

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-000436
[2022] NZHC 2425**

BETWEEN

TONI COLIN REIHANA
Applicant

AND

GREGORY FORAN
First Respondent

AIR NEW ZEALAND CHIEF
EXECUTIVE OFFICER
Second Respondent

Hearing: 7 September 2022

Appearances: Applicant in Person (by telephone)
J Q Wilson and T M J Shiels for Respondents (by VMR)

Judgment: 22 September 2022

**JUDGMENT OF VENNING J
STRIKE OUT/SUMMARY JUDGMENT**

This judgment was delivered by me on 22 September 2022 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Bell Gully, Auckland
Copy to: Applicant

Introduction

[1] Toni Reihana (Mr Reihana) is a New Zealand citizen living in Australia. In March 2022, he tried to book an airline ticket with Air New Zealand Limited (Air NZ) to return to New Zealand to celebrate his father's 80th birthday and to attend the annual harvest of the Sooty Shearwater (Titi) seabird at the Titi Islands off Stewart Island.

[2] As Mr Reihana was not vaccinated for Covid-19, he was not able to purchase a ticket because at the time, subject to certain exceptions, Air NZ required all passengers aged 18 or older travelling on Air NZ's international services to be vaccinated against Covid-19 (the Covid-19 vaccination policy). On 3 October 2021, Air NZ had announced the Covid-19 vaccination policy would apply to international travel on or after 1 February 2022.

[3] Mr Reihana's response was to issue proceedings against Air NZ's Chief Executive Officer, Greg Foran, and Air NZ.

[4] Mr Foran and Air NZ seek to strike out Mr Reihana's claims as disclosing no reasonable cause of action or, in the alternative, they seek summary judgment as defendants against Mr Reihana.

Mr Reihana's claims

[5] Mr Reihana represents himself. He raises three causes of action. In the first, he alleges that in making the Covid-19 vaccination policy decision on 3 October 2021 Mr Foran and Air NZ made:

jurisdictional error in the exercise of their legislative company decision making powers, or otherwise, by failing to take account of all relevant biomedical / immunological scientific considerations,

therefore, their:

"duty" to make a fully cognisant decision upon the relevance or necessity of needing to be Covid-19 vaccinated in order to undertake international air travel, remains unfulfilled.

[6] In the second, Mr Reihana alleges Air NZ breached the New Zealand Bill of Rights Act 1990 (NZBORA) and Human Rights Act 1993 on the grounds of discrimination. He says his religious and political beliefs have been discriminated against.

[7] In the third, Mr Reihana alleges breach of a duty of care not to require its customers and clients to undergo potentially dangerous vaccinations. He says Mr Foran and Air NZ were negligent in failing to apply biomedical and immunological science to justify making the decision to ban unvaccinated persons from flying internationally.

[8] Mr Reihana says the breach has caused him to suffer loss of enjoyment and a loss of opportunity.

[9] Mr Reihana seeks:

- (a) orders of certiorari invalidating the 3 October 2021 Covid-19 vaccination policy decision;
- (b) mandamus requiring the respondents to “diligently” apply applicable and relevant biomedical and relatable scientific considerations to a reconsideration of the 3 October 2021 Covid-19 vaccination policy decision;
- (c) costs;
- (d) damages for breach of the NZBORA and Human Rights Act;
- (e) damages in tort for pecuniary loss and loss of chance; and
- (f) such other order including punitive damages.

Background

[10] The applications to strike out and for summary judgment are supported by an affidavit of Nirupum Ravaji, a senior legal consultant employed by Air NZ.

[11] Mr Ravaji confirmed that on 3 October 2021 Air NZ announced the Covid-19 vaccination policy would apply on or after 1 February 2022 to international travel. In the announcement Mr Foran said, inter alia:

We've been hearing from both customers and employees that this measure is important to them. It came through loud and clear in our recent consultation process with employees and we want to do everything we can to protect them. Mandating vaccination on our international flights will give both customers and employees the peace of mind that everyone onboard meets the same health requirements as they do.

...

As with anything, there will be some that disagree. However, we know this is the right thing to do to protect our people, our customers and the wider New Zealand community. We'll spend the next few months making sure we get this right, ensuring it works as smoothly as possible for our customers. This also gives anyone wanting to travel from next year plenty of time to get their vaccination.

...

