IN THE COURT OF APPEAL OF NEW ZEALAND

CA646/2015
[2017] NZCA 196

BETWEEN	HELI-LOGGING LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) First Appellant
AND	MARK WAYNE FORD IN HIS CAPACITY AS TRUSTEE OF THE WESSEX TRUST Second Appellant
AND	MARK WAYNE FORD Third Appellant
AND	CIVIL AVIATION AUTHORITY OF NEW ZEALAND Respondent

Hearing:	27 September 2016
Court:	Winkelmann, Brewer and Toogood JJ
Counsel:	P J Dale and E Telle for Appellants L J Taylor QC and G M Richards for Respondent
Judgment:	22 May 2017 at 11 am

JUDGMENT OF THE COURT

A The application for further evidence to be adduced on appeal is granted.

B The appeal is allowed.

C The orders for summary judgment and costs are set aside.

D The proceeding is reinstated.

REASONS OF THE COURT

(Given by Toogood J)

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Introduction

[1] Helicopter logging, or heli-logging, involves the extraction of felled trees from forests by lifting them with cables attached to helicopters. In July 2004 the appellants sought exemptions from the Civil Aviation Authority of New Zealand (the CAA) to enable them to use former military aircraft, Wessex Mk 2 helicopters, for the first appellant's heli-logging business.[1] The exemptions related to prohibitions on the use of certain helicopters to carry external loads and the use of aircraft subject to an experimental airworthiness certificate for hire and reward.

[2] In 2005 the Director of the CAA declined to provide the exemptions. In 2014 Helilogging commenced the present proceeding against the CAA seeking damages

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[1] In this judgment we use "Helilogging" to refer principally to the first appellant company but also, collectively, to its principal, Mr Ford, in both his personal capacity and as a trustee of the Wessex Trust which owned one of the helicopters.

for losses said to have been sustained as a result of the Director's decision to decline the exemptions. Helilogging claims in tort and alleges deceit, misfeasance in public office and negligent misstatement. The proceeding was issued well outside the six-year period under s 4(1)(a) of the Limitation Act 1950 within which the claims were required to be brought.[2] Relying on s 28 of the Limitation Act, Helilogging alleged that the limitation period was postponed because the CAA deliberately and fraudulently concealed important information relating to the Director's decision to decline the exemption petitions, and that such information had only recently become available to Helilogging.

[3] The CAA applied for summary judgment and alternatively for strike-out, relying in part upon the limitation argument under s 4(1)(a). In October 2015 Associate Judge Osborne granted the CAA summary judgment on its application.[3] The Associate Judge held that some essential elements of the causes of action could not be established. He also accepted that there was insufficient evidence to support an inference of fraud on the part of the CAA, so the claims were in any event time-barred by the Limitation Act. Helilogging now appeals against that judgment.

[4] As it developed on appeal to this Court, the essence of the claim Helilogging wishes to pursue in the High Court was put in this way:

a) After giving Helilogging reason to believe the exemptions would be granted, the CAA changed its mind for undisclosed reasons which could not reasonably justify a decision to decline.

b) The CAA acted in bad faith by:

(i) failing to follow an agreed seven-stage procedure for considering and granting the exemptions;

(ii) withholding from Helilogging relevant information which supported the granting of the exemptions, and misleading

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2 Limitation Act 2010, s 59: the proceeding is one in which the causes of action are based on acts or omissions alleged to have occurred before 1 January 2011.

3 *Helilogging Ltd (in rec and liq) v Civil Aviation Authority of New Zealand* [2015] NZHC 2503.

Helilogging about the opinions held by CAA advisers and officials; and

(iii) the Director falsely representing his opinion about whether the exemptions should be granted and misleading Helilogging about the reasons for his decision to decline them.

[5] Helilogging acknowledges that the case it wishes to pursue has undergone a significant change of emphasis since it was argued before the Associate Judge. It says that summary judgment should not have been granted on the material before the Associate Judge and that when regard is had to new evidence adduced on appeal, that argument is stronger still. The judgment should be set aside.

The question for determination on appeal

[6] The principles relating to summary judgment applications by defendants are well settled. The defendant has the onus of satisfying the Court that none of the causes of action in a statement of claim can succeed.[4] A similar onus falls on a defendant applying for strike-out of a plaintiff's claim. Summary judgment will be inappropriate where there are disputed issues of material fact or where material facts cannot confidently be adduced from the affidavits.[5]

[7] As we come to, we consider that the question for determination is whether, in light of Helilogging's reformulation of its claim and the new evidence, the CAA has shown that none of the causes of action can succeed. In sum, we do not consider that standard has been met.

