

IN THE COURT OF APPEAL OF NEW ZEALAND

CA48/2011
[2011] NZCA 3

BETWEEN THE DIRECTOR OF CIVIL AVIATION
Appellant
AND AIR NATIONAL CORPORATE LIMITED
Respondent

Hearing: 4 February 2011

Court: Arnold, Ellen France and Harrison JJ

Counsel: K I Murray and J F Parnell for Appellant
S S Cook and K J Scott for Respondent

Judgment: 4 February 2011

Reasons: 17 February 2011 at 4 pm

JUDGMENT OF THE COURT

- A The appeal is allowed. The order made by the High Court staying the appellant's decision to suspend the respondent's air operator certificate pending the determination of its judicial review proceedings is quashed.**
- B The respondent must pay the appellant costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.**
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REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] On 28 January 2011 the appellant, the Director of Civil Aviation (the Director), wrote to the respondent, Air National Corporate Ltd (Air National), suspending its air operator certificate for 10 working days to enable him to investigate Air National's operations. The Director took this step under s 17 of the Civil Aviation Act 1990 (the Act). The consequence is that for the period of suspension Air National is unable to carry on its business of providing charter flights within New Zealand on behalf of Air New Zealand and others.

[2] On 31 January 2011 Air National issued two sets of proceedings in respect of the Director's decision:

- (a) An appeal under s 66 of the Act to the District Court; and
- (b) An application for judicial review. In conjunction with this application Air National sought interim relief under s 8 of the Judicature Amendment Act 1972, namely a stay of the suspension order until the review application was determined.

[3] Clifford J heard the contested stay application as a matter of urgency on 2 February 2011. The Judge granted a stay on conditions.¹ We heard the Director's appeal from this decision on 4 February 2011 and issued a results judgment allowing the appeal on 7 February 2011. We now give our reasons for doing so.

[4] As will be apparent, this appeal was heard as a matter of urgency. While we have reached a firm view that the appeal should be allowed, the views we express about the merits of Air National's case and the statutory framework are necessarily tentative. Understandably in the circumstances, some points were not argued in any detail by the parties, and in any event we have not been able to consider them in depth.

¹ *Air National Corporate Ltd v Director of Civil Aviation* HC Wellington CIV-2011-485-135, 2 February 2011.

Statutory context

[5] The Director is the chief executive of the Civil Aviation Authority of New Zealand (the CAA).² Among the Director's responsibilities are:

- (a) Taking such action as may be appropriate in the public interest to enforce regulatory requirements, including carrying out inspections and monitoring;³ and
- (b) Monitoring adherence within the civil aviation system to regulatory requirements in relation to (among other things) safety and security.⁴

[6] Sections 12, 15, 15A, 17 and 19 of the Act are of particular relevance in this context. Section 12 sets out the general obligations of participants in the civil aviation system. In his letter of suspension, the Director said that he considered the suspension was necessary in the interests of aviation safety because Air National was failing to meet its obligations under s 12. Before us, Mr Cook for Air National accepted that Air National had failed to meet its s 12 obligations in certain respects.

[7] Section 15(1) empowers the Director to require operators of air services (among others) to undergo or carry out "such inspections and such monitoring as the Director considers necessary in the interests of civil aviation safety and security". The Director may carry out such inspections and monitoring him or herself.⁵

[8] Section 15A(1) provides:

Power of Director to investigate holder of aviation document

- (1) The Director may, in writing, require any holder of an aviation document to undergo an investigation conducted by the Director if the Director believes, on reasonable grounds, that it is necessary in the interests of civil aviation safety and security, and if the Director—

² Civil Aviation Act 1990, s 72I(1).

³ Section 72I(3)(b).

⁴ Section 72I(3)(c).

⁵ Section 15(2).

- (a) has reasonable grounds to believe that the holder has failed to comply with any conditions of an aviation document or with the requirements of section 12; or
- (b) considers that the privileges or duties for which the document has been granted are being carried out by the holder in a careless or incompetent manner.