Air New Zealand's vaccination requirement will apply to all passengers aged 18 and older arriving or departing Aotearoa on an Air New Zealand aircraft. Customers who are not vaccinated will be required to present proof that vaccination was not a viable option for them for medical reasons.

[12] Mr Reihana's claim is dated 16 March 2022, although the proceedings were apparently not served on Air NZ until 22 April 2022. By that time, on 13 April 2022, Air NZ had announced the Covid-19 vaccination policy would end on 30 April 2022.

[13] Mr Ravaji also confirms that all travel on Air NZ flights are subject to Air NZ's conditions of carriage which are publicly available on the Air NZ website. He attached a copy to his affidavit. The conditions of carriage at the time included the condition that Air NZ might refuse carriage or service if the passenger:

... will not or cannot show valid travel or health documents for their entire journey (including evidence of vaccinations or inoculations against COVID-19 and/or negative COVID-19 test results if requested by Air New Zealand).

[14] The conditions go on to record that, in the event a passenger was refused carriage as the passenger was unable to provide necessary Covid-19 vaccination evidence or other required health documentations:

we [Air NZ] are not liable to the Passenger in any way. For the avoidance of doubt this includes liability for any refund of the Passenger's ticket.

[15] Mr Ravaji also identified the following public announcements made by the New Zealand Government relating to Covid-19 vaccination requirements for international travel, including:

- (a) On 3 October 2021, the New Zealand Government announced that full COVID-19 vaccination would become a requirement for all non-New Zealand citizens arriving into the country from 1 November 2021.
- (b) On 15 February 2022, the New Zealand Government announced that fully COVID-19 vaccinated travellers would be able to enter New Zealand without entering Managed Isolation and Quarantine facilities (MIQ) from 28 February 2022.
- (c) On 28 February 2022, the New Zealand Government announced that self-isolation requirements for all COVID-19 vaccinated travellers entering New Zealand would be removed from 2 March 2022 and that MIQ would still be required for travellers not vaccinated against COVID-19.
- (d) On 18 March 2022, the New Zealand Government announced that COVID-19 unvaccinated New Zealand citizens did not need to enter MIQ or to self-isolate. Minimum COVID-19 vaccination requirements for travel to New Zealand continued to apply to non-New Zealand citizens (including permanent residents) unless they had a relevant exemption.
- (e) On 23 March 2022, the New Zealand Government announced a change to New Zealand's COVID-19 public health settings. That included no longer requiring COVID-19 vaccine passes for entry to certain business and the removal of almost all of the COVID-19 'vaccine mandates'.
- (f) A series of further changes have been made to the New Zealand Government's COVID-19 vaccination requirements for international travel.

[16] Mr Reihana has filed an affidavit in opposition to the application. In that affidavit he annexes various documents, including news items regarding Air NZ's Covid-19 vaccination policy and reports of cases overseas ruling on the constitutional validity of mandatory vaccination requirements generally and in specific cases. He

also attaches articles which question the efficacy of the Covid-19 vaccine and discuss a co-relation between the vaccine, booster shots of the vaccine and death.

[17] In support of his opposition to the application to strike out Mr Reihana:

- (a) alleges unvaccinated New Zealand citizens who were extorted into being vaccinated in order to fly international with Air NZ may have sustained serious or maiming adverse effects or died;
- (b) reasserts the cautionary note in *Couch v Attorney-General*¹ that the claim must be considered on the basis upon which it was presently pleaded, but also on any basis it might be pleaded and says any defects in the pleadings could be addressed by amendment;
- (c) emphasises the public law nature of the breaches of the Bill of Rights Act alleged and other breaches;
- (d) notes the claims include a claim in tort for breach of duty of care;
- (e) refers to a breach of a statutory duty of care under s 137 of the Companies Act 1993;
- (f) repeats his allegations of negligence, takes issue with the affidavit of Mr Ravaji for Air NZ and notes it discloses no reliance upon expert scientific or biomedical grounds; and
- (g) traverses generally his allegations as to the dangers and failings of the Covid-19 vaccination.

¹ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

Principles

[18] The jurisdiction to strike out is used sparingly. The Court will only strike out proceedings where the causes of action are so clearly untenable they cannot possibly succeed.² As Elias CJ and Anderson J noted in *Couch v Attorney General*:³

It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

[19] If the defect in the pleadings can be cured then the court would normally order an amendment of the statement of claim.

