IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-2566

UNDER	The Judicature Amendment Act 1972
IN THE MATTER OF	An Application for Judicial Review
BETWEEN	JOHN RODERICK SMITH Plaintiff
AND	ATTORNEY GENERAL (SUED IN RESPECT OF THE CIVIL AVIATION AUTHORITY) First Defendant
AND	ATTORNEY GENERAL (SUED IN RESPECT OF THE MINISTER OF TRANSPORT) Second Defendant

Hearing: 18 September 2008

Appearances: L A Andersen for Applicant
A J Beazer for First Respondent
I C Carter and S Kinsler for Second Respondent

Judgment: 12 November 2008

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 12pm on the 12th day of November 2008.

RESERVED JUDGMENT OF MACKENZIE J

Introduction

[1] Mr Smith is a hang gliding and paragliding pilot who held a rating which authorised him to fly hang gliders and paragliders solo and with tandem passengers

and to instruct others in the art of hang gliding and paragliding. Those ratings were initially suspended, and subsequently revoked, by the Director of Civil Aviation. The suspension and cancellation arose out of an incident involving Mr Smith's flying on 13 April 2005. This application for judicial review raises two broad issues. First, whether the Director of Civil Aviation has jurisdiction in respect of hang gliding and their operation. The short question under this issue is whether a hang glider is an "aircraft". The second broad issue is whether the suspension and subsequent cancellation was carried out in accordance with proper administrative law principles, in particular the principles of natural justice.

Is a hang glider an aircraft?

[2] The Civil Aviation Act 1990 (the Act) is concerned with the operation of the New Zealand Civil Aviation system. For present purposes, the key definition in s 2 is that of the term "aircraft". That provides:

> **Aircraft** means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth:

[3] The applicant's primary submission is that a hang glider is not an aircraft as defined. That is the first question which must be answered.

[4] It is not disputed by the applicant that a hang glider can derive support in the atmosphere from the reactions of the air. It is also not in dispute that it does so otherwise than by the reactions of the air against the surface of the earth. The sole question then is whether a hang glider is a "machine". Counsel for the appellant submits that it is not a machine because it contains no moving part and is controlled by the controller's body; that it is used by a human to perform an activity but is entirely passive in that the human controls the flight by shifting body position. The respondents submit that a hang glider is an aircraft.

[5] There is expert evidence filed on behalf of the first respondent which is relevant to the question whether a hang glider is an aircraft, though in the end the question is one of law. The aerodynamics of an aircraft (using that term in a broad

sense to encompass any object that can derive support in the atmosphere from the reactions of the air) involves the balancing of four forces operating on the aircraft. The first is lift. That force derives from the movement of air around a wing section. The amount of lift generated is determined principally by the rate of the airflow over the aircraft wing, the shape of the wing section and the angle at which that section meets the air flow (the angle of attack). Lift operates vertically upwards through the aircraft's centre of pressure. The second force is that of gravity. That force also acts vertically, but downwards. It operates through the centre of gravity of the aircraft and the extent of the force is dependent upon the weight of the aircraft. The third force is thrust which operates horizontally and provides forward motion. This can be provided by engine power (in the case of a powered aircraft) or by descent through the air (in the case of an unpowered aircraft). The fourth, also operating horizontally but in a reverse direction, is drag. That results from the resistance of the aircraft to the flow of air around it and its extent is largely dependent upon the shape of the aircraft. The operation of an aircraft in flight involves maintaining a balance of these four forces which is appropriate to the desired flight condition. An alteration in the balance of those forces will alter the flight condition of the aircraft – for example from flying straight and level to ascending or descending. The way in which that alteration in the balance of the forces is achieved varies with the type of aircraft concerned. In a powered aircraft, or in a rigid glider, it will be achieved by the operation by the pilot of the controls which transmit the pilot's intentions to that part of the aircraft where an alteration to its state must be made to effect the change in forces. That involves, for example, the use of engine controls, or of controls which operate flaps, ailerons, and other moving parts of the aircraft's structure. In the type of hang glider which is here under consideration, the necessary movements in the aircraft's state relative to the air through which it is moving will be effected not by the transmission of the pilot's intention through mechanical means, but through the pilot's movement of his own body weight.

[6] The essence of the question is whether a hang glider, in which the necessary changes in its condition to alter the balance of forces are made in that manner, is properly described as a "machine". The word "machine" is not a defined term in the Act. It bears its ordinary meaning. Given the crucial importance of that word in the present context, it is helpful to compare a number of different dictionary definitions.

