

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT**

BEFORE:

**The Rt. Hon Sir John Chadwick, President
The Hon. Elliott Mottley, Justice of Appeal
The Right Hon. Sir Anthony Campbell, Justice of Appeal**

C.I.C.A. (Civil) CACV011/2013(G0056/2012)

BETWEEN

CIVIL AVIATION AUTHORITY OF THE CAYMAN ISLANDS

Appellant/Defendant

-and-

AXIS INTERNATIONAL LIMITED

Respondent/ Plaintiff/

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**C.I.C.A. (Civil) CACV012/2013
(G0056/2012)**

CAYMAN ISLANDS HELICOPTERS LIMITED

Appellant/Defendant

CIVIL AVIATION AUTHORITY OF THE CAYMAN ISLANDS

Appellant/Defendant

-and-

AXIS INTERNATIONAL LIMITED

Respondent/Plaintiff

Mr Richard Keen Q.C. and Ms. Reshma Sharma, Senior Crown Counsel, for the Appellant, Civil Aviation Authority of the Cayman Islands in both appeals. Mr Tom Lowe Q.C. with Mr George Giglioli of Giglioli and Company for the Appellant, Cayman Islands Helicopters Limited, in appeal 12/2013. Mr Philip Brook Smith Q.C. with Ms. Kirsten Houghton of Campbells for the Respondent, Axis International Limited, in both appeals.

Hearing: 18 and 19 November 2013
Judgment delivered: 26 March 2014

JUDGMENT

Sir Anthony Campbell J.A.

Introduction:

1. For the past ten years Cayman Islands Helicopters Limited (“Helicopters”) has operated from the private aviation terminal at Owen Roberts Airport in Grand Cayman.
2. Sight- seeing flights for visitors to the Island, especially those coming ashore from cruise ships lying off George Town, have formed an important part of the business of Helicopters.
3. In order to increase this trade Helicopters began to look for a site for an additional helipad that would be nearer than the airport to the area where passengers from cruise ships come ashore. It would be more convenient for visitors who have already booked a flight and with the helicopter in a more conspicuous position it was hoped that more visitors would be encouraged to take a flight. Eventually a site was identified off North Church Street in George Town that would meet these needs.
4. Helicopters applied for planning permission for the site and, subject to certain conditions, this was granted by the Central Planning Authority on 20 September 2010. The refusal of the Planning Appeals Tribunal to extend the time for an appeal against this decision is the subject of other proceedings for judicial review.
5. In addition to the grant of planning permission and the issue by the Central Planning Authority of a certificate of fitness for occupancy on 28 June 2011, Helicopters required an aerodrome certificate from the Civil Aviation Authority of the Cayman Islands (“the Authority”) before it could operate from the site. It was mid February 2011 before a formal application was made to the Authority for a certificate, though steps had already been taken by the Authority to evaluate the site in order to assess if it was likely to meet the requirements for an aerodrome certificate.
6. On 10 November 2011 the Authority granted Helicopters a certificate to operate the aerodrome subject to a number of operational limits. These included the helicopter being a Eurocopter AS-350 B2 with an overall length of 12.94m; the pilot in command having at least 2000 hours pilot in

command (“p.i.c.”) with 500 hours pilot in command on type; and new pilots into the site being briefed on the operational procedures for the site and having conducted five landings and five take offs before carrying passengers.

7. Axis International Limited (“Axis”), the owner of an office and residential building on the opposite side of North Church Street to the heliport, in a re-amended notice of motion to the Grand Court sought to quash the decision of the Authority to grant the Aerodrome certificate.
8. The matter came before the Chief Justice, sitting in the Grand Court, and by order dated 24 May 2013, rather than quash the decision of the Authority, he made a number of declarations:
 - “9.1 the decision to certify the Heliport by the Defendant is not in compliance with the Air Navigation (Overseas Territories) Order 2007 (“ANOTO”) and the standards set out in the OTARs;
 - 9.2 the Manual (as revised or otherwise) is not adequate within the meaning of ANOTO Article 105(2)(c); and
 - 9.3 the Heliport may not be considered safe for the purposes of the on-going operation of the Helicopter in the manner that it is being operated.
10. The Defendant pursuant to Article 122 of ANOTO forthwith monitor and reassess the Heliport and decide whether or not, in light of the Court’s clarifications of the Defendant’s responsibilities and the issues for its assessment set out in the Honourable Court’s judgment dated 24 May 2013, to vary, suspend or revoke the Certificate.”
9. On 31 May 2013, following the judgment of the Grand Court, the Authority suspended the certificate so that all flights to and from the Heliport (which had begun on 11 November 2011) ceased.
10. The Authority and Helicopters now appeal against the Order of the Chief Justice in the Grand Court.