The background facts

[8] What occurred between the time Helilogging's principal, Mr Mark Ford, first promoted the use of ex-military Wessex helicopters by Helilogging and the issuing of the High Court proceeding in 2014 is not much in dispute. But there is a serious

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4 High Court Rules, r 12.2(2); and *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58].

5 *Westpac Banking Corp v M M Kembla New Zealand Ltd*, above n 4, at [62].

contest between the parties about whether the CAA acted in good faith, about the merits of the opinions expressed by the Director and his advisers, and about whether those opinions were genuinely held.

[9] In order to understand Helilogging's allegations and arguments in support of the appeal, and our decision to allow it, it is necessary to understand something of the complex factual background, the reasons given for the Director's decision to decline the exemption applications and how Helilogging's allegations of fraudulent conduct arise.

Proposal to use ex-military Wessex helicopters for heli-logging

[10] Mr Ford has conducted heli-logging operations in New Zealand using single-engine helicopters with the approval of the CAA since the late 1980s. He is a director of the first appellant, Heli-logging Ltd, and sues also as the second appellant in his capacity as the trustee of the Wessex Trust, and again in a personal capacity as the third appellant.

[11] In or around early 2000 Mr Ford became aware that another heli-logging operator, Metro Air Limited (Metro) had imported a twin-engine Wessex Mk 5 helicopter into New Zealand for heli-logging purposes. Mr Ford investigated the possibility of using Wessex helicopters for his own operations and concluded that the helicopters were highly regarded, safe, and capable of lifting much bigger loads than the single-engine helicopters he had used previously.

[12] In 2002 after consultation with the CAA and other experts about the use of Wessex helicopters, Helilogging prepared a proposal for a heli-logging operation that employed Wessex Mk 2 helicopters for the external, repetitive heavy lifting of loads of felled logs. New Zealand Civil Aviation Rules, however, imposed an external load prohibition on the Wessex Mk 2. This meant that Helilogging would need to obtain an exemption from the prohibition in order for its proposal to receive CAA approval. In the view of the CAA, Helilogging would also require an exemption from the provisions of the New Zealand Civil Aviation Rules which prevented aircraft subject to an experimental airworthiness certificate from being used for hire and reward. The CAA and Helilogging accordingly became engaged in discussions

about the specific testing, maintenance, programmes and manuals that would be necessary for the exemptions to be granted.

Alleged encouragement from the CAA

[13] In his affidavit filed in opposition to the CAA's application for summary judgment or strike-out, Mr Ford says that CAA officials agreed that the external load prohibition which had been placed on Wessex Mk 5 and Wessex Mk 2 helicopters would be lifted if three conditions were satisfied, namely:

a) support obtained from the manufacturer of the aircraft, Westland GKN Aerospace;

b) maintenance programmes specific to the operation being put in place; and

c) testing for and putting in place an operations manual containing all necessary operational practices and specifications for heli-logging with the Wessex Mk 2 helicopter in New Zealand.

[14] We note that Mr Ford's assertion that there was an agreement that the CAA would approve the project if those conditions were met is not accepted by the CAA. The CAA says that it took the position at the outset, and subsequently, that it did not give any guarantees that the proposal would be approved.

[15] In February 2003 Helilogging purchased two Wessex Mk 2 helicopters for around $2,860,000. Its discussions with the CAA continued through 2003 and into the first half of 2004. Although it appears that Helilogging initially found the progress of the discussions encouraging, by May 2004 it started to become frustrated over what it perceived to be unexpected delays and changes in attitude from the CAA.

Petitions for exemption

[16] In the second half of 2004 Helilogging filed two petitions for exemption under s 37 of the Civil Aviation Act 1990, either one of which would have enabled the company to carry out its proposed heli-logging operations. Importantly for the purposes of this case, s 37(2) required the Director to be satisfied, before granting an exemption, not only that one of the four qualifying criteria in paragraphs (a)–(d) of subs (2) was met, but also "that the risk to safety will not be significantly increased by the granting of the exemption". It does not appear to be disputed that, even if the qualifying conditions for the granting of an exemption were met, the Director retained a broad discretion under s 37(1) to decline to grant the exemption.

