging Ltd.
>
> - No manufacturers' support is provided for the engine or gearbox. This being specifically declined by GKN Westland.
>
> - As detailed above much of the information requested on 24 December 2005 has not been provided.
>
> - The aircraft is ex-military with very limited civil history.
>
> - The Westland Wessex is not used anywhere else in the world on civil operations of any kind. The New Zealand CAA cannot undertake the complete oversight including the NAA responsibilities.
>
> - Some doubt exists over the airworthiness of the type as the last fatal UK accident investigation was not completed. Subsequently the manufacturer elected to withdraw the type certificate.
>
> - Mr Bernie Lewis comments about his "grave doubts about its safety for the tasks as suggested by Heli-logging".

[217] His file note then recorded that:

> As a result of the above information I am unable to be satisfied that the risk to aviation safety will not be increased. In addition other normal certified aircraft are available to Heli-logging. This is what other logging operators are using.

[218] In Mr Jones' letter to Helilogging Mr Jones also stated that he agreed with the policy concerns raised by Mr Fogden. His letter stated:

> In addition to the reason outlined above, I also consider it inappropriate to grant an exemption because of the significant precedent implications of such an exemption. In fact, I am of the view that, if granted, the exemption proposed would have serious consequences for the integrity of the Civil Aviation Rules relating to aircraft certification.

[219] The letter to Helilogging included a copy of Mr Fogden's report, which in turn appended Mr Lewis' advice.

Steps following decision

[220] The plaintiffs considered taking further steps after the decision was made, and advice was taken by Mr Castle and Mr Philip Grace in that respect. Ultimately, however, the plaintiffs' principal funder, Mr Terrence Haydon, decided later that month that because the application had been declined for safety reasons the Court was not likely to reverse the decision based on safety, and even if required to reconsider the decision the Director was not likely to change its mind. So he declined to provide further funding.

[221] The plaintiffs nevertheless made further attempts to persuade Mr Jones to change his mind including by letter dated 21 July 2006 which was rejected by Mr Jones' letter of 22 August 2006. Correspondence was sent to the Chair of the CAA Board, and politicians were again approached. These initiatives were not successful. Mr Ford's company went into receivership and liquidation in October 2006.

[222] It is significant to note that during the period of consideration of the plaintiffs' application, work continued within CAA on a review of the Rules. During the course of this review, in or around March 2006 Mr Jones made a decision on Mr Gill's advice to prohibit any helicopter issued with a Special category airworthiness certificate for being used for helicopter external load operations. There were eight helicopters on the register affected by this action, including the Westland Scout aircraft operated by the plaintiffs.

[223] When the review of the Rules was finalised in 2009 sub-categories of the Special category were introduced. Furthermore Part 115 was introduced into the Rules by a decision of the Minister on 11 October 2011. This allowed Special category aircraft to be used for hire and reward activities, but only when the activity was within the category of "adventure aviation".[41] In substance the final Rules as amended by the Minister did not encompass permitting activities of the kind contemplated by the plaintiffs' application.

---

[41] The categories of adventure aviation were: Special category aircraft – warbirds; microlight aircraft operations; parachuting; gliding; paragliding; hang gliding; and hot air ballooning.

PLAINTIFFS' SECOND ALLEGATION: MISFEASANCE SURROUNDING AUGUST 2005 DECISION

[224] The plaintiffs' second main allegation is that the defendant is liable in misfeasance, and deceit, in connection with the decision made by Mr Jones in August 2005. That allegation encompasses an allegation that from the period from November 2004 through to December 2005 the defendant, or more specifically Messrs Jones, Fogden and Lewis acted dishonestly in the steps taken leading to the ultimate decision, and this involved the commission of the torts of misfeasance and deceit for which the defendant is liable.

[225] For the reasons explained below I conclude that the plaintiffs' claims fail on the facts. In particular I find that there is no basis to say that either Mr Jones or Mr Fogden acted dishonestly at any point. Mr Lewis' opinions and conduct can be criticised, but again I am not satisfied there is a basis to conclude that he acted dishonestly. Neither were any misrepresentations made.

[226] In order to properly address the plaintiffs' allegations it is appropriate to consider a number of distinct aspects of the case.

Obtaining the advice of Mr Lewis

[227] The plaintiffs contend that Messrs Fogden and Jones acted inappropriately, and dishonestly, in seeking the advice from Mr Lewis late in the decision-making process, and contend that he was only instructed in order to provide them with ammunition to defeat any challenge to Mr Jones' decision.

[228] I accept that the plaintiffs can legitimately criticise the steps taken by the defendant to obtain advice from Mr Lewis at that stage, and I also accept that the process followed in this respect was procedurally unfair. In November 2004 Mr Jones had decided upon a process that would be followed. This included the formulation of a preliminary decision upon which the plaintiffs could make submissions. For the Director to seek the advice of an external consultant after that step, and then rely on his views to the effect that the application should not be granted without giving the plaintiffs opportunity to make submissions on his views was procedurally unfair, and

not consistent with the process the Director had implemented.[42] Furthermore the apparent flaws in Mr Lewis' advice which I address below could have been revealed had the plaintiffs been given that opportunity.

[229] But I do not accept that this evidences dishonesty. Mr Lewis' opinions were relevant, formulated in written advice, and the manner in which it was taken into account by Mr Fogden was set out in his written advice to Mr Jones, and then Mr Jones recorded how he had taken that advice into account in his final decision. That written material was provided to the plaintiffs when the decision was made. The procedural unfairness that had been engaged in was openly revealed to the plaintiffs.

[230] More generally I do not accept that either Mr Jones or Mr Fogden acted dishonestly in seeking advice from Mr Lewis. I accept that they only asked him to formulate his advice in writing after becoming aware he had views that were adverse to the application. But after becoming aware that Mr Lewis held those views as a respected expert, there is no dishonesty in asking that he record them formally so that they could be relied upon in the decision-making process. For the reasons addressed below, Messrs Jones and Fogden had no reason to doubt the integrity or reliability of what Mr Lewis was saying, and I accept that Mr Lewis' views were honestly held by him notwithstanding the deficiencies in the advice that I will address.

Timing of instructions

[231] In his closing submissions Mr Dale emphasised an issue arising from the timing of Mr Lewis' instructions. In an affidavit sworn in these proceedings on 21 October 2014 Mr Fogden said that Mr Lewis was first engaged by the CAA shortly after the powerpoint presentation on 13 June after Mr Lewis advised Mr Fogden that he was not supportive of the plaintiffs' proposals. In an affidavit sworn 21 October 2014 Mr Lewis gave evidence to similar effect. In affidavits then filed for the plaintiffs they disputed the truth of this, and pointed to records in Mr Lewis' diary that he had been retained at an earlier time. In a second affidavit dated 27 March 2015

---

[42] It is well established that affected parties should be given the opportunity to respond to new adverse material when the circumstances have already warranted giving them a right to be heard. Compare this case with *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 122.

