IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 56 OF 2012

BETWEEN	**AXIS INTERNATIONAL LTD.**	**PLAINTIFF**
AND	**THE CIVIL AVIATION AUTHORITY OF THE CAYMAN ISLANDS (CAACI)**	**1ST DEFENDANT**
AND	**CAYMAN ISLANDS HELICOPTERS LTD.**	**2ND DEFENDANT**

IN OPEN COURT
THE 25TH FEBRUARY TO THE 8TH MARCH, 2013; 24TH MAY, 2013
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Mr. Phillip Brook Smith QC instructed by Mr. Jan Golaszewski of Maples and Calder for the Plaintiff**

Mr. Michael Beloff QC instructed by Ms. Reshma Sharma, Senior Crown Counsel of the Attorney General's Chambers for the CAACI

Mr. Thomas Lowe QC instructed by Mr. George Giglioli for Cayman Islands Helicopters Ltd.

JUDGMENT

1. This application for judicial review concerns the decision of the defendant, the Civil Aviation Authority of the Cayman Islands (the "CAACI") taken on 10th November 2011, to grant an aerodrome certificate ("the Certificate") permitting helicopter flights to take place from a heliport (the "Heliport") which is located on the waterfront of central George Town. The Certificate was subject to certain conditions

which are to be examined in this judgment, and the Heliport is to be operated by reference to the operational manual submitted by the operator Cayman Islands Helicopters Ltd. ("CIHL') ("the Manual"). CIHL participates in the case as the Interested Party pursuant to GCR Order 53, rules 5(2) and 9(1).

2. The Plaintiff ("Axis") contends that the grant of the certificate by CAACI was

3. unreasonable in the ***Wednesbury***[1] sense, and therefore unlawful, and should therefore be quashed.

4. The parties are further described having regard to their positions as follows.

5. Axis is a Cayman Islands company and the owner of a property called Whitehall House. The property is situated on the landward side of North Church Street immediately diagonally opposite the Heliport. It houses business offices on the first three floors and a residential apartment on the fourth floor. Axis contends that the grant of the certificate was unreasonable on grounds of safety and nuisance.

6. CAACI is the statutory body having responsibility for the regulation of civil aviation in the Cayman Islands. It has the statutory functions conferred upon it by the Civil Aviation Authority Law (2005 Revision) as well as by designation by the Governor of the Cayman Islands under the Air Navigation (Overseas Territories) Order 2007, as amended ("the ANOTO"). At all material times the CAACI acted by its Director General Mr. Richard Smith who was assisted in the certification process by Mr. John Dick the aerodrome inspector appointed to the CAACI; by Mr. Alastair Robertson, its Director of Air Navigation Services (Regulation) and Mr. Douglas Cushman, Manager, Flight Operations.

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[1] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.

7. The Interested Party CIHL is a Cayman Islands company which operates a Eurocopter AS350-B2 helicopter (the "Helicopter") from the Heliport and has been so operating continuously (except for a brief stay) since the grant of the Certificate on 10 November 2011. The flights are commercial tourist flights. Paying passengers are taken on sightseeing tours over and around Grand Cayman. The Managing Director of CIHL, and its sole shareholder, is (and has at all material times been) Mr. Jerome Begot. He is also the pilot of the Helicopter and the only pilot currently authorized by the Certificate to fly the Helicopter to and from the Heliport. CIHL employs, among other persons, Ms. Nathalie Legras, although herself a licensed helicopter pilot, in certain administrative capacities. The Manual anticipates that other pilots could operate from the Heliport but certain conditions as to experience and minimum flying hours into and out of the Heliport before taking passengers, are attached.

Axis' grounds of complaint

8. The Heliport is situated on what is by any measure for its purposes, a constrained site. On the site, CIHL has a building that houses its office and souvenir store with a deck and walkway leading to a 50' x 50' concrete pad, where the Helicopter takes off and lands. Immediately to the south is a two storey building, One Cayman House ("OCH") which, together with its boundary fence presents obstacles to the safe operation of the Heliport.

9. Axis points to the fact that the placement of the 50' x 50' concrete pad, due to the dimensional constraints of the site, was in breach of the set-back requirements of the Planning Regulations and indeed, of the planning permission granted to CIHL for the development of the site.

10. It must be noted, however, that notwithstanding Axis' complaint in this regard, the Central Planning Authority ("CPA") has refused the enforcement of the Regulations and breach of planning permission by way of requiring the demolition of or relocation of the pad, suggesting that the CPA considers this infraction to be minimal and negligible.

11. Axis and Coastal Two Ltd ("Coastal Two"), the owner of OCH, also objected generally to the grant of planning permission for the development of the Heliport and sought leave to appeal to the Planning Appeals Tribunal (the "PAT") out of time but leave to appeal was refused.

12. Costal Two but not Axis sought Judicial Review of the CPA's decision to refuse leave to appeal out of time. A judgment is awaited from Justice Williams of this Court on this matter.

13. Against that background Axis prosecutes this application which focuses on safety issues. The complaint of nuisance is also raised but specifically as a CAACI certification issue in the context of the alleged unreasonableness of the decision to certify. Axis argues that safety issues are axiomatically and acutely important when the aerodrome in question is a heliport to be used by a single engine helicopter and located in a developed and populous area such as George Town. Axis points to the fact that Article 105(2) (b) and (c) of the ANOTO requires the CAACI to be satisfied before granting such a certificate in addition to the competency of the applicant operator that:

    (a) The aerodrome is safe for use by aircraft having regard in particular to the physical characteristics of the aerodrome and of its surroundings; and

(b) The required aerodrome manual submitted to the CAACI is adequate.

14. In light of those overarching requirements of the ANOTO, Axis' challenge to the rationality of the CAACI certification raises several considerations relating to the location of the Heliport and the operation of the Helicopter.

15. They begin with the obvious consideration that helicopters are complex machines that fly in a manner very different from fixed wing aircraft, helicopters being capable of hovering flight and transferring from hovering to forward flight. Flying them safely requires considerable expertise, not least when taking off and landing, always the most potentially risky phases of any flight. There are also the possibilities of engine or hydraulic failure to consider. Such failures are not everyday occurrences but are far from unknown. A pilot has to be prepared to act swiftly and competently in such eventuality so as, if possible, to land the helicopter safely and with minimal risk to those on board and on the ground, and with minimal damage to the helicopter and other property. This is both an expectation of common sense and of the air safety requirements to be discussed below.

16. It follows therefore, that the design (and operation) of any heliport must anticipate the safety issues which may arise in takeoff and landing, and, as regards the characteristics of the helicopter(s) which will use it.

17. Accordingly, says Axis, by Article 152 of the ANOTO, in granting the Certificate, the CAACI was required to take into account the matters set out in the Overseas Territories Aviation Requirements ("OTARs") together with the contents of the Manual. In particular, OTAR Part 139 (together with the relevant provisions of the ANOTO) set out the requirements applicable to the grant of a certificate. Axis

acknowledges that in some circumstances exemptions from OTARs can be granted by the CAACI, but argues that such exemptions require justification by reference to alternative means to achieve an equivalent level of safety; justification that Axis argues was not shown to exist in this case.

18. Indeed, it is most particularly in respect of the grant of exemptions to or failure to apply the OTARs that Axis complains of the irrationality of the CAACI's decision.

19. The CAACI and the CIHL contend that by Article 146 of the ANOTO, the CAACI could exempt from any of the provisions of the ANOTO (or any regulations made thereunder), any aircraft or persons or classes of aircraft or persons either absolutely, or subject to such conditions as the CAACI sees fit. Even if this is so, this is a discretionary power, says Axis and, of course, as Axis asserts, in public law, no discretion is absolute or unfettered. A discretion must be exercised reasonably.

20. The Overseas Territories Aviation Circulars ("OTACs") provide practical guidance on meeting the requirements contained in the OTARs. Where an aerodrome is unable to meet the OTAR standards and needs to identify alternative means to achieve an equivalent level of safety, OTAC 139-5 provides guidance on the production of an Aeronautical Study in accordance with OTAR 139. CIHL provided an Aeronautical Study ("the Study") which CAACI relied upon in granting a specific exemption from a particular OTAR requirement – to be considered in more detail below – that the paths or "surfaces" of flight into and out of the Heliport have a separation angle of no less than 150 degrees. The CAACI appear to have allowed a reduction in the angle of separation to 90 degrees by reliance on the Study.

21. Axis raises concerns about the content of the Study, ultimately as set out below, and is also concerned that its contents may have been unduly influenced by the CAACI's Aerodrome Inspector, Mr. John Dick, himself the person charged with the evaluation of the Heliport for the purposes of certification. Axis had at an earlier stage of the proceedings, raised concerns that Mr. Dick may even have authored or contributed to the authorship of the Study but in light of his 7th Affidavit filed only near the end of the trial before me and among other things, denying any involvement in the authorship of the Study, Axis is no longer able to press that aspect of its concerns. Axis nonetheless asserts its concerns about appearances of bias in favour of CIHL, such as the evidence reveals.

22. The question of bias influencing the certification process aside, Axis argues that the CAACI's decision to grant the Certificate was irredeemably flawed by reference to the following five main areas of concern. Only some of these are accepted by the CAACI and CIHL as based upon a proper understanding of the ANOTO and the OTARs. The five areas of concern will come to be discussed in the context of the provisions of the ANOTO and OTAR to be more fully set out below:

(1) A Final Approach and Take-Off Area ("FATO") in a heliport is a defined area[2] over which the final phase of the helicopter's approach manoeuvre to hover for landing is completed and from which take-off manoeuvre is commenced. A Safety Area is a defined area[3] surrounding the FATO which is free of obstacles (other than those required for air navigation purposes) and

[2] As defined in OTARs Part 1: Definitions, Abbreviations and Units of Measurement, taken from ICAO Annex 14 Volume 11 Heliports and to be elaborated upon below.
[3] As defined in ICAO Annex 14 Volume 11 Heliports.

intended to reduce the risk of damage to helicopters accidentally diverging from the FATO. The Safety Area and Secondary Safety Area requirements (OTAR Part 139.1.27 (c), (d), (f), (i) and (j)), were not complied with, and no exemption was applied for by CIHL (still less granted).

(2) Helicopters are required to approach or depart the FATO via one or other of two paths of flight ("take-off and approach surfaces"). For a surface level heliport like the Heliport, a 150 degree minimum separation angle between these surfaces is a requirement (OTAR Part 139.1.123 (f)). On the basis of the Study accompanying CIHL's application for an exemption under Article 146 of the ANOTO and OTAR 139.1.123 (e), the CAACI allowed a minimum separation angle of only 90 degrees and, according to the final independent survey accepted by CAACI, as little as 85.5 degree. Axis contends that this was an exemption that was not justified by the Study and one which the CAACI allowed only by way of "reverse engineering" to grant certification of the site, unreasonably relegating the safety standards of the OTARs. This concern relates to the obstacle limitation requirements in particular and as are next explained.

(3) Obstacles penetrating the take-off and approach surfaces along the slope of a specified rate of incline/decline over a specified distance from the outer edge of a Safety Area are not permitted.[4] The rate of incline/decline and distance of the slope specified by the CAACI for the Heliport were 8% (that is: 8 feet in every 100 feet) and 245 metres or 803.7 feet, respectively.

[4] OTAR 139.1.113(d) and (e) and ICAO Annex 14 Chapter 4: Obstacle Restriction and Removal.

Despite these requirements, there were such obstacles (a utility pole and a tree) penetrating the take-off and approach surfaces, of which CAACI was well aware at the time of certification. No exemption was applied for by CIHL (still less granted). Instead, CIHL purported in the Study to meet the requirements by trimming the tree and narrowing the northerly take-off approach surface to avoid the utility pole. Obstacles presented to the westerly surface by the boundary fence to OCH were simply not addressed.

(4) The Manual was very far from being "adequate" as required by Article 105(2) of the ANOTO, given the above matters, and in any event.

The CAACI has sought to justify its decision to grant the Certificate by reference to the contents of a later revision of the Manual dated 15 June 2012 ("the Revised Manual"). In so doing, the CAACI may be taken to have recognized the deeply flawed nature of the decision to certify; and embarked upon a process of "*ex post facto* rationalization". In the event, the Revised Manual does not remove the non-compliances. Indeed, it adds to them.

(5) By virtue of section 41(2) of the Civil Aviation Act 1949[5], no action lies in nuisance caused by noise and/or vibration from an aircraft on a certified aerodrome, and for that reason it was incumbent on the CAACI to have regard to the noise and vibration impact upon surrounding properties including that of Axis, caused by the Heliport. The grant of the Certificate would face neighbouring land owners and occupiers, including Axis, with noise vibration

[5] As extended to the Cayman Islands by Article 3 of the Civil Aviation Act 1949 (Overseas Territories) Order 1969

nuisance for which they would have no remedy in private law. The CAACI unreasonably, did not consider such nuisance.

The Statutory and Regulatory Framework

23. An understanding of the legislative history and framework is important to the assessment of the reasonableness of the CAACI's decision, in particular as to the reasonableness of the exercise of its discretion in the grant of exemptions to or waiver of requirements of the OTARs.

Relevant United Kingdom legislative history

24. The United Kingdom is a contracting state under the Convention on International Civil Aviation, which was signed at Chicago in 1944 (the "Chicago Convention"). Following the Chicago Convention, the United Kingdom passed the Civil Aviation Act 1947, and then the Civil Aviation Act 1949 (the "1949 Act") which provided (in sections 8, and 66) for Orders in Council to be made respectively applying the Chicago Convention and any Annex thereto in the United Kingdom itself and in the Overseas Territories. The United Kingdom subsequently enacted the Civil Aviation Act 1968, the Civil Aviation Act 1971 and the Civil Aviation Act 1982 (much of which latter Act was concerned with the duties of the United Kingdom Civil Aviation Authority (the "1982 Act"). The 1982 Act had provision for Orders in Council, similar to those made under the 1949 Act, to be made.

Among the Orders made earlier under section 66 of the 1949 Act was the Civil Aviation Act 1949 (Overseas Territories) Order 1969 (the "1969 Order"). By Article 3 of the 1969 Order, section 41 of the 1949 Act, relevant here to nuisance which is

the fifth ground of Judicial Review, was made prospectively applicable to the Overseas Territories.[6]

25. A series of Air Navigation (Overseas Territories) Orders were made under the 1949 Act and the 1982 Act including an Order made in 2001 (the "2001 Order") and culminating with the ANOTO in 2007, that which is directly relevant to these proceedings.[7]

26. Axis emphasizes that Section 41 of the 1949 Act is part of the law of the Cayman Islands. Indeed, that the purpose of the relevant Orders (outlined above), under the relevant statutory powers of the United Kingdom Parliament, was to create directly applicable law and regulatory regimes within the Overseas Territories. The Governor of the Islands exercises powers, subject to his power to designate that they be exercised by the CAACI, but the CAACI in turn may exercise such powers only as are delegated. This argument, as I have noted at paragraph 16 above, will be relevant to the determination of what is meant by the requirement that the CAACI must "take into account" the OTARs when deciding on a question of certification.

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[6] "Section 41 (1) An Order in Council under Section 8 of the Act may provide for regulating the conditions under which noise and vibration may be caused by aircraft on aerodromes and may provide that subsection (2) of this section shall apply to any aerodrome as respects which provision as to noise and vibration caused by aircraft is so made.

(2) No action may lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome to which this subsection applies by virtue of an Order in Council under section eight of this Act, as long as the provisions of such Order in Council are duly complied with."

[7] The ANOTO was amended by the Air Navigation (Overseas Territories) (Amendment) Order 2008, again made under the 1949 Act and the 1982 Act. This Order provided, amongst other things, that there was no longer a requirement to specify performance limitations of certain categories of helicopter, as these were detailed in relevant parts of the OTARs.

The Air Navigation (Overseas Territories) (Amendment) Order 2008 and the Air Navigation (Overseas Territories) (Amendment) Order 2011, made under the 1949 Act and the 1982 Act, further amended the ANOTO so as to accommodate, amongst other things, revisions of the OTARs.

Relevant local Cayman Islands legislation

27. The Civil Aviation Authority Law (2005 Revision) (the "CAA Law") created and confers statutory functions on the CAACI including, pursuant to section 5(1), such functions as are, for the time being, conferred on the Governor by or under the ANOTO (as amended), or under regulations of a similar nature made under any United Kingdom Act with respect to the regulation of civil aviation in the Cayman Islands.[8]

28. By section 5(3) of the CAA Law, the CAACI performs its functions through the Director General.

29. By sections 12 and 13, the Director General is authorized to employ, with the approval of the board of directors, persons having such professional, technical or other competencies necessary for carrying out the functions of the CAACI. The Director General shall determine what are the professional qualifications and other requirements necessary for the purposes of those appointments.

30. An issue that arose but in the end was not pressed by Axis, was whether by virtue of its functions and the skills and qualifications of those employed to assist in their

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[8] The Governor most recently designated the CAACI to carry out certain functions, including aerodrome certification, in January 2007. That designation was made under the 2001 Order, at that time still in force; but it has effect as a designation for the purposes of the ANOTO.

By virtue of sections 17(2)(b), 21 and 23 of the Interpretations Act UK 1978 and Sanction 25 of the Interpretation Law (1995 Revision); the provisions of the ANOTO became operative for all the purposes of any earlier Order it repealed or replaced; including for the designation of functions. And so, to the extent that section 5(1) may not have operated so as automatically to confer upon the CAACI the functions of the Governor under the ANOTO when the ANOTO came into effect in 2007, by virtue of the provisions of the Interpretation Law, the designation last made by the Governor in January 2007, has effect as a designation for the purposes of the ANOTO.

It follows that designated functions carried out by the CAACI since the ANOTO replaced the 2001 Order are lawful. Axis has acknowledged that it does not contend otherwise.

performance, the CAACI is to be regarded as an "expert body". In this, I do not think there is any doubt. Each of the persons employed by the CAACI and named above – Messrs. Dick, Robertson and Cushman – are qualified in their respective areas of expertise and responsibility and there was ultimately no challenge raised by Axis in this regard.

ANOTO and Certification

31. The Heliport is required by the ANOTO to be certified. In this regard Article 104 provides:

> (1) A person in charge of the operation of an aerodrome in the Territory is required to hold in respect of such aerodrome a certificate by the Governor in accordance with this article if
>
> (a) ...
>
> (b) The Governor considers that it is in the public interest to so require an aerodrome to be certificated.

32. The certification was granted by the CAACI as the Governor's designate under this provision.

33. As set out above at paragraph 10, Article 105(2) requires the CAACI to be satisfied (apart from clarification being in the public interest) with respect to three matters before granting an aerodrome certificate.

34. The third of those matters, the adequacy of the Manual, must include provisions for the implementation of a safety management system acceptable to the CAACI (Article 105(7)) and all information and instructions as may be specified by the CAACI, including those specified in Schedule 11 of the ANOTO. The Manual must:

(i) Identify safety hazards;

(ii) Ensure remedial action necessary to maintain that an acceptable level of safety is provided for;

(iii) Provide continuous monitoring and regular assessment of the safety level achieved; and

(iv) Demonstrate compliance with the aim to make continuous improvement to the overall level of safety.

35. Article 126 of the ANOTO provides, not surprisingly, that: *"A person shall not recklessly or negligently cause or permit an aircraft to endanger any person or property."*

36. Axis points to this provision as clear indication that the burden rests throughout upon CIHL to satisfy the CAACI and a duty in the CAACI to be satisfied, that the Heliport is safe for the operations of the Helicopter as proposed. Given the plain meaning, neither the CAACI nor CIHL contends otherwise.

The OTARs

37. The OTARs provide details of the means of compliance with the ANOTO that are acceptable to Governors of the Overseas Territories, as well as to the United Kingdom Government. They outline the way in which aircraft operators, aviation personnel and providers of services may obtain approvals and certificates, and the process through which these are maintained to ensure adequate levels of safety, and compliances with international standards; in particular as those standards are published by the International Civil Aviation Organization ("ICAO") as Annexes to the Chicago Convention.

38. ICAO is a specialized agency of the United Nations, created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection.

39. The ICAO serves as the forum for co-operation in all fields of civil aviation among its 191 Member States. The United Kingdom is a member of the ICAO; the Cayman Islands, as one of the Overseas Territories, accept the commitments that arise from the United Kingdom's membership of ICAO. The standards and recommended practices for aerodromes were designated by the ICAO as Annex 14 to the Chicago Convention. (This is termed "ICAO Annex 14"). ICAO Annex 14 Volumes I and II have been specifically adopted into the OTARs. Volume II addresses planning, design and operations of heliports, and provides specifications that prescribe the physical characteristics and obstacle limitation surfaces to be provided for at heliports, and certain facilities and technical services normally provided for at heliports.

40. It is essential therefore that the specific requirements of the OTARs in relation to the Helicopter and the Heliport are identified before proceeding to consider whether the grounds for judicial review which refer to the unreasonable departure from those requirements, are made out.

The Helicopter and the Heliport

41. According to the Certificate and both the Manual and Revised Manual, the only aircraft permitted to use the Heliport is CIHL's Eurocopter AS-350 B2 Squirrel helicopter. This is a Performance Class 3 helicopter.

42. While Performance Class 1 helicopters have at least two engines, Performance Class 2 or 3 helicopters, such as the Helicopter, have only one engine. The differences in Performance Class essentially relate to the obvious safety advantages of having two or more engines in the event an engine fails. According to OTAR Part 1 Definitions:

> *"Performance Class 3 operations" means flights where, in the event of an engine failure at any time during the flight, the helicopter will be required to carry out a forced landing."*

43. The design specifications for the Heliport should therefore be reflective of the class of helicopter intended to operate from it. As will come to be discussed, Mr. Dick's admission to not having taken account of the performance specifications of the Helicopter is raised as another related ground of complaint.