[17] Helilogging relies on an internal memorandum from a senior CAA official, Mr Gill, to the Director noting that after "discussions and encouragement from the CAA" Helilogging had satisfied "quite stringent criteria on all three" of the aspects of maintenance, operations and airworthiness referred to above. Mr Gill expressed the view that the CAA should never have started the process of allowing a non-certificated aircraft to be used for commercial operations, but continued "[h]owever now the CAA has allowed the trials and investigations to go so far and [Helilogging] has committed a substantial sum of money, it would be very difficult to refuse the application except on purely technical grounds". Helilogging says this is evidence that the CAA was conscious of having encouraged it to pursue its application for exemption at considerable cost, and of a perception within the CAA that it was backed into a corner.

Judicial review and the seven-stage process

[18] Mr Gill's views did not produce a prompt decision and Helilogging's frustration led the company to begin judicial review proceedings against the CAA in or around November 2004. In response to the litigation process, the Director provided by affidavit a seven-stage process through which he considered the matters

could be expeditiously resolved.[6] Helilogging accepted this process, which was as follows:

a) the Director's technical advisors would produce a written report and briefing on issues relating to ex-military helicopters;

b) the Director would write to Helilogging requesting any further information;

c) the Director's technical advisors would provide a written report based on the information Helilogging provided at stage (b);

d) the Director would consider the report and make a preliminary decision;

e) the preliminary decision would be provided to Helilogging for comment;

f) the Director would receive and consider the comments made by Helilogging, with technical advice as needed; and

g) the Director would make a final decision.

[19] The CAA and the Director commenced this process before Christmas 2004, with the Director appointing Mr John Fogden, CAA's Manager of Rotary Wing and Agricultural Operations, to manage the matter. To complete the first stage (steps (a) through to (e)), Mr Fogden provided the Director with a written report on 10 May 2005 which contained the preliminary recommendation that the applications be declined.

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6 MacKenzie J adjourned the judicial review proceedings by consent on 16 December 2004: *Helilogging Ltd v Civil Aviation Authority of New Zealand* HC Wellington CIV-2004-485-2558, 16 December 2004.

Involvement of Mr Barclay for Helilogging

[20] For the second and third stages (steps (f) and (g)), Helilogging's expert, Mr Jim Barclay, made a PowerPoint presentation to CAA officials on 13 June 2005 and produced a report that was provided to the Director on 20 June 2005 (the Barclay report). A key element of the Barclay report was a submission that the majority of the tasks which Helilogging proposed to undertake using the Wessex Mk 2 involved the company's use of the helicopters to lift the company's own logs, so they were not tasks to be carried out for hire or reward. Mr Barclay suggested that acceptance of that submission would provide a procedural pathway for approval.

[21] In the report Mr Barclay informed the CAA that his company, Aaleda Systems Ltd, would "have a management support contract to introduce the Wessex aircraft into operation, and support that operation for two years" and would be drawing on the expertise of a Mr Bernie Lewis.

The Lewis letter

[22] In 2005 Mr Lewis was in his mid-seventies and was a very experienced and respected helicopter test pilot who had been involved in early Wessex development work in the United Kingdom. He had also worked at the CAA some years earlier and was acquainted with Mr Barclay from that time. Mr Lewis had been re-engaged by the CAA in April 2005 to work on a project reviewing the rules on agricultural aircraft overloading. It appears that, on 19 May 2005, Mr Lewis had called on Mr Barclay to discuss with him a draft of the Barclay report which had been given to Mr Lewis by the CAA. Mr Barclay reported to Mr Ford that Mr Lewis had described the draft report as "superb".[7]

[23] At the CAA's request, Mr Lewis set out his views in a letter dated 23 July 2005 and headed "Westland Wessex Mark 2" (the Lewis letter) which he sent to the Director. The version of the Lewis letter received by the Director was typed

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[7] In two affidavits sworn and filed on behalf of the CAA in support of the summary judgment and strike-out applications, Mr Lewis denied he had expressed support for Helilogging's applications and said that he was concerned about the use of the Wessex helicopter for heli-logging.

and had no handwritten alterations. It discussed Mr Lewis' experiences flying the Wessex "Mk 52" helicopter. These experiences were all, on the face of it, a long time ago — it would seem in the vicinity of 40 years. In clear contrast to the impression Mr Lewis had given Mr Barclay at the time of their meeting, Mr Lewis said he had grave doubts about the viability of the Wessex helicopter for the tasks intended by Helilogging.