Mr Fogden accepted that he had involved Mr Lewis at an earlier stage, in or about 4 May 2005. Likewise in an affidavit sworn 31 March 2015 Mr Lewis also confirmed this.[43]

[232] The plaintiffs say that this involves dishonesty. They say that Mr Lewis had been retained at the earlier point in time, and prior to Mr Lewis' meeting with Mr Barclay referred to earlier in this judgment, and they were only forced to correct the position in their subsequent affidavits because the plaintiffs had pointed out the dishonesty involved in their earlier affidavits.

[233] I do not accept these allegations. When Messrs Fogden and Lewis swore their affidavits in 2014/2015 they were seeking to remember the precise chronology of events of matters that had occurred more than nine years previously. At this stage Mr Lewis was 86 years old. Moreover I see no significance in the timing of CAA's engagement of Mr Lewis. Mr Lewis met with Mr Barclay on 19 May and it is apparent that he took a copy of the report that Mr Barclay had provided to CAA to that meeting. Mr Barclay would have understood that Mr Lewis must have been assisting the CAA on this issue at that point.

Mr Lewis' letter of advice

[234] The plaintiffs are highly critical of Mr Lewis' advice in his letter of 23 July 2005, and I accept that legitimate criticisms can be made. Three key concerns that he raised with the use of the Wessex for heli-logging were:

(a) the absence of fuel drains that could be inspected by the pilot;[44]

(b) the reliability of the computer control system for the engines, and the engines themselves;[45] and

---

43 This affidavit also corrected the date of the vibration flight referred to below (1998/1999 rather than 2001) and it exhibited the 12 January 1999 report that had not previously been disclosed to the plaintiffs.

44 This is a drain that allows the pilot or other person to check, and drain off, contamination in the fuel supply, particularly arising from condensation.

45 The throttle for each of the engines that powered the Wessex was computer controlled. There was a problem with the computers freezing the throttle at a particular rpm, and also malfunctioning so that it swiftly increased or decreased the rpm.

(c) the susceptibility of the Wessex to ground resonance.[46]

[235] Mr Lewis' views on all three points can be criticised. First it is apparent that the Wessex aircraft had fuel drains, including fuel drains that could be inspected by the pilot. Mr Lewis' opinion in that respect was based on out of date information. Secondly the problem with the computer control system for the engines was recognised in the 1950s and 1960s, and new generation computers were introduced to deal with the issue. Mr Grainger of GKN gave evidence that there remained some residual issues, but the issues that Mr Lewis was emphasising had largely been resolved. So again his opinion was out of date. Finally, any issue about ground resonance was not related to the use of the helicopter for helilogging, and would apply whenever the aircraft was landing or taking off, whether it was being used to carry logs or not.

[236] But I do not accept that these factors demonstrate that Mr Lewis' advice was dishonest. Mr Lewis' experience with the Wessex had been in the 1950s and 1960s. His more recent experience was more limited. The problems Mr Lewis identified had been real ones. Mr Grainger accepted that there had been a problem with the fuel drains at the early stages of the aircraft's life. The evidence is also clear that the computer control system for the engines had been recognised as a significant problem at that stage. I accept that Mr Lewis' opinions were honestly held, and that he had genuine concerns about the aircrafts' use for helilogging activities. Whilst he thought it was a very good aircraft, it seems to me that his concerns were that without the detailed support that military operations and maintenance procedures provided — such as the environment he had found in the Iraqi Air Force where he had been obliged to ground the whole Wessex fleet — there was risk. It seems to me that he thought that risk may become apparent with a smaller operator without such support using what was now an old aircraft in remote areas for helilogging activities.

[237] If Messrs Fogden and Jones knew that Mr Lewis' advice was flawed, but they nevertheless relied upon it, then a basis to conclude they acted dishonestly could exist. But I do not accept that. The criticism that they should have asked him more questions,

---

[46] Ground resonance is a phenomena occurring when helicopter lands (or takes off) in certain circumstances when severe vibration can occur, even to the point that the aircraft breaks apart.

and if they had that would have revealed that his experience was all out of date, does not demonstrate dishonesty, or that they were recklessly indifferent to whether they were acting with their powers.

[238] The plaintiffs say that given Mr Fogden's report of 11 October 2004, he must have been aware that the Wessex did in fact have fuel drains, and that Mr Lewis' advice was wrong as that was one of the matters the report confirmed. But I accept Mr Fogden's evidence that he had not recalled what was said about fuel drains in his 2004 report when receiving Mr Lewis' advice in 2005. Accordingly I reject the suggestion that Messrs Fogden and Jones dishonestly adopted a report that they knew was flawed.

[239] Finally it is relevant that Mr Jones' decision did not turn on Mr Lewis' advice. Mr Dale described it as pivotal, and the "decisive knockout blow". But it was only one of eight factors listed in Mr Jones' 19 August file note. Mr Fogden put greater weight on it in his advice to Mr Jones, but it is plain from the other materials, including the preliminary decision, that the application would have been declined irrespective of Mr Lewis' opinion.

The earlier report of 12 January 1999

[240] One of the plaintiffs' central criticisms of Mr Lewis' report, and of the honesty of his opinions, is his failure to make any reference to a report he had provided six years earlier to enable one of the Wessex then operated by Mr O'Malley to receive an airworthiness certificate. The plaintiffs also say that the CAA could not realistically have forgotten about this earlier report. It is said that this report was dishonestly withheld from the plaintiffs, and dishonestly not referred to in the decision-making process.

[241] The report was dated 12 January 1999. Following undertaking flight trials appropriate in order to grant an airworthiness certificate, Mr Lewis not only approved the grant of the airworthiness certificate, but was complimentary about the aircraft. He advised:

> 6.5 The Wessex (single and twin engine variance) is a well proven helicopter it has operated successfully around the world in a service and civilian capacity. It has operated with the Queen's Flight in excess of 30 years and has proven reliability.

[242] Mr Lewis was not able to explain why he had not referred to his 1999 report in his 2005 report when he gave evidence, although he indicated that he was asked to write his 2005 report as a matter of urgency, and that the 1999 report was prepared for a different purpose and was not directly relevant to the new advice he was giving.