The structure of the legislation and guidance for certification of an aerodrome

11. The United Kingdom, as a signatory to the Chicago Convention on International Aviation, meets its obligations in its Overseas Territories, such

as the Cayman Islands, by Order in Council. During the period relevant to this appeal the Order in force was the Air Navigation (Overseas Territories) Order 2007 (“the ANOTO”). It has since been revoked and replaced by the Air Navigation (Overseas Territories) Order 2013 from 1 January 2014.

12. Article 149 of the ANOTO empowers the Governor to make regulations “for prescribing anything which, under the provisions of the Order is to be prescribed” and, with the approval of a Secretary of State, to make regulations amending the Air Navigation (General) Regulations in Schedule 9 to the ANOTO. The ANOTO describes, in general terms, what is required for the certification of an aerodrome. Under Article 146 the Governor may exempt from any of the provisions of ANOTO or any regulations any aircraft or persons or person, classes of aircraft either absolutely or subject to conditions.

13. To assist Governors in the exercise of their functions in relation to aviation, Air Safety Support International (“ASSI”) was created as a subsidiary of the UK Civil Aviation Authority. The Secretary of State directed it to produce in relation to each function of a Governor to issue a certificate, licence or other document where he has to be satisfied as to specified matters, the means of compliance that will enable him to be and remain so satisfied. This has led to the publication by Air Safety Support International of Overseas Territories Aviation Requirements (“OTARS”).

14. The Governor is required by Article 152(1)(a) of the ANOTO to publish the OTARS relevant to determining his satisfaction before granting a certificate. Under Article 152(1)(b) he has to take account of them before determining whether to effect a grant.

15. OTAR Part 139 Appendix I, which covers the certification of Heliports, takes account of Annex 14 to the Chicago Convention. This Annex sets out the standards that prescribe the physical characteristics and obstacle limitation surfaces to be provided at heliports and certain facilities and technical services that are normally provided.

16. Air Safety Support International also publishes Overseas Territories Aviation Circulars (“OTACS”) and these circulars provide advice and guidance on standards, practices and procedures. For example, where OTAR 139.91 provides for aeronautical studies to be conducted to assess the impact of deviations from an OTAR, there is guidance in OTAC 139-5 as to how such a study is to be conducted.

17. Although a Governor is required to carry out a number of the functions set out in the ANOTO he is empowered, by Article 153, (subject to certain exceptions) to designate a person to carry out such of these functions as are specified in the designation. In the Cayman Islands the Governor has designated the Authority as the regulator to exercise a number of his functions including the certification of aerodromes.
18. A helipad comes within the definition of an aerodrome in the ANOTO and it is for the Authority, as designated by the Governor, to decide if it is in the public interest to require the helipad to be certified. Once this is decided the person in charge of the operation of the helipad is required to hold a certificate (Article 105 (1) of the ANOTO).
19. A certificate is granted if the Authority is satisfied under Article 105(2) that:
 - a) the applicant is competent, having regard to his previous conduct and experience, his equipment, organisation, staffing, maintenance and other arrangements, to secure that the aerodrome and the airspace within which its visual traffic pattern is normally contained are suitable for use by aircraft;
 - b) the aerodrome is safe for use by aircraft having regard in particular to the physical characteristics of the aerodrome and of its surroundings; and
 - c) the aerodrome manual submitted under paragraph (7) is adequate.
20. The aerodrome manual, which is submitted with the application for a certificate, has to include provisions for the implementation of a safety management system acceptable to the Authority that:
 - a) identifies safety hazards;
 - b) ensures that remedial action necessary to maintain an acceptable level of safety is provided for;
 - c) provides for continuous monitoring and regular assessment of the safety level achieved; and

- d) demonstrates compliance with the aim to make continuous improvement to the overall level of safety.

21. Although Part 139 of the OTARs prescribes in detail requirements for the certification of an aerodrome, as is made clear in paragraph 139.I, these are requirements and not in themselves law. However, in places they repeat or reproduce provisions that are in the ANOTO.

22. OTAR 139.91 provides that an aeronautical study is to be conducted to:

- (1) assess the impact of deviations from OTARs and specified aerodrome standards in ICAO Annex 14 Volumes 1 and 2; and
- (2) present alternative means of ensuring the safety of aircraft operations; and
- (3) estimate the effectiveness of each alternative; and
- (4) recommend procedures to compensate for the deviation.

The application by Axis for judicial review.