44. ANOTO Article 73 (5) and OTAR Part 135.570(g) both require that a safe forced landing can be made at all times in the event of engine failure. OTAR Part 1.3 defines "Safe forced landing" as "*...an unavoidable landing or ditching with a reasonable expectancy of no injuries to persons in the aircraft or on the surface.*"

45. Specific operational issues relating to the Helicopter will arise given that it is single-engined. Most obviously, an engine failure will necessitate an immediate forced landing. The most critical phases of any flight being at takeoff and landing, Axis argues that there are obvious reasons why these proposed single-engined operations to and from the Heliport in and over developed and populous areas, should in general be heavily regulated.

46. In an emergency a helicopter cannot glide to safe landing like a fixed-winged aircraft. The helicopter's equivalent to a glide is autorotation. This is a process by which the

pilot can use the remaining energy in the rotors, after engine failure, to cushion the touchdown of the helicopter, provided the helicopter was in forward flight and at a minimum altitude of eight feet. The airflow through the rotors as the aircraft descends produces rotor thrust and therefore lift to off-set the pull of gravity.

47. It is part of Axis' case that the Heliport (including the Safety and Secondary Safety Areas) and its immediate wider surroundings, do not meet the safety requirements of the OTARs that a safe forced landing can be made at all times in the event of engine failure.[9]

48. The approach and departure paths or surfaces to the Heliport (whether as provided in the Manual or Revised Manual) pass over the sea in an area that is heavily trafficked by boats and frequently used by swimmers. Indeed, there are often snorkelers and scuba divers in the sea immediately at the edge of the shoreline of the Heliport as the Helicopter takes off or lands and so frequently experience the force of the downwash of the Helicopter's rotors. Axis points to the obvious concerns for the safety of persons in the sea in the area of the Heliport in the event of a forced landing. Axis also points to similar concerns about the safety of the Helicopter or in the surroundings of the Heliport, having regard to what Axis describes as breaches of the requirements of the OTARs for the physical design of the Heliport. The absence from the Manual and Revised Manual of any provisions addressing the safety of swimmers goes also to its "inadequacy", says Axis.

[9] OTAR 135.570(g) provides that: the operator shall ensure that: ...(g) where helicopters are operated in Performance Classes 2 or 3 in a flight phase when an engine failure may cause the helicopter to force land, the surface below the intended flight path permits a safe forced landing."

Touchdown and Lift Off Area

49. A Touchdown and Lift Off Area ("TLOF") is defined at ICAO Annex 14 Volume II as "*a load bearing area on which a helicopter may touch down and lift off*". The term "helipad" is an alternative word for a TLOF. The procedure involved in taking off from and landing on a helipad will vary, depending on the site conditions and the wind, particularly when or close to ground.

FATO

50. As mentioned above at paragraph 22(1), a FATO at a Heliport is a defined area over which the final phase of the Helicopter's approach to a hover for a landing is completed and from which take-off is initiated. The TLOF may be on the FATO or near to the FATO. At the Heliport, the TLOF is on the FATO.

51. The greatest overall length of the largest helicopter that a FATO is intended to serve is defined in OTAR 139.1.21(d) as "D". Both the Manual and the Revised Manual state that the overall length of the Helicopter is 42.45 feet ("D").

52. OTAR Part 139.1.157 (a) provides:

> "*FATO area markings or markers shall be provided at a surface level heliport on ground where the extent of the final approach and take-off area is not self-evident.*"

53. The Heliport is a surface level heliport.

Safety Area

54. A Safety Area on a heliport is defined in ICAO Annex 14 Volume II (Definitions) as:

> "*...a defined area 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.*"

55. OTAR Part 139.1.27 (c) further provides in respect of Safety Areas that:

"A safety area surrounding a FATO intended to be used by helicopters operated in performance class 2 or 3 in visual meteorological conditions (VMC) shall extend outwards from the periphery of the FATO for a distance of at least 3m or 0.5D, whichever is greater, of the largest helicopter the FATO is intended to serve; and

*each external side of the safety area shall be at least 2D where the safety area is quadruilatereal [*sic*]; or*

the outer diameter of the safety area shall be at least 2D where the FATO is circular."

56. Although unmarked, the FATO at the Heliport is regarded as circular.

57. OTAR 139.1.27 (f) requires that:

"No fixed object shall be permitted on a safety area except for frangible objects, which, because of their function, must be located on the area."

58. OTAR Part 139.1.28(d) requires that 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 side slope surface." [This is called the "Secondary Safety Area" *(first mentioned above at paragraph 22.]*

59. OTAR Part 139.I.27 (i) and (j) require that:

"*(i) Where applicable, the surface of the safety area shall be prepared in a manner to prevent flying debris caused by rotor downwash.*

(j) The surface of the safety area adjoining the FATO shall be continuous with the FATO." [Emphasis added.]

Take-off and Approach Surfaces

60. Also as mentioned above at paragraph 21, Helicopters are supposed to (says Axis but contended otherwise by CIHL) approach a heliport (and depart from it) along defined approach and departure paths (called "surfaces"). Take-off and approach surfaces are

required to ensure that there is safety of manoeuvre, clear of obstructions, for a helicopter taking-off from or landing at a heliport. On pages in the Manual and the Revised Manual, there are plans of the Heliport and the surrounding area showing the northerly and westerly take-off and approach surfaces for the Heliport.

61. As mentioned at paragraph 21 above, OTAR Part 139.1.123(f) states: "A surface level heliport shall have at least two take-off climb and approach surfaces, separated by not less than 150 degrees."

62. ICAO, Annex 14, Aerodromes, Volume II, Heliports, section 4.1 states in a Note:

> *"For heliports operated in performance class 2 and 3, it is intended that approach paths be selected so as to permit safe forced landing or one-engine-inoperative landings such that, as a minimum requirement, injury to persons on the ground or water or damage to property are minimalised..."*

63. These requirements are specifically adopted into the OTARs and Schedule One to this Judgment sets out in more detail the OTAR 139 requirements for approach surfaces for heliports used by performance class 2 and 3 helicopters.

64. Axis contends that once the approach and departure surfaces have been designated for a heliport, a helicopter should approach and depart the heliport along these surfaces only. It should not use any other paths. Tables 4-1 and 4-3 at ICAO, Annex 14, Chapter 4, pages 4-19 and 4-21 (and OTAR 139.1.113(d) and (e)) require a divergent angle of 10 degrees on either side of the surface for the helicopter to travel along, in effect creating a "funnel" on the take-off and approach surfaces. These surfaces for the Heliport are shown in the plans in the First Manual and in the Revised Manual. They are also reflected in diagrams elsewhere included in the respective Manuals and are depicted in Schedule Two of this Judgment.

Aeronautical Study

65. As recorded in the Manual and the Revised Manual, the CAACI granted an exemption to CIHL to allow a 90 degree separation angle between the take-off and approach surfaces for the Heliport. This was based on the Study, sent to the CAACI on 25 October 2011.

66. OTAC 139-5 provides guidance on the production of an Aeronautical Study in accordance with OTAR Part 139 where an aerodrome is unable to meet an OTAR requirement and needs to identify alternative means of achieving an equivalent level of safety. Section 3 of OTAC 139-5 states that the "*burden of justifying an application by means of an aeronautical study rests with the aerodrome.*"

Section 6 of OTAC 139-5 states that the decision whether or not to accept the study rests with the regulator (here CAACI). This must all be considered in the context of the burden resting upon both CIHL and the CAACI to ensure safety, as imposed by Article 126 of the ANOTO.

The process leading up to the application for the Certificate

67. Axis raises many concerns about the process of certification which it says are indicative of the unreasonableness of the decision of the CAACI to certify the Heliport.

68. These concerns require a detailed examination of the certification process.

69. The CAACI acknowledges that it had considered it appropriate to make earlier site visits at CIHL's request, in order to give CAACI's views as to whether different sites could possibly meet regulatory requirements, the aim being to "prevent investment in

a site that would not eventually be able to be certified"; as stated by Mr. Dick at paragraph 22 of his first Affidavit.

70. In an email to Mr. Richard Smith of the 27th January 2011, Mr. Begot wrote:

> *"In past reviews, if a site is clearly not certifiable, then [Mr. Alastair Robertson] has surveyed the site and identified the anomalies that would prevent certification. [He] would then discuss with [CIHL] how to address these anomalies from a safety viewpoint and I would submit proposals that hopefully would allow the granting of an exemption."*

71. In light of the sequence of events to be now described, Axis argues that it may fairly be said that the prospect of the site eventually chosen obtaining certification "gained momentum" due to the CAACI's involvement. Axis makes no criticism of the CAACI offering its early views as to certification issues in relation to the site, but it should go without saying, says Axis, that the CAACI must maintain its independence as the regulator and ought not to have become "too close" to an applicant for an aerodrome certificate.

72. Between May 2010 and the grant of the Certificate on 10 November 2011, the CAACI engaged with CIHL and assisted CIHL in relation to the application eventually made by CIHL to it. It appears that CIHL obtained a conditional agreement to rent the site in around May 2010. Early that month, Mr. Douglas Cushman, the CAACI's Manager of Flight Operations, performed a "preliminary inspection" of the site, and wrote to the CPA that the CAACI had informed CIHL that it would "approve its use for daily helicopter operations". That is, says Axis, a surprising indication of the CAACI "jumping the gun". No limitation was expressed as to that approval. What that inspection comprised is not stated. This was, says Mr.

Dick[10], an examination "only for safe operational suitability", not as against certification requirements. It is noted that it remains wholly unexplained what factors as regards safety Mr. Cushman considered, or indeed what was meant by the phrase "safe operational suitability" being different from what would be required to meet safety standards for certification purposes.

73. In the event, the planning application was made in May 2010 (with the assistance of a planning professional); but apparently in reliance on what Mr. Cushman had told CIHL.

74. Nonetheless, it appears from an email of 11 August 2011 from Mr. Alastair Robertson to the CPA that "further information" had come to the attention of the CAACI which it needed to evaluate and that the CAACI needed time to complete its "study".

75. On 13th August 2010, Mr. Dick visited the site and photographs were taken. He prepared a "site evaluation report" (containing the photographs) and provided it to CIHL on 19 August 2010. That report (the "SER") sets out certain conditions and Mr. Dick is recorded in his covering email as saying that the CAACI's recommendation to the CPA for the site was "*based on specific conditions and any changes to the proposal that was discussed with you at that time will require another certification assessment. With the exception of the reduced pad size to a radius of 50*

[10] 1st Affidavit paragraphs 22 and 25: B/3/4-5 (such alphabetic/numerical references throughout are to the evidence binders)

feet[11]*, these conditions were recorded in the site evaluation report which is provided to you again for your reference."*

76. Thus, the SER was provided to CIHL as Mr. Dick later confirmed in his 1st Affidavit so that it could "prepare its plans"; presumably for the development of the site.

77. The SER erroneously referred to OTAR 139 Issue 4, not to Issue 5 which was then since March 2010, the current Issue and resulted in Mr. Dick then applying measurements by reference to 1.5 times the length of the helicopter (or 1.5D) instead of two times (or 2D) the length.

78. This was however an error later recognized by Mr. Dick by the time of certification.

79. Its passing significance now is that at the time of the SER, referencing an out of date Issue of OTAR, important measurements were erroneously taken.

80. Its real significance now is that it recorded the obvious difficulties presented by the site and which Mr. Dick then raised as regulatory concerns as follows:

(i) The alignment of the separation of the take-off and approach surfaces as observed by Mr. Dick at time of evaluation showed a maximum of 130 degrees, and as such would be less than the 150 degrees which he then described as "required" by OTAR 139.1.123 (g).

(ii) Obstacle penetrations in what was then to be the southern approach/departure surface that "are outside the control of the heliport operator" and presented by the metal fence on the border with OCH and by the roof of the OCH building itself. Obstacle penetrations in the northerly approach/departure surface presented by a utility pole and a tree. (The tree was later trimmed to remove

[11] Email of 30 November 2010 – C1/1/49 (with the SER at 50-62). It must be assumed that this measurement refers to a side of the pad (which became a square with sides of 50 feet) rather than a reference to its "radius".

the obstacle it presented) These obstacles were then described by Mr. Dick (at page 55 of the SER as infringing "on the required 8% surface slope".

(iii) The set back required by the CPA from the shoreline, which would not permit construction of the "*deck size required by OTAR 139*" for the FATO and Safety Area; (emphasis added) and

(iv) By reference to a Diagram "D-2" which he drew illustrating the OTAR requirements and overlaid on the site, the Safety Area was subject to a "*slight overhang over the water unless the requirement for this portion could be waived.*" This was then an explicit recognition that a Safety Area partly over the sea would not ordinarily be permitted.

81. As mentioned above, the identified obstacle penetrations were both to the north and south. Nonetheless, elsewhere in the SER, these obstacles were said to be compliant, a conclusion that is unexplained and seems to be explicable only by reference to the separation angles being reduced to 130 degrees (or 135 degrees) from 150 degrees, thereby shifting the northerly approach surfaces barely to the west of the obstacles.

82. There then followed until December 2010, a series of interactions between CIHL (in the person of Mr. Begot), the CPA and the CAACI (in the person of Mr. Dick) relating to the planning approval for the Heliport in which the central concerns were its dimensions and set back from the seaward boundaries of the Heliport site.

83. The ultimate refusal of the CPA and CAACI to waive these set back requirements did not deter CIHL's entering into the lease for the site which it did on 30th November 2010 and in December 2010, contractors commenced framing for the pouring of the concrete pad.

84. Despite that history, on December 2010, Mr. Dick forwarded to CIHL, a document described as an "example manual" that the CAACI "was developing as general guideline material".

85. On December 2010 Mr. Dick asked for an update on progress in addressing the obstruction on the southern side. There was no reference to any obstruction on the northern side.

86. On 27th December 2010, Mr. Begot signed the application form for the Certificate. It appears from an email sent by Mr. Begot to Mr. Richard Smith on 27th January 2011[12] that he had been told by Mr. Dick on 26 January 2011 that he, Mr. Begot, would never land at the site if the southern obstacle (the boundary fence to OCH) remained.

87. Mr. Dick wrote on 25th January 2011[13] repeating that certain items were required from CIHL, including a satisfactory resolution of the southern obstacle, and detailed site drawings. Again, there was no reference to obstructions on the northern side.

88. The engineering site drawings were produced to the CAACI on or around 28th January 2011[14]. The day before (27 January) Mr. Begot had written to Mr. Richard Smith, setting out a contention that the southern obstacle was not a safety issue, and requesting Mr. Smith's "advice".[15]

89. Mr. Begot posited that he did not believe the boundary fence is a safety issue for the following reasons:

- the take-off and landing area is over water and the closest the end of the fence is to the landing area is diagonally 25 feet;

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[12] C1/1/113
[13] C/1/111
[14] Mr. Dick's 1st Affidavit at Para. 39 B/3/14
[15] 13C1/1/113

- if the wind is out of the west by more than 10 knots the Helicopter would not land at the site (in fact CIHL would probably not use the site in tailwind conditions) [emphases added];
- A decision to make a missed approach (or go around) would be made at 100 feet, and
- Any baulked landing (that is: go around) after 100 feet would always be made to the left to ensure that the Helicopter would be over water.

90. On 30 January 2011, concrete was poured to form the concrete helipad closer to the sea than required by the condition in the planning approval. From that point onwards, CIHL was in breach of the planning permission granted.

91. According to Mr. Dick, he was surprised to learn the construction had in fact commenced despite the CAACI's cautions that there were outstanding issues with the site. At meetings on the 7 and 8 January 20ll, the physical requirements for the TLOF, FATO and the Safety Area were (apparently) marked on the site drawings by Mr. Dick, and showed a 135 degree separation angle[16] between the take-off and approach surfaces. Those drawings were retained by CIHL and not copied to CAACI. It is to be noted that up until that time, no application for an exemption from OTAR 139.1.123(f) had been made, still less considered or granted.

92. At these meetings, there was always discussion about the obstacle on the south side but that on the northern side was seemingly not mentioned.[17]

93. On 18 April 2011, Mr. Richard Smith replied to Mr. Begot's email of 28 January 2011 in these terms[18] (emphasis added):

[16] Dick 1 paras. 39 to 41. B/3/14
[17] Dick 1 ibid.

"The site is situated in a built-up area close to public roads and facilities. It is also intended for frequent use based on its attraction to cruise ship passengers. As such, I consider the risk to public safety to be higher and it is therefore necessary to meet certification standards. If it cannot meet this requirement, then the variations from standard need to be minor and the associated risks easily mitigated to allow me to consider an exemption.

However it is unwise of you to develop this site on the assumption that it can be operated on the basis of exemptions rather than as a certified site and this has been made clear to you on a number of occasions....The likely problems...were identified to you and you offered assurances that they could be overcome on the basis of your relationship with adjacent landowner....The supporting information you have offered in your email may be considered in mitigation if the site cannot be certified due to minor deficiencies but this will only become apparent once an inspection for certification has taken place."

94. The apparent reasons or lack of reasons, for the ultimate departure by the CAACI from this entirely orthodox position, will be a central focus of this Judgment.

95. Axis also points to the fact that in May 2011 the Royal Cayman Islands Police Service ("RCIPs") Air Operations Unit, assessed the Heliport for use by its twin engine (Performance Class 1) helicopter, and assessed the site as not meeting the safety criteria relevant to its operations[19], concluding that nonetheless, in the event of

[18] C1/1/2
[19] C1/10

a National Emergency or serious accident, the site could be used by the police helicopter even though below the minimal requirements of the helicopter manual, at the discretion of the Governor.

96. Among the concerns about the site were the observations that the majority of the area currently surrounding the 50 feet concrete square is "iron shore" or a loose rubble mix and "currently an unsuitable surface". There was also noted the concern that it may not be possible to satisfy the criteria as to obstacles avoidance around the site with winds from the west and the north. For the police helicopter to maintain its performance criteria "there had to be no tail wind component".

97. Axis emphasizes that despite its higher performance classification than the Helicopter, the RCIPs would not routinely operate their helicopter from the site; having regard, among other things, to the dangerous effect of tail winds. The CAACI and CIHL both respond to this concern by noting, quite correctly, that the RCIPs' assessment, though they may be presumed to know what they are doing, cannot simply be substituted for that of the CAACI which is the body vested with the authority to certify the site and so whose decision must be shown to be "unreasonable" before it can be impugned.

98. To return to the chronology: Mr. Robertson of the CAACI met with Mr. Begot on 1st July 2011, to review progress[20]. Obstructions were discussed: that to the southern side presented by the "pipe fence" surrounding the car park (of OCH) and vehicles parked in the car park itself and the railings then protecting the ramp to CIHL's building. This discussion took place by reference to OTAR Issue 5. Prior to this (as already noted) it seems the CAACI had been mistakenly referencing OTAR Issue 4

[20] C1/118

which had seemingly prescribed different dimensions for the size of the FATO and Safety Area.

99. A first draft of the Manual was provided to the CAACI in late July 2011. No copy of it is provided in the evidence but its existence is referenced in an email from Mr. Robertson of 29 July 2011 in which he advised: *"I have completed the review of your document which didn't take as long as I had anticipated because it is a short document and lacking in some detail. I have attached my comment....Basically, you still have some work to do but all that you have already done can be incorporated into the updated document....I have also attached some excerpts from OTAR 139 "Certification of Aerodromes" which may be of help or at least of information to you. The OTAR content includes:*

- *OTAR 139 Part C: Requirement for and content of the Aerodrome Manual*
- *OTAR 139 Part D: Responsibilities of the Aerodrome Certificate Holder*
- *OTAR 139 Part E: Aeronautical Studies (information on how to construct the case for exemptions....)"*

100. So here, even before the Manual is provided in final form, is shown a readiness on the part of the CAACI to entertain, if not encourage, an application for exemption from the OTARs. It is to be inferred that the earlier processes by which other sites had been considered for the construction of a heliport but found unsuitable, had stopped short of a formal request for exemption. This is the reasonable inference as such a process would have involved the provision of an Aeronautical Study and OTAR 139 Part E was apparently not made available to CIHL until this occasion.

101. A revised draft version of the Manual was submitted to the CAACI on 31 August 2011 but again, no copy of this is in evidence. It is likely that any survey drawings it

contained depicting the approach/departure surfaces and separation angle between them, would have had the utility pole penetrating the northerly approach/departure surface. This is so because the Roland Bodden & Co. survey drawings eventually submitted with the Manual on 10 November 2011, showed the utility pole there.

102. There is no evidence as to what (if any), comments the CAACI provided as regards this revised draft Manual.

103. However, Mr. Robertson having provided OTAR 130 Part E to CIHL on 29 July 2011, in mid-September 2011 CIHL wrote, per Mr. Begot, to the CAACI that it would like to apply for an exemption to reduce the separation angle between the take-off and landing surfaces to 110 degrees. The expressed intention was to avoid the southern obstacles of the OCH boundary fence:

> *"I understand the certification of the Helipad is awkward due to the fence on the neighbouring property. I would like to apply for an exemption to the standard requirements of approach and departure angles to reduce to 110 degrees (see annex). The reduced angle will allow us to totally avoid the obstacle on the neighbouring property when using the south approach and departure slot".*
>
> [Although not produced in evidence, it is a reasonable assumption that the "annex" to this letter was intended and submitted as a form of aeronautical study].

104. As justification for this reduced separation angle, Mr. Begot wrote that *"whilst operating in Canada I used (a) number of heliports that had approach-departure angles as low as 90 degrees..."* He did not however cite specific examples.