[243] I accept that it would have been much better, and more complete, for Mr Lewis to refer to his earlier advice. But I also accept that the opinions were provided for different purposes. The 1999 advice was provided to say that the particular aircraft Mr Lewis flew was airworthy. The July 2005 advice did not say the Wessex aircraft was not an airworthy aircraft. That was clearly not Mr Lewis' view. As he said the Wessex had a good general reputation and had been used for the Queen's Flight. But Mr Lewis' 2005 opinion was despite its qualities it was not safe to use it for helilogging activities. As he said in his 2005 advice:

> I have flown the twin engine versions, the MK 52 with the Iraq Air force in Baghdad and the Wessex 60 (civilian version), with Bristow Helicopters in the North Sea and long-lining two tone oil pipes in Scotland for the same company. A large range of tasks were carried out over a large geographical area of operations. I considered that it was the best helicopter that I had flown at that stage. However, for the type of operation envisaged by Heli-logging I have doubts of a successful outcome for the following reasons.
>
> …
>
> I always enjoyed flying the Wessex, but as you can see, I have grave doubts about its safety for the tasks as suggested by Heli-logging.

[244] The 2005 advice relates specifically to the type of operation proposed.[47] Mr Lewis could have recorded that he had duly approved the airworthiness of a Wessex helicopter in New Zealand in 1999 without it affecting his 2015 advice in any way.

---

[47] The plaintiffs rely on answers Mr Lewis gave to questions that I asked him to counter that suggestion, but I do not view those answers as inconsistent with the point that the two letters addressed different issues.

[245] I also do not accept there was any dishonesty in CAA's failure itself to identify the earlier 1999 report. It had not been identified in the processes surrounding the consideration of the plaintiffs' proposal. It can be argued that it should have been, but the fact is that it was not. There was evidence that the CAA's filing system was not integrated, and I accept that Mr Lewis' report would have been placed on the file relating to the particular aircraft for which he was giving approval. That aircraft was later involved in the accident which destroyed the aircraft and killed the pilot, and the report was subsequently provided to the Coroner. But it was not revealed in the decision-making process for the plaintiffs' applications because of a lack of an integrated document retention system.

The vibration flight

[246] The so-called vibration flight was also an issue emphasised by the plaintiffs. In an affidavit sworn in these proceedings dated 31 March 2015 Mr Lewis revealed, for the first time, that after approving the airworthiness certificate for Mr O'Malley's Wessex in early 1999 he was involved in a further flight in that aircraft during which he encountered severe vibration whilst it was engaged in load lifting. In that affidavit he referred to this being when the aircraft was lifting logs but he said in evidence before me that he believed he had misremembered this, and that what was being lifted was a shepherd's hut on a 200 foot strop.

[247] The plaintiffs say that this further illustrates dishonesty. First, they contend that this flight may never have occurred and that Mr Lewis made this up to bolster his safety concerns. I do not accept this. I accept Mr Lewis' evidence that he did experience this event in Mr O'Malley's Wessex helicopter, and that it concerned him at the time, but that he made no formal report about the incident. When he gave evidence he explained that he was now of the view that this vibration may have contributed to the subsequent accident in that aircraft that killed the pilot.

[248] This incident was not referred to in Mr Lewis' July 2005 advice. He was not able to explain in evidence why he had not done so, although he raised the possibility that he raised it orally with Messrs Fogden and Jones. That is unlikely. But in any

event it was not referred to in Mr Lewis' written advice, and played no role in the decision Mr Jones made.

[249] The plaintiffs make a somewhat complicated alternative allegation in this respect. They allege that this vibration flight was the real reason for Mr Lewis' safety concerns in relation to the Wessex, and that the reasons he spelled out in his July 2005 letter were not the true reasons (ie the letter was dishonest). The plaintiffs say that Mr Lewis did not reveal his true reasons for concern because he knew that if he did the plaintiffs would have been able to easily answer those concerns.[48]

[250] I do not accept that this convoluted allegation has any substance. If Messrs Lewis, Fogden and Jones were looking for reasons to justify declining the application then this vibration flight would have been referred to. I also do not accept the vibration flight could have been easily answered as an issue if Mr Lewis said he believed the vibration arose because of log lifting operations. I conclude that Mr Lewis did not mention this matter in his July letter because he was unsure what had caused the severe vibration, and he considered that the most likely cause was an operational matter concerning the configuration of the load and/or the length of the strop. It did not qualify as a sufficiently clear matter to be raised as a general concern related to using the Wessex for helilogging operations, at least not one that could have been concisely outlined. He also may not have been forthcoming about the event because he thought it may have been associated with the subsequent accident, and he may have felt some responsibility for not reporting it at the time. But I see no substance in the plaintiffs' allegation that this was his real concern, and he did not record it because he knew it could be answered. It was not recorded in his advice because it was not a point that could be well made about the Wessex in this advice. As I have already held, the concerns expressed in his 23 July letter duly recorded his genuine concerns about the use of the aircraft for this type of activity.

[251] Neither do I accept the plaintiffs' allegations that Messrs Fogden and Jones knew about the vibration flight, and that this was the real reason for Mr Lewis' concerns, and that they joined with him in concealing it.

---

[48] Other variations of the allegation were put forward by the plaintiffs in closing, but I do not accept that they amount to evidence of dishonesty, and I focus on the main allegation.

Disclosure that advice was out of date

[252] The plaintiffs make a further allegation centering on an email sent by Mr Lewis to Mr Ford after the decision was made. After the plaintiffs had seen the advice provided by Mr Lewis, Mr Ford made contact with Mr Lewis. Mr Ford first telephoned and spoke to him, and followed up by email dated 14 December. Mr Ford said in the email that he did not see how Mr Lewis could say that the Wessex was unsafe, and he asked him to retract his advice. Mr Ford also provided written comments from Mr Brian Taylor, a very experienced Wessex pilot, responding to the suggested shortcomings with the Wessex. By email the same day Mr Lewis replied. He said:

> … I spent a lot of time thinking about what you said yesterday and have decided that:
>
> 1. CAA are determined that they do not want ex-military helicopters operating on commercial operations here because of their past record and
>
> 2. They insist that your operations are not Private, but Commercial.
>
> Because of that, I do not believe that for one moment they would accept my retraction, which would be have to be based on hearsay [sic]. What I said in my letter was fact, but I admit it was 40 year old fact and I would agree that things could have changed. I couldn't read what Brian [Taylor] said about fuel drains, but I don't like the lack of them. I cannot remember any UK machine ever having them! I also have some doubts about computers, as I've had a number of bad experiences with them. I don't know how yours have been stored, or if they have an expiry date.
>
> Talking to Peter O'Brien last week and to other people in, or around the industry, it would appear that you have a very good case.
>
> Jim Barclay has put up a very good and compelling case for your operation and I think you should continue with it.
>
> Mark, I am very sorry, but I feel that I cannot withdrawal what I wrote to the Director.

[253] The plaintiffs make a further complex allegation in relation to this email. They say it amounted to a further fraudulent misrepresentation. They say that it was not true that Mr Lewis' opinions were based on 40 year old fact at all. Rather the reasons for his concern were actually the 1999 vibration flight. Accordingly, this email contained further false misrepresentations.