The relevant definition in the Concise Oxford dictionary (10th revised edition 2001), is: "an apparatus using or applying mechanical power and having several parts, each with a definite function and together performing a particular task; *technical* any device that transmits a force or directs its application". The most relevant definition in the new Shorter Oxford English Dictionary (1993) is: "An apparatus, an appliance; a device for applying mechanical power and having a number of interconnected parts, each with a definite function, *esp.* one that does not utilise human strength; an apparatus of a particular (specified or understood) kind; a bicycle, a motor vehicle; an aircraft; a computer; a typewriter. *Mech* any instrument that transmits force or directs its application." The Oxford English Dictionary Online includes among the definitions the following: "*mech:* anything that transmits force or directs its application". Under that definition is given a usage dated from 1704 which says: "machine, or engine, in mechanicks, is whatsoever hath Force sufficient either to raise or stop the Motion of a Body … Simple Machines are commonly reckoned to be Six in Number, viz. the Balance, Leaver Pulley, Wheel, Wedge, and Screw … Compound Machines, or Engines, are innumerable." The New Zealand Oxford Dictionary (2005) defines the term as: "an apparatus using or applying mechanical power, having several parts each with a definite function and together performing certain kinds of work"; "an instrument that transmits a force or directs its application". Chambers 20th Century Dictionary (New edition 1983) includes: "any artificial means or contrivance: any instrument for the conversion of motion". Chambers 21st Century dictionary online gives as the relevant meaning: "A device with moving parts, and usually powered, designed to perform a particular task". Merriam-Webster's Collegiate Dictionary, 11th Edition contains as the relevant meaning the following: "an assemblage of parts that transmit forces, motion, and energy one to another in a predetermined manner; an instrument (as a lever) designed to transmit or modify the application of power, force or motion".

[7] All of those dictionaries, except possibly Chambers, include, as one of the meanings of the word 'machine', an instrument which directs the application of a force. There is no requirement, on that meaning of the word, that there be any moving parts. I consider that, on that ordinary meaning of the word, a hang glider is a machine. The hang glider is a device which directs the application of the four

forces to which I have referred. In the case of lift, it is the hang glider itself which, through its shape, and the angle at which it is maintained relative to the movement of the air around it, directs the application of the force of lift. The shape of the hang glider also directs the application of the force of gravity on it, and, by the way in which that force is applied in controlling the descent of the hang glider, directs the application of the force of thrust. The shape of the hang glider also largely determines the application of the force of drag. The fact that the alteration of the angle of attack of the hang glider, and other aspects of its relationship to the forces acting upon it, is achieved by the movement of the pilot and not by the operation of moving parts within the hang glider itself, does not mean that it is not a machine. Of the six simple machines which have been recognised at least since 1704, most of those have no moving parts. They depend on the application of force to them, normally directly by human agency, for their ability to transmit or direct the application of force. In this sense a hang glider is essentially similar to them.

[8] Mr Anderson for the applicant refers to one case in which the meaning of the word "machine" has been judicially considered. That is *Telecom Auckland Limited v Auckland City Council* [1995] 3 NZLR 489. The question in that case was whether telephone lines and booths were rateable property. One of the issues was whether they fell within an exemption which applied to "machinery, whether fixed to the soil or not." Telecom acknowledged that in isolation its telephone lines could not be regarded or machines or machinery in that they are passive conduits conveying impulses from transmitting devices at one end of the line to receiving devices at the other. However, it argued that the lines form part of a larger device within its totality should be regarded as a "machine". Fisher J's conclusion was that Telecom's network as a whole was not a "machine" for the purposes of that exemption and that the lines within it were not "machinery". That fact situation is so different from the present that I derive no assistance from it on the case which confronts me.

[9] The conclusion that the ordinary dictionary definition of the word "machine", in at least one of its meanings, is sufficient to include a hang glider is consistent with the scheme and purpose of the Act. The Act is concerned with civil aviation and aviation safety. It is consistent with that purpose to include with in the ambit of the Act any object capable of flight, and in particular any object capable of carrying a

human being into flight where the safety of any person or persons may be at risk as a consequence of their being carried aloft by that object. Mr Anderson submits that a finding that hang gliders are not aircraft would not remove the ability of the Act to regulate their operation. He submits that their interaction with and possible effect on aircraft and aviation facilities would come within the powers conferred by the Act. That may be so, but the purposes of the Act suggest that the Act is intended to apply to objects which might, through flight, pose a danger to human safety, by the imposition of controls on them in their own right, and not merely in respect of their interaction with other aviation elements.

[10] The adoption of a meaning such as is urged by counsel for the applicant would also involve the making of fine distinctions between different objects capable of flight, depending upon whether any alteration in the application of the forces to the object was achieved by the operator moving a part of the object or by moving his body relative to the object. The purposes of the Act do not suggest that fine distinctions of that sort, turning on the nature of the object, are intended in deciding what is an aircraft.