[20] However, in *Attorney-General v McVeagh*, the Court of Appeal confirmed that the striking out jurisdiction is founded on the realisation that court resources are finite and are not to be wasted.⁴ If a claim is doomed to failure there can be no justification for allowing it to continue.

[21] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal confirmed the further basis upon which this Court may strike out pleadings.⁵ The Court confirmed the grounds of strike out at High Court Rules 2016 (HCR) 15.1(1)(b)–(d) concerned misuse of the Court’s process.

[22] The Court is entitled to receive affidavit evidence on an application to strike out and will do so in an appropriate case.⁶ Evidence of uncontested fact, such as that advanced by Air NZ in this case, is admissible on a strike out application. However, it will not attempt to resolve genuinely disputed issues of fact.⁷

[23] As to the summary judgment application, the Court can give summary judgment against a plaintiff where none of the causes of action can succeed.⁸

² *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

³ *Couch v Attorney-General*, above n 1.

⁴ *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA).

⁵ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

⁶ *Attorney-General v McVeagh*, above n 4.

⁷ *Attorney-General v McVeagh*, above n 4.

⁸ High Court Rules, r 12.2(2).

The first cause of action

[24] Mr Reihana's first claim seeks to judicially review the decision of 3 October 2021, under the Judicial Review Procedure Act 2016 (JRPA).

[25] The starting point is that as a corporation, Air NZ is a private entity. The JRPA only applies to the exercise, failure to exercise, or the purported or proposed exercise of a statutory power.⁹ The first issue under the first cause of action is whether the imposition by Air NZ, a private entity, of a condition of carriage in its contract with customers can be said to be the exercise of a statutory power.

[26] Section 5 of the JRPA provides the meaning of a statutory power:

5 Meaning of statutory power

- (1) In this Act, statutory power means a power or right to do any thing that is specified in subsection (2) and that is conferred by or under—
 - (a) any Act; or
 - (b) the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.
- (2) The things referred to in subsection (1) are—
 - (a) to make any secondary legislation; or
 - (b) to exercise a statutory power of decision; or
 - (c) to require any person to do or refrain from doing anything that, but for such requirement, the person would not be required by law to do or refrain from doing; or
 - (d) to do anything that would, but for such power or right, be a breach of the legal rights of any person; or
 - (e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

[27] Air NZ's requirement for vaccination as a condition of carriage is plainly not the exercise of a power or right under s 5(1)(a) of the JRPA. If the JRPA is to apply to Air NZ it could only be pursuant to s 5(1)(b) of the JRPA. However, a power or right exercised by a corporation will only be a statutory power in the circumstances

⁹ Judicial Review Procedure Act, s 3.

set out in s 5(2). Section 5(2)(a), (b), (d) and (e) can have no application to the present case. The only possible issue is whether it could be said that in the circumstances the Covid-19 vaccination policy was the exercise of a statutory power to require persons travelling with it to do or refrain from doing anything that they would otherwise not be required by law to do or refrain from doing.

[28] There is a strong argument that it was not Parliament’s intent that s 5 of the JRPA would apply to conditions of carriage of Air NZ. Decisions of a private entity such as Air NZ are not normally amenable to judicial review.¹⁰ The concept of judicial review being available and applicable to actions of private corporations and incorporations in such situations has not been readily accepted by the Court. In *Hopper v North Shore Aero Club Inc*, the Court of Appeal observed:¹¹

Although it is conceivable that the actions of the club were, on a literal reading, pursuant to a “statutory power of decision”, such a classification seems to strain the statutory definition.

[29] However, as the authors of *Judicial Review: A New Zealand Perspective* note:¹²

Authorities have been inconsistent on whether there are limits to judicial review in this area, but now seem to have settled on the common statement in three Court of Appeal judgments¹³ that judicial review “may be available, depending on the specific circumstances” where the actions involved are (1) public or quasi-public functions, or (2) a membership decision is involved, or (3) breach of natural justice is alleged.

[30] None of those three general categories apply to Mr Reihana’s situation.

[31] As noted, Air NZ is a private corporation. It does not carry out public or quasi-public functions. In *Sharma v Air NZ Ltd*, Davison J accepted the submission for Air NZ that it had no legal obligation to carry anyone on its flights and that it was not a monopoly supplier of essential services.¹⁴

¹⁰ *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA).

¹¹ At [12].

¹² Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [2.15]

¹³ *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173; *Stratford Racing Cub Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329; and *Hopper v North Shore Aero Club Inc*, above n 10.