[254] For the reasons I have already canvassed in relation to the vibration flight I do not accept this. The vibration flight was not the real reason for Mr Lewis' concerns. His concerns were those set out in his letter. What this further email from Mr Lewis did acknowledge, however, was that his views could be out of date because they arose from experience from 40 years ago. That was an honest acknowledgement, fairly made.

Alterations made to Mr Lewis' 23 July letter

[255] Two alterations were made to Mr Lewis' letter after it was sent to the Director. The plaintiffs say these alterations further evidence dishonesty.

[256] First, the version of the letter initially received by the Director ended:

> I always enjoyed flying the Wessex, but as you can see, I have grave doubts about its viability for the tasks suggested by Helilogging.

[257] An alteration was made in handwriting to this concluding paragraph, however. The word "viability" was crossed out and replaced with the word "safety". I accept Mr Lewis' evidence, however, that he phoned Mr Jones and asked that this alteration be made after he reflected on the advice he had sent, and decided he needed to emphasise safety. He confirmed the change he wished to make in a letter to Mr Jones of 2 August 2005. There was no dishonesty in this process, and neither was Mr Lewis asked to make that change by Mr Jones or anybody else. It was a change transparently made without any dishonest concealment.

[258] The second change was more subtle. Mr Lewis began the third paragraph of his letter describing his personal experience:

> I have flown the twin engine versions, the Mk 52 with the Iraq Airforce in Baghdad and the Wessex 60 (civilian version) …

[259] Somebody at the CAA made an alteration to this sentence by blocking out the 5 by hand so that the sentence appeared to refer to the "Mk 2". The change was not obvious to the plaintiffs. It was only in April 2012 that Mrs Ford first noticed it when she looked more closely at the letter when it was on her kitchen table.

[260] It is clear that this change was made by someone at CAA. There are versions of this letter held by CAA without the change. This issue was also internally discussed. In a version of the letter which Mr Wellik discussed with an unidentified technical adviser of the CAA Mr Wellik has put a line through the 5 on his version while making notes. He indicated, however, that he would not have made the alteration to the original letter itself. None of the witnesses who were questioned accepted that they had made the alteration.

[261] There is no dispute that it was inappropriate for it to be made. I do not accept, however, there was a dishonest attempt to mislead anybody by the alteration. The evidence established that the Wessex aircraft at the time was used by different military services with a different number assigned, but the aircraft itself was the same. The Wessex Mark 2 was used by the Airforce, and the Wessex Mark 5 was used by the Navy. When the same aircraft was used in Iraq, it was given the number 52. But they were all the same aircraft. So nothing turned on the number. The fact that the number 52 had been used for the Wessex used in Iraq was not well known. I conclude that the person who made this change was simply seeking to avoid any confusion arising from the use of the number 52 rather than 2 or 5.

[262] The plaintiffs sought to argue that this alteration disguised the fact that Mr Lewis was referring to the obsolete aircraft used in the 1960s rather than the Mark 2 aircraft as it existed at the time of the application in 2004/05. I do not accept this. It is clear from the letter that Mr Lewis was referring to the aircraft that he flew with the Iraq Airforce in Baghdad, and in the context of this letter and Britain's historic association with Iraq, it was clearly referring to events of some time ago. Deleting the 5 did not suggest that this experience was recent. The number assigned to the aircraft had no association with the age of Mr Lewis' experience. So I conclude it was an inappropriate change to the letter without any fraudulent intent, and with no significance in terms of the information conveyed to the reader.

Conversation between Director and Irene King

[263] There is one final matter focussed on by the plaintiffs. At the time of the Helilogging decision Ms Irene King was the Acting Chief Executive of the Aviation

Industry Association (the AIA). The AIA began assisting Helilogging, particularly during 2005, in relation to its exemption application. Ms King and Mr Jones were friends and there was also a close professional relationship between the AIA and the Director. Mr Jones had been a former president of the AIA.

[264] Ms King gave evidence of a conversation between her and Mr Jones in the period June–August 2005 in his office. She raised the AIA's concerns with the way that the application made by Helilogging had been handled. She described Mr Jones' reaction when she did so was that there was a "visible change in his appearance" and that she had never seen him react in such a fashion before. She said:

> Mr Jones said in response to my question that there was no way that those aircraft were ever going to fly in New Zealand so I should stop wasting his time. This may not be the exact words but it was to that effect.

[265] She also gave evidence that Mr Jones said that any documents sought under the Official Information Act would not be provided as they would be subject to commercial confidentiality or privilege. She accepted in cross-examination, however, that this related to documents relating to the issue of hire and reward, and that they did not relate to the plaintiffs' application.

[266] It was suggested to Ms King in cross-examination that she was not telling the truth about this conversation concerning the plaintiffs' application. I reject that. I accept that she remembered this conversation because it was unusual and out of character for Mr Jones to react in the way that he did. When she gave evidence she was very careful to distinguish between what she could remember, and what she thought was likely to have happened. Ms King did not report this matter to the plaintiffs, or more broadly than the AIA President. But I conclude that was because of the nature of the relationship between the AIA and the Director. To have direct access to the Director would have been very valuable for both parties, and information exchanged in that context would have been treated with some sensitivity. To report it more broadly it may have caused damage to the relationship. I accept the honesty of her evidence.

[267] I am less certain about the accuracy of Ms King's recollection. Whilst Ms King remembers the nature of Mr Jones' behaviour, she could not recall his actual

words.[49] It is some time ago. She was unsure of the timing of the conversation, but indicated the period of June–August 2005 because it was inclement weather outside. Wellingtonians will recognise that that does not greatly limit the timeframe. Moreover a re-remembering of the event focussing on the emotional impact of the occasion may have distorted some of the detail.

[268] I nevertheless accept that a comment was made in forthright terms to the effect that the plaintiffs' application was not going to be granted. I conclude that this conversation occurred after the preliminary decision was released in May 2005. Mr Jones' intention to decline the application was accordingly already disclosed. I accept that Mr Jones answered emotionally when queried by Ms King. This is likely to have reflected the severe pressure that he was under. By this stage there had been High Court proceedings, a Close Up television programme, an inquiry by the Select Committee, matters had been raised in Parliament, and there was a degree of Ministerial pressure. Now Mr Jones' personal friend, Ms King, acting on behalf of the AIA was questioning his approach, and he reacted. That provides the context to the kind of strong comment I find that he made.

[269] As I have already concluded there is no misconduct in Mr Jones having views, even very strong views, in the decision-making process. He was obliged to act professionally, and with an open mind, when making a statutory decision. But I am not prepared to conclude that a comment of this kind evidences dishonesty, or a lack of integrity. It does not mean that Mr Jones would not have reconsidered his strongly expressed views if the plaintiffs had come back with compelling responses to the preliminary decision.