[11] New Zealand's obligations under international aviation agreements are an important aspect of the Act, as the long title makes clear. The view of the definition of 'aircraft' which I have expressed is consistent with international practice, so far as that is apparent from the evidence before me. The definition of 'aircraft' in the Act is the same as that in the international standards contained in the Convention on International Civil Aviation. The classification of aircraft in those international standards include a glider amongst the categories of non power driven heavier than air aircraft. It makes no distinction such as that urged by counsel for the plaintiff.

[12] For these reasons I hold that a hang glider is an aircraft within the meaning of the Act.

Judicial Review

(a) ***Factual background***

[13] A brief description of the current New Zealand regulatory regime for hang gliders is desirable. Hang gliding is regulated under the Civil Aviation Rules (CARs) made under the Act. Many of the powers are exercised and administered in relation to the operation of hang gliders and paragliders by the New Zealand HangGliding and Paragliding Association (Inc) (NZHGPA), under an authorisation from the Director dated 10 November 2000. NZHGPA has been authorised under Part 149 of the CARs to administer the issue of hang glider and paraglider certificates, to set standards for hang glider and paraglider pilot safety equipment and to administer the issue of hang glider and paraglider warrants of fitness and pilot registrations. In consequence, the Director's power in relation to issuing, granting, and renewing, hang gliding and paragliding certificates and related matters have been delegated under s23B of the Act to officials of the association. The powers delegated do not, and as a matter of law cannot, include the power to revoke hang gliding certificates.

[14] Mr Smith was the holder of a hang gliding certificate issued by the NZHPA. He was at the time a commercial hang gliding pilot operating a business at Queenstown. On 13 April 2005, he was operating his hang glider on a private basis, and not as part of his commercial operations, at Flight Park Queenstown, an area set aside for hang glider and paraglider landings. He had arranged with a friend (also a pilot) that he would fly close by that person so that he could be photographed. He did so and subsequently landed, close to another person, Mr Angus Tapper. Angus Tapper is also a hang glider pilot, and his father, Mr Jules Tapper, apparently operates another commercial hang gliding operation in Queenstown. The evidence available in the documents suggests that there had been a level of ill feeling between Mr Smith and the Messrs Tapper.

[15] On 14 April 2005 a complaint was made to the Department of Civil Aviation by Angus Tapper regarding the incident on 13 April 2005. The allegation was that Mr Smith dive bombed another person and then came into land next to Mr Tapper, landing so close to him that Mr Tapper had to duck out of the way to avoid being hit by the tip of Mr Smith's hang glider wing. A video recording of the incident was supplied by Mr Tapper.

[16] An investigation under s 15A of the Act was opened as a result of the complaint received and a separate enforcement investigation was also initiated. Those were conducted concurrently but separately. By letter dated 2 May 2005, the Director suspended Mr Smith's hang glider paraglider certificate with effect from that date, and required him to undergo an investigation pursuant to s 15A. Throughout this process, several extensions of the period of suspension were notified to Mr Smith. The suspension was continuously in place from 2 May until the certificate was revoked in September.

[17] Mr Kenny, the Manager Sport and Recreation in the General Aviation Group of the Civil Aviation Authority undertook the s 15A investigation. He arranged to hold an interview with Mr Smith with the other CAA investigation panel member, Mr Hanson, for the purpose of interviewing Mr Smith and obtaining his views about the incident and to assess his views and attitude toward the safety aspect of his flying behaviour. The meeting took place on 11 May 2005. Mr Smith arrived with approximately 20 support persons and Mr Kenny declined to hold the interview with all persons present. The interview took place with Mr Smith and a small number of supporters. Notes of the interview and submissions received from several of the supporters, were annexed to the s 15A report. Mr Smith sought an opportunity to consult his lawyer before making his submissions.

[18] The draft s 15A report described the background including the details of a previous investigation which had been conducted into Mr Smith's actions in 2003. It described the interview and meeting with Mr Smith and summarised the main points made by him at the interview. It also summarised the main points made by others and referred to other witness reports. These included reports by two persons who were unwilling to make a signed statement or allow their identity to be disclosed

whose information was described in these terms: "These parties confirmed that the "dive bombing" and other extreme manoeuvres where being regularly carried out by Mr Smith. This often occurred when commercial passengers were being carried." Mr Angus Tapper was described as making the following points when interviewed:

> He fears for the safety of himself and his passengers when they are subjected to the "dive bombing" shown in video evidence, which regularly takes place.
>
> Serious injuries could be sustained if a person on the ground was hit by a "dive bombing" hang glider due to the high speed involved in the manoeuvre.