[9] Accordingly, in the present case the power to investigate was dependent on the Director believing on reasonable grounds that:

- (a) the investigation was necessary in the interests of civil aviation safety and security; and
- (b) Air National had failed to meet its obligations under s 12.

Again, as we understand it, Mr Cook did not dispute that these two preconditions for the exercise of the power to investigate under s 15A were met in the present case.

[10] Turning to s 17, relevantly it provides:

Power of Director to suspend aviation document or impose conditions

- (1) The Director may suspend any aviation document issued under this Act or rules made under this Act ..., if he or she considers such action necessary in the interests of safety, and if he or she—
...
 - (b) is satisfied that the holder has failed to comply with any conditions of an aviation document or with the requirements of section 12;
...
- (2) Without limiting the general provisions of subsection (1), the Director may suspend any aviation document relating to the use of any aircraft, aeronautical product, or the provision of any service, or impose conditions in respect of any such document, if he or she considers that there is reasonable doubt as to the airworthiness of the aircraft or as to the quality or safety of the aeronautical product or service to which the document relates.
- (3) The suspension of any aviation document ... under subsection (1) or subsection (2) remain in force until the Director determines what action, if any, referred to in subsection (4) is to be taken; but any such suspension ... expire 10 working days after the date that the suspension ... are imposed unless, before the expiry of that 10-

working day period, the Director extends the suspension ... for a further specified period.

- (4) The Director may take 1 or more of the following actions:
 - (a) impose conditions for a specified period:
 - (b) withdraw any conditions:
 - (c) suspend any aviation document for a specified period:
 - (d) revoke or partially revoke any aviation document under section 18:
 - (e) impose permanent conditions under section 18.

...

- (7) Any person in respect of whom any decision is taken under this section may appeal against that decision to a District Court under section 66 of this Act.

[11] Finally, s 19 deals with the criteria for action taken under s 17. Relevantly it provides:

- (1) The provisions of this section shall apply for the purpose of determining whether an aviation document should be suspended ... under s 17 ...
- (2) Where this section applies, the Director may have regard to, and give such weight as the Director considers appropriate to, the following matters:
 - (a) the person's compliance history with transport safety regulatory requirements:
 - (b) any conviction for any transport safety offence, whether or not—
 - (i) the conviction was in a New Zealand court; or
 - (ii) the offence was committed before the commencement of this Act:
 - (c) any evidence that the person has committed a transport safety offence or has contravened or failed to comply with any rule made under this Act.
- (3) The Director shall not be confined to consideration of the matters specified in subsection (2) and may take into account such other matters and evidence as may be relevant.
- (4) The Director may—
 - (a) seek and receive such information as the Director thinks fit; or
 - (b) consider information obtained from any source.
- (5) If the Director proposes to take into account any information that is or may be prejudicial to a person, the Director shall, subject to

subsection (6) of this section, as soon as practicable, but, in the case of the suspension of an aviation document ... under section 17, no later than 5 working days after suspending the aviation document ..., disclose that information to that person and give that person a reasonable opportunity to refute or comment on it.

- (6) Nothing in subsection (5) or subsection (7) requires the Director to disclose—
 - (a) any information, the disclosure of which would endanger the safety of any person; or
 - (b) any information or the fact of non-disclosure of that information, before suspending an aviation document or imposing conditions in respect of an aviation document under section 17.

...

[12] There are several important points about ss 17 and 19:

- (a) The Director’s power to suspend arises where he or she considers suspension is “necessary in the interests of safety” and one of the other enumerated preconditions is met. Given that there is no dispute that one of these other pre-conditions was met in the present case (non-compliance with s 12 obligations), the focus of Air National’s challenge is on the Director’s decision that its suspension was necessary in the interests of safety. As we have noted, s 15A empowers the Director to undertake an investigation where he believes, on reasonable grounds, that it is necessary in the interest of aviation safety and security. Mr Cook did not dispute that the Director was entitled to conduct an investigation under s 15A in the present case; but he did not accept that this meant that the Director necessarily had the power to suspend under s 17. He argued that the “necessary in the interests of safety” test in s 17 involved a higher threshold than the similar test in s 15A.
- (b) Section 19(6) makes it clear that the Director may suspend an operator’s licence before the operator has had an opportunity to know of, and respond to, the Director’s concerns. In other words, there are minimal, if any, due process protections prior to the exercise of the

power of suspension. This suggests that Parliament contemplated that the power may properly be exercised before the full facts are known.