23. Axis advanced its grounds for quashing the decision of the Authority to grant an aerodrome certificate under four general headings.

(i) The Safety Area:

24. In accordance with the ICAO Manual the defined area for the final approach and take-off (FATO), at a surface level heliport, has to be surrounded by a safety area to:

- a) reduce the risk of damage to a helicopter caused to move off the FATO by the effect of turbulence or mishandling; and
- b) protect helicopters flying over the area during landing, missed approach or take-off by providing an area which is cleared of all obstacles except small

frangible objects which, because of their functions, must be located in the area.

25. It was claimed that the Safety Area was compromised in a number of respects and that the Authority had not paid any or any proper regard to them. No exemption had been sought or granted to permit these compromises and further in the Manual submitted by Helicopters there were no requests for deviations (other than in respect of the minimum separation angle between the two take off and climb approach surfaces). Accordingly, it was said that the Authority could not have been satisfied that the Heliport was safe or that the Aerodrome Manual provided under Article 105(7) was adequate.

26. A revised version of the Manual of 15 June 2012 contained a re-designated FATO and a revised safety area. However, it was said by Axis that the requirements for the Safety Area remained compromised and that the location of the re-designated FATO was not self-evident.

(ii) Exemption with regard to the separation angle for take off and approach.

27. OTAR Part 139.I.123(f) requires a surface level heliport to have at least two take-off climb and approach surfaces, separated by not less than an angle of 150 degrees.

28. The Authority in the exercise of the powers of the Governor under Article 146 of the ANOTO authorised a separation angle of 90 degrees. Axis refers to a number of safety issues and deficiencies in the Aeronautical Study as having made it perverse and unlawful for the Authority to grant an exemption. Especially when, as is said, the Safety Area was compromised.

(iii) Approach Surface /Take Off Climb Surface

29. The requirements for Approach and Take-Off Climb Surfaces in OTAR 139.I.113 (d) and (e) are not met along the northerly approach/departure path as a tree and a 33 foot utility pole that is 285 feet from the Heliport, penetrate the required approach and departure slope. There has been no Article 146 exemption

to allow for this and no request in the Manual for a deviation in respect of it. Therefore it is said that the Authority could not have been properly satisfied that the Heliport was safe or that the Manual was adequate.

(iv) Nuisance

30. Under this heading Axis claims that the Authority was wrong to grant a certificate without having determined the level of noise, vibration and encroachment that would be caused by the operation of the Heliport and the effect of this on office and residential dwellings in the immediate area.
31. In so far as the Authority considered that these were solely considerations for planning approval it is said that it was in error.
32. Under each heading it is stated that to the extent that the Authority was influenced by the terms of the assistance it had given to Helicopters, with regard to the application for the Certificate, such matters are irrelevant.

The judgment of the Chief Justice.

33. In a comprehensive and admirably detailed judgment the Chief Justice set out the nature of Axis's complaints before arriving at a number of conclusions.
34. In one of these, at paragraphs 469 and 470, he held that the Authority had allowed itself to become unduly influenced in the process of certification by a willingness to accommodate the commercial objectives of Helicopters.
35. During the hearing of the appeal Mr. Brook Smith QC informed the Court that Axis did not intend to rely on the findings in these paragraphs. He added that in addition, his clients did not seek to rely on an earlier passage in the judgment, at paragraph 422, where, after referring to the Authority as having instigated an application by Helicopters for a reduction in the separation angle, the Chief Justice went on to observe:

“That was not the kind of behaviour to be expected from a regulator who is scrupulous about maintaining its independence from those whom it regulates and its objectivity about the regulatory requirements.”

Nor did Axis seek to rely on the second sentence in the following paragraph, at 423, where the Chief Justice said:

“The question therefore fairly arises whether the objective of exemption would be to ensure safety or to accommodate the commercial viability of the site.”

36. Axis was right to make these concessions. The evidence did not justify a finding that amounted to one of bad faith on the part of the Authority, being the body responsible for the safety of the public in the certification of the Heliport. Mr Cushman, the Authority’s Flight Operations Manager, may have been imprudent, in writing in May 2010 to the Central Planning Authority, to say that following a preliminary inspection of the site Helicopters had been informed that the Authority would “approve its use for daily helicopter operations.” The very different tone of an e-mail from the Director General of the Authority to Helicopters on 18 April 2011 (set out at paragraph 93 of the judgment of the Chief Justice) serves to dispel any impression that may have been given by Mr. Cushman that the Authority had already decided to grant a certificate. The Authority had no reason to seek to advance the commercial interests of Helicopters.