The Fogden report and the Director's decision

[24] On 9 August 2005 Mr Fogden presented to the Director a document entitled "Final report: Heli-logging Limited's Proposal and Exemption Applications". In the report, Mr Fogden reviewed material which included the Barclay report and the Lewis letter. Mr Fogden said he placed great weight on Mr Lewis' views about the Wessex aircraft and suggested that the Director could not be satisfied that the "risk to safety would not be significantly increased".[8] Mr Fogden recommended that the Director decline both applications for exemption.

[25] On 19 August 2005, the Director sent to Helilogging by facsimile a letter (the Director's decision) recording the reasons for his final decision to decline the applications. Those reasons included acceptance of Mr Fogden's assessment of the issues and his recommendations. The Director noted the requirements of s 37 of the Civil Aviation Act and said that he did not consider that the circumstances of the case could be considered to meet any of the enumerated conditions in paragraphs (a)–(d) of s 37(2). He also said he was not satisfied that the risk to safety would not be significantly increased by granting the exemption to permit the Westland Wessex helicopter to be used as proposed, referring among other things to the information received from Mr Lewis.

Alterations to the Lewis letter

[26] It is common ground that, when Helilogging was provided with a copy of the Lewis letter with the Director's decision, the letter contained two handwritten alterations:

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[8] The "risk to safety" quotation is a reference to the qualifying requirement in s 37(2) of the Civil Aviation Act 1990.

a) the reference to Mr Lewis flying the "Mk 52" had the numeral 5 crossed out, so that it appeared to read "Mk 2"; and

b) the word "viability" in the penultimate paragraph was crossed out and replaced with the handwritten word "safety".

When, how and by whom the handwritten changes were made; their significance; and when Helilogging became aware of that significance are issues in dispute between the parties.

Events between 2005 and 2007

[27] Reviewing the Director's decision to decline the exemption petitions, Helilogging identified what it regarded as significant errors in the information relied upon by the Director. In particular it considered that advice provided to the CAA by Mr Lewis was ill-founded, based on out-of-date information and experience, and wrong. Nevertheless, the adjourned judicial review proceedings were discontinued in September 2005 and Helilogging attempted by other means to either force or persuade the Director to change his decision. The efforts were unsuccessful.

[28] In October 2006, Helilogging was placed in receivership by its financiers. Apparently considering that there was little prospect of the exemptions being granted, the financiers declined to authorise fresh judicial review proceedings challenging the CAA's decision.

The High Court proceeding

[29] Helilogging commenced its proceedings against the CAA in tort in September 2014. At the time of summary judgment, Helilogging's first amended statement of claim included three causes of action: deceit, misfeasance in public office and negligent misstatement. It is not necessary here to detail the particulars of each cause of action; they are fully described in the Associate Judge's decision.[9] It is

[9] *Helilogging Ltd (in rec and liq) v Civil Aviation Authority of New Zealand*, above n 3, at [72]–[106].

sufficient for the purposes of this appeal to summarise briefly Helilogging's main allegations as they stood at the time of the High Court proceedings:

a) For the deceit claim, Helilogging says the CAA deliberately and fraudulently provided it, in August 2005, with a version of the Lewis letter containing the two alterations. As a consequence, Helilogging was unable to appreciate that it had grounds to mount a legal challenge to the CAA's decision and it did not do so.

b) For the misfeasance in public office claim, Helilogging says the Director, as a public officer, acted unlawfully in breaching the seven-stage process in a number of ways, including by failing to make the Lewis letter available to Helilogging before the final decision; instigating material alterations to the Lewis letter; withholding a copy of the original Lewis letter; and breaching a fiduciary duty.

c) For the negligent misstatement claim, Helilogging says the Director negligently provided the altered Lewis letter to Helilogging and did not comply with the seven-stage process. It is also alleged that Helilogging was misled because it believed Mr Lewis was referring in his letter to a Mk 2 helicopter, not the materially different Mk 52 helicopter.

[30] Helilogging sought damages for the loss of a chance (to pursue judicial review proceedings), loss of profits, general damages, exemplary damages, interest and costs.

The High Court decision

[31] Associate Judge Osborne discussed in detail the events subsequent to the decision to decline.[10] He found it was beyond argument that between late-2005 and 2006 Helilogging had identified and considered grounds upon which to pursue

[10] At [25]–[65].

judicial review proceedings in relation to the Director's decision to decline the applications for exemptions.[11] The grounds were:[12]

a) Breach of natural justice because the CAA failed to provide the Lewis letter to Helilogging before the Director's decision was reached.

b) The Director predetermined the application.

c) The Director had regard to irrelevant material (namely, Mr Lewis' outdated experience of Wessex helicopters).

d) The Director failed to have proper regard to relevant material in the form of Mr Barclay's evidence.