- (c) In considering whether to suspend, the Director is entitled to take account of the operator's prior history of compliance with safety regulatory requirements.
- (d) Unlike the powers conferred by s 15A and by s 17(2), the powers conferred by s 15 and s 17(1) are not, on their wording, dependent on the existence of reasonable grounds.

We return to these aspects in the analysis section below.

The Director's decision

[13] The Director began a management audit of Air National on 26 January 2011, involving a number of CAA officials. In his affidavit, the Director, Mr Douglas, deposed that the audit was "in response to the high risk profile of Air National" and was "to assess the effect of recent changes in senior persons". He explained Air National's risk profile as follows:

Air National has a high risk profile as an operator within the Part 125 (medium aircraft) and Part 121 (large aircraft) sectors in which it operates. It is currently the highest of all operators in both sectors. The CAA uses the risk profile to direct its monitoring activities at areas of highest risk, and a number of factors are used in compiling the overall rating. Audit performance is one of these factors. The risk profile for Air National, currently at 38.47 and 29.63 respectively, has not reduced and has remained high over an extended period. (Most operators have ratings in the range 5-15 in the relevant sectors). More recently it has increased because of changes in senior person positions at the Airline, until these changes were able to be assessed at audit.

[14] The day before the audit commenced, the Director had received a visit from the Auditor-General and an Assistant Auditor-General. The Auditor-General said that her office had received a number of complaints from members of the public about Air National raising a variety of safety and compliance concerns. The Auditor-General also raised concerns about the stance adopted by the CAA in its oversight of

Air National and questioned whether CAA staff had been overly helpful in responding to issues with Air National. Clifford J expressed some disquiet about the conjunction between the Auditor-General's visit and the Director's decision to suspend.⁶ Mr Murray said there was simply a coincidence of timing and that the Director made his own decision for good reasons.

[15] In any event, during the audit, several matters of concern to the Director came to light:

- (a) Training records were "falsified" in that they indicated that simulator training for two pilots in relation to the Westwind II aircraft had been conducted in respect of certain routes when in fact other routes were used. This training had been overseen by Air National's manager of flight operations, Mr Cliff, and he had prepared the documents at issue and made sure that the pilots signed them.
- (b) Air National's training manager, Mr Haverfield, had been checked for competency on the Jetstream J32 aircraft by a flight examiner who did not meet the requirements of the relevant civil aviation rules. The training manager had therefore been flying aircraft in breach of the rules and had been carrying out competency checks on other pilots when not qualified to do so.
- (c) One of Air National's pilots had operated an aircraft although he did not have the required airport identity card, an important element of the aviation security system.

[16] When the Director wrote to Air National on 28 January 2011 he advised it of the first two matters referred to in the preceding paragraph and then went on to say:

Air National has an elevated risk profile because of the number of serious findings by the CAA over recent years. Although Air National has implemented specific corrective actions to address these findings, there is little evidence to indicate a systematic and proactive approach by Air National to reduce risk. There continues to be recurring organisational

⁶ At [44].

failings such as the critical issues raised by this recent audit. These can be partially attributed to a lack of resource investment and a negative safety culture. Although the falsification of documents discovered during the recent audit reflects the actions of one individual, the certificate holder bears the responsibility for this failing. The organisation's internal quality systems have failed to identify these serious issues.

Further investigation of these issues will be undertaken; however, based on the information available now, I consider that continued operations pose [an] unacceptable risk to aviation safety. Accordingly, I am suspending the Air National [air operator certificate] under section 17 of the Act while these investigations are carried out.

As previously noted, the Director said that he considered the action to be “necessary in the interests of aviation safety because Air National is failing to meet its obligations under section 12 of the Act”.