[19] The investigation findings were expressed in these terms:

> The flight track used by Mr Smith on this occasion, even if he was asked by Dermot Mayock to swoop down at him, was unnecessary and dangerous. The subsequent final landing approach showed little or no effort to land clearly away from Mr Tapper. Notwithstanding the point that Mr Tapper could have moved away the fact remains that he did not.
>
> Mr Smith holds the position of safety officer in the Southern Club and conducts commercial hang glider operations. The example set by Mr Smith in the video evidence is not supportive of his role in the hang gliding sector.
>
> The previous suspension of Mr Smith's document related to the same extreme flying and examples of "dive bombing". As a result of Mr Smith's recognition that this type of flying was not appropriate and that he was prepared to change the way he operated the suspension lapsed.

[20] The recommendation included the following:

> On the basis of Mr Smith's continued extreme flying which is considered unnecessary and dangerous to other person, the investigation team conclude that Mr Smith may have failed to comply with the Act and may no longer meet the requirements of the fit and proper person test.
>
> It is recommended that General Manager Aviation review this report and consider if Mr Smith continues to satisfy the requirements of section 9(3) of the Act, which requires that he remains fit and proper.

[21] Mr Kenny completed the draft s 15A investigation report on 21 June 2005 and it was sent to Mr Smith on 5 July 2005 for comment. There was then some correspondence with Mr Smith's lawyer. Among the information which was supplied by Mr Smith's lawyer following the receipt of the draft report and before it was finalised, under cover of a letter dated 22 July 2005, were two statements obtained from hang glider pilots. One had held a licence as a hang glider pilot since

1984 issued in the USA and been a member of the NZHGPA since 1997. He reviewed the film clip of the incident in April 2005 and said:

> You have asked me to give an opinion on the following items as appearing in the clip:
>
> 1. The "beat up" over the paragliding pilot; and
>
> 2. The landing
>
> With respect to the first item, I understand that the paraglider pilot had asked Mr. Smith to "buzz" him so he could take a dramatic picture. The approach is on target, as Mr. Smith obviously speeds up in order to keep perfect control of the wing. He initiates a controlled, shallow dive and continues his path, giving the observer on the ground plenty of time to calculate the glide path and stay out of the way. Certainly not a manoeuvre for a beginner or intermediate pilot to try, but one that most advanced hang glider pilots would feel comfortable with as an example of light aerobatics.
>
> I would also like to point out that the type of glider Mr. Smith is flying on the clip is capable of generating enough speed to enable the pilot to make a low downwind approach at high speed so he can easily, (as seen in the clip), regain enough altitude to allow a comfortable turn into the wind and a safe landing.
>
> The landing itself is very well effected. After a right turn in order to get into the wind Mr. Smith stabilises the flight path into final approach, gets his feet out of the harness in time and grabs the upright tubes in order to prepared for the flare.
>
> The person on the left seems to be watching the glider as it comes in downwind as well as when it makes its turn to the right and as it goes on final. It is obvious that the pilot is on final approach several feet to the left and that the glider path will carry the glider close to that person on the left, (although not on a collision course). I can't see any effort from the person on the left to move away from the glider's projected path until the glider goes right past him or her.
>
> There is obvious clear space between the glider's wing and the observer on the left's head. I cannot give an estimate of the distance, but it is clear that the glider has continued in a straight line since Mr. Smith started his final approach so this observer would have had plenty of time to move away if there had been any thought of collision.
>
> In summary, I consider the events as shown on the clip as a safe but spectacular, well executed landing by an advanced pilot. Any person familiar with hang gliding sites where experienced pilots fly would admire it but not be surprised by it.

[22] A second pilot also expressed an opinion favourable to Mr Smith on the matter. In addition, several submissions from hang glider pilots essentially in support of Mr Smith were received as part of the investigation and annexed to the

report. All of those expressed the opinion that Mr Smith's flying was not dangerous. One of those made the following comments which are worthy of note:

> Given the evolution of this action taken against Mr John Smith we were slightly perturbed that the NZHGPA was not consulted. We appreciate however that it was felt necessary to take immediate action until some facts had been ascertained.
>
> The complainant was neither present at the flight area, witness to the incident or expert in the field of judgment of hang gliding maneuvers [*sic*].
>
> By passing judgment a precedent will be set. We need to make sure in this case that a decision is made based on factual evidence, being wary of opinion and taking note of advice offered by experts qualified and experienced in the field of hang gliding aviation.
>
> …
>
> Whilst not wanting to encourage impromptu air shows or even liken this event to an air show – it seems suggestible that for mr Smith to perform such a simple maneuver [*sic*] for a pilot of his quality and experience would only carry risk if he were not in control – which it appears he was and usually is at all times despite his ability to generate higher speeds than most of us.
>
> …
>
> As an association and club we would like to feel that we have a responsibility to help deal with such situations and offer our support in finding an acceptable solution.