105. He continued:

> *"To ensure the safety of the GT Helipad some restrictions are in force and included in the Operation Manual.*
>
> *The GT Downtown Helipad decision height (whether to land or not) will be 200 feet AGL. If a decision to land is made, a landing to the hover must be made followed by a touchdown.*
>
> *If a decision to go around is made at 200 feet AGL, the go around may be made to the south-west and north-west on the north approach. This will satisfy clearance of any obstacles.*
>
> ....
>
> *Any CIH pilot who will operate out of the GT Helipad site will have a minimum of 500 hours experience. In addition, there will be a minimum of 3 training landings and 2 overshoots. (ie: go arounds) per year....*
>
> *The GT Helipad site will not conduct operations with a tail wind of 30 knots or more."*
>
> [I note the comparison of the restriction of 10 knots offered on 28 January 2012].

106. Mr. Begot ends by expressing the hope that the site inspection can be completed as soon as possible as "*I would like to be able to begin operating from the site without further delay. Utilizing this location will assist us in providing an improved tourism product as the helicopter will be visible to a wider audience as they arrive in Grand Cayman.*"

107. By this time, in September 2011, CIHL had reportedly spent some CI$200,000 in connection with the site[21]. Thus, the development of the site had continued despite the earlier expressed view of Mr. Richard Smith that it was unwise to continue in the hope of obtaining exemptions from the certification standards.

108. On 27 October 2011, CIHL made its formal request for an exemption, accompanied by the Study[22]. The request was now for a 90 degree separation angle and so even more stark departure from the normal standard of 150 degrees required by the OTARs. Thus, a reduction successively from 150 degrees to 130/135 degrees, to 110 degrees, to 90 degrees. It is to be noted moreover, that in practice – as Axis alleges is shown from video recordings – the Helicopter habitually uses an even narrower angle than 90 degrees – instead taking off or landing at any point within an arc described by the area which is within the separation angle of 90 degrees. And these were not the only problems with the Study, says Axis. There was no statement (or other information) as to where the take-off and approach surfaces would actually (and specifically) lie, should the request for a reduced separation angle be acceded to.

109. Further, Figure 2 in the Study marked the square concrete pad to be the FATO, and illustrated a Safety Area extending over CIHL's building on the site.

110. In early November 2011, "final revisions" were made to the revised draft Manual and it was submitted by CIHL to the CAACI. According to Mr. Dick[23] as the Manual was then considered compliant by the CAACI, he then undertook a final site inspection. It is to be assumed that these final revisions would be reflected in the Manual that is required to accompany the Certificate.

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[21] Per Ms. Legras' affidavit para. 9 B/8/5

[22] Under cover of Mr. Begot's letter of that dated but the study has no attributable authorship. C1/1/128.

[23] 1st Affidavit para. 78, B/3/25

111. The Certificate[24] was issued on 10 November 2011. It refers to a "final physical assessment of [the site] having confirmed compliance with OTAR 139."

112. However, until near the completion of the trial when Mr. Dick submitted his 7th and 8th Affidavits, there was no evidence as to when that "final physical assessment" was carried out, or by whom.

113. Indeed, there was no evidence until he filed his 7th Affidavit, as to what measurements were taken by Mr. Dick at any time, in the absence from the trial of information relating to his inspection of the site. This absence of information was explained by Mr. Beloff on the basis that the presumption of regularity applies to the conduct of the CAACI.[25] While as a general point of principle that is correct, the taking of that point instead of explaining what was actually done in the particular circumstances of the case, where public safety is in issue, seemed obviously unsatisfactory. Accordingly, on 5th March 2013 I directed that Mr. Dick provide answers to 7 specific questions raised by counsel for Axis including the following[26]:

- What measurements were taken by him in respect of the site, e.g. on the ground; bearings of the approach/departure surfaces; inclines, obstructions through inclines; the separation angle between such surfaces?

114. In his 8th Affidavit Mr. Dick explained that during the preliminary site evaluation carried out on August 13 2010 leading to the SER and referred to in his 1st Affidavit,

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[24] C1/1/143 to 144

[25] Until an administrative act or determination is set aside by the Court, it exists in fact and law and has legally valid consequences. Implicit in this is the presumption that the CAACI was likely to have followed the rules that govern its decision-making process and so would have followed the process required by the OTARs, including the taking of measurements. Derived from the *maxim* omnia *praesumuntur rite esse acta*, this is a principle of longstanding. See per Jervis C.J, in Davies v Prath 17 C.B. 183 at 188.

[26] However, I refused to direct that Mr. Dick should submit to cross-examination. Such relief in judicial review proceedings, though permissible, is only sparingly and exceptionally ordered. R (G) v. London Borough of Ealing [2002] EWHC 250; R (Bancoult) v. Foreign Sect. [2012] EWHC 2115.

he had made certain measurements, no helipad then being on site, by using "Google Earth" to estimate the dimensions of the proposed site to be 100 feet x 80 feet. Using those estimated site dimensions, he applied the relevant OTAR Part 139 (Issue 4 which he mistakenly then thought to have been in force) standard for the TLOF, FATO and Safety Area applicable for Class 3 Performance helicopters (of the class which the applicant intended to use at the site, if approved) and prepared estimated dimensions for each of those surfaces. The reference to the outdated Issue 4 resulted in his calculations being based on 1.5 times the length of the helicopter instead of two times the length as required by OTAR Issue 5. This is as shown in the diagrams at page 9 of the SER[27] provided again to Mr. Begot on the 30 November 2010 "*for reference*". As he explained in his 4th Affidavit however, had he used the measurements required by OTAR Issue 5 (i.e. 2D instead of 1.5D the Helicopter) the results would have yielded the same dimensions for the primary Safety Area: the diameter of the outer edge would have been 84.9 feet, the same as the outer edge under Issue 4.

115. In his 7th Affidavit Mr. Dick explained that he had also used an inclinometer on that occasion in an attempt to identify possible approach/departure surfaces to see whether obstacles penetrated the 8% slopes and so as to ascertain whether the proposed site could facilitate OTAR compliant approach/departure surfaces. He explained that he observed that the utility pole would infringe the 8% surface slopes along the northerly approach/departure surface but using the top of the pole as a reference point, he drew the outer boundary of a northern approach/departure surface specifically excluding the utility pole from that surface. Using the inclinometer, he also noted that a

[27] C1/1/49-62

possible south-westerly approach/departure surface would lie over the parking lot on OCH's property. The fence on the north-west corner of that property and a pole on the south end also appeared to be obstacles. These findings are recorded at pp 6 – 7 of the SER, where, at page 7[28] he shows an alignment between the north/south departure surfaces with a separation angle of 130/135 degrees. The result was that while the utility pole was excluded from the northerly approach/departure surface, the fence and south-west corner to OCH property clearly presented obstacles to the southerly approach/departure surface.

116. Mr. Dick goes on to explain at paragraph 16 of his 7th Affidavit that in the last week of October 2011 he carried out the final site certification assessment. By this time CIHL had constructed the concrete pad and so, using the length of the Helicopter (i.e.: 42.45 feet) as the standard (D), he calculated the radius and diameter of the FATO respectively at .5D or 21.225 feet, by reference to OTAR 139.1.21(d) (2) which provides that a FATO shall be "*of sufficient size and shape to contain an area in which can be drawn a circle of diameter not less than 1D of the largest helicopter [that is; 42.45 feet] the FATO is intended to serve*".

117. He also calculated the dimensions of the Primary Safety Area by reference to OTAR 139.1.27(c) which prescribes the requirement for a safety area surrounding a FATO intended to be used by a helicopter such as the Helicopter. The safety area where the FATO is circular, as per OTAR 139.1.27(c) shall have an outer diameter of at least 2D or 84.90 feet.

118. These measurements of the Safety Area resulted in the outer diameter infringing upon the deck of CIHL's building on the site. This infringement was inadvertently

[28] C1/1/56

overlooked at that time, Mr. Dick says, because of an error which he explained in his 7th Affidavit (at paragraph 17) in this way:

> *"...I took these measurements at the site by using a 50 ft. measuring tape. I held one end and moved around the site while Mr. Rob Hopcroft, the Helipad Manager, standing at the centre point of the Primary Safety Area, held the other end. I believe a very slight foot adjustment of his at the centre point of the Primary Safety Area as I turned around full circle at the site during the exercise, resulted in the infringement of that surface by a small part of the CIHL deck which the (CAACI) discovered later."*

119. Peculiar though this explanation may seem for the error, it cannot be refuted now as the infringement was indeed later noticed and CIHL was required to and did remove the offending parts of the deck.

120. Mr. Dick further explained in his 7th Affidavit, that for the certification purposes he took no magnetic bearing measurements for the approach/departure surfaces nor were any required of CIHL although such bearings were provided in the Manual. For the purpose of the separation angle he was content to refer to the "approximate orientations" because the CIHL site is a VFR (Visual Flight Rule) site to be used by only one pilot (viz: Mr. Begot). This implies that only where the site is to be accessed by instrument flight rule (IFR) would it be necessary to prescribe the precise magnetic bearings. The notion is also that Mr. Begot understands the location of the northern and western approach/departure areas.

121. The problem with this approach, says Mr. Brook Smith, is that the application of the precise magnetic bearings to the required 90 degree separation angle, shows the utility pole penetrating the northerly approach/departure surface. This is apparent from Figure 2 of the Manual[29] even while Mr. Dick's diagram showing his "*approximate orientations*" overlaid on a Google Earth photograph, is inconclusive in that regard.

122. Summarizing what appeared to have happened: it is plain that the obstacles on the southern side were a preoccupation during the application process but the obstacles to the northerly approach/departure surfaces seem to have fallen out of consideration. In particular, the utility pole remained there, but the CAACI appears to have either forgotten about it, or decided that it was not a problem presumably because a "visual orientation" of a 90 degree separation angle appeared to allow for its avoidance. But, says Mr. Brook Smith with obvious force, if there was to be a reduced separation to 90 degrees caution would have dictated that there had to be some precision as to where the take-off and approach surfaces lay, for only then could obstacles properly be assessed.

123. The Roland Bodden drawings submitted with the Manual[30] apply magnetic bearings to the measurement of the take-off and approach surfaces referencing a 90 degree separation angle and clearly show that the utility pole infringes the north-easterly sector of the northerly surface.

124. A subsequent Roland Bodden drawing intended to form part of the Revised Manual clearly shows that when the surfaces are shifted, still applying the 90 degree

[29] C/1/158 – The Roland Bodden drawing relied upon for the certification.
[30] C1/1/558, 159

separation angle to the south and west and barely avoiding the utility pole; the southern surface is infringed by the boundary fence and wall with OCH.

125. This state of affairs at the time of certification must go to the question of reasonableness of the decision to certify notwithstanding the Defendants' joint argument, that the process of safety regulation is an ongoing process in which the CAACI retains oversight and in which the Manual can be required to be altered to ensure the ongoing safe operation of the Heliport. Failure to comply could, on that ongoing basis, result in revocation of certification in the discretion of the CAACI and in keeping with ANOTO Article 122.

More on The Study

126. Having regard to the very technical nature of the operation of helicopters and of helicopter flight, Axis argues that an aeronautical study prepared to support a request for exemptions from the OTARs should be prepared by someone having the appropriate expertise.

127. The Study was purportedly prepared "*in accordance with*" OTAC 139-5 as the Study itself declared[31] but the OTAC itself (at paragraph 4) requires input of qualified expert opinion – providing that "*Both aerodrome and flight operational expertise is needed.*"

128. The identity of the authorship of the Study came to light only on 6 March 2013 near the end of the trial, by way of the affidavit of Mr. George Giglioli, CIHL's instructing attorney. Mr. Dick's evidence was that he did not know who wrote the Study and had not enquired because he thought the authorship to have been irrelevant.

[31] C1/1/129

129. Mr. Giglioli explains that he had been informed by Mr. Begot that the Study was written by him assisted by Mr. Robert Hopcroft, CIHL's flight engineer (the same person described by Mr. Dick in his 7th Affidavit as the "Helipad Manager": … para. 17).

130. Mr. Brook Smith argues that Mr. Dick's failure to have considered the identity of the authors is also indicative of the unreasonableness of the decision to certify. For all that Mr. Dick then knew, the author was Mr. Begot himself (as turned out to be the case subject to whatever unparticularized input may have been given by Mr. Hopcroft).

131. Axis argues strenuously that the CAACI should have had regard to whether Mr. Begot authored the Study. This is because Mr. Begot cannot be considered an expert in heliport design and the safety issues requiring OTAR compliance. There is indeed no evidence to suggest – and a good deal to the contrary – that he is to be so considered. His relevant experience is as a pilot.

132. Axis asks the Court in this context of assessing the reasonableness of CAACI's acceptance of the Study, to note that Mr. Begot has a checkered history as a pilot. He had been warned by the CAACI against low flying over the reef in 2008, with suspension of his pilot's licence to follow if it recurred[32].

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[32] C2/15/115: An email exchange between Mr. Smith and Mr. Biehn of the CAACI dated 16 July 2012 referencing an earlier incident in 2008 in these terms:

> *"I cautioned Jerome (Mr. Begot) about this type of (flying) activity back in March when I saw another video of a flight where he also flew very low over the reef. I consider this to be reckless endangerment. We have a letter on Jerome's file dated February 2008, warning him against low flying over the reef and indicating that any further instances of it would result in a two weeks suspension of his pilot's licence….I recommend a two week suspension of his licence….". Mr. Biehn is the CAACI's Director of Air Safety Regulation. The suspension of Mr. Begot's air operator certificate was notified in a letter of 17 July 2012 from Mr. Smith.*

133. Axis submits that Mr. Begot may fairly be described as what aviators term a "bold pilot". That he appears to have an attitude to risk, and to safety regulations, which is not the most salutary and that this is highly relevant. The CAACI should have considered Mr. Begot's flying history when considering whether to rely on the Study submitted by him. Despite letters from the CAACI warning him about flying at "dangerously low altitudes", Mr. Begot's subsequent flying is of a piece. He was cautioned again in March 2012 (as seen from Mr. Biehn's email excerpted at footnote 31) for flying considered to be "reckless endangerment". His flying activities had attracted the attention of the RCIPs (Air Operations Unit), the officer's reaction being one of "dismay". In one video recording, Mr. Begot is shown conducting a flight without his hands on the controls of the Helicopter at certain intervals. When Mr. Begot's licence was suspended on 17 July 2012 for such reasons, Mr. Richard Smith's letter records that he offered no explanation or defence for his actions.

134. The CAACI and CIHL both argue, through counsel, that the manner of Mr. Begot's flying was neither relevant to the decision to certify the Heliport in November 2011 nor to any decision which the CAACI could be argued as being obliged to take to revoke the certificate subsequently. Mr. Begot's manner of flying, they argue, may be a matter of operational concern to be dealt with in the discretion of the CAACI, but not a matter that could have been relevant to the certification of the Heliport.

135. I will return to this issue in my analysis of the evidence below.

136. I continue here to set out relevant considerations about the Study.

137. The thrust of the Study as submitted by Mr. Begot, was that the OTAR requirement for a 150 degree separation between the approach/departure surfaces, failed to

recognize the "proven capability" of a helicopter for safe operations into "more limited areas" and that there were "very few potential sites" in the Cayman Islands that could meet such requirements[33]. This latter point was, Axis submits, plainly irrelevant although it was implicitly accepted by the CAACI in its overall acceptance of the Study. The focus ought not to have been upon the commercial implications of the unavailability of other suitable sites, the focus was required to be on the suitability of this site.

138. In addition to that argument of Mr. Begot's, the Study offered mitigations, including:

- That all operations were to be conducted "within the height velocity curve profile" of the Helicopter (about which more below);
- A land/go around decision at 100 feet (above ground level "AGL");
- All touch downs to be made with the Helicopter aligned into the wind;
- No flights would take place when the wind from any westerly direction exceeded 17 knots; and
- A minimum 1000 hours experience for the pilot, and a minimum of 50 hours on type (meaning the same type of helicopter as the Helicopter), with minimum 5 landings and take-offs within the last 30 days.

139. Axis invites comparison with the "mitigations" first proposed by CIHL in Mid – September 2011 in connection with the "annex" where a separation angle of 110 degrees was proposed; a land go around decision would be taken at 200 feet AGL and flights would not take place with a tail wind of 30 knots or more (10 knots or more

[33] C1/1/130

having been proffered on 28 January 2011) presumably from any direction, not just westerly.

140. This issue of wind impact was implicitly a concern throughout the certification process. It was apparently recognized as such from Mr. Begot's undertaking to fly *"within the height velocity curve profile"* to land *"with the Helicopter aligned into the wind"* and to desist from flying when tail winds variously above 10 knots, 17 knots and 30 knots are prevailing and from the OTAR requirement that there shall be a safe separation angle between the approach/departure surfaces.

141. These are all factors of critical importance to the performance capabilities of the Helicopter, as the expert evidence in the case, and that eventually of Mr. Dick himself, agreed. I will need to elaborate upon this further below.

142. Here it is apt to note, for further discussion also below, the concern raised by Axis that the varying nature of its proposed "mitigations" notwithstanding, CIHL appears to have persuaded the CAACI to accept them as ultimately proposed in the Study, without there being any apparent reason why they varied so widely or why such variations were acceptable to the CAACI.

143. It was implicit in the reference in the Study to the Canadian Aviation Regulations as allowing for a 90 degree separation angle[34] that Mr. Begot was inviting the CAACI to rely on the Canadian standards rather than OTAR 139 for these purposes. He himself had had extensive helicopter operational experience in Canada and it may be assumed that he was aware of Mr. Dick's background as an experienced regulator in Canada before coming to the CAACI.

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[34] C1/1/131

144. Nonetheless, says Axis, the fact that the Study identified no specific Canadian example of a heliport operating within a 90 degree separation angle with a slope of 8%, let alone one positioned with such prevailing wind conditions and in so populated an area as the Heliport; the alarmingly "*laissez faire*" attitude on the part of Mr. Dick was an attitude more concerned with accommodating Mr. Begot's commercial objectives for his business, than with the proper safety considerations required by the OTARs to be observed.

145. This regrettably, is an allegation that finds itself at the centre of the issues to be resolved in this Judgment.

146. It must be noted here, however, that Mr. Dick came to explain, if rather belatedly in his 7th Affidavit, that he had in fact given consideration to the matter and had had specifically in mind examples of Canadian heliports with which he had been familiar operating at 90 degrees or less separation angles. These, the Victoria Harbour and Vancouver Harbour heliports, he had been specifically aware of on 10th November 2011 as heliports where – despite the stricture of the approach/departure surfaces – Performance Class 3 helicopters are operated. In support, he exhibited the Air Navigation Manual of Canada 2013 which identifies as he said "*over 70 heliports in Canada with a separation angle of 90 degrees or less in different types of locations*". He deposes that *"The Aeronautical Study presented by CIHL prompted me to remind myself of the fact that these heliports existed and that Canadian regulations permitted this. I had been aware of this in the course of my career in Canada*". Having mentioned prior to his 7th Affidavit only that he had in mind an unnamed heliport in Western Ontario, Mr. Dick is criticized here and in other respects, for having engaged

in a process of *ex post facto* rationalization of what he had come to realize is an unreasonable decision to certify the Heliport.

147. From this evidence given in his 7th Affidavit, and from extensive reference to the Canadian Civil Aviation Regulatory process ("CARAC") in his 1st Affidavit, it is against that background that Mr. Dick regarded or came to regard the CARAC as providing the "appropriate risk assessment....that is associated with an aeronautical study's requirements". His decision to be guided by the CARAC, instead of by strict adherence to the OTARs in this respect, is clear from this conclusion appearing at paragraph 63 of his 1st Affidavit:

> *"The (CAACI), like CARAC, is committed to following a process intended to ensure safety and is satisfied that the Canadian Civil Aviation regulatory process addresses the same issues as those required to be taken in account by the (CAACI). OTAC 139-5 suggests that both aerodrome and flight operational expertise should be included in an aeronautical study and I assessed these matters taking into account the evaluation requirements for the Canadian regulatory process. For this reason, the (CAACI) was of the view that CIHL's reliance on the Canadian approach to the 90 degree separation between alignments was both reasonable and appropriate."*

148. And at paragraph 66:

"The safety considerations raised in CIHL's Study are therefore consistent with the reform proposed by ICAO[35] *and in any event, exceed the current published concern as to a 95% usability factor which can be reasonably attained by the imposition of wind speed limitations for the Site."*

149. Notwithstanding that the reference to the "reform proposed by ICAO" was one raised by CIHL only after the CAACI had accepted the Study, Mr. Dick cites the proposed ICAO reform now as support for the decision to accept the Study and in particular, the aspect dealing with the reduced separation angle. In his 7th Affidavit Mr. Dick reaffirms this premise in his assertion that the ICAO Reform will in fact come into effect at the end of 2013, following which they are to be expected to be adopted by changes to the OTARs.

150. It will be seen from the proposed ICAO reform, that the critical change would be that which removes the requirement for a separation angle between approach/take-off surfaces, in effect allowing for a single in and out path of flight. Thus, notwithstanding OTAR 139, Mr. Dick's position is that in exercise of the discretion which was always vested in him (as the CAACI's expert) whether to impose the

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[35] The proposed reform 4.2.7 [See C1/8] provides (with the words in square brackets deleted to show the proposed reform):
"A surface level heliport shall have at least two approach and take off climb surfaces [separated by not less than 150 degrees]. An aeronautical study shall be undertaken by an appropriate authority where only a single approach and take-off climb surface is provided considering as a minimum, the following factors:

(a) the area/terrain over which the flight is being conducted;
(b) the obstacle environment surrounding the heliport;
(c) the performance and operating limitations of helicopters intending to use the heliport; and
(d) the local meteorological conditions including the prevailing winds.