[32] The Associate Judge, however, found that the reason Helilogging did not pursue any judicial review claims was because its financiers, in March 2007, terminated a funding agreement established for the purpose of judicial review proceedings.[13]

[33] After setting out the principles to be applied in a defendant's summary judgment application, the Associate Judge noted that whether Helilogging's causes of action were statute-barred fell to be determined under the Limitation Act 1950, because the claims were based on acts or omissions which occurred before 1 January 2011. He held that, because the claims were in tort, the applicable limitation period was six years from the date on which the cause of action accrued, unless Helilogging could show it was arguable that the limitation period was postponed by reason of Helilogging's cause of action being concealed by the CAA's fraud, or unknown because of mistake.

[34] The Associate Judge then considered each cause of action:

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11 At [63].
12 At [63].
13 At [65].

a) For the deceit claim, he concluded that it must fail because Helilogging was unable to point to any material reliance on the representation that Mr Lewis had flown a Wessex Mk 2 rather than a Wessex Mk 52.[14] In respect of the "viability/safety" alteration, he considered that this alteration was plain to see and was authorised by Mr Lewis. That meant Helilogging could not point to any misrepresentation.[15]

b) The Associate Judge also found there was no causal connection between any deceit and the loss. This was because of his finding that the judicial review proceedings proposed in 2006 were not pursued because the funding agreement was cancelled.[16]

c) For the negligent misstatement claim, the Associate Judge applied his analysis from the deceit claim and reached the same conclusion.[17]

d) The misfeasance in public office claim was held to be time-barred in respect of the alleged breaches of the seven-stage process.[18]

[35] Associate Judge Osborne accordingly found that no cause of action could be established. Because of his conclusion that Helilogging would not be able to prove an entitlement to damages on the basis of its stated causes of action, the Associate Judge did not consider it necessary to rule on the CAA's argument that the plaintiffs could not establish fraudulent activity on the part of the CAA, but accepted that "there is a distinct lack of evidence to support an inference of fraud".[19] He granted the CAA summary judgment.

Applications to adduce further evidence

[36] Helilogging applied for leave to file additional evidence on appeal. The CAA abides the Court's decision as to the admission of this evidence. The evidence

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14 At [124].
15 At [124].
16 At [119].
17 At [126]–[127].
18 At [128]–[150].
19 At [121].

consists of an affidavit from Mr Ronald Potts, an aircraft engineer, who was the licensed aircraft maintenance engineer recognised by the CAA for the Wessex Mk 5. His evidence is to the effect that he flew with Mr Lewis in the Mk 5 on several occasions in the late 1990s and was aware that Mr Lewis flew the aircraft many times around that time period. Mr Lewis did not, at any time, mention concerns regarding the vibration or otherwise. Mr Potts said that as the licensed engineer for the craft he would have been informed of any concerns immediately, and also that Mr Lewis was required to pass those concerns on.

[37] Mr Potts says that he was involved in the investigation of the 2001 crash of a Mk 5 being used for heli-logging. He says the CAA report into the crash makes no mention of a vibration problem. His understanding was that the crash was caused by loss of power to one engine, possibly because the helicopter was low on fuel.

[38] Finally, Mr Potts provides information that around 1999 Mr Lewis was providing accreditation flights for pilots wanting to become accredited to fly the Mk 5. He had no authority from the CAA to do this and was required to stop. Mr Potts says that the CAA took no further action against Mr Lewis although it was a relatively serious breach.

[39] For Helilogging, Mr Dale says that this evidence is cogent. Why he asks would Mr Lewis offer this opinion when the evidence suggests that it did not truly reflect his experience of the helicopter? He adds this to Mr Lewis' failure to mention any concerns about vibration when he had his friendly chat with Mr Barclay.

[40] As to whether the evidence is fresh, Mr Potts explains he was working in Australia and few people knew of his whereabouts. He now understands that Mr Ford made attempts to contact him but those were only successful on his return to New Zealand. Mr Ford confirms the attempts he made to contact Mr Potts.

[41] We accept that this evidence is fresh in the sense it could not have with reasonable diligence have been obtained for use in the Court below. We also consider it cogent and credible. The content of Mr Lewis' report, what it does and does not say, and the circumstances in which it was procured are critical to

Helilogging's case. It is clearly relevant that Mr Lewis had recent experience of the aircraft, of which he made no mention. It is also relevant that this appears to have been positive experience and that it could be inferred the CAA was aware of this. We grant leave to adduce this evidence.