The separation angle:

37. A topic which occupied considerable time in the Grand Court was the separation angle. As I have said, OTAR 139.I.123 (f) requires a surface level heliport to have at least two take-off climb and approach surfaces, separated by not less than 150°. Helicopters sought a deviation from this requirement and produced an aeronautical study in order to justify it. As OTAC 139-5 states, the right to accept or reject the results of an aeronautical study rests fully with the Regulator.

38. The Authority accepted a deviation from 150° to 90° (according to an independent survey the reduction is to 85.5°). Axis made the case that this reduction was not justified by the aeronautical study.

39. During the hearing in the Grand Court it was stated that Mr Begot, Helicopters' chief pilot, had prepared the study with the assistance of the flight engineer. Axis was critical of the Authority for not having asked for the identity of the authors. The Authority for its part took the view that the study was to be judged on its merits and that the identity of the authors was irrelevant.
40. In the study reference was made to the Canadian Aviation Regulations which allow for a 90° separation angle. Mr Dick, an aerodrome inspector with the Authority with considerable experience as an inspector in Canada, was familiar with heliports there operating with 90° or less separation angles. In support of the decision to permit a 90° separation angle Mr Dick referred to a proposed change by ICAO to Annex 14 which was expected to come into force in mid-November 2013. This proposed change made provision for a single approach take-off and climb surface, subject to an aeronautical study. This would remove the requirement for a separation angle between approach and take off surfaces.
41. The Chief Justice, having considered all of the evidence concluded that the decision to allow a 90° separation angle was not one that the Court could say is in and of itself unsafe and so not one that may fairly in and of itself be described as irrational. No argument advanced on the hearing of the appeal would lead to any different conclusion.
42. The Chief Justice did refer to a number of other respects in which he found the decision made by the Authority to certify the Heliport not to be in compliance with the OTARs. In his opinion the Authority, in taking a contrary view or failing to consider the respective issues at all, failed to require an alternative means of ensuring an equivalent level of safety.
43. These findings are listed at paragraph 473 of the judgment as being primarily:
 - (i) the failure to require that the FATO is properly marked;
 - (ii) the failure to recognise that a part of the Safety Area over the sea is not OTAR compliant;
 - (iii) its misunderstanding of the requirement that the surface of the safety area must be continuous with the surface of the FATO;

- (iv) its misunderstanding of the requirement that obstacles may be allowed to penetrate only one side of the 45 degree side slope of the Secondary Safety Area;
- (v) its failure to impose any limitations for operating with tailwinds in excess of 17 knots (still less any in excess of 12 Knots) on departure from the Heliport by the Helicopter in keeping with the performance characteristics of the Helicopter as specified in its operational manual and the obvious dictates of safety.

For this reason also, it may not be said that the Manual or Revised Manual is “adequate” within the meaning of ANOTO Article 105(2)(c), even while its inadequacy is also shown by the continuing absence from it of diagrams appropriately depicting the approach/departure surfaces and any protocol to ensure that they remain free of obstacles.

44. At paragraph 474 of his judgment the Chief Justice went on to say:

“These failings on the part of the CAACI [the Authority] (whether or not including its failure to take nuisance into account) do, in my view, cumulatively justify a conclusion that its decision to certify the Heliport was unreasonable in the *Wednesbury* sense.”

The Appeal:

- 45. Mr Keen QC began his submissions on the legal issues by referring to a number of observations made by the Chief Justice on the proper construction of the ANOTO and the OTARs.
- 46. In his judgment (at paragraph 284), the Chief Justice expressed the view that exemptions from the ANOTO itself (or regulations made thereunder) may only be granted by the Governor.
- 47. When the Authority was designated for the purposes of the ANOTO of 2001, and any Order amending or replacing it, the designation included the power to exempt under Article 126. This provision, which is now Article 146 of the ANOTO of 2007, allows the Authority to exempt from any of the provisions

of the Order (other than certain articles which are specified) or any regulations. The Chief Justice accepted that the designation was lawful and applied to Article 146, however, in his view the power to exempt remained solely in the Governor.

48. In Article 156 of the ANOTO of 2007 “Governor” is defined as meaning:

“...the person for the time being administering the Government of the Territory and, in relation to such of the functions of the Governor under this Order as are specified in a designation made by the Governor under Article 153, includes any person specified in that designation to carry out those functions.”

49. The Governor has exercised the discretion, given to him under Article 153, to designate the Authority to exercise his function under Article 146 to grant exemptions. The presumption *delegatus non potest delegare* is rebutted by the authority given to the Governor by the ANOTO to sub-delegate this function. I do not agree therefore that the Authority when acting within its designation may not exempt from provisions of the ANOTO.