Recommendation: - A surface level heliport should have at least two approach and take off climb surfaces to avoid downwind conditions, minimize cross wind conditions and permit for a balked landing."

requirement vested by the OTARs themselves, he was satisfied that the allowance of a reduced separation angle to 90 degrees (between the two approach/departure surfaces) is well within the bounds of safety. And, the expected ICAO reform serves to confirm this.

151. More specifically, with respect to wind as an environmental limitation, Mr. Dick explained also in his first affidavit, that he also gave close consideration to the Study and concluded that its recommendation to cease operations in the event of 17 knot or greater westerly wind was acceptable. He explained that in assessing the merits of this recommendation and the impact of wind on flight operations, the CAACI had requested information from the Cayman Islands National Weather Service (CINWS) on the wind patterns for the past five years and was advised by the CINWS that the highest winds are not likely to come from the north.

152. According to the information recorded from CINWS on October 28, 2011; the only winds above 11 knots were in a sector from the northeast to a southerly direction. Such wind orientation, says Mr. Dick, would be aligned with one of the two approach/departure surfaces. Thus, with approach/departure areas aligned to the north and west and a westerly wind restriction of 12 knots, the CAACI deemed the concern of the impact of wind on operations to be adequately addressed. It should be noted, he states, that the CAACI determined that a reduction from the 17 knots proposed by CIHL to 12 knots would impose a more stringent safety standard and this was ultimately reflected in CIHL's Manual. A copy of the email dated October 28

2011 from the CINWS was exhibited showing the "windrose" representation of the wind patterns[36].

153. From this, Mr. Dick goes on to state at paragraph 68 of his 1st Affidavit that Axis's criticism – as supported by its expert Mr. Geoffrey Connolly – that "*all touchdowns should be made with the Helicopter aligned into the wind*" while recognizing that a helicopter has the capability for out of wind landings; is really one that recognises that safety will be increased by insistence on into-wind alignment. When raised in that light, for all the reasons given, the CAACI considers that it has properly considered all touchdown issues.

154. Even at that, the concern remained (and was developed during the arguments by exchanges between the Bench and Bar) that by omitting to impose any restrictions against taking off with a tail wind, the CAACI failed to take into consideration an important relevant factor that it should have taken into account.

155. This was an issue flagged up not only in the arguments and in the Amended Notice of Motion (the "ANM") at ground 5.6(e)[37]; Mr. Connolly's strongly expressed expert views on this issue although the subject of debate engaged in by CIHL's expert Mr. Carey, and by Mr. Dick himself as the CAACI's expert, in the end was not a subject of substantive disagreement. They all agreed that mitigations for tailwind operations are advisable although, as will be discussed in more detail below, Mr Dick saw no need to impose a limitation in this respect. Rather, the Defendants' final response to

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[36] C1/9 – A colour copy was provided in Court.

[37] A/14/9: *"The "Aeronautical Study" recommended that flight operations should cease if there were 17 knot westerly winds. However, there was no analysis of safety issues caused by northerly winds, which would cause the same safety issues as a westerly wind because of the site of the Heliport. Further, issues regarding the effects of an easterly or southerly wind, considering the turbulence that would be caused by the buildings, located to the east and the south of the Heliport, were not addressed."*

this concern came from Mr. Lowe QC to the effect that as Mr. Connolly does not say that taking off with a tail wind of up to 12 knots would be unsafe, any concerns about prevailing tail winds from the north-east (as would usually be the case as take off would be to the west or north-west over the sea) could be addressed by the CAACI being directed by the Court to impose such a restriction as well. Quashing the Certificate would not be the appropriate response.

156. This argument seems to run contrary to the CAACI's primary argument that, as the regulatory expert body responsible for the regulation of civil aviation in the Islands, the Court should defer to its judgment on the matters in dispute and not seek to substitute its own judgment. The Court can interfere only where the CAACI's decision is manifestly unreasonable. The juxtaposition of these two arguments as respectively presented by the CAACI and CIHL, is a matter to which I must return.

The Contents of the Manual

157. Given the requirement of Article 105(2) and (7) of the ANOTO that the Manual must be "adequate" (as set out above at paragraph 13), Axis raises specific concerns about its adequacy, all reflective of the other concerns about the physical and environmental circumstances of the Heliport. These are concerns which, as also already mentioned, the Revised Manual still largely failed to remedy:

(i) Figures 2, 3 and 4 are the revised drawings by Roland Bodden & Co.[38] (first prepared on 30 August 2011) and included the representation of the approach/departure surfaces which are approved for the operation of the Helicopter. As such, they show a circular Safety Area, with the centre point at

[38] C1/1/158 to 160

the centre of the concrete pad (itself marked by the customary letter "H"), and the take-off and approach surfaces specifically marked by reference to magnetic north. Yet, the utility pole is clearly marked on Figure 2 as penetrating the northerly approach/departure slope.

(ii) The "FATO diameter" is stated simply as "50 ft x 50 ft[39] then suggesting a square and this as being the same dimensions as the concrete helipad.

(iii) The Safety Area diameter is given as 2D or 84.9 ft. and is depicted marked in pen on two photographs one of which markings infringes upon the deck of the CIHL building[40]. However, a safety area properly measured to avoid infringement on the deck of CIHL building, had an actual diameter of only 78.85 feet as shown on the Evans & Assoc. drawing #3, thus then failing the OTAR 139.1.27 requirement by more than 6 feet.

(iv) As for the surface of the Safety Area, the Manual recognises that the FATO pad "has a 6 to 8 [inch] vertical drop to the ironshore" [which in reality Axis has measured to be as deep as 2.7 ft. to 4.8 ft in some pockets of the ironshore and described by Axis as "shambolic"]. So, says Axis, the surface area of the Safety Area adjoining the FATO (being the concrete pad) was not "continuous" with the FATO as required by OTARs 139.1.27 (j) (see paragraph 60 above).[41]

(v) Penetration of the Secondary Safety Area by buildings "is permitted to the south and east side."[42] This is a recognition that the Secondary Safety Area

[39] C1/1/168
[40] ibid
[41] C1/1/169
[42] C1/1/170-172

was not free from impediments within the area extending 10 metres along a 45 degree slope measured from the edge of the FATO as required by OTAR 139.1.28(d). Instead it was compromised (to the south) by OCH itself and (to the east) by CIHL's building. This is clearly shown by the Evans Survey Map #12 and thus to be persisting even when incorporated into the Revised Manual. Take-off and approach surfaces (primary) were defined by magnetic bearings – at 90 degrees and 360 degrees; and take-off and approach surfaces (secondary) were defined by magnetic bearings – at 180 degrees and 270 degrees[43]. The photograph inserted shows the obstacle that is presented by the wall and fence to OCH to the southern approach/departure slope.

(vi) A diagram inserted (said to have been sketched on a Google Earth photograph by Mr. Dick himself) apparently shows "accepted orientation of app/dep areas"[44]. However, being a crude drawing, it specifies no magnetic bearings but depicts a separation angle of 90 degrees with 10 percent splays to the northerly and south-westerly approach/departure slopes which would respectively include the obstacles to the north (the utility pole) and to the south the fence and wall to OCH.

(vii) The take-off and approach surface is "said to be entirely over water and helicopter has pop-out floats"[45] but nonetheless depicting a photograph said to have been taken by Mr. Dick in August 2010, that shows that the northern surface passes over the dock, land and building of the adjacent Lobster Pot restaurant, by reference to the 8 % incline/decline slope.

[43] C1/1/172 and Dick 4th para. 10 B/5.
[44] C1/1/172
[45] C1/1/171

(viii) The FATO and TLOF "are constructed as having the same outer boundary…discernible from the surrounding safety area and as such does not require marking[46] (thus, again, suggesting that the FATO was the same area as the concrete pad and at once waiving the requirement of OTAR 139.1.157(a) that the FATO be marked clearly.

Mr. Dick later wrote on 2nd June 2012[47] – some months after this action was commenced – directing Mr. Begot to revise the Manual to show the radius of the FATO to be .5D or 21.25 feet (the minimum OTAR requirement). There was, however, no evidence to suggest that this was a requirement specifically considered at the time of certification and is further part of what Mr. Brook Smith described as *ex post facto* rationalization to justify the certification of the Heliport. Even up to the conclusion of the hearing, the FATO remained undistinguished from the helipad itself and even if the FATO (despite all the evidence) was in reality a circle of radius 21.25 feet, then it was irrational, says Mr. Brook Smith, for the CAACI to consider the Manual (given its contents at the time) was nevertheless "adequate".

Take-off and approach surfaces continued

158. The requirement for an 8% approach and departure slope along the northerly take-off and approach surface was not achieved at time of certification, says Axis as there was: (1) the 33-foot utility pole located around 285 feet from the Heliport (and still there even now); and (2) a tree (subsequently trimmed); each of these obstacles being located along and penetrating the take-off and approach surface. This is clear from

[46] C1/1/172
[47] C2/3

the Evans' Survey Maps Nos. 4 and 5 as submitted by Axis[48]. The CAACI's view that this important requirement was achieved at time of certification, flies in the face of reason, says Axis.

159. Mr. Dick was aware from his "site evaluation" as reported in the SER in August 2010, of obstructions to the north that would affect certification. These were then (seemingly) ignored or forgotten by the CAACI, with the continued focus on the obstruction to the south, as noted above looking at the process leading to certification.

160. In his letter of 8th June 2012 to Mr. Begot, directing revision of the Manual[51], Mr. Dick wrote (thus subsequent to the grant of the Certificate), that the CAACI considered that the Manual had a "technical inconsistency" in that the northerly approach/departure area was "specifically chosen to avoid the pole but was shown as including the pole in Figure 2 of the Manual[49]. It was (apparently) this alignment that was "approved by the Authority", as Mr. Dick later explained[50]. Yet, the alignment referred to is that depicted on the Google Earth Photograph prepared by Mr. Dick himself on which he drew lines depicting a 90 degree separation between approach/departure surfaces with the "northerly" surface marked thus and without any specification of the bearings such that it is impossible to tell whether that surface could be penetrated by the utility pole[51].

161. At paragraph 11 of his 3rd Affidavit, Mr. Dick's comment is that "this discrepancy itself has no safety implications but nonetheless in the interests of technical accuracy"

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[48] D4 and 5

[49] The Roland Bodden Survey drawing, the only precise drawing with magnetic bearings included in the Manual: C1/1/158.

[50] Dick 3rd para. 10: B/5/3

[51] The Manual C/1/1/172

he requested CIHL to submit a revised diagram consistent with his Google Earth diagram.

162. This, says Axis, is a remarkable assertion to make when the safety implications are borne in mind and when the whole purpose of the exemptions sought by CIHL was to reduce the separation angle of the approach/departure surfaces so as to avoid the obstruction presented by the utility pole. Thus, says Axis, this exercise on Mr. Dick's part smacks very much of *ex post facto* rationalization for having approved the Manual with the obstruction clearly shown as present in the northerly approach/departure surface. Moreover, even if Mr. Dick's explanation is correct, it would mean that the CAACI approved an insufficiently identified flight path to the north intended to avoid the utility pole, but without any consideration as to whether (given the 90 degree separation) the take-off and approach surface to the west (instead of earlier to the south) would be compromised, as indeed it still was by the boundary wall and fence of OCH.

163. Thus, as the Manual set out take-off and approach surfaces inconsistent with those (apparently) approved, it was therefore unreasonable to consider the Manual "adequate".

Further criticisms of the Study, of the Manual and of the decision to certify

164. Axis submits that the Study seeking as it did to justify the 90 degree separation angle did not comply, in substance or in form, with OTAC 139-5. For the CAACI to accept that it did was unreasonable and it would equally be unreasonable for the CAACI to have accepted the Study as a basis for certification while recognizing that it was not compliant (if that was in fact what the CAACI did):

- The identity and qualifications of the Study's author although relevant (as per OTAC 139-5) was neither considered by Mr. Dick (per his 7th Affidavit) nor disclosed by CIHL. In his tabular form commentary on the Study given with his 4th Affidavit, Mr. Dick opines that "the authorship of the Study was not and would not be an issue, it is the contents that count".
- There was no proper identification in the Study of the potential hazards and risks involved in the reduction to the 90 degree separation angle as sought, particularly those that may be caused by a forced landing, and having particular regard to the fact that the take-off and approach surfaces were to be over water frequented by boats and people.
- Although stating that flight operations should cease if there were 17 knot westerly winds, the Study contained no analysis (as was required) of safety issues caused by northerly winds, which would cause the same safety issues as westerly winds due to the site of the Heliport. Moreover, issues regarding the effects of easterly or southerly winds, were not addressed in the Study.
- The Study further failed to address problems that would arise when the Helicopter landed, particularly downwind, by reference to the mitigation requirement that all touchdowns were to be made with the Helicopter aligned into the wind, simply implying that there were to be no landings when there was a tail wind greater than 17 knots (later reduced to 10 knots by the CAACI) and so failing to recognize the requirement of ICAO Annex 14 paragraph 4.2.9, that the Heliport should be capable of being operated for at

least 95% of the time for the purposes of the helicopters the Heliport is intended to serve.

165. Mr. Dick's "tabular defence" of the Study provided with his 4th Affidavit, appears to involve further ex post facto rationalization for his acceptance of the Study having regard to the following in particular:

- He relies on the Canadian Regulatory Authority's "expert opinion". His evidence is that considerations for risk assessment purposes is deemed to have been conducted by a "Canadian Export panel" through the CARAC process. This is not an acceptable position. The CAACI is required to be the expert aviation safety regulator, for the Cayman Islands. It may not discharge its duties by simply referring to what another expert regulator does in relation to a very different location.
- As for the required analysis of "causal factors", "severity and likelihood", and "description of risk", required by OTAC 139-5. Mr. Dick again relies on the CARAC process.
- The position is likewise when estimating the effect of "mitigating measures".
- OTAC 139-5 requires that the results of the Study be presented by being documented in such a way that it is possible to see what has been done. The steps referred to should be identifiable.

166. In short, says Axis, the approach apparently taken by the CAACI to the request for exemption was bluntly that Canada permits a 90 degree separation angle, and therefore so should the CAACI. A departure from the minimum 150 degree separation stipulation under OTAR 139-5 required a properly reasoned Aeronautical

Study by reference to the particular site. Causal factors of risk, severity and likelihood of risk, and description of risk are all site specific.

167. Axis' arguments in this regard are supported by its expert, Mr. Connolly's opinion; which is that the Study was not a proper aeronautical study as properly understood by reference to OTAC 139-5 and could not reasonably form the basis for approving the 90 degree separation angle.

168. In his first Affidavit at paragraphs 101 to 103 this is the way Mr. Connolly expressed his views:

> *"In my opinion, the Aeronautical Study is defective in that it has not followed the guidelines for an aeronautical study in OTAC 139-5 (see pages 45-51), in particular, it does not contain a thorough risk analysis. It also does not contain a proper analysis of causal factors, severity and likelihood. Further, the supporting evidence set out therein does not, in my opinion, support the author's contention that a take-off/approach separation angle of 90 degrees is acceptable for the Heliport.*
>
> *Mr. Dick[52] is correct that there is nothing in the OTARs or the OTACs which prevented Mr. Begot of CIHL, the applicant for the requested dispensation, [himself] producing the Aeronautical Study. However, an objective third party whose professional reputation would be at stake, would have raised incentive properly to carry out a thorough risk analysis in an Aeronautical Study:*

[52] Dick 1 paragraphs 53 and 72

The Aeronautical Study does not, as per the requirements in OTAC 139-5, identify risks, categorizes them and then list mitigating factors. Risks with which the Aeronautical Study does not deal include:

- *Collision by the Helicopter with objects that obstruct the flight path or on the ground in different phases of flight;*
- *Handling performance characteristics of the Helicopter during cross wind and downwind take offs and landings, which would be more significant given 90 degrees separation and the easterly prevailing winds in the area [the risks addressed has to do only with approach/landing with westerly tail wind conditions] (referencing the Wind Rose MWCR[53] and the effects of wind on a helicopter during take-off and landing).*

169. It is in this regard, as Mr. Dick explains at paragraphs 62-63 of his 4th Affidavit[54] that the CAACI sought to address the risks presented by tail wind on approach to land from either the north or west by inclusion in the Manual of (i) a requirement for a high level of pilot experience (which would ensure awareness of operational conditions such as *Vortex Ring State* (see below) and the capability to address such conditions; and (ii) reducing such risks by imposing the wind limitation of 12 knots from any westerly direction.

170. Mr. Connolly continued as to risks not addressed by the Study

- *Operations of the Helicopter in the Height Velocity Curve which denotes a stage of flight in which a combination of*

[53] C1/9
[54] (B/7/21)

airspeed and height makes a successful forced landing of a helicopter unlikely if an engine fails. The more critical time to avoid flying through a section of the Height Velocity Curve is during the take-off and climb, when the blade pitch angle is high, and therefore the potential rotor revolutions per minute decay more rapidly in the transition from powered flight to autorotation (the maneuver which must be successfully performed to result in a safe landing when a single-engined helicopter loses power). This requires immediate pilot reaction and gives little margin for error if a successful forced landing is to be made.

(Operating at) a maximum gross weight of 2250 kg (this would be around the weight of the Helicopter with fuel and seven adults on board,; the Helicopter will take significantly longer than when not fully loaded to attain the height and velocity to be safely airborne[55] (avoiding what is called the Vortex Ring State), particularly when flying with a prevailing tailwind".

171. As Mr. Connolly explains, it is universally accepted that the safest course is for take-off/initial climb, and final approach to landing, to be made by a helicopter into wind, and at the very least, with a headwind component. In these important aspects of his evidence, he was not controverted by Mr. Carey or Mr. Dick. He continues:

- *A tailwind especially on take-off is likely to greatly increase the distances required, but no manufacturer's data is given in*

[55] As explained in greater detail at paragraphs 37-51 of his 1st Affidavit

respect of the Helicopter (which is single engined) because it is anticipated that operations would normally be conducted with a headwind component. He concludes that "a westbound departure with an easterly wind would be inherently unsafe without a restriction similar to that of 12 knots imposed by the Manual for approaches to landing from the west with a tailwind of more than 12 knots".

172. I emphasize here, to be discussed in more detail below, that this aspect of Mr. Connolly's evidence is not controversial as between himself, Mr. Dick and Mr. Carey, CIHL's expert. In effect the Defendants' joint response to these technical concerns is that none of them necessarily render the operation from the Heliport of the Helicopter unsafe and Mr. Connolly does not say it is unsafe. CIHL says, through Mr. Lowe, that the fact of the matter is as take-off and approach to landings are to be performed over the sea, there is ample room for the operation of the Helicopter even with tailwind conditions and in this regard restrictions are imposed. As mentioned above, further restrictions could be imposed as regards easterly tailwind conditions if the Court so concludes and that would not justify the quashing of the Certificate.

173. I return to Mr. Connolly's criticisms of the Study.

- *Risks of attaining a safe landing associated with engine or hydraulics failure which are greater with a single engine helicopter than with Performance Class 1 helicopters.*

- *Mr. Dick appears to accept the Statement in the Aeronautical Study that there are very few sites in the Cayman Islands that meet the requirements of a 150 degree separation angle, a statement shown to be unfounded given that there already appear to be at least three other such sites in operation. It seems that what the Study really means in this respect, is that there are very few foreshore sites, particularly in George Town, which would accommodate a 150 degree separation angle. Thus, the real objective of the Study was to meet CIHL's objective for the Heliport being in George Town because of the trade from tourists from cruise ships that regularly dock in George Town.*
- *Mr. Dick refers to the Canadian regulations quoted in the Aeronautical Study, namely CAR 2325.29(b) and Note 3. These do not make it clear that they are referring to an accepted 90 degree approach and take off path separation. They refer [instead] to Transitional Surfaces which ICAO Annex 14 does not require in relation to a non-instrument VFR FATO (like this one at the Heliport).*

174. The fact that Transitional Surfaces are not required for the Heliport is one that Mr. Dick accepts as noted in the Manual[56] but at paragraphs 79 and 80 of his 4th affidavit

[56] C1/1/172

he insists, it seems to me paradoxically, that Transitional Surfaces – which he deems the same as the requirement for Secondary Safety Areas – are required.

- *Mr. Connolly notes that the Aeronautical Study refers to the heliport in Monaco as an example that does not meet the ICAO requirements for two approaches separated by at least 150 degrees although a very active commercial passenger air service has been in operation there for a number of years.*

  Mr. Connolly describes his detailed knowledge of the Monaco heliport having carried out a study on it for a UK-based operator to determine whether a Performance Class 3 helicopter could operate there safely and determined that it could not.

175. Mr. Dick's response to this, as explained in his evidence, is that as he has no personal knowledge of the Monaco heliport he "discounted" the reliance on it in the Study when he decided to accept the Study.

Boats and Swimmers

176. Although the CAACI imposed a condition in the Certificate that "*Landings or take-offs are not to be conducted when boats in the adjacent water areas obstruct the approach/departure slopes*", this unreasonably, says Axis, did not address the presence of people (swimmers, snorkelers or scuba divers) in the adjacent water areas. Further, there was no sufficient definition of "adjacent water areas". Although

(as noted, in the Manual[57]) the Helicopter had "pop out floats" providing over-water emergency landing capability for the Helicopter itself, these would not reduce the safety hazard of the Helicopter undertaking a forced landing and impacting boats or people in the water, and it was unreasonable for the CAACI to consider that they did.