¹⁴ *Sharma v Air New Zealand* [2020] NZHC 230.

[32] Despite the Government's majority shareholding in it Air NZ is not a State Owned Enterprise nor one of the companies identified as a mixed ownership model company provided for in the Public Finance (Mixed Ownership Model) Amendment Act 2012.¹⁵ Furthermore, the Government's status as a majority shareholder would not create any further scope of review because of clearly defined roles of shareholders and directors of a company.¹⁶

[33] Nor does Mr Reihana's situation raise a membership decision or an arguable breach of natural justice, primarily for the reasons that follow in relation to Mr Reihana's second cause of action.

[34] However, even assuming for present purpose there was a basis for judicial review of the decision to implement the Covid-19 vaccination policy, any such review would be constrained or limited. As Davison J observed in the *Sharma* decision:¹⁷

... such a decision to refuse carriage will be lawful so long as it is not unreasonable in the sense that it is irrational, capricious, or unreasonable in the public law sense of being a decision that no reasonable decisionmaker could make.

[35] Air NZ has a reasonable discretion in fixing its conditions of carriage. As Mander J observed in *C & S Kelly Properties Ltd v Earthquake Commission*:¹⁸

... Commonwealth Courts are willing to intervene in the exercise of a prima facie unfettered discretion. Such intervention will ordinarily be premised on an implied term to constrain the exercise of the discretion so as to give effect to the reasonable expectations of the parties. The exercise of contractual discretion will be open to challenge where it can be established that it was not exercised honestly in good faith; or not exercised for the purpose(s) for which it was conferred; or when exercised in a capricious or arbitrary manner; or otherwise falls into the category of what would be considered *Wednesbury* unreasonableness.

[36] Mr Reihana's challenge as to the requirement for vaccination is based on his argument the policy and requirement was not scientifically justifiable. While the

¹⁵ *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056. The present circumstances can be distinguished from the judicial review in *Ririnui* as this is not a State Owned Enterprise.

¹⁶ Companies Act, s 128; and *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 (CA).

¹⁷ *Sharma v Air New Zealand*, above n 14, at [66].

¹⁸ *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [73].

Court cannot resolve any disputed factual issues on a strike out application such as this, there are a number of relevant matters of which there can be no dispute that confirm the reasonableness of Air NZ's actions. At the time Air NZ issued its Covid-19 vaccination policy on 3 October 2021, the New Zealand Government required persons entering New Zealand who were not citizens to be vaccinated. It cannot be said it was not open to Air NZ to consider it was necessary to require passengers to be vaccinated bearing in mind its obligations under the Health and Safety at Work Act 2015 and the Civil Aviation Act 1990 to passengers and staff.

[37] Further, Mr Reihana's challenge to the scientific reasonableness of the decision to require passengers to be vaccinated cannot stand beside the analysis in the cases of *Four Aviation Security Service Employees v Minister for COVID-19 Response*; *Four Midwives, NZDSOS Inc and NZTSOS Inc v Minister for COVID-19 Response*; *NZDSOS Incorporated v Minister for COVID-19 Response*; *Yardley v Minister for Workplace Relations and Safety*; and *Meng v Chief Executive, Ministry of Business, Innovation and Employment*.¹⁹

[38] As in *Meng v Chief Executive, Minister of Business, Innovation and Employment* Mr Reihana is asking the Court to examine and rule on the scientific validity and safety of the Covid-19 vaccinations, which is an exercise that goes well beyond the boundaries of judicial review.

[39] Despite Mr Reihana's subjective views as to the dangers associated with the vaccination, in the circumstances the 3 October decision to implement a vaccination policy cannot seriously be argued to have been irrational, capricious or unreasonable, in the public law sense, as would be required for the first cause of action to have any prospect of success.

[40] Next, the fact that the Covid-19 vaccination policy was kept under revision and later removed entirely at an appropriate time and in keeping with the change in the

¹⁹ *Four Aviation Security Service Employees v Minister for COVID-19 Response* [2021] NZHC 3012; *Four Midwives, NZDSOS Inc and NZTSOS Inc v Minister for COVID-19 Response* [2021] NZHC 3064; *NZDSOS Incorporated v Minister for COVID-19 Response* [2022] NZHC 716; *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291; and *Meng v Chief Executive, Ministry of Business, Innovation and Employment* [2022] NZHC 82.

New Zealand Government requirements also confirms the reasonableness of Air NZ's action in relation to the policy.