50. The Governor is not permitted under Article 153 (4) of the ANOTO to include in a designation his function under Article 152 in relation to publication of the OTARs. The Chief Justice concluded (at paragraph 289) that: “An interpretation that would vest [the Authority] with a power to freely dispense with the OTARs even while they are requirements which only the Governor may prescribe under Article 152, would therefore be absurd.”

51. It is the Authority that certifies that an aerodrome or helipad is safe. Provided that it takes into account the requirements in the OTARs before arriving at a decision, it may dispense with them. In doing so it must not act either irrationally or perversely.

52. The Chief Justice appears to share this view (at paragraph 293) of his judgment where he said:

“I conclude that when the ANOTO Article 152 speaks of taking the OTARs into account, it means that the OTARs are to be applied by the [Authority] unless the [Authority] is satisfied that another equivalent standard of safety can be applied in which case having taken the OTARs into account, the [Authority] might dispense with a requirement provided an equivalent standard of safety will be applied as stipulated by the [Authority].”

53. Later in his judgment the Chief Justice appears to take the view that the Authority may not permit any departure where the word “shall” appears in the OTAR. Deviations are provided for in 139.91 by having Aeronautical Studies conducted where deviations to the ICAO standards are proposed in order to “assess the impact deviations from OTARs and specified aerodrome standards in IACO Annex 14...” and to “present alternative means of ensuring the safety of aircraft operations...”. Paragraph 139.51 (f) anticipates the possibility of a deviation from paragraph 139.35(a) and there “shall” appears. In so far as he considered that a deviation is not permitted if “shall” appears in an OTAR I do not agree with the Chief Justice.

Expert Evidence

54. At a preliminary hearing it was ruled that expert evidence could not be allowed in the proceedings:

“for the purpose of inviting the Court simply to prefer the views of another expert over those of the expert decision-maker [the Authority]; nor for the purpose of inviting the Court to substitute its own views for those of the administrative decision makers...”

55. In his judgment where he comes to consider the evidence about the Safety Area the Chief Justice stresses that his finding is based not so much on a preference for the evidence of the expert on behalf of Axis over that of the expert for the Authority and Mr Carey (the expert witness called by Helicopters) as on a matter of plain common sense.

56. There is an obvious danger in applying “plain common sense”, when dealing with a complex subject that calls for considerable expertise, to reject the opinion of the regulator.
57. Axis having accepted that the Authority did not allow itself to be influenced by the commercial objectives of Helicopters, Mr Keen went on to deal with the argument advanced by Axis that by filing a considerable body of evidence in response the Authority was engaging in *post facto* rationalisation for a decision that was flawed. There was no obligation placed on the Authority to give reasons nor were reasons given when the certificate was granted; unlike *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 203 where there was a requirement to give reasons and *R (Richards) v Pembrokeshire County Council* [2004] EWCA Civ. 1000 where reasons were given in a Direction. The reasons given by the Authority in these proceedings cannot therefore be said to differ from reasons given at some earlier stage.
58. Mr Keen referred in particular to the conclusion reached by the Chief Justice that it was the cumulative effect of the various findings at paragraph 473 of his judgment that justified the decision that it was unreasonable to certify the Heliport. Counsel said that the problem with such a finding is that it leaves open to question when did the rational lapse into being irrational? If one of the findings leading to the Chief Justice’s conclusion does not stand up, he asked, does the decision to certify now become rational? Two of the findings by the Chief Justice refer to a “misunderstanding” on the part of the Authority. Is a misunderstanding irrational?

The findings at paragraph 473 of the judgment:

(i) the failure to require that the FATO is properly marked;

59. The final approach and take-off area (FATO) is described in IACO Annex 14 as “A defined area of which the final phase of the approach maneuver to hover or landing is completed and from which the take-off maneuver is commenced.” This definition is relevant because OTAR 139.11 imports the definition in IACO Annex 14.
60. OTAR 139.I.157(a) requires FATO area marking or markers to be provided where the extent of the final approach and take-

area is not self evident. In his sixth affidavit at paragraph 16 Mr J.V. Dick, the authority aerodrome inspector, said that in order to avoid multiple markings on the helipad it was decided that only the touch down position should be marked. This had the added benefit of assisting the pilot to focus on the smaller touch down area when manoeuvring and would improve operational safety. Mr Begot who flew Helicopters' aircraft was very familiar with the layout. Before any other pilot used it he was required to have been briefed on the operational procedures for the site and to have conducted five landings and take offs within the last thirty days before carrying passengers. In the circumstances it was assessed that the absence of markings did not compromise the safety of the Heliport in any way.