[17] In essence, then, as the parties accepted before Clifford J and before us, the Director's principal concern was that Air National's internal systems were defective and that this posed a threat to aviation safety.

[18] Air National's legal advisers wrote a lengthy letter to the Director on 30 January 2011 giving the airline's responses to the various issues which the Director had raised. The letter outlined the impact that the suspension would have on Air National's business and offered certain undertakings which were intended to meet the Director's concerns. Finally, the letter advised that Air National would institute legal proceedings if the Director maintained his decision. The CAA's Chief Legal Counsel replied by letter on 31 January 2011, advising that, having considered the contents of the letter, the Director maintained his decision to suspend. The letter said that the Director considered “the issues uncovered by the audit to be symptomatic of elevated organisational risk”.

Basis of Air National's judicial review proceedings

[19] In its statement of claim Air National alleged that the Director's decision was invalid because he had:

- (a) failed to take account of relevant matters;

- (b) breached procedural fairness by failing to give Air National an adequate opportunity to address the concerns raised by CAA officials; and
- (c) had made an irrational or unreasonable decision.

[20] In relation to the falsified documents, Air National alleged that the Director had failed to take account of Mr Cliff's explanation that the error in the documentation was the result of an isolated and innocent oversight; that Mr Cliff had been open in his dealings with the CAA; that the mistake was not material as the Westwind II aircraft was not currently in service and the two pilots still had to complete their training; and that there was no risk to public safety as a result of the error.

[21] As to the competency check, Air National alleged that the Director had failed to take into account that the check had been carried out by a duly authorised organisation which was common within the industry and had in any event been recommended to Air National by the CAA; that the flight examiner had in fact completed the steps necessary to carry out the check but they had not been documented as he had said that was not necessary; and that there was no threat to aviation safety as a result of what had happened.

[22] Finally, in relation to the Director's concerns about its internal systems, Air National alleged that the Director had failed to take into account the steps that it had taken to improve its systems including the creation of new roles within the company, the institution of new training and similar procedures and the introduction of further safety steps. Air National said that the Director had failed to have regard to the fact that it had conducted numerous audits, most of which had resulted in "nil" findings. Where problems had been identified, Air National had resolved them. Air National alleged that the Director had failed to take into account that its actions posed no risk to aviation safety, or that suspension would have disproportionate effects on its business.

[23] These allegations were supported by affidavits filed by Mr Cliff, Mr Gray, Air National's Chief Executive, Mr Carter, Air National's Operations Administrator, and Mr Haverfield. Further, Mr Gray addressed the concern about the pilot operating without a security card, noting that it was not a matter referred to by the Director in his letter of suspension and saying that, as he understood it, the pilot did hold a temporary airport identity card, although Air National was still looking into that.

Analysis

[24] We will consider the case under the following headings:

- (a) The approach to be adopted to s 8 of the Judicature Amendment Act 1972 (the JAA).
- (b) The relevance of Air National's appeal.
- (c) The likely impact of the suspension on Air National.
- (d) The strength of Air National's case against the Director.

We will discuss Clifford J's decision in the context of our discussion under these heads.

Approach to be adopted to s 8 of the JAA

[25] Section 8 of the JAA allows the Court to make an interim order before the final determination of an application for review in order to preserve the applicant's position. This Court discussed the approach to be adopted in *Carlton and United Breweries Ltd v Minister of Customs*.⁷ There Cooke J emphasised the contextual nature of the s 8 analysis. He said:⁸

⁷ *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 429 (CA).
⁸ At 430.

Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, ... the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[26] Before Clifford J the Director accepted, as he did before us, that the order sought was necessary to preserve Air National's position until the hearing of its judicial review application. Accordingly, the matter fell within the area of the wide discretion. Clifford J focussed on two aspects in this context – the strength of Air National's case and the likely repercussions of the suspension on its business, which we will shortly address.