[41] Further, in any event, the principal relief sought under the JRPA cause of action is moot. The policy Mr Reihana complains of is no longer operative. It was revoked when circumstances changed. In fact, Air NZ had announced it would withdraw the policy before these proceedings were served on it.

[42] The claim under the JRPA is not justiciable. The pleaded facts do not disclose a cause of action which is reasonably arguable.

The second cause of action — NZBORA

[43] Section 3 of the NZBORA provides that it applies only to acts done by:

- (a) the legislative, executive or judicial branches of the Government of New Zealand; or
- (b) any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.

[44] Section 3(a) does not apply. Nor can it be reasonably argued that by providing for conditions of carriage Air NZ was acting in the performance of a public function, power or duty imposed by or pursuant to law as is required for s 3(b) of NZBORA to apply. In *Ransfield v Radio Network Ltd*, Randerson J considered the plaintiff's claim that their ban from participation in talkback radio programmes operated by The Radio Network Ltd was a breach of their rights under NZBORA. Randerson J accepted that it could arguably be said The Radio Network Ltd was performing a function or power conferred by law as it was operating pursuant to licences issued under the Radio Communications Act 1989, so that in that sense, the Radio Network Ltd was performing a function or power conferred by law. However, as the function was a

private one the NZBORA had no application to The Radio Network Ltd's conduct of talkback radio programmes.²⁰

[45] In the present case Air NZ operates pursuant to approvals under the Civil Aviation Act, but the focus of those regulatory approvals is on safety. The requirement to obtain such approvals in order to operate is very different to the situation of the commercial licences issued to The Radio Network Ltd.

[46] In any event, the function and business of carrying passengers is part of Air NZ's commercial operation and is a private function. As Randerson J went on to note in the *Ransfield* case:²¹

The primary focus of inquiry under s 3(b) is on the function, power, or duty rather than on the nature of the entity at issue. Nevertheless, the nature of the entity may be a relevant factor in determining whether the function, power, or duty being exercised is a public one for the purposes of s 3(b).

And:²²

... In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it "governmental" in nature or is it essentially of a private character?

[47] Randerson J then went on to identify a number of non-exclusive indicia relevant to determination of that fact:²³

- (a) The fact that the entity in question is performing a function which benefits the public is not determinative. If it were, anyone delivering goods or services to the public under licence or other authority conferred by law, would fall within the section. That could not have been intended.
- (b) Whether the function, power, or duty is carried out in public is immaterial. A public function, power, or duty under s 3(b) may be performed in private.
- ...
- (d) The primary focus of inquiry under s 3(b) is on the function, power, or duty rather than on the nature of the entity at issue. Nevertheless,

²⁰ *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC).

²¹ At [69(d)].

²² At [69(f)].

²³ At [69].

the nature of the entity may be a relevant factor in determining whether the function, power, or duty being exercised is a public one for the purposes of s 3(b).

...

- (f) Given the many and varied mechanisms modern governments utilise to carry out their diverse functions, no single test of universal application can be adopted to determine what is a public function, duty, or power under s 3(b). In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it “governmental” in nature or is it essentially of a private character?
- (g) Non-exclusive indicia may include:
- (i) whether the entity concerned is publicly owned or is privately owned and exists for private profit;
 - (ii) whether the source of the function, power, or duty is statutory;
 - (iii) the extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme);
 - (iv) whether and to what extent the entity is publicly funded in respect of the function in question;
 - (v) whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty;
 - (vi) whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public;
 - (vii) whether coercive powers analogous to those of the state are conferred;
 - (viii) whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person (drawing by analogy on part of the definition of statutory power under s 3 of the Judicature Amendment Act 1972);
 - (ix) whether the entity is exercising extensive or monopolistic powers; and
 - (x) whether the entity is democratically accountable through the ballot box or in other ways.

[48] Applying those indicia to the present case it is apparent that s 3(b) of NZBORA can have no application to Air NZ when it set its conditions for carriage and implemented the Covid-19 vaccination policy.

The third cause of action — negligence

[49] The proposed duty of care proposed by Mr Reihana in his third cause of action is, at best, properly described as novel.