[270] In many respects this is the plaintiffs' best evidence, especially when it is coupled with the views Mr Jones held as evidenced by the draft 9 November 2004 memorandum. It suggests the Director was strongly opposed to the exemption application. But by itself this does not demonstrate misfeasance, or deceit. Neither

---

[49] Research indicates that memory for the gist of conversations can be good, there can be notable failures to remember verbatim content. See Michael P Toglia, J. Don Read, David F. Ross and R.C L Lindsay (eds) *The Handbook of Eyewitness Psychology: Volume 1 Memory for Events* (Lawrence Elbaum Ass 2007) at p.11. See also footnote 26 above.

does it evidence that Mr Jones was dishonest in saying that the decision-making process he imposed was required before the statutory decision could properly be made.

Conclusions on misfeasance and deceit

[271] My findings above are relevant to both the claims in misfeasance in a public office, and deceit. In terms of misfeasance, I find that at no stage did Mr Jones or other officials act knowingly beyond their functions or powers, or recklessly indifferent to this. In terms of deceit, I conclude that at no point did they make untrue representations to the plaintiffs.

[272] In assessing each of the matters relied upon by the plaintiffs to establish their claims, I have also stood back and considered the allegations as a whole. The allegations are factually interrelated, and the plaintiffs say that the cumulative effect of the evidence they rely upon demonstrates that Mr Jones had made up his mind not to grant the exemption applications by 9 November 2004, and the steps taken from that time dishonestly concealed his true views, and involved a process that was never genuine, but simply followed in order to avoid criticism or challenge to the Director's decision.

[273] I do not accept these allegations. As a matter of fact I conclude that the relevant CAA personnel, and Mr Jones and Mr Fogden in particular, acted honestly throughout. I also reach that conclusion in relation to Mr Lewis. I accept the draft 9 November 2004 memorandum indicated strong views adverse to the plaintiffs, and that Mr Jones revealed the strength of those views again in his conversation with Ms King in 2005. But I do not accept that this demonstrates he acted improperly. He had strong views precisely because he believed that granting the exemption application was not appropriate given the relevant statutory considerations under s 37. His decision to follow a process before the statutory decision was made was not improper.

[274] For these reasons the plaintiffs' claims fail on the facts.

OTHER ISSUES RAISED BY PLAINTIFFS' CLAIMS

[275] Given that the plaintiffs' claims fail on the facts, it is strictly unnecessary to address the further issues that have been argued. But it would be appropriate to address some of those issues, at least in summary form.

Was the decision reasonably open to the Director?

[276] Significant evidence was led at trial going to the merits, or otherwise, of the Director's s 37 decision. As indicated, in opening the plaintiffs accepted that a decision to decline was open to a reasonable Director. In closing, however, Mr Dale withdrew that concession and contended that a reasonable Director would have been compelled to grant the exemption application. He argued that this was a consequence of the evidence that had emerged at trial.

[277] I accept that it was open to a reasonable Director to decline the plaintiffs' applications. This was the view of Messrs Jones, Fogden and Gill at the time. Expert evidence was also called from two existing senior CAA employees Richard Hughes and Shaun Johnson to the effect that the applications were rightly declined. I conclude that a decision to decline was reasonable for the following reasons:

(a) The application to use a Special category aircraft for commercial activities, or to allow a non-type certified aircraft to obtain a Restricted categorisation, involved an exemption from fundamental aspects of the Rules. What was being permitted was essentially a new category of commercial operation involving ex-military aircraft. Such changes could be seen to be more appropriately dealt with by way of a Rule change made by the Minister of Transport rather than the application of s 37. A Rule change would allow the precedent setting aspects of the application to be addressed with input from wider participants, including the industry, with appropriate Rules then formulated. The discretion under s 37(1) could have been exercised to decline the exemption application on this basis.

(b) The accident history in relation to ex-military aircraft, including the Wessex, could by itself have been a reason to conclude that the s 37(2) prerequisites were not met. The UKCAA had advised that any request to re-establish support for the Wessex would need to address the unknown causes of the North Sea accident involving multiple deaths. In New Zealand the only Wessex used for helilogging had also crashed, with the cause of the accident not identified. The accident history of ex-military aircraft was generally poor. By themselves such matters were sufficient to allow a reasonable Director to say that s 37(2) was not satisfied and/or that allowing ex-military helicopters to operate commercially was simply not a good idea from a generic safety policy perspective under s 37(1).

(c) Notwithstanding the CAA's requests the plaintiffs had not confirmed an arrangement for support of the engine from Rolls Royce, or that the "lifing" of components for the proposed repetitive heavy load lifting operations had been established. The assessment of the lifing components would not have been straightforward as detailed records were not available from the military.[50] Rolls Royce had advised the plaintiffs that the New Zealand CAA would need to approve of any assessment it made of the lifing of key components.[51] This had not occurred. Rolls Royce approval and support could legitimately have been treated as a necessary pre-requisite for approving the operation.

(d) No NAA had been identified notwithstanding the point had been repeatedly raised by CAA. This is the authority which would oversee the functions undertaken by GKN and Rolls Royce. The New Zealand CAA did not have the technical ability to perform this function as it had no expertise in the Wessex helicopter. The plaintiffs did not provide any information that the UKCAA would be prepared to perform this role, or that it had even been approached. On that basis an important

---

50 Exchange rates converting the hours of use in military operations into cycles for each of the components were not readily available.

51 This letter, dated 3 March 2005 to Mr Gordon was not disclosed by the plaintiffs to the CAA at the time. An earlier letter from Rolls Royce to Mr Remacha of 20 April 2002 raised similar issues.

feature of the integrated safety system was absent, and a reasonable Director could conclude that s 37(2) was not satisfied.

(e) Whilst the plaintiffs had obtained a large number of spare parts, and many of them appear to have been properly certified in accordance with the requirements, not all of them were. Despite requests by the CAA, the plaintiffs had not confirmed the position in detail. Confirmation of a clear and unquestioned supply of duly certified spare parts could have been treated as a pre-requisite that had not been satisfied by the plaintiffs.

[278] I am less convinced that other factors, at least by themselves, would have meant that a reasonable Director could have declined the application. For example, the requirement for a duly signed contract with GKN had a "catch 22" aspect, as the plaintiffs may not have been able to commit to signing up a contract without knowing that they were being granted the exemption application. That is also true with respect to other matters, such as the identity of the chief pilot. It seems to me that this kind of matter could have been appropriately addressed by the exemption application being granted on conditions — for example a condition that a contract between the plaintiffs and GKN, on terms and conditions agreeable to the Director, be entered before operations could start.