61. Mr Dick added that, if necessary, markings could be swiftly applied. It is also important to note that the markings were in position at the time of certification in November 2011 and it was as a result of the changes that were made after this date that the markings were removed.

62. The Chief Justice described the lack of markings as a legitimate ground of complaint but one that did not necessarily mean that the authority had been irrational. In my view the reason advanced by the Authority for not requiring markings could not in any sense be regarded as irrational.

(ii) the failure to recognise that a part of the Safety Area over the sea is not OTAR compliant;

(iii) its misunderstanding of the requirement that the surface of the safety area must be continuous with the surface of the FATO;

63. "Safety Area" is defined in IACO Annex 14 Vol.II as "A defined area on a heliport surrounding the FATO which is free of obstacles, other than those required for air navigation purposes, and intended to reduce the risk of damage to helicopters accidentally diverging from the FATO".

64. Axis complained that as part of the safety area extended slightly over the sea it could not be said to be continuous with the surface of the FATO as required by OTAR 139.1.27 (j).

65. At the date of certification the safety area did not extend over the sea and it was only after changes were made and the safety area was re-aligned that it extended for a short distance over the sea.
66. The safety area by definition is intended to reduce the risk of damage to helicopters and the Chief Justice took the view that *a fortiori* it was intended to reduce these risks when there is a forced landing.
67. In the 5th issue of March 2010 OTAR 139.I.27(a) states “ A FATO shall be surrounded by a safety area which need not be solid.” This is a change from the 4th issue where the surface of the safety area adjoining the FATO had to be capable of supporting, without structural damage, the helicopters using the heliport. As a result of this change the safety area is no longer required to be solid and it follows that the sea can form a part of it.
68. Another requirement in OTAR 139.I.27 (j) to be met is that the surface of the safety area adjoining the FATO has to be continuous with the FATO. “Continuous” in this context means that there has to be a continuous area over which a helicopter can manoeuvre. To allow for this the surface must be uninterrupted and free from obstacles.
69. The OTAR prescribes the standard for a rising side slope but there is no reference to a downward slope. Presumably, this is seen as not causing any obstruction to a helicopter that is hovering. That there is a slight fall of between 6” and 8” between the concrete surface and the iron shore does not interrupt the continuity with the FATO which can be regarded as a single area.
70. There is a reference by the Chief Justice in his judgment to OTAR 139.I.113 (e)(7). Where a heliport is used by a class 3 helicopter, such as the one used by Helicopters, it is intended that departure paths be selected so that any forced landing areas minimise injury to persons on the ground or water or damage to property. The helicopter to be used is certified for landing on land or on water. There was expert evidence that where there is iron shore a pilot can execute a forced landing. This was disputed by expert evidence from Axis but it was not an issue to be resolved in proceedings for judicial review. Where there was expert evidence to support the view that a forced landing could

be executed the decision maker could not be said to have acted irrationally.

71. As a result of the change in the OTAR, which no longer requires the surface of the safety area to be solid, and for the reasons that have been discussed, the conclusions at (ii) and (iii) in paragraph 473 of the judgment cannot in my view be supported.

(iv) its misunderstanding of the requirement that obstacles may be allowed to penetrate only one side of the 45 degree side slope of the Secondary Safety Area.

72. OTAR 139.I.27 (d) provides:

“There shall be a protected side slope rising at 45 degrees from the edge of the safety area to a distance of 10 metres, whose surface shall not be penetrated by obstacles; except that when obstacles are located to one side of the FATO only, they may be permitted to penetrate the the (sic) side slopes surface.”

This requirement allows for an area outside the safety area (sometimes referred to as the secondary safety area) to be penetrated provided that it is only on one side. Where the FATO and safety area are circular in shape how is one side to be described? The Authority was of the opinion that where the approach and departure areas extend out from the primary safety area they divide the secondary safety area into two sides. This will provide a helicopter with protection from obstacles during approach and possible overshoot.

73. In his affidavit the expert witness for Axis expressed a different opinion. He interpreted the OTAR as meaning that a FATO has four sides, even where it is circular, so that a helicopter has space for a go-round. By measuring from the centre and dividing the area into four sides if only one of these sides is obstructed a helicopter has two paths remaining open to it.
74. As the Chief Justice observed, if the view of the Authority is accepted and one side is “operational “and the other “non-operational” then the narrower the separation is between the approach and departure areas the greater is the area that can be obstructed.