[50] In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, the full Court of the Court of Appeal considered the principles to apply on a strike out where it was alleged a duty of care arose in a situation not clearly covered by existing authority.²⁴ Reasonable foreseeability of loss or harm, proximity between plaintiff and defendant and a balancing of any relevant policy considerations are all relevant considerations.²⁵

[51] Where the underlying relationship is a contractual one, the first inquiry when determining whether to apply a duty of care is particularly focused on the degree of proximity or relationship between the parties. The second stage involves wider policy considerations that may tend to negative or restrict the existence of the duty in a contractual setting.²⁶

[52] Mr Reihana's claim seems premised on the basis that the contractual terms offered by Air NZ, including the requirement at the time the passengers be vaccinated, were unfair contractual terms. There are however clear statutory regimes that govern fair contractual terms, such as the Fair Trading Act 1986. There can be no duty in tort to perform or enter a contract. A duty to take reasonable care in or while performing a contract is a different concept. In the present case, Air NZ had no duty to enter a contract or carriage with Mr Reihana.

[53] Next, a corporate entity choosing to offer terms of their contract under certain terms is not a harm. The lack of being offered a contract because Mr Reihana refused vaccination cannot be regarded as a harm.

²⁴ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

²⁵ *North Shore City Council v Attorney-General* [2012] NZSC 49.

²⁶ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

[54] Also the scope of the asserted duty is, as Mr Wilson submitted “incoherently broad”. It would be potentially owed to every intending passenger whether inside or outside New Zealand. Richardson J noted in *South Pacific* if the novel duty of care could not reasonably be confined it would lead to “unacceptably indeterminate consequences for the public interest”.²⁷ Also, the content would also apparently require some type of balancing of the various interests of passengers who might be disadvantaged by Air NZ’s terms of carriage or safety policies. Some vulnerable passengers would be at risk if unvaccinated passengers were travelling at a time Covid-19 was active.

[55] Finally, there are also strong policy considerations which would militate against any such duty. It would cut across Air NZ’s position as a private commercial enterprise and its statutory duties under the Civil Aviation Act and the Health and Safety at Work Act 2015.

[56] Although Mr Reihana emphasised that he had issued the proceedings at short notice, and relied on the comments of the Supreme Court in *Couch*,²⁸ as to the need for caution before striking out a novel cause of action this is not a case where the obvious defects in the pleadings could be addressed by an amended pleading. The defects are inherent in the claim.

[57] I accept the submissions by Air NZ that the duty alleged by Mr Reihana falls well short of the standards for a novel duty of care in tort.

The claim against Mr Foran

[58] The claim is against both Air NZ and Mr Foran. For the above reasons there is no basis for the claim against either Air NZ or Mr Foran. However, in Mr Foran’s case there are further relevant principles which support the strike out summary judgment.

[59] Mr Reihana’s complaint is directed at Air NZ’s conditions of carriage. The conditions of carriage are those of Air NZ, not Mr Foran’s. Mr Foran is not a director

²⁷ At 310.

²⁸ *Couch v Attorney-General*, above n 1.

of Air NZ. Mr Reihana suggested that his reference to s 137 of the Companies Act was simply to show that a duty of care could be owed but that is misapprehension on his part. Even if he was a director, any duty under s 137 of the Companies Act is owed to the company, not the shareholders or wider members of the public such as customers.²⁹

[60] Mr Foran could only come under a personal duty to Mr Reihana if he had assumed a duty of care, which would be dependent on assumption by Mr Foran of personal responsibility.³⁰ He has done nothing that could make him personally responsible for Air NZ's vaccination policy. There is no possible reason, or policy, consideration for imposing a separate duty of care on Mr Foran in this case.

Alternative grounds for strike out

[61] Apart from Mr Reihana's pleadings not disclosing a reasonably arguable cause of action and thus being amenable to strike out under HCR 15.1(a), r 15(1)(b) to (d) also apply. Mr Reihana's pleading is ill defined. The notice of opposition and the grounds in it are unfocused and Mr Reihana seeks to use the proceedings as a vehicle for him to pursue his subjective views about the failings and dangers of Covid-19 vaccination. To allow Mr Reihana to do so would be to allow an abuse of the Court's process.

Result

[62] For the above reasons each of Mr Reihana's causes of action against Air NZ and Mr Foran are struck out.

[63] The above reasoning would also support, if necessary, the entry of summary judgment for both defendants against Mr Reihana as there is no basis upon which the pleaded claims can succeed.

²⁹ Companies Act, s 169(3).

³⁰ *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

Costs

[64] The defendant is entitled to costs on a 2B basis for steps associated with the proceeding to date together with disbursements as fixed by the Registrar.

Venning J