[279] I also conclude, however, that a reasonable Director could have granted one or other exemption application. Mr Lanham advised Mr Jones that he could do so with the input from Messrs Gill and Fogden in 2004. A former Deputy Director, Mr Maxwell Stevens gave evidence that the exemption should have been granted, and Mr Remacha also gave evidence that he would have given a recommendation to approve it had he still been employed by CAA. In relation to the matters I have highlighted above, there were potential answers to these points that meant that a reasonable Director could have granted the application. In particular:

(a) The fact that the application involved departure from significant rules, and was potentially precedent setting would not, by itself, mean it could not be granted. Section 37 still applied in such circumstances. A

reasonable Director could also have concluded that it would be unfair to the plaintiffs not to allow the exemption after the encouragement the plaintiffs had received during 2003–2004 to progress the application in knowledge of these features. The Director could also have concluded that the exemption did not create a precedent given the very detailed requirements the plaintiffs had met, such as the flight trials with GKN support, and the fact that the CAA policy disclosed at the September 2002 AIA conference was that all new imports would need to be type certified.[52]

(b) Whilst the accident history of ex-military helicopters was very poor, and there were unresolved accidents involving the Wessex, the materials the plaintiffs had put together in terms of airworthiness, operational procedures, the maintenance programme, and Mr Barclay's report more generally were regarded as very high quality. As Mr Gill advised, the Wessex was in a different league from other ex-military aircraft. Approving an operation with thorough materials of the kind provided could have allowed a reasonable Director to be satisfied that s 37(2)(b) was met — namely that the action taken was "as effective or more effective than actual compliance with the requirement".

(c) Whilst the support of Rolls Royce, and their confirmation of the lifing of components would have been necessary, this could have been addressed by way of conditions requiring both the entry of a contract satisfactory to the Director, and that the lifing of components also be established to the Director's satisfaction under such arrangements. Rolls Royce did not suggest that this was not possible. In addition lifing could have been achieved in the manner suggested by Mr Barclay and Mr Gordon — by more heavily discounting the remaining life of key components adopting a precautionary approach.

---

[52] See [72]–[76] above. The Wessex was an exception as it had already been imported and certified for operation.

(d) The NAA matter could reasonably have been treated as not being a pre-requisite for the grant of approval. The requirement for such an Authority did not exist in the Special category, and the Director could reasonably conclude that the overall systems put in place by the plaintiffs, with the support of GKN and Rolls Royce, were sufficient in themselves to demonstrate an equivalent level of safety, and a greater level of safety than other type certified aircraft currently in operation in New Zealand.

(e) Whilst some of the plaintiffs' spare parts were not certified, it is clear that a number were. An audit could have been required as a condition of approval. In any event as a certified operator the plaintiffs could only use certified spare parts, installed and maintained by a certified LAME, in accordance with the operational and maintenance programmes that had duly been signed off.

[280] Accordingly I conclude both that a reasonable Director could have granted the application, and that a reasonable Director could also have declined it. These findings are not inconsistent. Section 37 is a power that requires the Director to exercise judgment, and then a discretion. Reasonable Directors could reach different conclusions. This is not only because of the discretionary nature of s 37(1), but also because different judgments could be formed by different persons when making the assessments required under s 37(2).

[281] The main significance of this conclusion is its impact on the difficult question of causation and loss.

Causation and loss

[282] The trial dealt with what was identified in my ruling separating liability from quantum as "regulatory causation".[53] What was alive for determination at this trial was what would have occurred from a regulatory perspective but for the alleged wrongdoing.

---

53 *Helilogging Ltd v Civil Aviation Authority of New Zealand*, above n 1.

[283] There are complexities with the plaintiffs' case in this respect. These complexities do not mean that the case will have failed on this basis, but there are difficult issues.

[284] The plaintiffs did not advance their case on the basis that Mr Jones acted knowingly beyond his s 37 power, or recklessly indifferent to this. That approach became less clear in closing given Mr Dale's argument that a reasonable Director would have been obliged to grant the exemption given the evidence at trial. To the extent this included an argument that Mr Jones knowingly/recklessly acted beyond his power by declining the application I reject the argument. The evidence does not support it. For example, the plaintiffs' case is that the 9 November 2004 memorandum evidenced Mr Jones' true thinking. But there is nothing in that memorandum suggesting that Mr Jones thought that he would be (or may be) acting beyond his powers in declining the application.

[285] It was this feature of the plaintiffs' case that led me to characterise it during the plaintiffs' opening as a claim for procedural misfeasance.[54] It was also this feature that led the plaintiffs to advance their case on a "loss of a chance" basis.

[286] In advancing the case on a loss of a chance basis, the plaintiffs called very detailed evidence as to what would have occurred had the defendant's alleged wrongdoing been discovered at the time. I received evidence from counsel who acted for the plaintiffs in 2004, Mr Castle, as to the judicial challenges he would have advised to be advanced if the 9 November 2004 memorandum had been revealed. I also heard evidence from the Rt Hon Winston Peters, the Deputy Prime Minister, as to the political avenues that would have been pursued to assist the plaintiffs in this event. Some of the evidence and argument pursued by the plaintiffs on this counterfactual approach also became complicated. For example it was argued that not only would a judicial review challenge have been successful in 2004 or 2005 if the true position had been known, but that Mr Jones would have been disqualified from reconsidering the plaintiffs' applications because of the discovery that he had not been acting in good faith.

---

[54] See paras [17] and [178] above.

[287] Much of this evidence seems to me to be directed to the wrong question. In assessing causation for the purpose of assessing loss the relevant inquiry is what would have occurred if there had been no wrongdoing, rather than what would have occurred if the wrongdoing had been exposed. In addition it seems to me the inquiry should be made by reference to whether a reasonable Director would have (or could have) granted the application but for this wrongdoing, rather than what Mr Jones himself would have done. I do not think it would have been appropriate to include Mr Jones, and the views he personally had, within the counterfactual. The wrongdoer's personal views are properly excluded. Rather the question should be considered objectively – what a reasonable Director would likely have done.

[288] A related question concerns the appropriate method for quantifying or assessing the plaintiffs' loss. There appear to be three possible approaches:

(a) The first approach is to consider whether the plaintiffs could establish that it was more likely than not that the s 37 exemption would have been granted, with the full loss to be awarded on that basis only if that was established (the "all or nothing" approach).