[23] Apart from the correspondence from his solicitor, no submissions were received from Mr Smith personally. Some extensions of time were given to enable submissions to be made but none were received. The report was therefore finalised without submissions from him. No changes were made to the draft report as Mr Kenny did not consider that any of the information received, including the material submitted by Mr Smith's lawyer, changed his views.

[24] Mr Kenny's views, as expressed in the report, were amplified in his affidavit in these proceedings. He said:

> [55] As I indicated in that report, the view of the investigation panel regarding the alleged low flying/dive bomb manoeuvre of 13 April 2005, after taking into account the complainant's view and the video tape evidence, was that it was dangerous and unnecessary flying activity. I was not convinced otherwise by the submissions and testimonials made by others on behalf of Mr Smith. I note that the standard of proof I applied in assessing this matter, as well as the other matters noted in my report, was the balance of probabilities.

> [56] When considered against a background of similar complaints in 2003, and the absence of any evidence, despite assurance to the contrary, that Mr Smith had changed his behaviour, I felt that Mr Smith's conduct was unacceptable and a risk to aviation safety. I felt that his attitude in fact demonstrated a hardening or resistance against any attempt to change his behaviour or recognise the safety risk associated with his activities, that he had not portrayed in 2003. I remained of the view that, for the reasons stated in my report, Mr Smith had failed to comply with the Act and may no longer meet the requirements of the fit and proper person test. I did not therefore amend the draft report.

[25] The report was submitted to Mr Lanham, General Manager, General Aviation who in accordance with CAA policy was required to review the report before any decision was made by the Director on it. Mr Lanham's report, dated 25 August 2005, noted that this was, as he described it: "The second fit and proper person investigation carried out on Mr Smith". He noted the earlier investigation in 2003 and said: "In April 2005 I established terms of reference for the second fit and proper investigation based on reports and a complaint that Mr Smith was once again flying in a careless or dangerous manner, including "dive bombing" people on the ground …". Mr Lanham noted that the information presented a wide range of evidence, opinion and hearsay, regarding Mr Smith that he was regarded as a highly skilled hang glider pilot who had competed successfully in national and international events. It recorded views as ranging from praise of his flying skill and accomplishments through to reports from people who describe him as unsafe or even dangerous in his flying, and unprofessional in his approach to the activity. He noted that in his assessment he had focused on determining Mr Smith's fitness to exercise properly his responsibilities as a commercial hang glider pilot and to perform the function and duties expected of such a pilot. He noted that he had attempted to weigh the material according to a number of factors. He did not assign hearsay evidence significant weight because it is unverified and he also considered the damaging effect an adverse decision would have on Mr Smith's career. He noted that in balancing Mr Smith's personal interests against the public interest he has assigned greater weight to the public interest. His report said:

> The central issue in the current investigation is the (video-ed) 'dive bomb' or 'beat up' manoeuvre carried out by Mr Smith within two meters over the head of Mr Mayock and the subsequent approach and landing during which Mr Tapper had to step back to avoid being struck. The testimonials given by requested parties and the general sentiments of the support persons in the

> interview process all made the claim that the manoeuvre(s) were not dangerous because they are well within Mr Smith's capabilities and, in the first example, was requested by Mr Mayock.
>
> As a very experienced display/demonstration pilot myself, including the display of low energy aircraft at very low level, I do not agree with those propositions. The fact that a pilot is capable of performing an extreme or limit type manoeuvre does not make it safe per se; it is the situation in which the manoeuvre is performed that will determine its safety or appropriateness. Such a manoeuvre may well be acceptable in, say, an aviation event or other formally briefed and/or controlled environment where relevant safeguards are in place. It is not appropriate in the environment of a free flying or uncontrolled airfield or landing site where unpredictable elements are present, including other aircraft and people on the ground. Equally, the requesting of a pilot to perform a particular manoeuvre does not justify or condone the manoeuvre if it is careless, dangerous or non-compliant with CARs in the circumstances. Such an argument has been unacceptable since the dawn of aviation. Accordingly, I have assigned little weight to the testimonials and expressions of support.
>
> …
>
> Although Mr Smith has expressed regret and good intentions in the past I do not detect any suggestion that he acknowledges his deficiencies and is committed to modifying his attitude or behaviour in the future. Accordingly, I consider that, despite the supporting testimonials and the significant personal impact of revoking Mr Smith's certificate, the evidence to the contrary is sufficiently robust to suggest that on the balance of probability Mr Smith does not meet the F&PP standard applicable to a commercial hang glider operator in the New Zealand aviation environment. I recommend, therefore, that you revoke Mr Smith's certificate.