Relevance of Air National's appeal

[27] As we have said, Air National has appealed to the District Court against the Director's decision under s 66 of the Act. Clifford J considered that the existence of the appeal was relevant to Air National's application for a stay. He said:⁹

I record that I discussed at some length with counsel whether in considering the issue of the strength of Air National's case, I should do so, as Mr Murray suggested, solely by reference to its judicial review proceedings, or also having regard – in an appropriate way to the fact that the position it seeks to preserve includes that of the benefits of its District Court appeal. I note that I do not accept Mr Murray's submission that in these circumstances the strength of Air National's case should be assessed solely by reference to judicial review considerations. Clearly they are relevant. But I also think it is relevant that Air National seeks to preserve the benefit of its right of appeal to the District Court, which affords it a broader base for challenging the Director's suspension decision [than] does its judicial review proceeding. I have therefore assessed the strength of its case in that context.

[28] While we do not propose to express a definitive view on this point given the urgency with which we have had to deal with the case and the fact that we can determine it without doing so, we query whether this is the correct approach. Section 66(3) provides:

Every decision of the Director appealed against under this section continues in force pending the determination of the appeal, and no person is excused

⁹ At [45]

from complying with any of the provisions of this Act on the ground that any appeal is pending.

The effect of this is to remove the power that the District Court would otherwise have to grant a stay pending appeal.¹⁰ On the face of it, granting an interim order under s 8 in a case such as the present does not sit well with this provision. Moreover, we do not see any justification for adopting a different approach to an application under s 8 because the applicant wishes to preserve the benefit of a right of appeal to the District Court, as Clifford J appears to suggest.

[29] Mr Cook drew our attention to two oral decisions in which Judges took a similar approach to that adopted by Clifford J in respect of comparable legislation, namely *Pohoikura Waitoa Logging Ltd v New Zealand Transport Agency*¹¹ and *J Mahoney & Sons Ltd v New Zealand Transport Agency*.¹² Section 106 of the Land Transport Act 1998 confers a right of appeal to the District Court against certain decisions but contains a subsection in identical terms to s 66(3). In *Pohoikura Waitoa Logging* Heath J noted that under s 106 the District Court had no jurisdiction to stay the operation of the revocation of a licence until the appeal was heard.¹³ He also noted that the applicant wished to pursue its appeal¹⁴ and that despite appeal rights, the Court could entertain an application for judicial review and, in that context, grant interim relief.¹⁵ The Judge said that it was impossible for him to express any view on the merits. Rather, a balance was to be struck between the public interest in road safety and the impact on the applicants' business if no order was made.¹⁶ In the result, the Judge granted a stay, but subject to conditions.

[30] We accept that the High Court has jurisdiction to make interim orders in this type of case. This follows from the language of ss 4(1) and 8 of the JAA. However, courts do need to be cautious in this context. As we have said, the effect of statutory provisions such as s 66(3) of the Act and s 106(3) of the Land Transport Act is to

¹⁰ See Anthony Willy *District Courts Practice (Civil)* (looseleaf ed, LexisNexis) at DCR14.11.03.

¹¹ *Pohoikura Waitoa Logging Ltd v New Zealand Transport Agency* HC Gisborne CIV-2010-416-277, 19 November 2010.

¹² *J Mahoney & Sons Ltd v New Zealand Transport Agency* HC Napier CIV-2008-441-573, 5 September 2008.

¹³ At [8].

¹⁴ At [10].

¹⁵ At [11].

¹⁶ At [13].

deprive the District Court of the power to grant a stay on an appeal in circumstances where otherwise it would have had that power. Too ready a resort to s 8 runs the risk of undermining such prohibitions and creating an incentive for appellants to launch judicial review proceedings simply to access the High Court's s 8 jurisdiction. At the very least, this will be a relevant consideration to the exercise of the discretion. As we have noted, however, this is a preliminary view.

Impact of suspension on Air National

[31] Air National said that the suspension would have devastating, perhaps fatal, consequences for the future viability of its business. Air National operates between 20 and 50 flights a week and employs 60 staff. Obviously this activity will come to a halt during the period of suspension. Air National provided us with some data about its financial position, which we will not detail here as we made a confidentiality order in respect of it. It is sufficient to say that the suspension will clearly have a significant impact, financial and reputational, on Air National's business and that impact is likely to be felt well beyond the 10 working day period of the suspension. This is a private interest which Clifford J took into account in exercising his discretion under s 8, as he was entitled to do.¹⁷ However, the Judge noted that Air National's private interests would not have prevailed had it not established a strong substantive case on its judicial review application.¹⁸ Accordingly, we now turn to that.