75. Whether the view of the Authority or of the expert on behalf of Axis is to be preferred the central question is whether in these proceedings the Authority can be said to have acted irrationally. Mr Dick, in his affidavits, has demonstrated that he gave the issue careful consideration and that having done so he arrived at the interpretation of the OTAR on which the Authority relies. He finds some support for his interpretation in the Canadian Aviation Regulations. The OTARS are not ‘law’ and as the Chief Justice accepted (at paragraph 402) “...in reality there is no definitive answer” to the correct interpretation. However, the Chief Justice felt compelled by the purpose of the legislation, to promote air navigation safety, to the conclusion that there are four geographical sides to a FATO. This was on the basis that it was safer if only on one of these four sides of the secondary safety area obstacles could be allowed. Thus he concluded that a secondary safety area did not comply with OTAR 139.I.127(d).

76. As Mr Lowe QC submitted a Court should be slow to reject the opinion of the Authority as to whether or not safety is compromised, by applying the construction that it has placed on the OTAR. There has to be a level of safety that is acceptable otherwise if taken to its logical conclusion complete safety may only be achieved by not granting a certificate at all. OTAR 139.I.127(d) is open to the interpretation placed upon it by the Authority and the judgment it made is not in my view irrational.

(v) in its failure to impose any limitations for operating with tailwinds in excess of 17 Knots (still less any in excess of 12 Knots) on departure from the Heliport by the Helicopter in keeping with the performance characteristics of the Helicopter as specified in its operational manual and the obvious dictates of safety.

77. The issue of wind speed restriction arose in connection with the reduction in the separation angle between the take-off and approach surfaces from 150 degrees to 90 degrees. In the Aeronautical Study, provided by Helicopters under OTAR 139.91 to allow for such a reduction, there was a recommendation by Helicopters that it would cease operations if the westerly wind speed reached 17 knots. According to the Flight Manual for the Eurocopter, hovering with wind from any direction has been substantiated at up to 17 Knots though this is not to be taken as a limit. Helicopters in its Manual reduced the

limit to 12 knots, and the Authority regarded this as being inherently safer.

78. The criticism of the Authority is that it did not take account of the performance characteristics of the helicopter and of the risks associated with taking off in a tailwind.
79. There is a distinction between the safety issues connected with the physical features of the heliport and those connected with flight operations. Beyond the general requirement in the ANOTO that the Authority has to be satisfied that the heliport is safe before granting a certificate, there are no requirements in the OTARs making the Authority responsible for placing restrictions on landing and taking off due to wind speed. All that is required is that the heliport be equipped with a wind direction indicator giving a clear indication of the direction of the wind and a general indication of the wind speed. (OTAR 139.I.141).
80. The expert evidence on behalf of Axis, as the Chief Justice accepted, was not that take off with a tailwind was unsafe or required the imposition of a condition but that taking off with a head wind is inherently safer than taking off with a tailwind.
81. An important factor in helicopter flight is the height velocity curve that gives the combinations of altitude and airspeed that will allow a safe autorotational landing in the event of engine failure. During a taking off in a tailwind the period during which the aircraft cannot make a safe autorotational landing is greater than when taking off into the wind.
82. The Authority appears to have taken the view that when taking off in a tailwind a pilot has an expanse of sea over which to overcome the Height Velocity Curve. The Chief Justice accepted that this was not a recommended mode of operation and he referred also to the presence of boats in the dock below and to prolonged exposure within the Height Velocity Curve not being in keeping with the Recommended Take-Off Profile for the helicopter. For these reasons he concluded that it was irrational for the Authority not to have taken into consideration the performance specifications of the Helicopter and so imposed

a limitation in the Manual on taking off in tailwinds of a significant velocity.

83. In the absence of evidence that it was unsafe to take-off with a tailwind and bearing in mind the responsibility on the pilot to judge when it is safe to take-off it appears excessive to regard the failure to impose a condition when taking-off in a tailwind as irrational.
84. Even if it is to be regarded as important to impose a limit on take-off in a tailwind it is a subject that can be dealt with in the ongoing revision of the Manual. As it is capable of resolution without difficulty it would not require the setting aside of the Certificate.

For this reason also it cannot be said that the Manual or Revised Manual is “adequate” within the meaning of ANOTO Article 105 (2)(c) even while its inadequacy is also shown by the continuing absence from it of diagrams appropriately depicting the approach/departure surfaces and any protocol to ensure that they remain free of obstacles.