[26] Following receipt of Mr Lanham's report, the then Director, Mr Jones, considered the matter. In his affidavit he said: "Mr Lanham's report was comprehensive and well reasoned. I agreed entirely with his conclusions and recommendations." He therefore determined to make a proposed adverse decision to find Mr Smith not fit and proper to be the holder of a hang glider/paraglider certificate and to revoke that under s 18 of the Act. He wrote to Mr Smith on 26 August 2005 setting out his proposed adverse decision. In that letter, he set out the reasons for his proposed decision in these terms:

> I have considered Mr John Lanham's (General Manager, General Aviation) report to me, dated 25 August 2005. Please find a copy attached. While I accept the reasons set out in Mr Lanham's report, I would like to highlight the following matters upon which I place particular emphasis.
>
> In the course of an investigation in March 2003 into previous incidents, you admitted in an interview that some of your flights has been irresponsible and intimidating. At the time of making those admissions, you agreed to cease

such activities. As a result that investigation was closed. However, shortly following that interview, you were involved in an accident. As a result your operations ceased for some time.

I also rely on the evidence given by witnesses who describe your flying as unprofessional unsafe and dangerous.

I acknowledge that you are technically highly skilled, and I am mindful that your operation is a commercial business. However, I agree with Mr Lanham that when balancing your personal interest with the public interest, the public interest must prevail.

Finally I note that you have expressed regret for your past actions, and that you have given an undertaking to refrain from such dangerous activities and to comply with the Civil Aviation Rules. However, I place great weight on the fact of your lack of follow through with regard to previous similar assurances. I consider that your assurances are unreliable.

I consider that on the balance of probabilities you do not satisfy the Fit and Proper Person standard applicable to a commercial hang gliding operator in New Zealand.

[27] He provided an opportunity to make submissions. He received a letter dated 5 September 2005 in which Mr Smith expressed his consciousness of the need to set a good example, and of the need for safety in his commercial operations. He noted that he had never had an accident during his commercial operations. He indicated that he would request NZHGPA to spot audit him. Mr Jones in his affidavit said of that letter:

> [64] I was not swayed by Mr Smith's letter to change my mind, particularly given that he had been shown leniency and accepted at his word following the 2003 investigation, and had not conducted himself accordingly. I remained of the view that, for the reasons I have outlined, Mr Smith was not fit and proper to hold a hang gliding/paragliding pilot certificate and that is was in the interests of aviation safety that his aviation document should be revoked.

[28] Accordingly, he wrote to Mr Smith on 23 September 2005 advising him that his certificate was revoked with effect from 5pm that day. The notice was given in accordance with s 11(6)(b) of the Act. The decisions and grounds were set out in these terms.

Decisions

1. That you are not fit and proper to hold a Hang Glider/Paraglider Pilot Certificate;

2. That your Hang Glider/Paraglider Pilot Certificate shall be revoked.

Grounds

> I have taken into account your submission of 5 September 2005. I am encouraged by the attitude towards safety that you demonstrate in your submission. However, I am aware that you have on a previous occasion had your licence suspended and that this suspension was allowed to lapse because you admitted that your flights had been irresponsible and had agreed to refrain from dangerous activities. In video evidence received by the CAA you were observed "dive-bombing" an individual subsequent to your assurances and this demonstrates a lack of follow through.
>
> I have received a number of submissions from third parties to the effect that the "dive bomb" manoeuvre was not dangerous because it was well within your capabilities. I agree with the General Manager, General Aviation that the fact that a pilot is capable of performing an extreme type manoeuvre does not make it safe per se. Such a manoeuvre is not appropriate in the environment that you performed it in, namely an uncontrolled landing site where unpredictable elements were present, including other aircraft and people on the ground.
>
> Additionally, I have received reports from witnesses who describe your flying as unprofessional, unsafe and dangerous.

[29] Mr Jones in his affidavit also notes that there were simultaneous s 15A and enforcement investigations by the CAA in 2005. These were conducted separately by different units within CAA and the enforcement investigation was completed after the s 15A investigation. He accepted an independent recommendation from the enforcement unit that a prosecution be initiated against Mr Smith for careless operation of an aircraft in respect of the April 2005 incident. That prosecution was dismissed.

(b) ***Discussion***

[30] The applicant contends that the decision to revoke his certificate, and the investigations which preceded that decision, were reached contrary to the principles of natural justice. As to the investigation, Mr Andersen submits that the notice dated 2 May 2005 contains two matters of significance:

a) The investigation is being carried out by the Director and is not delegated; and

b) The notice does not allege a breach of a condition of an aviation document or the requirements of s 12 but relies on the grounds in s 15A(1)(b) with the allegation being that the privileges or duties are being carried out in a "careless or incompetent manner".