Strength of Air National's case

[32] To understand Clifford J's evaluation of the merits of Air National's case it is necessary to understand how he saw the scheme of the relevant part of the Act. Accordingly we begin by addressing that. We will then discuss the facts and state our conclusion.

(i) The scheme of the provisions

¹⁷ At [46].
¹⁸ At [47].

[33] Clifford J noted that where the Director had safety concerns in relation to a particular operator, he had two alternative mechanisms available to him. First, he could require or conduct an investigation under ss 15 or 15A. Clifford J said that s 11 of the Act gave certain rights to persons affected by proposed adverse decisions, including those that the Director proposed to take after a s 15 or s 15A investigation.¹⁹ These included the right to be informed of the proposed decision and the grounds for it and the right to make submissions before the Director makes a final decision. Second, the Director could exercise the power to suspend under s 17. That power could be exercised on a summary basis, without the prior provision of any information. Clifford J said:²⁰

These two alternative procedures in my view emphasise that the s 17 power to suspend or impose conditions is given to the Director to respond to pressing safety issues. That is, ones which raised immediate concerns of such significance that it is not appropriate for the more measured process provided by ss 15, 15A in conjunction with s 11 to be followed.

[34] Against this background Clifford J considered that Air National had a strong case on the merits on the unreasonableness or irrationality ground of review. This was because he considered there were explanations for the specific instances about which the Director was concerned and the Director's concern about systemic failure was unjustified given Air National's record of largely satisfactory responses. He considered that it was "strongly arguable that the rational and reasonable approach by the Director to the issues raised by the audit would have been, as he did, to initiate a s 15A inquiry" and considered it "very arguable that summary action under s 17 was not required and was inappropriate".²¹

[35] Mr Murray accepted that the Director had two options under the Act – investigation without suspension and investigation in conjunction with suspension. He also accepted that suspension under s 17 was available only in more serious cases, those involving "imminent danger". But he argued that the concept of "imminent danger" in the aviation context did not require a high threshold. Under s 17(1) the Director had a broad discretion and the Court should be slow to interfere with the Director's assessment of the need for action in the interests of safety on the

¹⁹ At [40].

²⁰ At [41].

²¹ At [43].

unreasonableness/irrationality ground given his expertise and responsibilities under the Act. Mr Murray did accept, however, that a decision of the Director under s 17 was susceptible to judicial review. For his part, Mr Cook supported the Judge's "high threshold" reasoning, arguing that in the present case the Director had to point to "recent events of sufficient gravity and threat to operational safety" to justify halting Air National's operations. The mere possibility of a safety risk was not sufficient.

[36] Although worded slightly differently, both ss 15A and 17 contain a "necessary in the interests of safety" test. To order an investigation under s 15A, the Director must have reasonable grounds to believe the investigation is necessary in the interests of safety. There is no explicit "reasonable grounds" requirement in s 17(1), although s 17(2) utilises the concept of "reasonable doubt" – if the Director has a reasonable doubt about, for example, the airworthiness of an aircraft, he may suspend the relevant aviation document.²² The use of the concept of reasonable doubt in 17(2) provides some assistance in understanding the scope of the "necessary in the interests of safety" test in s 17(1) in that it indicates that the power to suspend may be used in a precautionary or risk averse way. This conclusion is reinforced by other features of the suspension provisions. In particular:

- (a) A suspension remains in force until the Director decides which of certain actions he wishes to take, up to a maximum of ten days (subject to any further extension).²³
- (b) Subsections 19(5) and (6) make it clear that the Director may make a suspension order on the basis of information that he has not disclosed to the affected person. The obligation to disclose information, and the affected person's opportunity to refute or comment on it, arises after the order is made.