[42] We also record that following the hearing the Director sought and was granted leave to file additional evidence. This consisted of an affidavit from another of their experts, Mr Paul Jones. Mr Jones provided evidence to corroborate Mr Lewis' evidence that there was no material difference between a Mk 2 and a Mk 52 at the time Mr Lewis flew the Mk 52. This new affidavit corrects factual errors in an affidavit filed in the High Court, including clarifying that Mr Jones does not hold qualifications he claimed to hold.

The applicable law

[43] Section 4(1)(a) of the Limitation Act 1950 provides that actions founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. Section 28, however, suspends the start of the period of limitation in certain cases where a claim is based on the fraud of the defendant, or when a right of action has been concealed by fraud:

> **28 Postponement of limitation period in case of fraud or mistake**
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> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
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> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
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> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
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> (c) the action is for relief from the consequences of a mistake,—
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> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
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> ….

[44] In considering what the CAA must do to satisfy the Court that Helilogging's causes of action should be struck out on the grounds that they are statute-barred, we apply the observations of Tipping J in *Murray v Morel & Co Ltd.*[20] *Murray* was a case which concerned, like this one, what a plaintiff must do to resist the striking out of a claim that, subject to matters of postponement and extension, is clearly statute-barred.

[45] Tipping J delivered the principal judgment for the Supreme Court, with the other members of the Court approving his reasoning on the approach to be taken to a strike-out claim by a defendant where a plaintiff relies on s 28. The Judge said:

> [33] I consider the proper approach ... is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.
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> [34] In the end the Judge must assess whether, in such a case, the plaintiff has presented enough by way of pleadings and particulars (and evidence, if the plaintiff elects to produce evidence), to persuade the Court that what might have looked like a claim which was clearly subject to a statute bar is not, after all, to be viewed in that way, because of a fairly arguable claim for extension or postponement. If the plaintiff demonstrates that to be so, the Court cannot say that the plaintiff's claim is frivolous, vexatious or an abuse of process. The plaintiff must, however, produce something by way of pleadings, particulars and, if so advised, evidence, in order to give an air of reality to the contention that the plaintiff is entitled to an extension or postponement which will bring the claim back within time. A plaintiff cannot, as in this case, simply make an unsupported assertion in submissions that s 28 applies. A pleading of fraud should, of course, be made only if it is responsible to do so.

The nature of the fraud alleged in this case

[46] Both s 28(1)(a) and (b) are relied upon by Helilogging.

[47] Although Mr Dale for Helilogging did not abandon his reliance on what he says are the misleading alterations to the Lewis letter, his argument on appeal focussed principally on what is alleged to have been the wilful non-disclosure by the

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[20] *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33]–[34].

CAA of Mr Lewis' recent positive experience flying the aircraft and, in particular, its failure to disclose a report written by Mr Lewis for the CAA in 1999 (the 1999 report) — the existence of which was not disclosed to Helilogging until it was attached to the second affidavit sworn by Mr Lewis in March 2015. In his first affidavit Mr Lewis said that he had flown a Wessex Mk 2 helicopter then owned by Metro and operated by Mr Bruce O'Malley and "completed a report which went to the CAA so that it was certified and authorised to fly in New Zealand". But there had been no reference in the Lewis letter to recent experience with the helicopter or to the 1999 report.

[48] In his second affidavit Mr Lewis clarifies that the aircraft concerned was in fact a Wessex Mk 5 aircraft and he referred to the wrong registration number of the aircraft. The correct registration was "ZK-HVK".

[49] Helilogging says the Wessex Mk 5 ZK-HVK was not materially different from the Wessex Mk 2 ZK-HBE for which it was seeking the exemptions. In the 1999 report, Mr Lewis praised the Mk 5 helicopter and recommended that the CAA certify it for airworthiness. It is submitted that Mr Lewis' opinions in the 1999 report are inconsistent with the opinions expressed in the Lewis letter only six years later, that it should have been disclosed and that it was deliberately concealed.

[50] The Wessex helicopter ZK-HVK which was certified by Mr Lewis in 1999 as airworthy, crashed on 12 February 2001 while being flown by Mr O'Malley as part of a heli-logging operation. Tragically, Mr O'Malley was killed in the accident. This is the crash referred to by Mr Potts in his affidavit filed in this appeal.