(b) An alternative is to conclude that when a discretionary power could have been exercised either way the indeterminate feature relevant to assessing damages on a loss of a chance basis exists (the "lost chance" approach).[55]

(c) A further alternative would have been to identify the loss more directly caused by the wrongdoing. That would be the loss incurred by the plaintiffs arising from being required to undertake the further procedural steps from November 2004 following the Director's improper imposition of them, or his misrepresentations about the true position. Those could be said to have been limited to the additional costs or losses incurred by the plaintiffs over this period of time, rather

---

[55] See *Strack v Grey* [2019] NZCA 432 at [46]–[53]; and *Forest Holdings Ltd v Mangatu Blocks Inc* [2019] NZHC 2258. See also *Lock v Australian Securities and Investments Commission* [2016] FCA 31, (2016) 334 ALR 250 at [138] per Gleeson J.

than a loss assessed on the basis of the chance of the exemption being granted (a "wasted expenditure" approach).

[289] This last alternative also arises in relation to the tort of deceit. The first alleged deceit would have been the representation by the Director in November/December 2004 that he retained an open mind. But the only loss directly caused by any reliance on this representation may well have been limited to the further costs incurred by the plaintiffs in seeking to satisfy the Director on the issues he had outlined.

[290] Equally any misrepresentation in August 2005 that Mr Lewis' views, (and indeed the Director's decision) were the true reasons why the plaintiffs had been declined could only be said to have caused loss if steps were taken in reliance as a consequence. That is also so in relation to any misfeasance related to the integrity of Mr Lewis' views. It could be argued that the plaintiffs did not challenge the decisions by way of judicial review because of a belief in those matters. But unless the plaintiffs could demonstrate on the balance of probabilities that they could have overturned the decision through judicial review and that the application would have been granted — conclusions I do not necessarily accept for the reasons I address further below — then no loss of that kind would have been caused.

Would judicial review have been successful?

[291] The complexities in relation to causation and loss are reflected in the arguments directed to the potential judicial review challenges to Mr Jones' decisions. For the reasons already outlined, had the plaintiffs succeeded in establishing liability for misfeasance it would not have been necessary for the plaintiffs to have also demonstrated that they could have overturned Mr Jones' decisions by way of judicial review. The question would more simply have been what would have happened with their applications if there had been no wrongdoing. It is potentially more relevant if the claim in deceit had succeeded, although if there had been any such deceit the decisions themselves could have been overturned for fraud. In any event, for completeness, I address some of the matters the plaintiffs raised on this issue.

[292] Had Mr Jones declined the exemption application on the basis set out in his 9 November 2004 memorandum (or revealed he had so declined it) I accept that the

plaintiffs would likely have succeeded with a claim for judicial review on two related grounds:

(a) First on the basis that the decision was made in breach of the plaintiffs' legitimate expectations arising from the earlier express and implied representations earlier made in 2003–2004.[56] Given the statutory context of this decision, however, there is no prospect of the plaintiffs establishing a legitimate expectation of a substantive outcome.[57] All that the plaintiffs could have obtained was an order that Mr Jones reconsider the application after giving the plaintiffs an opportunity to be heard before the earlier representations were departed from. Given that was essentially what the plaintiffs were given in the seven-stage process, I conclude that the plaintiffs would have been in materially the same position.

(b) Second the plaintiffs could have succeeded on the basis that the policy concerning ex-military helicopters announced at the AIA conference in September 2002 was not considered and/or applied. That included the policy that all new imports would need to be type certified, which would have been particularly relevant to any precedent considerations. This involved a failure to consider a mandatory relevant consideration. Again, however, all that the plaintiffs could have obtained was an order requiring reconsideration by Mr Jones, and the plaintiffs would have been in materially the same position.

[293] I do not accept that any other potential grounds of judicial review at that time would have succeeded. I do not accept the plaintiffs' argument that there was an irrelevant consideration — namely that a precedent would be set which would encourage the incumbents to lower existing standards. That seems to me to be a relevant consideration under s 37.

---

56 See *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.
57 See *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623 at [40].

[294] As I have indicated, however, if liability was established for conduct in November/December 2004 it may not be necessary to ask what Mr Jones would have done on a Court ordered reconsideration. In those circumstances the relevant inquiry would more likely have been what a reasonable Director would have done. On that approach a different outcome was possible as a reasonable Director could have granted one of the applications for the reasons I have outlined.

[295] I also accept the plaintiffs could have successfully challenged Mr Jones' 2005 decision on two grounds:

(a) First on the basis of procedural unfairness. Mr Jones relied on Mr Lewis' report without disclosing and allowing submissions on it.[58] As I have held, that was inconsistent with the seven-stage process. Such a judicial review would likely have identified the significant issues arising from Mr Lewis' advice. But again that could only have resulted in an order directing Mr Jones to reconsider his decision in light of the submissions made by the plaintiffs on Mr Lewis' advice. I also conclude that Mr Jones would have declined the application irrespective of Mr Lewis' advice. So the plaintiffs would have ultimately been placed in the same position.

(b) Second, whilst Mr Fodgen's advice to Mr Jones referred to the policy set out to the September 2002 AIA conference, it did not refer to the part of the policy providing that all new imports of ex-military aircraft would need to be type certified. That part of the policy might have answered the concern that granting the application would create a precedent.[59] This again involved a failure to consider a mandatory relevant consideration. But this was only one consideration and for the reasons already addressed I conclude that the ultimate outcome would have been no different.

---

58 See [228] above.

59 The Westland Wessex was an exception because it had already been imported and certified for operation in New Zealand.

[296] I do not consider that there were grounds of judicial review that would have succeeded at this time.[60] Again, however, the position would be different if liability were established for the conduct through to August/December 2005, and the relevant inquiry is what a reasonable Director would have done. On that basis one of the applications could have been granted.

[297] I accordingly conclude that the decision made in August 2005 was vulnerable to successful challenge by way of judicial review. If a decision had earlier been made by Mr Jones on 9 November it would also have been vulnerable to such a challenge. The ultimate decision by Mr Jones would still likely to have been the same in either case if he had been directed to reconsider it, but a reasonable Director could have reached a different decision.

[298] Apart from identifying these complexities, and difficulties with the plaintiffs' case on the questions of causation and loss, I take the issues no further. It would be difficult to express the chances of success if the applications were considered by a reasonable Director in percentage terms. That is particularly so when what is involved is a discretionary power, and alternative approaches are reasonably open. It is ultimately artificial to attempt to reach such conclusions without findings of fact which establish the torts of misfeasance or deceit that would allow a clearer analysis of causation, and the loss flowing from those findings.

Mr Lewis and vicarious liability

[299] The plaintiffs advance their case on the basis the defendant was vicariously liable for Mr Lewis' conduct. There are difficulties with this approach even if I had found that Mr Lewis acted dishonestly.

[300] First, in relation to misfeasance, I do not accept that Mr Lewis could himself have been liable for this tort. That is because he was not exercising a public office. Rather he was acting as a private consultant providing his opinion to the Director of Civil Aviation within his area of expertise. In *Commissioner of Inland Revenue v*

---

[60] The claim for breach of legitimate expectation would not have been available because the plaintiffs were given the right to be heard in the seven-stage process.