[31] Counsel submits that "the real issue in respect of the investigation was whether the manoeuvre was dangerous. It is accepted that if the manoeuvre was dangerous then the s 15A(1)(b) criteria would be established". That submission does not accurately reflect the terms of reference for the s 15A investigation. The investigation was not confined to the issue whether the manoeuvre was dangerous. It was considerably broader than that. The purpose of the investigation was described in these terms:

> The purpose of the investigation is to gather information and make recommendations regarding Mr Smith's compliance with his obligations under the Civil Aviation Act 1990 (the Act) and in particular to:
>
> 1. investigate the allegations that Mr Smith has failed to comply with the requirements for participants within the aviation system under section 12 of the Act: and
>
> 2. gather information to establish whether, in accordance with section 9(3) of the Act, Mr Smith continues to be a fit and proper person and make recommendations to the Director accordingly. The criteria for the fit and proper person test are set out in section 10 of the Act.

The Act requires, by s 9(3), that the holder of an aviation document must continue to satisfy the fit and proper person test specified in s 9. The criteria for the fit and proper person test are detailed in paragraph 10. The matters which are to be taken into account are specified. They are extensive. The s 15A investigation was not limited in the way in which the applicant contends.

[32] The proposition that the issue was whether the applicant's flying was dangerous underlies Mr Andersen's submissions that there was a breach of natural justice in the processes undertaken with both the s 15A investigation and the subsequent revocation of the applicant's certificate. Mr Andersen submits that none of the four people involved in the investigation claim any experience or expertise as a hang glider pilot. He submits that letters provided by the applicant from two expert hang glider pilots were not properly assessed. He submits that the Director had

power to obtain expertise evidence by consulting NZHGPA, which would have been able to provide the appropriate and relevant expertise.

[33] I consider that, if the central focus of the investigation had been whether the applicant's actions in the incident in April 2005 had been dangerous, there would be force in Mr Andersen's submission that input from persons with hang gliding expertise would have been appropriate. The investigators' aviation experience is as pilots of powered aircraft. It seems to me that the differences between a hang glider and a powered fixed wing aircraft are likely to be so great that specific input from an experienced hang glider pilot would be more relevant than that of a powered aircraft pilot. The views of the hang glider pilot asked to review the tape, which I have set out at para [21] above, in particular, seem to me to be moderately and objectively expressed, and would seem on the face of it to be entitled to respect. Further, as I have noted, at para [22], one of the persons who made comments expressed concern that NZHGPA was not consulted. I consider that there is merit in that concern. The regulatory functions in respect of hang glider pilot certificates have been substantially delegated to NZHGPA. That organisation is clearly seen as having a sufficient level of expertise and responsibility to be entrusted with those functions. Its functions do not extend to a power to revoke certificates, but that does not mean that its input to the revocation process would be inappropriate. I consider that, in a case where the ground of revocation involves a question of competence as a hang glider pilot, or of whether the actions of such a pilot were dangerous, the Director ought to consider obtaining appropriate input through the NZHGPA.

[34] However, I do not consider that the absence of specific hang gliding expertise, either from NZHGPA or from CAA's own resources, constitutes a breach of natural justice or otherwise invalidates the investigative or decision making process. The issue for the investigators, and for the Director in his decision making, was considerably broader than whether the manoeuvre was dangerous on not. The issue was whether Mr Smith met the fit and proper person test. The manoeuvre was relevant to the assessment of whether he continued to be a fit and proper person to hold a hang gliding pilot certificate. The question whether the manoeuvre was such as might properly be conducted by a fit and proper person is not necessarily the same as the question whether the manoeuvre was dangerous. The evidence does establish

that regard was had to the opinions expressed by the hang gliding pilots whose statements were adduced. Mr Andersen submits that there is no evidence that the opinion of the hang glider pilots were given any consideration. I do not accept that submission. Mr Kenny, in his affidavit says that the material provided in response to his draft report, which included these opinions, did not change his view. That was a view he was entitled to reach. While, for the reasons I have given, it may have been preferable to obtain more specific input from a hang gliding expert, the submission that the material actually available was not properly considered is not made out. I do not consider that any failure to have proper regard to those views, or to obtain appropriate input from persons with hang gliding pilot experience, such as to invalidate the investigation or the decision to revoke, has been made out.