85. Under the ANOTO (105 (2) (c)) before granting a certificate the Authority had to be satisfied that the Aerodrome Manual was adequate. It must include provisions for the implementation of a safety management system that is acceptable to the Authority and *inter alia* identifies safety hazards, provides for continuous monitoring and regular assessment of the safety level achieved and demonstrates compliance with the aim to make continuous improvement to the overall safety level.
86. It is envisaged in the legislation that there will be amendments or additions to the manual and these have to be furnished to the Authority before or immediately after they come into effect.
87. Axis made the case that the Manual was far from adequate and that a later revised manual produced in June 2012 merely added to the inadequacy. Helicopters had produced manuals in draft form that were revised before it provided the version of November 2011 on which the Authority granted the certificate.
88. In his judgment (at paragraph 157) the Chief Justice identifies a number of concerns about the Manual raised by Axis. That there were some errors in it is not in dispute. For example the FATO

diameter was wrongly stated to be 50 feet x 50 feet when this was the area of the concrete pad and the diameter should have been given as 84.9 feet. A diagram prepared by Helicopters and included in the Manual was not the one that reflected the alignment that was approved by the Authority.

89. While there were shortcomings in the Manual that was provided by Helicopters these did not necessarily prevent it from being “adequate” or sufficient. It was not suggested by the Chief Justice that it was, in itself, irrational to have granted a certificate on the basis that the Manual was inadequate but rather that it was one of the components that taken collectively made the decision irrational.

90. The Manual has to be kept under review and where issues have been identified about it, the Authority has power, under article 122 of the ANOTO, to suspend the certificate until these have been rectified. It should ensure that the Manual has been corrected before deciding to remove the suspension from the certificate

Nuisance

91. The Chief Justice found that it was manifestly unreasonable of the Authority not to have regard to the impact of nuisance upon adjacent properties when considering the grant of certification of the Heliport. The Authority contends that nuisance is a matter to be taken into account by the Central Planning Authority and that it was raised before it and again when leave was sought to appeal to the Planning Appeals Tribunal.

92. Article 109(2) of the ANOTO incorporates, by Schedule 2 of the Civil Aviation Act 1949 (Overseas Territories) Order 1969, section 41(2) of the Civil Aviation Act 1949. It provides that no action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome as long as the provisions of the ANOTO are duly complied with.

93. Article 109 (1) of the ANOTO gives the Governor power to specify the conditions under which noise and vibration may be caused by aircraft on certified aerodromes. These conditions, which are found in Schedule 9 to the ANOTO at paragraph 4, allow for aircraft taking off and landing, moving on the ground

and when operating engines for specific purposes. These are the only references in the ANOTO to noise and vibrations.

94. The Chief Justice in his judgment relied on Article 105(1)(b) of the ANOTO, which requires the Authority to be satisfied that it is in the public interest that an aerodrome is certified before granting a certificate, as the basis for finding that the Authority should have recognised that adjoining property rights would be negatively affected by noise and vibrations.
95. The Authority relies on the fact that Article 105 (2) of the ANOTO, obliges the Authority to grant a certificate if satisfied of certain matters, of which absence of nuisance is not one.
96. The level of noise can be significant when a helicopter is landing and taking off. It is not suggested that the planning authority cannot take this into account when deciding if planning permission should be given. I do not agree that it is an abdication of its responsibilities under Article 105(1)(b) by the Authority to leave the issue of nuisance to be decided by the planning authority. Article 105(1) is concerned with the circumstances in which a person is to be required to hold a certificate. One of these circumstances is if the Governor considers that it is in the public interest to require it to be certified.
97. Even if Article 105(1)(b) is given the interpretation placed upon it by the Chief Justice it would be strange if two different public bodies were to be made responsible for deciding the same issue. As has been mentioned above, the powers given to the Authority concerning noise and vibration are limited. It would have been open to criticism if it had taken account of nuisance, given its limited powers in relation to noise and vibration and to the matters specified in the ANOTO on which it has to be satisfied in order to grant a certificate. In my view the Authority was not required to take account of nuisance in deciding whether to grant a certificate.

Conclusion

98. It was open to the Authority to be satisfied, on the information before it, that Helicopters had complied with the conditions under Article 105 (2) of the ANOTO for the grant of a certificate. In arriving at the decision to grant a certificate the Authority did not at any stage act unreasonably. I would allow the appeals, set aside the declarations and dismiss the application for an order of certiorari to quash the decision of the CAA to grant a certificate.

Hon. Elliott Motley JA

99. I agree with the judgment of Sir Anthony Campbell JA and with the reasons he has given.

Sir John Chadwick, President

100. I also agree that the appeals should be allowed and the declarations set aside, for the reasons given in the judgment of Sir Anthony Campbell, JA.