Chesterfields Preschools Ltd the Court of Appeal addressed whether the tort of misfeasance in a public office could be alleged against a lawyer acting for the Commissioner of Inland Revenue.[61] The Court adopted the approach of the New South Wales Court of Appeal in *Leerdam v Noori*,[62] and held that the legal practitioner was acting in a private capacity and did not thereby hold a public office or exercise any statutory power.[63] That reasoning applies here, and for that reason I conclude that Mr Lewis was not exercising a public office, and would not have been liable for misfeasance.

[301] In relation to deceit there needs to be a representation by the defendant intending that the plaintiff rely on it, and that the plaintiff does in fact rely on it.[64] Here Mr Lewis' advice was given to the CAA, not to the plaintiffs. The plaintiffs respond to this point by arguing that Mr Lewis' advice was subsequently given to the plaintiffs, but that argument seems to me to be artificial. So Mr Lewis would not have been liable in deceit. I accept that Mr Lewis' subsequent email of 14 December 2005 in which he said his views were based on 40 year old fact was a representation made to the plaintiffs which might have formed the basis of liability if it had been false and the plaintiffs relied upon it.

[302] In closing I put to Mr Taylor that it seemed to me that when a private individual dishonestly induced a public body to make an adverse decision against a prospective plaintiff tortious liability should arise. I drew an analogy with private individuals inducing prosecutions where such liability can arise.[65] Mr Taylor's answer to this point was to say that such liability could exist for the tort of injurious falsehood.[66] I accept that that is a potential answer to any suggested gap.[67]

---

61 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

62 *Leerdam v Noori* [2009] NSWCA 90, (2009) 255 ALR 553.

63 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, above n 61, at [77]–[82].

64 See [19] above.

65 See, for example, *Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187 (CA).

66 See Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [15.3].

67 If the plaintiffs had established the elements of injurious falsehood, but not deceit, I would have expected an application to amend the pleadings.

[303] In any event, even if Mr Lewis did commit a tort, I do not accept that the defendant would have been vicariously liable for it. I accept the defendant could become liable if it, or one of its officers, participated in the tortious wrongdoing and become principally liable. But if Mr Jones and Mr Fogden were unaware of dishonesty by Mr Lewis, I do not accept that the defendant would have been liable for Mr Lewis' tortious actions on vicarious liability principles. In advancing their case for vicarious liability the plaintiffs relied on cases where a person is acting as an agent for the principal, including *Dollars and Sense Finance Ltd v Nathan*[68] and *FM Custodians Ltd v R*.[69] But Mr Lewis was not acting as the agent of the CAA. He was asked for his advice as an independent expert. I accept the defendant's general proposition that there is no vicarious liability for the actions of independent contractors in the absence of an agency relationship.[70]

[304] Finally on the question of vicarious liability, I record that the defendant argued that if Messrs Jones or Fogden had acted dishonestly the defendant may not be vicariously liable on the basis that if they did so they were acting outside the scope of their employment.[71] That is a difficult point, and on the face of it not a particularly attractive one for the defendant to rely upon. But in the absence of factual finding relevant to such an assessment I do no more than note the point.

Limitation

[305] These proceedings were commenced in 2014 more than six years after the causes of action arose.

[306] To address this point the plaintiffs relied on s 28 of the Limitation Act 1950 contending that the limitation period was postponed because a cause of action for fraud was not known or able to be discovered with reasonable diligence. The relevant test for that inquiry is set out by the Supreme Court in *Murray v Morel & Co Ltd*,[72] and the Court of Appeal in *Amaltal Corporation Ltd v Maruha Corporation*.[73]

---

68 *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557.
69 *FM Custodians Ltd v R* [2019] NZHC 1128.
70 See *Cashfield Houses Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452 (HC).
71 See Stephen Todd, above n 66, at [22.5.04].
72 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.
73 *Amaltal Corporation Ltd v Maruha Corp*, above n 9, at [150]–[161].

[307] Given that I have concluded that there was no fraud, then there is no relevant inquiry to make under s 28. I make the somewhat obvious point that the plaintiffs neither discovered, nor were able to discover any fraudulent conduct given that none existed. Neither was there anything on the face of the events at the time that would have put the plaintiffs on notice of fraud. But any further analysis on this question becomes artificial given my findings on the facts.

CONCLUSION

[308] For the above reasons the plaintiffs' claims fail.

[309] I do not accept that the plaintiffs have established any relevant dishonesty, or conduct in bad faith. In particular they have not established that Mr Jones acted knowingly beyond his functions or powers, or recklessly indifferent to this, or that Mr Fogden and/or Mr Lewis acted such that the tort of misfeasance could be established. Furthermore there was no untrue representation by any of them that could found a claim in deceit.

[310] I also conclude that there may have been difficulties in upholding the plaintiffs' claimed loss if misfeasance or deceit as alleged had been established. This is because of the point initially accepted by the plaintiffs in opening, and then found by me when that concession was withdrawn, that the ultimate decision made by the Director not to grant the exemption applications was open to a reasonable Director. I also conclude that a reasonable Director could have granted one of the exemption applications, and it may be that damages could still be awarded based on the application being granted, including on a loss of a chance basis. An alternative would be to allow only the additional costs incurred by the plaintiffs from November 2004 when the alleged torts were committed. In the absence of factual findings in relation to misfeasance or deceit, it is not realistic to take that analysis any further.

[311] I also find that there would have been no basis to find the defendant was vicariously liable for any tort committed by Mr Lewis. Otherwise I do not reach conclusions of the issues that were raised during the proceedings.

[312] I generally accept that the plaintiffs were unfairly treated. The plaintiffs committed substantial resources to the project on an understanding of the requirements outlined to them by CAA from early 2003. By the time CAA advised that the requirements were actually more extensive the plaintiffs were financially committed. Declining the applications ultimately led to the first plaintiff's demise. The treatment of the plaintiffs was far from ideal. But that does not mean the defendant is liable in tort.

[313] The plaintiffs' have advanced a comprehensive case. A large number of witnesses were called to address wide ranging factual issues, and a number matters of expert evidence. They key questions, however, centre on the honesty of the decision-makers at the time — namely Mr Jones and Mr Fogden, and those advising them — Mr Lewis and (as it transpired as the evidence emerged) Ms MacIntosh and Mr Gill. I conclude that all acted honestly.

[314] The plaintiffs' claims are dismissed. If the parties are unable to agree upon costs I invite memoranda. I set no precise timetable for doing so, but any claim for costs that is filed and served should be responded to by a memorandum filed and served within 20 working days.

Cooke J

Solicitors:
Neilsons Lawyers Ltd, Auckland for plaintiffs
Darroch Forrest Lawyers, Wellington for defendant