[51] The change in the emphasis of Helilogging's argument is captured by the proposed amendments to its pleadings on the claims of deceit and misfeasance in public office. It now seeks to plead as follows:

> The defendant fraudulently withheld disclosure of a report prepared by Mr Lewis dated 12 January 1999 and in which Mr Lewis stated that, *"The Wessex (single and twin engine variance) is a well proven helicopter that has operated successfully around the world in a service and civilian capacity. It has operated within the Queen's flights in excess of 30 years in a proven reliability.*"

> The [CAA] acted fraudulently and without any honest belief and [sic] in the accuracy or truth of the statement represented in its letter of 19 August 2005 that the appellants' exemption applications were declined because the director was *"not satisfied that the risks to aviation safety would not be significantly increased by granting an exemption"* and further that *"I consider it inappropriate to grant an exemption for safety policy reasons"* when the defendant was aware that its expert Mr Lewis had in his report dated 12 January 1999 confirmed that the Wessex was safe.
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> Mr Lewis on behalf of the respondent fraudulently and without any honest belief represented that his 23 July 2005 report was based on "40 year old experience" and "40 year old fact" when the true position was that he had flown the Wessex in 1999 and confirmed that it was safe.
>
> (Footnote omitted.)

[52] The actions Helilogging relies upon for its alternative arguments under s 28(a) and (b) respectively, were identified by Mr Dale in his written and oral submissions as these:

a) False representations that Mr Lewis was acting as an independent expert when providing the Lewis letter in 2005.

b) Mr Lewis did not genuinely hold grave doubts about the safety of the Wessex Mk 2 helicopter for use in heli-logging, given his approval of the issue of an Airworthiness Certificate for the Metro Wessex Mk 5 in 1999 (that aircraft being identical to the Wessex Mk 2 for all material purposes) and by his enthusiastic reaction to Mr Barclay's draft report in 2005.

c) Mr Lewis made a false assertion about the circumstances in which he requested the alteration in the Lewis letter of the word "viable" to "safety".

d) The Director decided deliberately not to refer to the 1999 report in giving his reasons for refusing the exemptions, because it was inconsistent with the conclusions the Director wished to express for other reasons.

e) The Director made a deliberately false representation that Mr Lewis was referring in the Lewis letter to a Wessex Mk 2 helicopter rather than a Wessex Mk 52 helicopter.

f) In 2005 the CAA knew that Mr Lewis had reported favourably on the Wessex Mk 5.

[53] Mr Dale argues that Helilogging has been prejudiced by the Director's fraud. If Helilogging had been aware of the true position in 2005, it would have pursued judicial review proceedings based on the failure of the Director to comply with the seven-stage process for addressing the exemption applications, and would also have been in a position to issue the tort claims asserting the three causes of action which it has now identified.

The CAA's response to these allegations

[54] Mr Taylor QC for the CAA argues that, at best, Helilogging's claims are merely challenges to the Director's opinion dressed up as allegations of fraud but more suitable to judicial review. He submits:

a) Each of Helilogging's claims is clearly statute-barred. All material facts were either known by Helilogging around 2005 or 2006, were reasonably discoverable, or do not support any allegation of fraudulent concealment so as to engage s 28(a) or (b) of the Limitation Act 1950.

b) There is no credible basis for Helilogging's allegations of fraud.

c) The High Court's conclusions on Helilogging's causes of action were correct and should be upheld by this Court.

[55] In response to the allegations about Mr Lewis and the deliberate withholding of relevant information by the Director, the CAA says, among other things:

a) The intention to use the helicopter for external load carrying, which is said to have caused the fatal crash in 2001, was not disclosed to the CAA by Metro in 1999 and was not considered by Mr Lewis in his certification investigation.

b) The 1999 report related only to the general airworthiness of the aircraft. It was not prepared in consideration of the entirely different purpose of its suitability for use for repeated high loads; ie for external use in heli-logging activities.

c) The concerns about the use of the Wessex Mk 2 for heli-logging expressed in Lewis letter in 2005 were not confined to the vibration issue. Mr Fogden advised the Director that Mr Lewis' "most important point" was a concern about the adequacy of the fuel control system in the aircraft's engine and its ability to withstand the rigours of repetitive heavy lifting. These views were known to Helilogging in 2005.

d) The prominence given to the alleged failure of the Director to disclose the 1999 report and the other omissions related to Mr Lewis' involvement in the decision-making, over-emphasises the significance of Mr Lewis' views in the Director's decision-making.

e) Compliance with the CAA's international obligations required the existence of a National Airworthiness Authority (NAA) to issue a Type Certificate for the aircraft, and the lack of information and expertise relating to the Wessex helicopter within the CAA would prevent it from carrying out that role.