177. The CAACI's response through Mr. Dick, is that the presence of swimmers was in fact considered in the process of the site evaluation when it was recognised that the pilot of the Helicopter would have a clear view of them on approach to land and would be aided by a marshall on the lookout for them on departure from the Heliport. The downwash from the propellers of the Helicopter is neither a threat nor discomfort to swimmers who are shown in video footage swimming comfortably and undisturbed as the Helicopter passes over them. And whilst it is accepted that the pop out floats would not protect swimmers or others with whom the Helicopter came into contact upon an emergency landing, the pilot should be able to avoid swimmers in such circumstances as they would be visible from some distance. Although made after the fact of certification, these were observations made by Mr. Dick before the trial began in the letter of 8 June 2012 to Mr. Begot in which the latter was instructed to make revisions to the Manual as further discussed above[58].

The Revised Manual

178. There is pointed criticism also of the manner in which the Revised Manual came about. Figures 2 and 3 were revised by Roland Bodden & Co. clearly because of the prompting of Mr. Dick's letter of 8 June 2012 to CIHL. In it he instructed CIHL to

[57] C1/1/172
[58] C2/3

have Figure 2 in the Manual redrawn "to confirm with the alignment on page 27 (viz: in keeping with his Google Earth non-specific drawing and to avoid showing the pole as penetrating the northerly approach/departure slope).

179. In his 5th Affidavit[59], Mr. Dick's evidence is that the revision "resulted in a slight shifting of the FATO centre point and does not affect the site's compliance with OTAR 139 requirements".

180. From the (new) Figure 2 it is apparent that the take-off and approach surface to the west has been drawn to escape the obstruction to the south, but this is unexplained when compared to the old Figure 2. In reality this is only achieved by measuring with the centre of the FATO notionally positioned at a new and different point over the concrete helipad such that the magnetic bearings for the centre of the northerly approach departure surface change from 0 or 360 degrees [true magnetic north] to 354 degrees 30' 39" and the center of the westerly approach/departure surface from 90 degrees 00' 00" to 84 degrees 30' 39".

181. If the measurements are taken as before from the center of the FATO being the center of the concrete pad, as intended at time of certification, the obstacle to the south can be avoided only if the separation angle between the two approach/departure surfaces becomes 85.5 degrees instead of the 90 degrees approved for the Heliport. Even as proposed to be revised, the Manual is therefore in breach of OTAR 139.1.113(d) and (e) and must therefore be "inadequate".

Mr. Brook Smith also emphasized that the Court has actually heard no evidence at all as to how the deficiencies in the Manual have been solved. He reminds the Court that the Evans Survey drawings are commissioned not exclusive by CIHL but by CAACI

[59] B/9/2 para. 3

also, and paid for by the CAACI. The charge is that this was all done in an obvious attempt by the CAACI "knocking heads with" CIHL to defeat any objections raised by Axis' challenge.

182. In fact, as explained in Court, a series of drawings were commissioned from Evans & Associates[60] by each of Axis CIHL and CAACI.

183. The concerns raised by Mr. Brook Smith, described by him as the CAACI having been engaged in "reverse engineering" to ensure that the Heliport appeared post-certification to comply with the OTAR exemption (let alone the OTAR 139 requirement for a separation angle of 150 degrees) is evidenced by the following passage from the Evans & Associates report dated December 14 2012 (at page 5):

> *"For the CAA drawings I was initially instructed to amend the instructions of the (Giglioli) instructions [given on behalf of CIHL] to employ a FATO of radius 21.225' and tangential to the northern and western edge of the concrete pad (CP) and then construct flight lines in accordance with the CAA instructions in GCL to be 90 degrees* 00'00" *apart and to avoid the Utility Pole and the boundary wall south of the CP. I was able to construct this scheme which is shown on sheet "1 in to 10 ft. CAA Amended", however on attempting the same exercise employing the original FATO scheme I could not achieve a 90 degree separation angle between the centre lines of the flight paths – this as shown on sheet "1m to 10 ft CAA original".*

184. Thus, it appears that it was on the instructions of the CAACI that, in order for the Manual to include drawings which could show the separation angle of 90 degrees as that finally approved by the CAACI, avoiding the obstruction of the Utility Pole and the OCH boundary wall, drawings were commissioned from Evans & Co., not by CIHL but by the CAACI. And, when presented based on those instructions, we see that it resulted in the "slight" shift of the FATO; which itself carried the other consequences already mentioned above.

[60] Report of Evans & Assoc. C2/15/1-6

185. Mr. Brook Smith complains that such an approach to the requirement of ANOTO Article 105(2)(c) that there shall be an "adequate" manual, cannot be acceptable. The CAACI's partisan involvement cannot be excused on the basis that Article 105(9) requires on-going revision of a manual because, as Mr. Lowe submits, the Manual is a "living document". It is not difficult to see that in promoting the situation which presently exists, the CAACI has entered the fray in a way that runs entirely counter to the process which should be followed under the ANOTO. It is one thing for the CAACI to propose that an amendment be made to the Manual, it is quite another for the CAACI to find itself in a situation whereby it is positively promoting to CIHL a solution which seeks to get both parties out of the difficulties which this case has raised.

186. Indeed, given this history, Mr. Brook Smith asks the pertinent question whether there is a prospect of having an adequate manual at all.

187. The Manual was amended in June 2012 but the Evans survey drawings were not commissioned until December 2012. They show that it is presently simply not possible, having regard to the Revised Manual – using measurements from the centre of the FATO as the centre of the helipad – to have a separation angle of 90 degrees while avoiding the obstructions to the north and south. No steps have been taken to correct those deficiencies (and any steps to be based on the Evans Survey will only create others).

188. The prospect is a still further revised manual that does not yet exist, despite the Heliport having been certified since 10 November 2010. One is left to wonder whether a further revision will prescribe approach/departure paths at all, says Mr.

Brook Smith, given the habitual use of an "arc" within the 90 degree separation by the Helicopter as observed by Axis and as allegedly shown in the video recordings presented to the Court. Such operational matters are relevant to the Court's consideration now says Mr. Brook Smith and despite Mr. Lowe's objection that the Amended Notice of Motion does not include them. This is so, says Mr. Brook Smith, because both CIHL and CAACI have responded to Axis' complaints by saying that they can keep amending the Manual and revising the conditions of the Certification if deemed appropriate to address operational concerns. This cannot be correct, says Mr. Brook Smith, when the operational matters vary so widely between matters such as whether there are actual markings showing the outline of the FATO on the concrete pad, to whether they exist and if so, where the approach/departure surfaces actually are and just what conditions of the prevailing winds should apply to the operation of the Helicopter from the Heliport.

189. Ultimately, says Mr. Brook Smith, what CIHL submits (per Mr. Lowe) is when it comes to remedy, even if Axis establishes that the decision of the CAACI was unreasonable and unlawful, then the utility of this case does not require the quashing of the certificate, but rather some judicial stipulation as to how the problems might be fixed.

190. Another consequence of the revised Figure 2 having to be measured from a different centre point on the FATO is that the centre shifts, according to Mr. Dick, "slightly" to the north and so not only being like the FATO itself unmarked but also is no longer centered over the concrete helipad, resulting also in a part of the Safety Area now

shown to be over the sea. This was regarded by Mr. Dick in the SER in August 2010 as a breach of the OTAR requirements (see para. 80(iv) above).

191. This last point also became a matter of concern because Axis argues that a Heliport with part of its safety area being over the sea cannot be said to be under the ownership and physical control of the operator as required by OTAR 139.1.27, because the operator does not have control over the sea. Only the Port Authority does and the Port Authority has imposed no restriction upon the access to that part of the sea now shown to be within the Safety Area.

192. Official Surveys from the Lands and Survey Department presented by CIHL show, however, that the small area of the sea involved may well be within the registered boundary of the CIHL property.

193. It is also to be considered nonetheless that the two photographs showing the Safety Area markings remain the same in the Manual, although the Safety Area has changed; thus failing to recognize that a part of the Safety Area is over the sea and so not in keeping with OTAR 139.1.27 – the very infraction as earlier perceived by Mr. Dick.

NUISANCE

194. Axis claims that the CAACI's decision to certify the Heliport was further tainted by unreasonableness. It contends that the CAACI failed to determine (or cause to be determined) the level of noise, vibration and encroachment to be caused by the operation of the Heliport on the Heliport's neighbours, and failed to consider (properly or at all) any such factor when it granted the Certificate. As much is admitted by Mr. Dick who explains that the CAACI regarded such matters as for the CPA to consider.

195. Axis says that to the extent that the CAACI considered that such factors were a matter exclusively for planning approval, and was influenced thereby, it was wrong. The grant of the Certificate and not the grant of planning permission was the administrative act that would deprive neighbouring owners and occupiers of the right to claim for nuisance in private law.

196. Even leaving aside Article 15 of the Bill of Rights[61] (which was not at that time in force), it was incumbent on the CAACI, as a matter of good administration and the consideration of relevant factors, to form a view on the noise and vibration issues as they would affect the property rights of adjacent land owners. Noise and vibration were (and remain) significant[62]. The CAACI simply failed to consider this.

197. Axis contends that, had the CAACI considered this issue, then the CAACI could not reasonably have concluded that the noise and vibration would be sufficiently minimal as to outweigh the legitimate concerns of Axis and other neighbouring occupants as to those matters.

198. The noise and vibration caused by the Helicopter are considerable and continue whilst the Helicopter prepares for departure (as the pilot warms up and checks the engine and makes other pre-flight checks), takes-off, makes its climb out and when it approaches to land, and lands. This was indeed the impression of the Court during the site visit conducted at the request of the parties on 1st March 2013.

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[61] Which provides inter alia that, "Government shall not interfere with the peaceful enjoyment of any person's property except in accordance with law and where the interference is necessary or expedient to the public interest and where a law provides for the payment of compensation ....."

[62] Vide affidavit of occupant of OCH Mr. David Hindle: C1/1/251H. Mr. Hindle complains that the vibration and noise generated by the Helicopter is so severe as to render OCH unsuitable as offices for the conduct of business. Neither he nor the owner of OCH Costal Two is, however, a party to these proceedings.

The legal basis of the challenge: unreasonableness

199. The foregoing being in summary, the nature of the criticisms of the certification process and of the Certification itself for the Heliport, I will now summarize the legal principles which must apply to a court's consideration whether the decision to certify was unreasonable.

200. These principles will set the context for my analysis of the arguments for and against the challenge to certification, and in setting them out I pay tribute to the industry of counsel on all sides of this complex matter.

201. Axis argues that the measure of the reasonableness of the CAACI's decision must be taken in the context of this case where public safety is of paramount importance. So much should be plain from the terms of the ANOTO itself and the requirements of the OTARs, the OTARs themselves being drawn from ICAO Annex 14, being the collective views of the signatories to the Chicago Convention as to what requirements there should be to ensure the safety of aircraft operations and civil aviation in general.

202. Much will depend on what is the true meaning to be ascribed to Article 152 of the ANOTO in its requirement that in granting the Certificate, the CAACI was required "to take into account" the matters set out in the OTARs, together with the adequacy of the Manual and whether the CAACI operated under a proper understanding of its duties in that regard. The existence of and manner of exercise of the CAACI's discretion assertedly given by Article 146 of the ANOTO to grant exemptions from the provisions of the ANOTO (or regulations made thereunder), must also be considered carefully.

203. The classic modern statement of the grounds for judicial review of administrative actions remains that of Lord Diplock in the GCHQ case[63], summarizing the three grounds for judicial review as being illegality, irrationality and procedural impropriety.

204. As regards a challenge based on irrationality or "unreasonableness" as he then described it, Lord Green MR's well-known dictum in ***Wednesbury [1948] 1 KB 222*** at **229** remains definitive:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense.*
>
> *It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".*

205. And as Lord Diplock later declared in ***GCHQ AT 410-411:***

> *"By irrationality I mean what can by now be succinctly referred to as "Wednesbury unreasonableness".... It applies to a decision which is*

[63] Council of Civil Service Unions v Members of the Civil Service [1985] AC 374 at 410. GCHQ is the UK Government's Communications Head Quarters. The case concerned a ban on trade unions at GCHQ.

so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system...."

206. Lord Denning also encapsulated the principle as follows in ***Breen v AFU [1971] 2 QB 175 at 190***:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by ***Padfield v Minister of Agriculture, Fisheries and Food*** *[1968] AC 997 which is a landmark in modern administrative law."*

207. Controversial especially from Mr. Beloff's point of view, Mr. Brook Smith's submission is that Lord Reid's statement in ***Padfield*** (at p.1030) as to discretionary powers conferred under statute is particularly apposite to a case such as this – one which raises the question whether the licensing decision that is challenged conforms with the legislative policy of promoting aviation safety:

> *"Parliament must have conferred the discretion that it should be used to promote the policy and objects to the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."*

208. Mr. Beloff was especially at pains to emphasise that this statement of Lord Reid's must be regarded as ameliorated when applied to a case such as this where the regulatory functions are entrusted to a specialist expert body like the CAACI. The Court in such circumstances must be very hesitant to interfere. Whether or not such a regulator is "satisfied" must especially be a matter for its judgement[64].

209. This I regard as a correct statement of principle, to be borne in mind throughout. Nor is a court of judicial review to act as an appellate tribunal. It may not simply substitute its own judgement on a matter given by legislation to a regulator or other public law decision maker for the judgement of that decision maker. See in this regard, this Court's decision in ***Streeter and K Coast Development v Immigration Board and Governor in Council*** [*1998] CILR 366*, summarising judicial review principles at 371-4.

210. As was there noted, however, "the tests of irrationality and illegality require a close consideration of the … decision" which is under review (page 371 at line 40). In the

[64] Citing: Fordham: Judicial Review Handbook (6th Ed.) para 13.1 p.147 and cases there cited. F/1.

present case, such close consideration points, Axis says, inevitably to the conclusion that the decision challenged is one which is so far outside the bounds of reasonableness as to be unlawful. Axis submits that the decision is so strikingly at odds with the dictates of safety that apply to aerodrome certification that the Court can confidently describe the decision as unreasonable.

211. Note also, says Mr. Brook Smith, that when considering as an aspect of a ***Wednesbury*** challenge, the contention that a decision maker has not had regard to relevant considerations (very much in issue in this case):

> *"It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the* ***Wednesbury*** *sense."*

Per Lord Keith in ***Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759 at 764 G-H.***

212. Lord Hoffman said the same thing, albeit with different emphasis (op. cit. at 782 F-H):

> *"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it dies not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.*

> *This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British Planning Law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."*

213. These are dicta of the highest judicial authority upon which both Mr Brook Smith and Mr. Beloff rely, but with Mr Beloff placing particular emphasis upon the courts' recognition of the primary decision making role of the administrative body, and as well, that there is to be no point of distinction for present purposes between a planning authority and a safety regulator such as the CAACI merely on the basis that the CAACI is responsible for ensuring the public interest in the safety of air navigation.

214. Such concerns about the public interest in safety are common place in other contexts but have resulted in no different view being taken of the courts' judicial review role. These contexts have ranged from the safety of pharmaceutical drugs to the safety of nuclear plants – citing the many cases digested and discussed at Fordham (op cit) paras. 4.4; 4.6; 13.1 – 13.5 et seq at pp 143-152.

215. From para 13.4 (page 148) Mr Beloff relied particularly upon this digested statement of principle:

> *"Restraint and expertise. Another classic context warranting judicial restraint is where the issue was within the particular expertise of the public body. Here, general restraint is reinforced by the insight that the primary decision-maker is better placed than the Court to evaluate matters falling within its area of expertise."*

216. This is settled principle and it is a topic to which I must return below when considering the true meaning of the ANOTO as regards the discretion it vests in the CAACI "to take account of" the OTARs.

Reasons for the CAACI's decision, or ex post facto rationalisation?

217. The CAACI has filed substantial evidence in response to the challenge. In approaching such evidence, the Court as mentioned in passing above, is invited by Axis to bear in mind the distinction between explaining a decision, by reference to the reasons for which it was made, and providing an ex post facto rationalisation of the decision. The former is permissible; the latter is not. As Hutchinson LJ said in ***R v Westminster City Council ex parte Ermakov*** *[1996] 2 All ER 203*:

> *"The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction.*
>
> *(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. ...*
>
> *(4) ... in cases where the reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very*

exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings.."

218. *In* ***R (Richards) v Pembrokeshire County Council [2004] EWCA Civ 1000,*** Neuberger LJ, giving the judgment of the Court of Appeal, considering the same question whether evidence should be admitted to explain the decision under challenge, said at paragraph 58:

> *"First, the primary source for identifying the reasons for the decision to adopt the Directions must be found in the Directions, the Decision, and the Report, as already mentioned. Secondly, where there is any ambiguity in the reasons, that ambiguity can be resolved by reference to evidence, provided that that evidence is credible and authoritative. This makes it inherently unlikely that evidence of the relevant debate or discussion would normally be admissible. It also means that reasons which could have been, but were not, in the decision-makers' minds are immaterial. If, however, as Lord Goddard said, the court can remit an ambiguous decision for an explanation or resolution of the ambiguity, it must be right, when the matter comes before the court in the first place, that any ambiguity can be explained at that stage. Thirdly, it would require exceptional circumstances before the court was prepared to entertain evidence of any other nature to enable reasons to be given for a decision."*

219. In the present case, Axis submits - for reasons mentioned above and to be further examined below - that the CAACI's extensive evidence is in effect an attempt to provide ex post facto rationalisation, or, to be colloquial, "boot strapping", for a decision that, when taken, was fundamentally flawed.

Expert evidence

220. In this case, the Court has been properly assisted by expert evidence on the technical aspects of helicopter operations and the parameters of flight safety. Subject to the limitations recognised and discussed above from the case law, the question of reasonableness is for the Court, and of course, no expert witness can seek to usurp the

Court's role, but the Court can be, and I accepted here should be, assisted in forming a view on reasonableness by being provided with expert evidence on the technical issues. That was the basis on which the expert evidence of Mr. Connolly (as presented by Axis) and Mr. Carey (as presented by CIHL) was found by me to be admissible when preliminary arguments were taken on the subject earlier during the trial and my decision was made to admit it. That decision is of sufficient general importance to justify further explanation which I now offer.

221. The approach taken to admission is consistent with the principles outlined by Coulson J in ***BY Development Ltd v Covent Garden Market Authority [2012] EWHC 2546 (TCC)***. That was a public procurement case, but the case raised a "manifest error" challenge, which is closely comparable with a judicial review reasonableness challenge, and the Judge helpfully reviewed the authorities on expert evidence in judicial review proceedings:

> *"11. The test of 'manifest error' applied in the European cases, which is that required by the 2006 Regulations, is very similar to, if not the same as, the Wednesbury test of irrationality in domestic judicial review proceedings: see Upjohn and paragraph 74 of the judgment of Hidden J in R v The Licensing Authority (Ex Parte Novartis), a judgment dated 30 March 2000.*
>
> *12. In domestic judicial review proceedings, it is very rare for expert evidence to be either relevant or admissible. The reasons for that were fully set out by Collins J in R (on the application of Lynch) v General Dental Council [2003] EWHC 2987 (Admin). He concluded that, in most JR cases, expert evidence will not be admissible, particularly where the public body making the decision under review is itself composed of experts or has been advised by an expert assessor. He said of such cases at paragraph 25:*
>
> > *"it will be virtually impossible to justify the submission of expert evidence which goes*

beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert."

13 Collins J did, however, draw a distinction between a report from an expert "which seeks to explain what is involved in a particular process and how complicated that process is", and a report which goes on to opine that it was irrational for the public body to have reached the conclusion it did. As to the latter, he thought that such a report would involve an illegitimate usurpation of the court's function. However, as to the former, he accepted that, in a truly technical field, expert evidence might be admissible to explain the technical terms and concepts. Even then, he said that "cases where this can be permitted will be very rare and what I have said should not be regarded as opening the door to the admissibility of experts' reports in all cases such as this which involve judicial review of an expert tribunal or body."

14 The conclusions of Collins J in Lynch were similar to those reached by Hidden J in R v The Licensing Authority (ex Parte Novartis). In the latter case, again concerned with the licensing of drugs, the judge emphasised "the difficulties in the judicial review process in seeking to have the evidence of one expert witness preferred to that of another by the reviewing court in a contrary manner to the decision arrived at by the body under review". He accepted the defendant's submission in that case that, in an application for judicial review, it was inappropriate to invite the court to engage in a debate between experts on matters of scientific opinion (paragraph 49 of the judgment). He said that the court should respect the judgment of the decision-maker "unless it had no rational basis"."

222. Coulson J went on to say:

"20 In summary, I consider that the authorities demonstrate that, where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the

decision; and in part because such evidence may usurp the court's function.

21 *All of that said, however, I believe that it goes too far to say that expert evidence can never be admissible in public procurement cases concerned with manifest error. In some cases, it may be required by way of technical explanatory evidence (Lynch). In addition, there may be other cases where, unusually, such evidence is both relevant and necessary to allow the court to reach a conclusion on manifest error. That may be particularly so where the particular issue is specific and discrete, such as a debate about one of the criteria used in the evaluation (Henry Bros) or complex issues of causation (Harmon). Thus, I do not accept the submission, trailed at one point in Mr Giffin's skeleton argument, that, if expert evidence is required to support an allegation of manifest error, that would of itself indicate that the error could not be manifest. In my view, that would always depend on the facts of the particular case.*

....

25 *.....The need for explanatory expert evidence should be carefully assessed. It is only where there is a complex technical field where explanation is required in order for the court to reach a conclusion that such evidence should be permitted."*

223. This is such a case, says Axis. It is a case in which, to adopt the words of Collins J in ***Lynch***, the expert evidence served by Axis "seeks to explain what is involved in a particular process and how complicated that process is". The safe operation of helicopters and heliports is a "truly technical field". In order for the Court to form its view on the reasonableness of the decision challenged, it needs to be assisted by expert evidence on aviation operations and flight safety. That expert evidence can address not merely the standards applied internationally to the design of heliports, but also such fundamental matters as how helicopters take-off, hover, fly forwards, and land; what happens when a single engine helicopter suffers an engine or hydraulic

failure; and how wind speed and direction can affect the safe operation of a helicopter. This has been the basis – limited as advised by the case law – upon which I have relied upon the expert evidence in this case. And, I should emphasize, to that extent the expert evidence has not been controversial.