[35] Mr Andersen also relies on the failure of the criminal prosecution against the applicant in respect of the manoeuvre. He says that that failed to establish a *prima facie* case and that that raises the issue as to whether there was any evidence the manoeuvre was dangerous. That submission too is heavily dependent on the proposition that the relevant issue was whether the manoeuvre was dangerous. The fact that, as I have had held, the issue was broader than that means that less significance can properly be attached to the failure of the prosecution.

[36] Mr Andersen further submits that the investigators did not fairly listen to both sides. He submits that the statements made by the Messrs Tapper about the manoeuvre were not independent, and that Mr Kenny, one of the investigators, did not have an open mind as to the key matter at issue. He relies, in support of that latter submission, on certain statements made by Mr Kenny in the course of the meeting with Mr Smith to which I have referred. I do not think that statements made by Mr Kenny at that meeting can properly be viewed as indicating that he had made up his mind on the issues under investigation. The interview was part of the investigation process. The investigators were entitled, indeed bound, to put the essence of the allegations, and their concerns, to Mr Smith. Their doing so does not indicate either a closed mind or a preconceived view as to those issues. As to the proposition that the statements by the complainants were not independent, the relevant facts as to the position of the parties were known to the investigators and there is no evidence to suggest that those facts were not taken into account.

[37] Mr Andersen further submits that the Director's decision that the manoeuvre was dangerous was not based on material that had probative value. Again, that submission does not accurately summarise the nature of the Director's decision. The Director's decision was that Mr Smith was not a fit and proper person to hold a hang glider pilot certificate. The passage from the Director's grounds for that decision, which I have set out at paragraph [28] indicate that the view of the Director was that the manoeuvre was "not appropriate in the environment that [Mr Smith] performed it in". That was a factor which could properly be taken into account in reaching his conclusion that Mr Smith did not meet the fit and proper person test.

[38] It is necessary also to address the proposition that the investigation did not involve a delegation of the Director's powers. In effect, the submission is that the principles of natural justice require that the inquiries should have been undertaken by the decision maker, namely the Director. I do not consider that the director must personally undertake all inquiries. The power of revocation conferred by s 18 may be exercised if the Director considers it necessary in the interests of aviation safety after an inspection carried out under the Act. In determining whether or not a person meets the fit and proper person test under s 10, the Director may consider information obtained from any source. Neither of these provisions suggests a requirement that there must be a hearing, by the director personally, of the evidence upon which a decision to revoke is based. The Director was entitled to rely, in reaching his decision to revoke the certificate, on the investigation considered by his officials, and the evidence produced by that investigation.

[39] It is clear from the terms of the decision itself, and from the Director's affidavit, that an important consideration which weighed with him was that Mr Smith had been the subject of an earlier investigation, and that part of the outcome of that was that Mr Smith had given the following assurance:

> As such I will impose conditions on manouvers [*sic*] performed when flying fare paying passers.
>
> I will not fly within 20 ft. of any person on the ground or in the air. Any manouvers [*sic*] performed will not exceed certified standards.

[40] Mr Andersen submits that the April 2005 incident was not a breach of that commitment, as that was confined to Mr Smith's commercial operations. I consider that the previous incident, and that assurance, were relevant considerations which the Director was entitled to take into account. The Director was entitled to have regard to that commitment, whether or not the incident involved a breach of the strict letter of the commitment.

[41] Mr Smith had a right of appeal, conferred by s 18(5), to the District Court under s 66 of the Act. That is a right of general appeal, where a challenge on the merits to the Director's decision is possible. In particular, it would have been possible, on such an appeal, for expert evidence as to hang glider piloting practice to have been given. The existence of that right of appeal is relevant to the extent to which this Court should intervene by way of judicial review. Mr Smith has chosen not to exercise that right of appeal. Mr Andersen submits that the *vires* point, which rests on the definition of 'aircraft' could not have been resolved on an appeal. That may be so, but that does not explain why a general appeal as well as proceedings to determine that point could not have been brought. The applicant has elected to rest on this application for judicial review alone.

[42] I have expressed the view that it might have been better if specific hang gliding expertise had been applied in the decision making process, but that this did not invalidate the decision making process. Had I reached the conclusion that that point did go to the validity of the decision making process, the existence of the right of appeal would have weighed heavily against the exercise of the discretion to grant relief. There have also been considerable delays in these proceedings. The conclusion which I have reached, namely that no ground for relief has been made out, makes it unnecessary for me to consider the effect of this delay.

Result

[43] For these reasons, the application for review is dismissed.

[44] The parties may submit memoranda as to costs. I indicate a preliminary view that each respondent is entitled to costs on a 2B basis.

"A D MacKenzie J"

Solicitors: Queenstown Legal Chambers, Queenstown for Applicant
Raymond Donnelly & Co, Christchurch for First Respondent
Crown Law Office, Wellington for Second Respondent