Both features support the view that suspension may be used as an interim measure, before the full facts are known.

²² Section 17(2) is expressed to not limit the generality of s 17(1).

²³ Section 17(3) and (4).

[37] Finally we note that s 19(2) identifies compliance history as one of the factors to which the Director may have regard when reaching a decision to suspend. This suggests that the Director is entitled to take a more serious view of a particular incident when it is viewed against the background of a record of non-compliance than he would if the incident stood alone.

[38] We consider, then, that s 17 was intended to confer a wide discretion on the Director to impose a suspension where he is satisfied that safety requires it. The Director's concerns must be serious and immediate, but he is entitled to take a precautionary approach. Clearly, situations involving the risk of defective parts in aircraft may fall within s 17.²⁴ We see no reason why situations where there are concerns about the training or competencies of pilots or other similar systemic concerns should not also, potentially at least, fall within the section. Deficiencies of this sort may place safety at risk.²⁵

(ii) *Application to facts*

[39] Turning to the facts of the present case, the Director obviously regarded the preparation of the erroneous training reports as a serious matter. In his 28 January letter he said the falsification of the records misrepresented the competency of the pilots and created a serious safety risk. He also said that the misrepresentations constituted a breach of trust. In their affidavits Air National deponents say that the errors were simply the result of clerical oversight and were of no great moment. But the Director's actions must be assessed on the basis of the information available to him at the time he made and then later confirmed his suspension decision.

[40] On 27 January 2011 CAA officials had interviewed the pilots concerned. They had been shown the training reports and asked to comment on them. According to the CAA's notes of the interview, both said that the documents were not a true record of the training that had been carried out and went on to discuss in detail what had happened in the training sessions, including that the simulator had

²⁴ See *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (HC).

²⁵ It is not necessary that we comment in any detail on Clifford J's view about the role of s 11. We do note, however, that it seems to have more limited application than he suggested given that the definition of "adverse decision" relates to the "fit and proper person" component of the requirements for aviation documents: see ss 9 and 10.

“crashed” or “frozen” several times during the training. They said they were told that they had to sign the forms because the CAA required it. On 28 January 2011, CAA officials interviewed Mr Cliff about this. He said that he had filled in parts of the forms in advance and had not changed them to reflect what had actually happened in the training. When he was asked whether the pilots had said anything about the errors on the forms when asked to sign them he responded “You know what pilots are like. They will sign anything”.

[41] It may ultimately turn out that the errors in the training reports are isolated incidents involving administrative oversight. But the Director was confronted with a situation where significant documents had apparently been falsified. This was consistent with the information he had received from the Auditor-General and with Air National’s high risk profile. The Director was not obliged to accept the explanations Air National personnel offered and was entitled to conduct his own investigation. Mr Cook accepted this much – as we have said, he acknowledged that Air National had breached s 12, so that one of the requirements in s 17(1) was met. If this and the other specific incidents which triggered the Director’s decision were representative of a deeper systemic problem, we consider that would go to the safety of Air National’s operations. We do not accept that the Director was obliged to carry out his investigation to determine whether there was a systemic problem before exercising his power to suspend. He had material which indicated there may be such a problem and, as we have said, s 17 allows him to take a precautionary or risk averse approach. He must, of course, have regard to the effect of any order for suspension on the subject of it, but his primary concern is with safety.

(iii) Conclusion

[42] Ultimately the Director was required to assess whether, given the information he had and his knowledge of Air National’s performance to date, it was necessary in the interests of safety to order suspension under s 17. Although the evidence is at this stage incomplete, we do not consider that Air National has demonstrated that it has a strong case that the decision to suspend was not reasonably open to the Director or was irrational. Accordingly, we consider that the interim order under s 8 should not have been granted.

Decision

[43] The appeal is allowed. The order made by the High Court staying the appellant's decision to suspend the respondent's air operator certificate pending determination of its judicial review proceedings is quashed. The respondent must pay the appellant costs for a standard appeal on a band A basis plus usual disbursements. We certify for two counsel.

Solicitors:
Buddle Findlay, Auckland for Respondent