224. Axis served two affidavits of Mr Connolly. His considerable expertise as a helicopter pilot is set out in his First Affidavit. The aspect of his evidence, I am invited especially to rely on, relates generally to helicopter operation, including the practical consequences of engine failure, a critical issue in this case. He develops this by reference to the attributes of the Helicopter, given its design and technical capabilities, and by reference to the Heliport. He reviews the contents of the Manual and the Revised Manual in the above context, intended as they are to be adequate for the purposes of the OTARs. His evidence that I rely on is limited to those technical issues. It is noted and accepted that Mr. Connolly professes no expertise as an air safety or aerodrome regulator.

225. Mr Dick has considered it right to provide evidence in rebuttal to that of Mr Connolly's First Affidavit (albeit without prejudice to the CAACI's contention that expert evidence is inadmissible). Axis says that this is unsurprising, given the technical issues inevitably raised by this case. Just as it is legitimate, and helpful to the Court, for Axis to support its pleaded challenge by providing technical information, it is by the same token appropriate for the CAACI to seek to explain its response to the challenge by putting forward its own technical evidence. The nature of the issues in this case is such as to render the involvement of experts unavoidable, and necessary.

226. I note also that Mr Dick's work on the grant of the Certificate is criticised below, because – it is said – he has placed inappropriate reliance on Canadian regulatory standards. This point is particularly important in relation to the OTAR exemption allowing reduction to the 90 degree separation angle. This places this case in a different category, says Axis, from cases in which a regulator, entrusted by the legislature with an expert appraisal of an issue, has used its own internal expert to arrive at its decision. Here, says Axis, the internal expert effectively abdicated his function, simply referring to what another regulator in a very different location would or might do. Compare and contrast a case such as ***R (London & Continental Stations and Property Ltd) v The Rail Regulator [2003] EWHC 2607 (Admin)*** in which the regulator had his own expert on an economic issue to assess that issue.

227. All of this leads naturally to the further question: On what basis might a reviewing court interfere with the decision of an expert administrative body such as the CAACI and to what extent might the Court rely upon third party expert opinion for so doing?

228. As Mr. Beloff succinctly put it by referring to ***Lynch*** (above) (per Justice Collins):

> *"When a body is itself comprised an expert, it will be virtually impossible to justify the admission of expert evidence which goes beyond the explanation of technical terms...since it will almost inevitably involve an attempt to challenge the factual conclusions and judgments of an expert. That is something which is inappropriate for a review in Court."*

229. And as it was put in ***BY Developments*** (above):

> *"It is inappropriate to invite the court to engage in a debate between experts on matters of scientific opinion."*

230. This is all cautionary advice that I accept. As I sought to explain in my earlier ex tempore ruling at the trial on the question of the admission of the opposing expert

evidence of Mr. Connolly on the one hand and Mr. Carey and Mr. Dick on the other; there can be no question of my choosing one side over the other where they disagree on substantive technical matters. That, however, does not preclude the Court, where there is no such disagreement, from educating itself as to the view it might properly take of the CAACI's treatment of those important aspects of the ANOTO and the OTARs in particular, which require that substantive technical standards are met. An obvious example, as it has emerged in this case, is the treatment of the OTAR requirements which are concerned to ensure that the approach/departure surfaces to be taken by the Helicopter in its operations to and from the Heliport are safe and as to the reasonableness of the decision to certify in that regard. Here, I have in mind obstacle limitations and the effect of wind, in particular.

231. In this regard, it is, I think, helpful to note the views expressed by CIHL's own expert, Mr. Carey (himself an experienced aerodrome inspector and helicopter pilot) on the value of the OTARs where at paragraph 15 of his first affidavit after noting that the UK and by extension the Overseas Territories are parties to the Chicago Convention, he said:

> *"I do believe the regulations and/or requirements are not guidelines to be used for convenience, nor may they be expanded on if in the belief of the regulator they should be more stringent. Particularly in the field of aviation it is important (that) regulations are applied consistently and it is therefore essential that regulators attempt to keep as closely as possible to the language of the regulations."*

232. This view of the OTARs I regard as being entirely in keeping with their statutory history and intent. Nevertheless, Mr. Beloff has correctly emphasized throughout his submissions that it has never been contended by Axis that no account has been taken of the OTARs by the CAACI. Accordingly, the challenge may not succeed as the relative weight to be attached, once account has been taken, must be a matter for the CAACI as the responsible expert authority. The Court may not be invited simply to substitute its own views or those of another expert, for those of the CAACI.

233. This, for all the reasons discussed above, must be as a broad statement of principle, correct. However, it must be equally correct that if the CAACI is shown to be manifestly unreasonable or irrational in its refusal or failure to apply the OTARs, which are not to be used for convenience but are to be applied consistently, the Court may be required or even obliged, to intervene.

234. I will come to further explain the extent of my reliance upon the expert evidence in the case in the course of my analysis of the issues.

Structure of the Defendants' responses

235. In their responses to Axis' submissions, Mr. Beloff and Mr. Lowe divided their efforts with Mr. Beloff taking the lead on legal issues and Mr. Lowe on the technical factual issues, primarily those areas in which the CAACI's decision to certify the Heliport is criticized in the evidence of Axis' expert, Mr. Connolly.

236. Mr. Beloff, in what is by repute, a characteristically full and helpful review of the case law and legislative regime, dealt in detail with what he described as the "height of the perversity hurdle" that Axis must overcome, before it might succeed in having the Certificate quashed by the Court.

237. Mr. Beloff's argument (firmly supported by Mr. Lowe), is that in the exercise of its powers and functions, the CAACI has a very wide discretion as to the manner and extent to which it shall be bound by the OTARs and OTACs. Against the background of ANOTO 152 1(a) and (b) which prescribes the OTARs as the requirements to be published by the Governor as to be "taken into account" when determining whether to certify an aerodrome, they argue that the OTARs and OTACs do not carry the force of law as such. None of the OTAR requirements are prescriptive, they say, and, provided that the CAACI took them into account, in the sense of having had due regard to them, the CAACI is allowed to accept alternative means of compliance, provided it is shown by the applicant that the level of safety will not be reduced below the standard intended by the OTAR requirements. This, as explained by Mr. Dick at paragraph 9 of his first affidavit[65], was correctly the way in which he approached the matter of certification and in particular, the application by CIHL for exemption from the OTARs.

238. Thus, submits Mr. Beloff, it cannot seriously be contended that Mr. Dick did not take the provisions of OTAR 139 into consideration in his assessment of certification. He clearly did so, on the evidence presented in the case.

239. Moreover, it must also be borne in mind that there has been no allegation against the CAACI of illegality in the conventional sense of acting outside its jurisdiction, or indeed in breach of ANOTO, the empowering instrument. ANOTO is the only law which defines the CAACI's powers and the only obligation material to the present case is the limited obligation to "take into account" the OTARs, the published requirements.

[65] B/3

240. Given the limited circumstances in which the Court can intervene, all of this, says Mr. Beloff, means that the start and end of the analysis in this case is whether the CAACI's judgment, that the Heliport was safe, was in all the circumstances "perverse".

241. This, further explained Mr. Beloff, is not to say and he is not to be taken as saying that it would never be possible to show that if a heliport was certified as safe, that the certification could never be successfully challenged.

242. Such could be the outcome in an extreme case; for example, where the presence of surrounding obstacles on all sides presented unavoidable hazards to even the most skilled of pilots or where the presence of strong prevailing winds was simply not taken into account at all. That might be self-evident to a court, an exercise of a perverse decision. But the very extravagance of the examples canvassed; said Mr. Beloff, only serve to illustrate the height of the perversity hurdle.

243. For his part, Mr. Brook Smith does not shrink from the criticism of the CAACI's decision as "perverse" and irrational both in terms of its "laissez-faire" approach to the application of the OTAR requirements and in terms of its failure to have regard to relevant and obvious concerns about public safety and the private right to the enjoyment of property free from the nuisances presented by the Heliport.

Construction of the ANOTO, OTARs and OTACs

244. With the battle lines so clearly drawn around the subject-matter of the ANOTO, the OTARs and the OTACs, I must decide, first of all, on the nature of their applicability.

245. As a starting point, I regard it as incontrovertible as Lord Reid stated in ***Padfield*** (at 1050, above) that:

"Parliament must have conferred the discretion [here that vested in the CAACI] with the intention that it should be used to promote the policy and objects of the Act as a whole and construction is always a matter of law for the Court."

246. Here, the uncontroverted policy and object of the legislative scheme is to ensure and promote the public interest in the safety of civil aviation.

247. As much is clear from Article 105(2) (b) of ANOTO where it is prescribed that the Governor (here his delegate the CAACI) shall grant a certificate (only) if satisfied that the aerodrome is safe for use by aircrafts.

248. This must be the context in which the true meaning and effect of the OTARs is to be found. It is, in my view, the context in which any question as to the extent of the discretion of the CAACI not to apply the OTARs must also be considered.

249. In this regard Article 121(b) of the ANOTO also points to a discretion in that it provides that the grant of an aerodrome certificate will "be subject to such conditions as (the CAACI) thinks fit."

250. A further indication of the intended nature of the regulatory oversight and the discretion vested for those purposes is to be found in the ANOTO Article 122 powers of revocation, suspension and variation of certificates.

251. Here the CAACI "if it thinks fit may provisionally suspend the certification of an aerodrome (heliport) pending inquiry"; or may "on sufficient ground being shown after due inquiry" revoke or suspend certification.

252. These are the discretionary powers cited both by Mr. Beloff and Mr. Lowe, as being indicative of the legislative policy approach to "operational" breaches of the

conditionalities of certification. Indicating, they say, that where such breaches are alleged as now, they may not properly be regarded as a basis for the quashing of the Certificate by the Court. They must be left by the Court to be addressed by the CAACI by way of its powers and discretion under ANOTO Article 122.

253. And so, if it be the case, for instance, that adherence by the pilot to the designated approach/departure surfaces is regarded by the Court as mandatory, the concerns that Mr. Begot habitually fails to adhere to them, flying instead through the "arc", could not be a ground for quashing the Certification but must be left for the consideration of the CAACI whether or not to revoke, suspend or vary the Certificate or the Manual.

254. In other words, such operational concerns, which by nature must arise after certification, do not go to the question of the reasonableness of the grant of certification. I note here that I regard this argument to be correct, so far as it goes.

255. What it does not address, however, is the further concern implicitly raised by Axis whether the decision to grant certification in the face of patent impracticality of adherence to the conditionalities, shows the unreasonableness of the decision.

256. The wide discretion given by ANOTO Article 146 said to be delegated to the CAACI to grant exemptions from the OTAR and even from the ANOTO itself, is also referenced by Mr Beloff as indicating the inappropriateness of intervention by the Court. As he puts it, Article 146 provides that:

> *"The CAACI may grant exemption from any of the provisions of (ANOTO) [including Article 105 but excluding other Articles not arising for consideration now] or any regulations made thereunder, to any aircraft or persons or class of aircraft or persons, either absolutely or subject to such conditions as (it) thinks fit."*

257. While insisting that the OTARs are not "regulations" in the sense of Article 146 but merely "requirements": as so described by Article 152 – Mr. Beloff's point here is that the Article 146 discretion is nonetheless vested in the CAACI as the Governor's delegate to grant exemptions from the OTARs and even from the ANOTO itself.

258. This, at first blush, may seem like a pivotal argument because it lies at the heart of the CAACI's contention that it is obliged only to "have regard to" the OTARs where ANOTO Article 152 provides that before determining whether to grant a certificate, it shall "take into account" the OTARs.

259. Mr. Beloff proposed that the nature of the legislative regime is such that the Governor is required by Article 152 of ANOTO to publish requirements which an applicant for certification will be expected to satisfy, but the CAACI is not bound by such requirements, it has only to take them into account.

260. He relied in support for this proposition upon a number of cases.

261. He pointed out that in ***JML Direct Ltd. v Freesat UK Ltd. 2010 - EWCA Civ 34***, Lord Justice Moore-Bick, in the context of construing the meaning of the words "take into account" as used in a private contract for a provision of telecommunication services; held that when used the parties intended the expression to mean no more than "have regard to" or "bear in mind" and did not intend to limit the provider's (Freesat's) discretion to attach to each factor for consideration such weight as it deemed appropriate. He concluded that the expressions meant that Freesat was only required *"to give conscious consideration"* to each of the factors. The distinctions between giving consideration to a matter and deciding what weight to attach to it is

one for the decision maker and *is "one of common sense and capable of being well understood by commercial parties."*

262. Thus, says Mr. Beloff, there is to be no point of pedantic distinction that can arise as between the meaning of the expression "take into account" merely on the basis that in this case, it arises in the context not of a private contract but of public law.

263. This is plainly so. Indeed the assimilation of the two contexts was recognised by Moore-Bick LJ himself where (at para. 22) he relied upon the passage[66] from Lord Hoffman's speech in ***Tesco Stores Ltd. v Secretary of State for the Environment*** given in the context of a public law planning appeal.

264. In the present case, where the context involves the paramount concern for public safety, an obvious question for the Court to resolve is whether the discretion vested in the CAACI as the decision-maker, albeit itself an expert body, can indeed properly and generally be regarded as being as broad as that given a planning authority as proposed by Mr Beloff (above); that is: provided only it has regard "to all material considerations being at liberty to give them whatever weight it thinks fit or no weight at all" (per Lord Hoffman in ***Tesco Stores*** above)

265. Further and equally authoritative dicta from the House of Lords to the same effect were relied upon by Mr. Beloff and can briefly be noted here.

266. ***City of Edinburgh Council v Revival Properties Ltd.*** was another planning case in which, again, the question was what was meant by a statutory provision that stated that the planning authority in dealing with an application was required to "have regard to the provisions of the development plan, so far as material to the application,

[66] Above at paragraph 212.

and to any other material considerations.". Lord Clyde adopted[67] the meaning of the formulation as it had appeared in the context of the earlier statute (and given by Lord Guest in ***Simpson v Edinburgh Corp 1960 S.C. 313***) in the following statement:

> *"It was argued ...that this section required the planning authority to adhere strictly to the development plan. I do not so read this section.... To have regard to does not, in my view, mean slavishly to adhere to, it required the planning authority to consider the development plan but does not oblige them to follow it. If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it. In my opinion, the meaning of section 12.1 is plain, the planning authority are to consider all material considerations of which the development plan is one."*

267. Lord Hope expressed similar views in his speech[68]. That, notwithstanding the enhanced status given the development plan by the Act:

> *"It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A [granting its enhanced status] have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson v Edinburgh Corporation 1960 S.C. 313, 318 "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise."*

268. Bolstered by the declaration of OTAR 139.1.6 itself, that "*These requirements are not in themselves law*", Mr. Beloff's further proposition is that the OTARs (and a fortiori the OTACs) must be regarded as being "for guidance only". The CAACI must take them into account. If it reached a decision without reference to its consideration of the OTARs at all, the decision would be flawed. But as long as the CAACI had considered the OTARs, whether or not deciding to follow them, the CAACI was at

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[67] [1997] 1 W.L.R. at 1457 E-H.
[68] At p. 1450 B-D

liberty to decide without applying the OTARs. Taking into account is one matter, adherence is another.

269. And the difference between guidance and something more coercive is very well established in law, was Mr. Beloff's final proposition on this point, for which he found settled authority in ***Regina (Alvi) v Secretary of State for the Home Department)***[69].

270. In his judgment in that case, Lord Clarke explained the difference in these terms:

> *'It seems to be that, as a matter of ordinary language, there is a clear distinction between guidance and a rule. Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast, a rule is mandatory in nature, it compels the decision maker to reach a particular result."*

271. Mr. Beloff's exhaustive treatment of the subject culminated with the following passage from Mr. Justice McNeil given in ***Ex parte Madden v Rhone [1983] 1 W.L.R. 1447*** where the learned judge approved of the arguments of counsel none other than Mr. Beloff himself, and worthy of note here for the reason that it preceded the later more authoritative dicta to the same effect delivered from the House of Lords in the cases discussed above.

272. The question was whether the Police Complaints Board, in the requirement that it had to "have regard to any guidance" given by the Secretary of State, was right to conclude that it could not institute disciplinary proceedings against officers who had been exonerated of criminal charges by the DPP without trials; because the Guidance issued by the Secretary of State required that officers be protected from any

[69] [2012] 1. W.L.R. 2208 at 2244 F-G.

disciplinary proceedings that were in substance the same as criminal charges for which they had been tried. *"In the end"*, said McNeil J (at 471 F-G) "*I accept that the Board's statutory obligation to have regard to the criteria means precisely that, no more no less. If, having had regard to the Guidance, the Board is persuaded that it should accept its Director's view and determines accordingly, so be it. If, on the other hand, the Board determines that despite the Director's view, and bearing in mind the standard of proof required, disciplinary proceedings should be recommended or directed, it would, it seems to me, be doing precisely the task which Parliament created it to do.*"

273. So, said Mr. Beloff on this issue, the decision maker, the CAACI, is free to depart from the OTARs as guidance if it can be satisfied as to the issues of competence of the operator or safety of the Heliport itself which have been allocated to its adjudication in some other way. (Emphasis added.)

274. But, he concluded, there is another aspect, this from the perspective of the applicant for certification and indicative of the "double function" served by ANOTO Article 152. While it tells the CAACI what it must do – which is no less and no more than take account of the OTARs, on the other hand if an applicant actually satisfies the OTARs, then he submits, the CAACI is obliged to grant the applicant a certificate and must do so, so long as there are no other matters that could be held against the applicant. That, says Mr. Beloff, is the purpose of the Governor being required to publish the OTARs. They tell the applicant that if it wishes to obtain a certificate, a licence or other document, these are the standards that it must meet. If the standards

are met then you will obtain certification. But it does not follow that the CAACI is not able to relax the requirements.

275. In the end, for reasons to be explained – and despite my disagreement that the wide statutory discretion vested by Article 146 ANOTO is reposed in the CAACI itself instead of the Governor – I accept Mr. Beloff's submission. However, and I note the importance, it is a submission that is heavily and importantly qualified by the words in emphasis at paragraph 273 above.

276. Mr. Brook Smith's response is nonetheless worthy of being recorded because much of it is also now accepted, leading to my final view of what is the true nature of the discretion given the CAACI. He submits that the CAACI misunderstands its obligations in this regard, a misunderstanding that influenced its very "lax and unreasonable approach" to the observance of the OTARs in its process of certification of the Heliport.

277. He developed this response by reference to the entire legislative history and context of the OTARs as being requirements published in exercise of the powers given the Governor (not the CAACI), by ANOTO Article 152 and which are also meant by ANOTO Article 155, to give effect to the Island's international obligations for the due observance of the standards for aviation safety and the implementation to that end of the ICAO Annexes made in accordance with the Chicago Convention.

278. It is against the background of that legislative history and context of national and international obligations that Mr. Brook Smith submits the requirements embodied in the OTARs must be construed. I agree.

279. ICAO Annex 14 itself provides a definition of "standards" and "recommended practices"[70], the former being more strongly prescriptive to ensure safety and the latter as being desirable in the interest of safety. This dichotomy between "standards" "and recommended practices" is carried through into the OTARs, said Mr. Brook Smith. This is evidenced, for example, where "recognised as necessary" converts into the more prescriptive word "shall".

280. Indeed, the OTARs are replete with the use of the word "shall" – suggesting not only the ordinary mandatory use of the word but also its lineage from Annex 14.

281. Thus, the proposition advanced by Mr. Brook Smith is that the CAACI, "in taking into account" or being obliged to take account of the OTARs, were not merely obliged to "have regard to them"; but were meant, in context, to treat them in the words of Annex 14 either as "necessary to be applied" or "desirable to apply".

282. Subject further only to the meaning and effect of the OTACs as they apply to the discretion vested in the CAACI to grant exemptions, this is a proposition that I accept. In doing so, I have regard to the following further considerations.

283. With great respect for Mr. Beloff's submissions (which I have largely accepted as explained above), I do not accept that the CAACI is vested with so wide a discretion as he perceives it to be (by reference to Article 146 of ANOTO) for dispensing with or exempting from the provisions of the OTARs. Indeed, his own submission that the

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[70] "Standard: Any specification of physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the (Chicago) Convention....

Recommended Practice: any specification for physical characteristics, configuration, material...the uniform application of which is recognised as desirable in the interest of safety, etc...."
And as to "Editorial Practices" Annex 14 provides further that: "The following editorial practice has been followed in the writing of specifications: for Standards the operative verb *"shall"* is used, and for Recommended Practices the operative word *"should"* is used.

OTARs are not "regulations made under" the ANOTO, correct as I think it is, is also an indication that Article 146 when it speaks of exemption, is not speaking to exemption from the OTARs such as the CAACI in its usual regulatory role might allow.

284. Exemptions from the ANOTO itself (or regulations made thereunder) in my view, may be granted only by the Governor.

285. In this particular context of the ANOTO, the principle *delegata potestas non potest delegari* applies: a delegated authority cannot be redelegated.

286. In the present context of the legislative scheme for the certification of aerodromes, I believe that this correct principle of construction is amply demonstrated by Article 152 of the ANOTO itself as read with Article 153[71].

287. As it reads and as already mentioned, Article 152 is that under which the OTARs are published as the requirements to be taken account of in deciding whether or not a grant of certification will be made. Article 153 is that under which the Governor delegated to the CAACI his functions including those under Article 152(b) for the grant of certification of aerodromes.