Discussion and conclusion

[56] Because of the cogency of the new evidence, we have to look afresh at the issue of whether the causes of action were "so clearly statute-barred that the

[Helilogging's claims] can properly be regarded as frivolous, vexatious or an abuse of process".[21]

[57] We cannot say that this threshold is met in respect of the claims as it is proposed they be formulated. The material now before the Court raises questions as to the circumstances in which Mr Lewis was instructed to provide his report, the failure to disclose Mr Lewis' earlier experience with the Mk 5, and the failure to disclose the 1999 report. Factual issues have been raised by this new material, which Helilogging should be able to pursue through discovery processes. These are factual issues which are also relevant to the causes of action as pleaded. As Mr Dale emphasised, further inquiry is necessary to understand the nature and therefore the relevance of Mr Lewis' experience with the Metro helicopter and, in particular, his discussions with Mr Potts and the late Mr O'Malley. Further information is required as to what knowledge there was within the CAA of Mr Lewis' more recent involvement with the helicopter. Attempts by Helilogging to obtain information in connection with the helicopter crash were shut down on the basis of privacy considerations.

[58] Mr Dale made the point that none of his expert witnesses has commented on the significance of the 1999 report in the context of Helilogging's applications for exemption. He submitted that there are general issues about the suitability of ex-military helicopters, principally designed to carry internal loads, for the carrying of external loads in the manner required by heli-logging operations. Technical questions about the similarity or otherwise of the Mk 2 and Mk 5 aircraft require further investigation.

[59] We are satisfied that at this point Helilogging has pointed to sufficient material to give an air of reality to its claim for postponement of the limitation date. Mr Dale frankly acknowledged that Helilogging may find after further discovery and inquiry that its case is no stronger than that which it presented to the Associate Judge in the High Court. If that is the case, then reference to the Associate Judge's analysis may be instructive.

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[21] *Murray v Morel & Co Ltd*, above n 20, at [33].

[60] We have considered whether Helilogging's allegations, as they are now presented to us, take the basis for any claim against the CAA beyond judicial review and into the area of arguable tortious liability. The allegation that a senior public servant such as the Director has deliberately withheld the existence of relevant information and wilfully misrepresented his true opinion on a matter for statutory decision is a serious allegation of its kind. But, as we have observed, the case as presented in this Court is quite different to that argued before the Associate Judge. Accordingly we did not hear full argument on the reasoning of the High Court on the merits of the intended causes of action. We observe, however, that neither counsel suggested that Associate Judge Osborne was wrong in his careful analysis of the matters which Helilogging will be required to be prove to succeed with its claims in tort.

[61] We note that the CAA placed significant reliance upon the finding of the Associate Judge that Helilogging could not show material reliance or loss because the earlier judicial review claims were discontinued because funding for them was withdrawn by the receivers.

[62] We do not see that point as inevitably fatal to Helilogging's claim. The material which Helilogging says was withheld may well have been material to the receiver's assessment of whether to fund that claim. This is a factual issue more appropriate for trial than summary judgment.

[63] We record that we have not decided that there is merit in the claims as articulated in this Court, which involve an allegation that the Director acted in bad faith in reaching his 2005 decision. It is important to record that the Director has not had an adequate opportunity to respond to an assertion which, if true, has serious implications for a senior public official.

Result

[64] The application for further evidence to be adduced on appeal is granted and the appeal is allowed.

[65] The orders for summary judgment and costs are set aside. The proceeding is reinstated. It will be for the High Court to make such orders as may be necessary to get the proceeding back on track, including orders requiring re-pleading of the claim, and re-addressing the issue of costs in that Court if costs are sought.

Costs

[66] Counsel agreed at the hearing that costs in this Court should normally follow the event and be approached on a standard basis. However, given that the arguments which we have found to justify allowing the appeal were not expressed in the same way before the High Court, and were refined only in the reply submissions for Helilogging, we consider that the decision to allow the appeal does not fully reflect the merits of the respective positions taken by the parties on appeal. In the circumstances, we conclude that Helilogging has succeeded but by reason of the indulgence that it has been able to argue a case differently from the basis on which it was put to the High Court. In those circumstances, costs should lie where they fall and we make no costs order.

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