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[71] Which in relevant parts provide:

Publication of Requirements

"152(1) Where any provision of this order provides for the Governor to grant a certificate...if he is satisfied as to matters specified in the provision, he shall, before determining whether to effect that grant:

(a) publish the requirements which he considers....known as OTARs ...and

(b) take into account those requirements.

Designation by the Governor

153(1) Subject to paragraphs (3) and (4), the Governor, acting in his discretion, may designate a person to carry out those functions of the Governor under this order that are specified in the designation, subject to such conditions as he sees fit.

....

(4) The Governor may not include in any designation made under paragraph (1) the functions of the Governor –

(a) to make rules, orders or regulations or give instructions under this Order; or

(b) Under this article or articles 113, 152, or 154 (emphasis supplied).

288. What is important for present purposes though, is that it is clear from the words in emphasis in Article 153[68], that the delegated functions may not include the functions by which the Governor is required himself to publish the OTARs as the requirements to be taken into account for the purposes of certification. This is the clearest of indications that the Governor's designate, the CAACI, is intended to have no power generally to vary or dispense with the OTARs nor, in the words of Article 146 of ANOTO, to "exempt from any of the provisions of (ANOTO itself) or any regulations made thereunder." The Article 146 power to exempt is, in my view, vested solely in the Governor.

289. This is a construction that is further borne out by the fact that Articles 152 and 153 are among those from which, by exercise of the Article 146 power, exemptions may be granted even while Article 153 makes it clear that only the Governor may exercise the functions given under Article 152. An interpretation that would vest the CAACI with a power freely to dispense with the OTARs even while they are requirements which only the Governor may prescribe under Article 152 would therefore be absurd.

290. It is also significant to note that Mr. Lowe appears implicitly to agree with this interpretation where he submitted (at paragraph 143 of his written closing submissions) in relation to the Study:

> *"Article 146 enables the CAACI to grant exemptions from "regulations". ...OTAR 139 is a guideline and not a regulation. The CAACI did not have jurisdiction [to grant exemption] or need to grant an exemption. The fact that it went through the process of doing so shows that it considered OTAR 139.1.123(f) very carefully."*

291. While I find the logic of that connection between Article 146 and OTAR 139 proposed by Mr. Lowe to be unpersuasive, it is clear at least that Mr. Lowe accepts

that the Article 146 power is not one available to be invoked by the CAACI for the grant of exemptions from the OTARs.

292. What this all means then is that subject only to the specific powers of exemption from the OTARs enabled by the OTACs, (or OTAR 139.9 itself); the CAACI in its consideration whether to certify the Heliport, was obliged to regard the OTARs as to be followed, as "necessary" or (as the context required), "desirable" to be applied; being guided in that regard in the former sense by the use of the mandatory "shall" as that word widely appears throughout the OTARs; and most specifically appears throughout in OTAR 139.1 dealing with approach/departure surfaces, FATO and TLOF dimensions and Safety Areas.

293. And therefore further, that where exemption from the OTARs is contemplated, this is allowed – where the OTAR requirement is one expressed as mandatory; that is: necessary to be applied – only where the CAACI is satisfied that an equivalent standard of safety can be applied. This is, in effect, that latter aspect of Mr. Beloff's submissions as noted above at paragraph 273 emphasising that all important qualification that makes it correct. I conclude that when ANOTO Article 152 speaks of taking the OTARs into account, it means that the OTARs are to be applied by the CAACI unless the CAACI is satisfied that another equivalent standard of safety can be applied in which case, having taken the OTARs into account, the CAACI might dispense with a requirement provided an equivalent standard of safety will be applied as stipulated by the CAACI.

294. The CAACI, in my view, has no discretion having taken the OTARs into account, simply to disregard or disapply them.

295. The OTARs are published by the Governor (I emphasize not by the CAACI itself) as the requirements which, in the words of OTAR 139.35, "before an aerodrome certificate is granted, the applicant shall satisfy the CAACI that (as for instance in the case of the Manual) the requirements of paragraph 139.33(b)) have been met.

296. Any other conclusion would admit of a discretion in the CAACI, subjectively by having regard to its own notions of safety, not to apply the OTARs but even to apply standards it deems equivalent and even if such standards are not referable to the established international standards embodied in the OTARs themselves.

297. It is worth noting here as well that like CIHL's expert Mr. Carey, this construction of the OTARs appears to be that to which Mr. Dick himself subscribed at least during the certification process; having regard to his frequent reference to the requirements of the OTARs, for instance, in the SER. It is a view that he only confirms at paragraph 6 of his 4th Affidavit where (in criticizing what he saw to be a different attitude taken by Mr. Connolly) he stated:

> *"The relevant standards and criteria have already been developed for ICAO and the associated OTARs. The key function of the Regulator is to assess compliance with the standards and criteria contained in any relevant requirements or guidance to which the certification process was subject and not instead, as Mr. Connolly does, to consider how they might be improved or restated.... A regulator has a duty to apply the regulations as they are written."*

298. Taken at his word, it must therefore be appropriate to see how it was that Mr. Dick performed that "key function" of the Regulator by assessing compliance with the OTARs in carrying out the certification process of the Heliport.

299. And I should add that nothing in the Civil Aviation Authority Law itself detracts from the foregoing conclusion. Rather, where by section 5(1) it is provided that the functions of the CAACI shall be such functions "*as are, for the time being, conferred on the Governor by or under (the (ANOTO) ...with respect to the regulation of civil aviation in the Cayman Islands ...and the certification of airports*" – the Law means exactly that – these stipulated "functions" of the Governor as distinct from the rule making functions under ANOTO.[72]

300. As for the OTACs themselves, careful consideration must also be given to their meaning and application. That which has arisen for consideration in this case is OTAC 139-5 – dealing with Aeronautical Studies. An important guide to its construction is apparent from OTAC 139.5 itself.[73]

301. That rubric fits logically with other introductory provisions of OTAC 139.5 which provide, inter alia, at 139.5.1.1.4 that "*it is important to note that the preferred option*

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[72] A contrary interpretation (I note there was none advanced) would suggest that section 5(1) of the Law would trump the ANOTO (here Article 153) which delimits, as discussed above, the delegation of the rule making power – an untenable proposition as the ANOTO is an instrument of the Westminster Parliament.

[73] "GENERAL

OVERSEAS Territories Aviation Circulars (OTACs) are issued to provide advice, guidance and information on standards, practices and procedures necessary to support Overseas Territory Aviation Requirements (OTARs). They are not themselves law but may amplify a provision of the (ANOTO) or provide practical guidance on meeting a requirement contained in the OTARs.

PURPOSE

This (OTAC) provides guidance on the production of an Aeronautical Study in accordance with OTAR Part 139 where an aerodrome is unable to meet the OTAR requirement and need(s) to identify alternative means to achieve an equivalent level of safety. Although this OTAC relates to aerodromes, the principles contained in it may be applied more widely in circumstances where requirements cannot be met and an alternative means of compliance is proposed."

must always be to seek compliance with the requirements. In order to achieve an equivalent level of safety by other means, one must usually establish mitigating measures that affect the efficiency and usability of the aerodrome". Again, the all-important qualification upon the discretionary dispensatory power, requiring that an equivalent level of safety is achieved.

302. Equally consistent in this regard, it must be emphasized that OTAR 139.35 provides that before an aerodrome certificate is granted, the applicant shall satisfy the CAACI that the requirements of paragraph 139.33(b) have been met. These include at (b)(2), that "the Aerodrome Manual prepared for the aerodrome contains all of the relevant information" or as in the sense of ANOTO 105(2)(c) itself that it is "adequate".

303. Viewed in that proper light of construction, the OTARs are of crucial importance to the maintenance of the necessary standards of safety. They impose requirements which shall be complied with except only where exemptions are allowed after careful construction and presentation of a request (supported by a proper aeronautical study) and the due and equally careful consideration of the grounds for exemptions. An essential and invariable pre-condition to the grant of an exemption from a standard is that an equivalent level of safety will be achieved. The fact that neither the OTARs nor OTACs are themselves "law", does not detract from their importance as the "requirements" to be satisfied to ensure that the policy and objectives of the ANOTO and the Civil Aviation Law are enforced in turn to ensure the safety of civil aviation.

304. They are described as not themselves being law, not to diminish their importance as safety requirements, but simply to recognise the fact that they may be charged from

time to time by the Governor, as typically for instance, where ICAO makes provisions.

305. I conclude that there is not in fact that wide unfettered discretion in the CAACI for which it contends, in the words of Mr. Beloff that:

> *"the nature of the legislative framework is impregnated with descriptions that are effectively subjective, which repose in the decision maker decisions as to by what the decision maker is satisfied, what the decision maker considers adequate, what conditions the decision maker determines are appropriate, if indeed any are appropriate at all. There is no, if I may put it this way, "hard-edged" obligation arising under ANOTO other than that limited obligation to take account of the OTARs and, of course, that have to be the subject matter of satisfaction."*

306. That is language descriptive of a wide discretion, to be exercised on the basis of what the decision-maker may regard as being subjectively "to its satisfaction".

307. That is a notion that is antithetical to the whole history, structure and lineage of the complex legislative scheme embodied by the ANOTO - and the OTARs and OTACs - which are its requirements.

308. For support of his construction and as already mentioned, Mr. Beloff (as did Mr. Lowe), sought throughout to lay emphasis on the fact that the CAACI is an "expert body", one that, because of its expertise, is entrusted with the wide discretion for which it contends. While there is force in this argument to be recognised, particularly when the functions of the CAACI are to be juxtaposed with those of the Court – the latter itself obviously lacking the same kind of institutional expertise while nonetheless called upon judicially to review the CAACI's decisions – the CAACI's expertise must itself be considered against the background of the wealth of experience, knowledge and expertise that the OTARs, as the off-springs of the

Chicago Convention, themselves embody. In this sense, it may not be forgotten that the OTARs derive from the collective expertise of the global ICAO membership.

309. In summary: because the CAACI has not itself been given the legislative powers vested by the ANOTO in the Governor, it has no power to grant blanket exemptions from the requirements – the OTARs – which are prescribed by the Governor for the regulation of air navigation safety. In the exercise of its regulatory functions, the CAACI may grant specific exemptions from OTARs but only where it satisfies itself that an alternative means of ensuring safety will be in place.

310. Having, I believe thus set the proper context for the examination of the CAACI's treatment of the OTARs, I must return to set, still more fully, the proper legal parameters for the present exercise of judicial review which the Court is asked to undertake.

"Heightened Scrutiny" and Human Rights

311. This further area of debate as to the nature of the Court's review in a case like this has to do with what Mr. Brook Smith described as the need for "heightened scrutiny" presented by the public safety implications of the Certification of the Heliport.

312. Axis submits that notwithstanding the established limitation upon the Court's review powers as described above in the case law, the standard and intensity of judicial review varies according to the subject matter, as recognised by the House of Lords in ***R (Daly) v Home Secretary [2001] 2 AC 532***. And this is of importance in the present case, says Mr. Brook Smith, where the decision challenged: (1) is a decision made by a safety regulator that is directly concerned with the safety of persons and

property (see Article 105 of the ANOTO); and (2) has an impact on the enjoyment of property rights by Axis and other owners and occupiers of property.

313. It is in this context that the Court is invited by way of "anxious or heightened scrutiny", to have regard to the rights provided for by the Constitution of the Cayman Islands Order 2009, and, in particular, in its Bill of Rights, Freedoms and Responsibilities (the "**Bill of Rights**") enshrined in Schedule 2 and which became effective in the Cayman Islands on 6 November 2012.

314. Because the decision in this case pre-dates the implementation of the Bill of Rights, Axis does not plead a free-standing Bill of Rights challenge to the decision, but the Court, being itself bound to give effect to the principles enshrined in the Bill of Rights, should have regard to relevant constitutionally protected rights when determining the intensity of judicial review appropriate to this case, recognising that any threat to life and property posed by the Heliport continued after the decision challenged, and indeed continues to this day.

315. The rights protected by the Bill of Rights include the right to life, protected by Article 2. This right imposes on the State a positive obligation to protect life: ***Osman v UK (2000) 29 EHRR 245*** (ECHR). That obligation will now be engaged whenever a safety regulator such as the CAACI makes a decision that must explicitly be based on safety considerations (as set out in Article 105 of the ANOTO), and, even in respect of a pre-Bill of Rights decision such as that here challenged, the Court is entitled to consider the compatibility of the continued operation of the Heliport with the positive obligation to protect life.

316. Axis does not contend that the level of scrutiny required of the decision here challenged is as intensive as it would be, for example, in a case involving an actual death or deaths for which the State was said to have some responsibility, or which the State was said to have wrongly failed to prevent[74] but, says Mr. Brook Smith, the fact that the State's positive obligation to protect the lives of those who live, work in and visit the Islands is engaged here, justifies the Court giving close scrutiny to the decision.

317. Article 15 of the Bill of Rights provides for the protection of property rights, in the terms already noted at footnote 60 above at paragraph 196.

318. Property rights are, of course, qualified rights, and may be displaced in an appropriate situation by, for example, the development or utilization of property so as to promote the public benefit or the economic well-being of the community. It is also true that, at the time when it made its decision to grant the Certificate, the CAACI was not yet under an obligation to form a view on the proportionality of interference with property rights (it would be if making the decision now by virtue of section 19 of the Constitution); but the argument is nonetheless that the Court can and should apply a higher standard of review in this case than it would in a case in which constitutionally protected rights were not engaged.

319. Mr. Brook Smith developed his argument by reference to an emerging principle in the case law. In ***R v Ministry of Defence Ex. p. Smith***[75] (per Sir Thomas Bingham, as he then was) the English Court of Appeal approved of the following approach to the issue of irrationality:

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[74] As in ***Osman*** (above).
[75] [1996]Q.B. 517

> *"The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."*

320. The foregoing was described by Sir Thomas Bingham as "*an accurate distillation of the principles*" laid down by the House of Lords in ***Reg. v Secretary of State for the Home Department, Ex Parte Bagdaycay [1987] AC 514*** and ***R v Sect. of State for Home Department, Ex Parte Brind*** **[1991] 1 A.C. 696**. He continued (at page 531):

> *"...The limitations on the scope of (the Courts' power of judicial review of administrative action) are well known.... Within those limitations, the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk; the basis of the decision must surely call for the most anxious scrutiny."*

321. The limitations of the ***Wednesbury*** principles as a method of judicial review in human rights cases is alluded to in that passage. Its conceptual weaknesses have led to proposals for the common law to recognise a number of substantive principles to replace the reasonableness test (e.g.; equality of treatment)[76]or for the replacement of the reasonableness test generally with one of proportionality[77]

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[76] See J. Jowell and A. Lester "Beyond Wednesbury: Substantive Principles of Administrative Law [1987] P.L. 368. Cogently arguing for the replacement of the Wednesbury irrationality test the emergent tests of proportionality, legal certainty and consistency, including consistency by equality of treatment in human rights cases.

[77] Jowell and Lester: Proportionality: Neither Novel Nor Dangerous: New Directions in Judicial Review (*Stevens, London, 1988).

322. The subject has continued to engage the courts at the highest level. In ***R (Daly) v Home Secretary***[78] the House of Lords provided an authoritative examination of both the orthodox application of common law principles of judicial review as well as of the adaptation of principles in terms of "heightened scrutiny" emerging from the fundamental rights cases.

323. In concluding his speech on the subject, Lord Steyn delivered the following passage which Mr. Brook Smith invites me to bear in mind now:

> *"The differences in approach between traditional grounds of review and the proportionality approach may...sometimes yield different results. It is therefore important that cases involving Convention rights must be analyzed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] P.L., 671, 681 has pointed out, the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent, the general tenor of the observations in Mahmood [2001] 1 W.L.R 840 is correct. And Laws LJ rightly emphasised in Mahmood, at 847, para. 18 "that the intensity of review in a public law case will depend on the subject-matter in hand". That is so even in cases involving Convention rights. In law context is everything."*

324. Responding to Mr. Beloff's criticism of Axis' reliance, in the present context, on the test of anxious scrutiny as "*contrived*", Axis being, he says, but a lifeless corporate entity, Mr. Brook Smith says he misses the point.

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[78] Above.

325. Although not in effect at the time of certification of the Heliport, the Bill of Rights[79], says Mr. Brook Smith now establishes, for every citizen, certain fundamental rights: Under Article 2, the right to life, and under Article 15, the respect for private property. First, it is in recognition of the right to life of those citizens – be they swimming in the sea or boating in the waters by the Heliport or riding on the Helicopter itself or standing on the roadway outside the Heliport – that this Court should engage in the intensified review which is described by Lord Steyn and endorsed by other members of the House of Lords in the ***Daly*** case (above) and the earlier cases.

326. Likewise, Article 15 has particular significance in this case, says Mr. Brooks-Smith. The grant of the Certificate created an immunity from suit for nuisance arising from noise or vibration. Compensation for his clients was there none. It was therefore unreasonable for the CAACI to have granted Certification without any consideration of the impact upon adjacent properties of the nuisance to be presented by the Heliport.

327. It follows from the case law, given the threat to life and impairment of rights to property, that the intensity of review that the Court should bring to bear, suggests a preparedness to look more closely at the details of the decision making. The Court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity, something less will do.

328. This does not go so far as to propose the application of the proportionality test which is not proposed or advanced by Axis. It is accepted that this is a ***Wednesbury*** case

[79] As noted above at para. 313, the Bill of Rights provision of the Cayman Islands Constitution 2009 Order came into effect on 6th November 2012.

which Axis says should be subjected to "***Super Wednesbury treatment***"[80]. Thus, once the court reaches the position of adopting that other perhaps more responsive test proposed by Lord Justice May "My goodness; that is certainly wrong!" [81] (and as approved by the House of Lords[82]); the focus should be less on precisely how Axis puts its case and more on how the CAACI explains its reasons. That is not a shift of the burden of proof in any way but a shift of focus.

329. I recognise the force of Mr. Brook Smith's arguments in this regard and I accept that the concern for public safety mandated by the ANOTO is itself indicative of the obligation of the CAACI to consider the ramifications of its decision as they might affect the fundamental rights of citizens, most especially the rights to life and property. After all, these rights were not created but only affirmed by the introduction of the Bill of Rights and the fact that the CAACI took its decision in this case fully one year before its introduction does not prevent the court from adopting what should be the proper degree of scrutiny of the decision. As Lord Cooke observed in **Daly** (above)[83]:

> *"The truth is, I think, that some rights are inherent and fundamental to democratic civilized society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them."*

330. But Mr. Beloff's response is equally compelling when he says that human rights issues are themselves considered and provided for by the State in promulgating the very elaborate legislative scheme embodied in the ANOTO and the OTARs, and the vesting of the responsibility for their safe and proper administration in the hands of

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[80] As the "anxious" or "heightened scrutiny" test was described by the ECHR in Application 45508/99 (5 October 2004) arising from ***Re L [1999] 1 A.C. 458 (HL)***

[81] ***Neale v Hareford and W.C.C. [1986] 1. C.R. 471, 483.***

[82] ***Reg. v Devon. C.C. Ex. P.G [1989] 1 A.C. 573, 583.***

[83] At p. 548 F-G

the CAACI which is the expert statutory body created specifically for the purposes. The CAACI is the body responsible for the certification of aerodromes by the application of the law and regulations having regard to safety considerations and that is, says Mr Beloff, exactly what they have done. There is thus no scope for the application of the "anxious" or "heightened scrutiny" test because there is a mechanism put in place by the State to address concerns about safety and property and the resort to the so-called "***Super-Wednesbury*** approach" is an illegitimate invitation to the Court to supplant the decision of the CAACI with views of its own.

331. Mr. Lowe in his final submissions supported Mr. Beloff in this. He particularly rejoined in respect of Axis's reliance on the test proposed by Lord Justice May in ***Neal v Hereford*** (above): – "My *goodness, that is certainly wrong!"* – cautioning that it is essential in a judicial review for the court *"not to be beguiled by invitations to trespass on the merits of the case."*

332. Even while recognizing the force of Mr. Brook Smith's arguments, I am compelled to accept Mr. Beloff's and Mr. Lowe's warnings in this regard.

333. As Lord Steyn advised: In law context is everything. The contextual issue here is whether or not the CAACI in its certification of the Heliport acted irrationally. This question must be examined having regard strictly to the statutory context and its true meaning and objectives. The context is one which itself embodies regulatory standards of safety – primarily the OTARs published pursuant to the ANOTO – by which the State imposes strict duties upon the regulator, here the CAACI. The conduct of the CAACI in the fulfillment of its duties must, I accept, be assessed in the context of the regulatory standards.

334. I accept that the intensity of review invited by the modern case law is not a cloak that may be used by the court to embark upon a review of the merits of an administrative decision rather than its legality. I therefore regard the law applicable to the present exercise engaged before the court still to be, until authoritatively otherwise stated to be, as it was stated in the ***Wednesbury*** case. I remind myself of what Lord Greene MR said in this regard[84]:

> *"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming.... It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act ...within the four corners of their jurisdiction, the court, in my opinion cannot interfere."*

335. There is to be borne in mind moreover, the further advice from ***Ex parte Smith***[85] as to the adequacy of the ***Wednesbury*** approach in a case like this:

> *"The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law, and like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the [Wednesbury] test, but the test is sufficiently flexible to cover all situations."*

336. Thus, the approach to the several grounds of complaint in this case is to ask myself the question: given the limitations imposed upon the court by the ***Wednesbury*** test and the strictness nonetheless of the responsibilities reposed in the CAACI to ensure

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[84] (Above), at page 230.
[85] Above, at P.556 B-C

the safety of civil aviation, has the CAACI, in its approach to its responsibilities, shown to have crossed the threshold of reasonableness into irrationality? If the CAACI has not so conducted itself, there can be no basis for intervention by the Court. If it has it has acted unlawfully and the court has a duty to intervene.

Analysis of the grounds of complaint

337. I have already set out extensively above, the nature of Axis' complaints in relation to the SER, the Study, the Manual, Mr. Dick's final inspection of the site leading to the acceptance of the Manual, the Certification of the Heliport and the subsequent requirement for the "Revised" Manual.

338. Included in the concerns are those about the exemption from the OTAR 139.1.123 (f) requirement for at least two take-off climb and approach surfaces separated by not less than 150 degrees and the requirement that the surfaces not to be penetrated by obstacles such as may present a threat to safety for the Helicopter taking-off from or landing at the Heliport. In its continuing failure to have the surfaces specified in the Manual or in the Revised Manual or in keeping with a 90 degree separation angle, the CAACI is also criticized for allowing the Helicopter to operate outside the approach and departure surfaces, effectively operating within the "arc" between the two surfaces in a way not in keeping with ICAO Annex 14 as intended by OTAR 139.1.113(d) and (e).

339. There still are further concerns about:

(i) the continuing operation of the Helicopter in circumstances of prevailing tail winds from the east and north east without any limitations imposed in that regard by the CAACI;

(ii) the obstacles (the CIHL and OCH buildings) penetrating the 45 degree slope of the Secondary Safety Area;

(ii) the non-continuous nature of the surface of the FATO (the TLOF and helipad) with the "surface" of the Safety Area;

(iii) the extension of part of the Safety Area over the sea, a consequence of the FATO being "slightly" shifted to the north and west; and

(iv) the absence of markings for the FATO itself.

340. I now turn to consider in more detail CIHL's and the CAACI's responses to these concerns before expressing the conclusions at which I am compelled to arrive.

341. As mentioned above, Mr. Lowe took the lead on these factual matters for both Defendants.

342. He began by identifying four points of concerns raised by Mr. Brook Smith in the arguments which were not raised in the Amended Noticed of Motion ("ANM"). Such unpleaded allegations should not be permitted and should not weigh in the Court's deliberations, he submitted.

343. First, he supported Mr. Beloff's concern that Axis's reliance on operational matters, such as Mr. Begot's manner of flying, are issues not pleaded in the ANM. I will come to address this issue below.

344. Second, there is no mention in the pleadings of inappropriate reliance on the Canadian comparables, those to which Mr. Dick ultimately deposed he had had in mind when deciding to accept the Study. Axis should not be allowed, says Mr. Lowe, to rely on this criticism when no mention of it is made in the ANM where Axis sets out all the other aspects of the Study of which it complains.

345. I do not see this so much as an issue of pleading as it is an issue of substance going to the reliability of the Study. Mr. Dick's reliance on those comparables and their significance to his decision to accept the Study was not fully explained until his 7th Affidavit was filed. Axis could therefore not have earlier addressed the issue fully in context in its pleadings.

346. Mr. Lowe's third point of pleading relates to the criticism that Mr. Dick failed to take into account, what he described as the "unidentified performance characteristics" of the Helicopter.

347. Here too, however, the issue did not crystallize until Mr. Dick's 7th Affidavit was filed. It was there at paragraph 27 that he stated:

> *"Although I was aware of the performance characteristic of the helicopter, I had no regard to them for the purpose of certification since they are not part of the OTAR 139 standards against which an aerodrome is assessed and certified. I obviously appreciated it was a single engine class 3 helicopter. I did consider the dimensions of the helicopter in order to determine the dimensions of the FATO (which in turn is used to establish the Safety Area). Mr. Cushman, on the other hand, took these into account during his operational assessment of the site (see paragraph 24 of my fourth Affidavit)."*

348. But, at paragraph 24 of his 4th Affidavit, Mr. Dick simply stated in this regard:

> *"...Mr. Cushman, in his capacity as Manager of Flight Operations had, however, examined the site only for safe operational suitability and had not considered the aerodrome certification requirements. The latter matters remained to be considered by an aerodrome inspector".*

349. These passages from Mr. Dick's 7th and 4th Affidavits may be seen as suggesting but do not expressly assert that, to the extent the performance characteristics of the Helicopter were relevant to the exercise of certification of the Heliport, Mr. Dick was satisfied that Mr. Cushman had taken them into account. If they were required to be

taken into account, it must therefore be legitimate for Axis to complain that they were not, in light of what Mr. Dick admitted in his 7th Affidavit.

350. Mr. Lowe's fourth point is that the allegation raised in Axis' arguments that the Heliport infringes the planning requirements is not a pleaded allegation. I agree. The breach itself of the planning set-back requirements by the helipad location can have no bearing upon the validity of the certification of the Heliport.

351. At all events, I note that I accept – as Mr. Lowe also submitted – the principle that it is essential, in a judicial review case, that the plaintiff focuses on its complaints and that the Court knows clearly the grounds upon which it is being asked to review the acts of the public authority. It is also an essential condition of fairness to the respondent parties that the issues are clearly identified, as cases like these are not given to full sets of pleadings.

352. Uncertainty of pleadings in cases of this kind tends to encourage both drift and delay – what Munby J referred to as *"litigation creep"* in ***CF v Secretary of State for Home Dept. [2004] EWHC 111 (Fam)*** (at page 218) and which can lead, as he further pointed out in ***R (on the application of P) v Essex County Council [2004] EWHC 2127 (admin); (at para 39)***; – all too easily to a situation where the proceedings are, in effect if not in intention, being used inappropriately as a means of monitoring and regulating the performance of a public authority of its public duties and responsibilities.

353. This is all very important to remember in the overarching context of this litigation where the court must have constantly in mind that the court's function is essentially one of review of the CAACI's decision, rather than primary decision making. It is

not the function of the Court itself to come to a decision on the merits. The Court is not concerned to come to its own assessment of whether the Heliport meets the standards and requirements of safety set by the legislative scheme. The Court is concerned only to review the CAACI's decision by reference to public law criteria, here, more particularly, those established in the cases by way of the test of unreasonableness or irrationality and by reference to clearly pleaded grounds of complaint.

354. With all those cautionary principles in mind, I am nonetheless of the view that the concerns or complaints which must be the focus of the present exercise of judicial review of the CAACI's decision to certify the Heliport, are those described immediately above at paragraphs 338 to 339 of this judgment and which I regard as sufficiently pleaded in the ANM.

355. On the factual grounds of the challenge to the CAACI's decision, Mr. Lowe also further developed his "fall back" argument on behalf of CIHL.

356. At risk of oversimplification, it was to the effect that as the process of regulatory oversight for the purposes of certification of the Heliport is an ongoing process, the CAACI should now be regarded by the court as being at liberty, in the exercise of its statutory discretion, and in light of any short-comings which have been identified (but which are not conceded) to require the remediation of shortcomings or even to overlook them if deemed to be only marginal.

357. Examples of such "shortcomings" would be (a) the absence of the FATO markings; (b) the extension of the small portion of the safety area over the sea; (c) the obstruction to more than one side of the Secondary Safety Area caused by the CIHL

and OCH buildings (if found to be so); and (d) the infringement of the northerly and westerly approach/departure surfaces respectively by the utility pole and the boundary fence to OCH (if found to be so).

358. Each of them, says, Mr. Lowe, has been recognised by the CAACI and has been addressed in the process of ongoing regulatory oversight.

359. In this regard, the Court should attach no significance to the fact that the short comings may have originally been the result of errors on the part of the CAACI nor to the fact that they may have been exposed by Axis' challenge.

360. It is in the nature of an ongoing process of regulatory oversight such as that required by the CAACI in respect of ongoing operations of aerodromes (which – it must be remembered – are themselves business enterprises whose interests must be considered) that errors may be made and when revealed, corrected if too serious to be overlooked. Mistakes may be corrected and it must surely be within the reasonable limits of margin of appreciation to be afforded to an expert regulator such as the CAACI, in the exercise of its undoubted discretion vested by the ANOTO Article 105 (9) (c) and 122 (respectively allowing for amendments to the aerodrome manuals and for suspension or revocation of certificates); to decide whether and if so how, they may be corrected. Thus, mistakes need not be fatal to certification and it is within the undisputed discretion given the Court as to what remedy it should grant, that instead of quashing the certificate, the Court could declare that the Certificate is non-compliant with one or other of the OTARs, requiring or advising that compliance is enforced. In the exercise of that discretion the Court will have in mind the fact, for

instance, that CIHL has operated the Heliport for over a year now without accident and without complaint from the public at large.

361. I accept that all relief granted by way of judicial review is discretionary and the principles upon which the discretion is to be exercised take account of the needs of good administration: ***Bahamas Hotel Maintenance and Allied Works v Bahamas Hotel Catering and Allied Workers [2011] UK PC 4 (at 40)***. The discretion of the Court in deciding what remedy to grant can be exercised by taking into account many considerations: as was said in ***Credit Suisse v Allerdale Borough Council [1997] Q.B. 304 at 355 D*** per Hobhouse LJ:

> *"The discretion of the Court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act."*

362. That being the state of the law, I am nonetheless obliged first to consider whether the CAACI's decision to grant and uphold the Certification falls within the bounds of reasonableness. I will do so by so by considering, in turn, each area of complaint.

The FATO

363. It is plain that the failure to establish and mark the position of the FATO is in breach of the requirements of OTAR 139.1.157(a) which provides that FATO area markings or markers shall be provided where the extent of the final approach and take off area is not self-evident.

364. While the 50' x 50' dimension of the Helipad can obviously contain a FATO of an area in which can be drawn a circle of diameter not less than 1D (here 42.45 feet, the length of the Helicopter) as required by OTAR 139.1.27(d)(2); the notional "shifting" of the FATO by some three feet means that it can no longer be regarded as centered over the Helipad and the TLOF as before and so its exact location is no longer self-evident. Notwithstanding that the Heliport must operate only by VFR and at day time and that for the time being the only pilot will be Mr. Begot, I do not think that a responsible air safety regulator could be content with the notion that for those reasons the FATO need not be marked. Even the narrowest margins of safety can be important and the presence of markings is meant to assist in the judging of those margins. A consistent failure on the part of an air safety regulator to recognize that fact where there has been no application for an exemption and none given, could itself, in my view, be an indication of irrational thinking.

365. The absence of FATO markings in the present context is therefore a legitimate ground of complaint by way of judicial review. That, however, does not by itself necessarily mean that the CAACI has been "irrational" in the grant of certification or in not having required the markings up until now.

366. Mr. Dick's evidence is that deliberate consideration has been given to this issue. I note again though, that no application has been made for an exemption from OTAR 139.1.157(a) and so no specific alternative means of ensuring safety has been prescribed. Instead, there is ongoing reliance on Mr. Begot's ability to discern roughly where the FATO is.

SAFETY AREA

367. The FATO markings are also important because the Safety Area and (in turn) the Secondary Safety Area are measured from the periphery of the FATO, using the measurements of the Helicopter as the standard. The results of the shifting of the FATO are shown on the composite Evans and Associates survey drawings 14 and 15.

368. One positive result is that the 6 foot infringement of the Safety Area once caused by the deck to the CIHL office building is avoided but a negative result is that the Safety Area extends slightly over the sea (by some three feet).

369. The original allegation in the ANM of an infringement by the deck to CIHL building was based on the measurements in the Manual which might now, in light of the Evans Survey drawings 14 and 15, be regarded as corrected. Such a view of that obstruction as having been removed, cannot be regarded as unreasonable.

370. The view of the CAACI that the dimensions of the Safety Area are now OTAR compliant is said nonetheless to be unreasonable because of the extension over the sea which is not a part of and so not under the control of the Heliport. Nor, as it is over the sea and not on land, can it be said to be "continuous" with the surface of the FATO. I feel compelled to recognize that the point about the extension over the sea not being a part of or under the control of the Heliport is at best a moot point, given the official registry records which indicate that the area of the sea in question falls within the registered boundary of the property on which the Heliport stands. Moreover, as Mr. Lowe submits, the requirement is that the Safety Area is free of obstacles, not that it is under the operator's control. This must be acceptable subject

to the obvious concern that the operator must be in control to the extent necessary to ensure the safe operation of the Heliport.

371. The question whether the Safety Area must be "continuous" with the surface of the FATO is, however, a separate issue and will be addressed next below.

372. As shown in Schedule One and mentioned above at paras. 54 and 55; OTAR 139.1.27(b) requires the Heliport to have a safety area around the FATO. This is an area of specific dimensions which must be clear of obstacles and debris to facilitate take off and landing (see OTAR 139.1.27(f) and Dick 1 para. 12 B/3). From ICAO Annex 14 Volume 11 Definitions, one also sees that the Safety Area is intended to reduce the risk of damage to helicopters accidentally diverging from the FATO. Thus, the Safety Area must be a fortiori, intended to reduce those risks when there is a forced landing. This is reinforced by OTAR 139.1.113(e)(7) which in part provides:

> *"Provisions for forced landing areas are expected to minimize risk of injury to the occupants of the helicopter."*

373. A safety area partially over the sea is not consistent with these requirements. That this was also Mr. Dick's view is apparent from the SER where at page 9, he noted that this would not be OTAR compliant "unless the requirement for this portion can be waived". No application for exemption has been made and so the grant of the Certificate as regards that non-compliance is unexplained.

<u>Surface of Safety Area</u>

374. Part of the Safety Area consists of iron shore and loose stones which creates an uneven surface and which can be blown around by downwash. For this reason the

surface is said to be in breach of OTAR 139.1.127(i). The issue of loose stones and debris I consider to have been addressed by the CAACI as a conditionality for the purposes of certification and, to the extent it could remain an operational issue, could continue to be addressed by the enforcement of that conditionality.

375. More recently a new allegation has been added in the ANM. It is said that part of the Safety Area consists of ironshore and so does not meet the standards of the OTARs. Since there is a drop of between 2.7 and 4.8 feet between concrete pad and surrounding ironshore, the surface of the Safety Area is not continuous with the surface of the FATO (the FATO being on any view, located on the helipad). There was, in any event, the drop of between 6" – 8" between the edge of the FATO and the ironshore which the CAACI had itself observed and noted at time of certification.

376. The allegation that part of the Safety Area consists of ironshore and is not "continuous" with the FATO being between 2.7 and 4.8 feet deep is also factually wrong, says Mr. Lowe, because it is based on measurements to the bottom of the holes of the ironshore. Any such measurement should be from the surface of the FATO to the surface of the ironshore.

377. The CAACI denies the suggestion that the Safety Area is not "continuous" bearing in strength to support a helicopter in the sense intended. Mr Dick explains at paragraph 34 of his 4th Affidavit that while a literal interpretation of the requirement is that the surface of the Safety Area must be continuous, the OTAR Issue 5 version has "abandoned the requirement of the Safety Area to be "solid" as it used to be required by Issue 4.

378. OTAR 139.1.27(a) Issue 5 states in clear terms, says Mr. Dick, that "*a FATO shall be surrounded by a safety area which need not be solid*".

379. The difficulty with Mr. Dick's interpretation as it seems to me though, is that he would trail the surface of the Safety Area at the Heliport as being in the air but the FATO is in reality surrounded by a Safety Area that is solid but one, the surface of which is not continuous with the surface of the FATO.

380. Moreover, the approach taken by Mr. Dick to this important matter of construction is not one which, in my view, places appropriate emphasis on the all important question: is the Safety Area safe for the purposes intended?

381. He takes support from Mr Carey who, for his part, does say that a helicopter can land on the ironshore surface safely (see B/10 paragraph 26).

382. Mr. Lowe emphasizes that the evidence from Axis that this causes a safety issue (see Connolly 1 para 88 B/6) is denied (see Dick 1 B/3 para 69 and 71, Legras B/8 para 23, Dick 4 paras 88-89 B/7 and Carey 1/10 para 39.4, 39.7, 43-46, 49). That there is no explanation as to why the CAACI (which plainly did have regard to this issue) should have considered this as more than an operational matter (see Dick 1 B/3 para 62-64, 69, 74, 76, 86 and Carey 1/10 para, 49).

383. I do not think that this response of CIHL and the CAACI can be regarded as acceptable in relation to a matter that could be of fundamental importance to the safety of the Heliport in the event especially of divergence by the Helicopter from the FATO and helipad during a forced landing. It is plain that the OTARs regard the Safety Area (as helpfully explained in ICAO Annex 14) as being an area where a safe

forced landing at a heliport can be facilitated and as "intended to reduce the risk of damage to helicopters accidentally diverging from the FATO".

384. The requirement that the surface of the Safety Area be continuous with the surface of the FATO is consistent with that objective only if the words "surface" and "continuous" in this context are given their natural and ordinary meaning, in the absence of a specific OTAR definition. This is the approach to be taken to construction according to the Foreword to ICAO Annex 14. The Shorter Oxford English Dictionary gives the meaning; in that sense: "*extending in space without a break*"; "*acting without interruption*"; "*connected*".

385. At the Heliport, the FATO and the Safety Area cannot be said to be extending together in the space they occupy without a break where there is a sudden drop from the edge of the FATO of some 6" – 8" and even far less so as the area descends into pockets along the shambolic surface of the surrounding ironshore, with some pockets as deep as 4.8 feet.

386. In my view, on no reasonable interpretation of OTAR 139.1.113(e)(7) in particular, might the Safety Area provided at the Heliport be regarded as safe for the purpose intended or as compliant with the OTAR requirements.

387. The Helicopter diverging accidentally from the FATO at the Heliport is plainly most likely to sustain damage with resultant risk or injury or worse to passengers or others in the immediate surroundings because of the obstacles presented by the irregular and non-continuous nature of the surface of the ironshore within the Safety Area.

388. I emphasize that this is not so much a matter of my preferring the views of Axis's expert over that of the CAACI and Mr. Carey as expressed in their evidence respectively identified above, as it is a matter of plain common sense.

389. Indeed, a persistent view taken by an air safety regulator to the contrary, particularly after having had the benefit of the elucidating debate provided in these proceedings, would in my view be irrational. It is therefore surprising that Mr. Carey expresses the view that in the event of hydraulic failure, the Helicopter should be able safely to land at the George Town International Airport, rather than be assured of being able to do so at the Heliport. Up to now, the interpretation given to this OTAR requirement may be less than so drastically regarded on the basis, as he explains, of Mr. Dick's view of the change from OTAR Issue 4 to Issue 5, no longer requiring that the surface of the safety area be "solid". But that is a view which I am now obliged to regard as wrong, nonetheless. The surface of a safety area extending from a FATO over water but continuous with the surface of the FATO could be one such as Issue 5 contemplates because a pilot could safely anticipate accidental divergence from a FATO in those circumstances..That is not the situation at the Heliport where this Safety Area lies upon the ironshore.

The Secondary Safety Area

390. OTAR 139.1.27(d) requires the Secondary Safety Area to be comprised of a side slope rising at 45 degrees from the edge of the Safety Area to a distance of 10 metres with a surface (necessarily in the air) which 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 side slope surface.

391. Here, the fundamental dispute is that, in the opinion of the CAACI[86] as supported by Mr. Carey[87]; OTAR 139.1.27(d) allows penetration by obstacles (here buildings) to the south and east, as the FATO is circular and thus has two distinct sides only – the "operational side" and the "non-operational side". Just as one "side" of the moon is dark, adds Mr. Lowe. This remains a primary dispute but, says Mr. Lowe; even if the CAACI and Mr. Carey are wrong in this their interpretation of OTAR 139.1.27(d); exemption from its requirement can reasonably be allowed by the CAACI for the following reasons.

392. As the Evans Survey drawings demonstrate, the obstructions presented by the CIHL and OCH building together, cover an angle, measured from the centre of the FATO circle (as shifted) of about 100 – 110 degrees. If a "side" of the FATO means one of four sides of 90 degrees each, the combined obstructions would cover only a marginally greater angle than that of one side; viz: by some 10 or 11 degrees.

393. Such a marginal infraction, says Mr. Lowe, must be well within the discretion of the CAACI to allow.

394. Moreover, says Mr. Lowe, on the construction of OTAR 139.1.27(d) adopted by Mr. Dick and Mr. Carey, the FATO has only two sides – the operational and non-operational as defined and designated by the departure/approach surfaces as they align over the centre of the FATO.

395. In this respect, Mr. Dick relies upon Canadian Aviation Regulations ("CAR") 325.29 and his explanation of it at paragraph 48 et seq. of his 4th Affidavit. There he says that "*the only possible regulatory interpretation*" of OTAR 139.1.27(d) requirements

[86] Per Mr. Dick's 3rd Affidavit, B/3 paragraphs 83-84
[87] B/10 paragraphs 23-24

is that for which he contends and that similar logic supporting that interpretation and its rationale is illustrated in CAR 325.29 Figure 4.4 which was published as a Canadian standard in 2007.

396. In response to Mr. Connolly's criticism that CAR 325.29 relates not to secondary safety areas but to transitional surfaces for a non-instrument (VFR) FATO, Mr. Dick explains that the term "transitional surface" has been used instead of "Secondary Safety Area" but the concept of the slope requirement is the same in both instances. Figure 4.4 does suggest that an obstacle (that is: a building) may be present on two sides of a FATO that is divided by what is described as 180 degree sectors or two sides.

397. If Mr. Dick is correct and the Secondary Safety Area is so defined and designated, the operational side at the Heliport would be that which faces west and north over the sea and the non-operational side east and south towards the land; and accordingly, that in which the obstructions of CIHL and OCH buildings are located. No aeronautical study would be required as no exemption is required or sought.

398. Construed in that way, the obstructions to the 45 degree slope of the Secondary Safety Area are allowed and the Heliport would be OTAR 139.1.27(d) compliant.

399. Given the differing views on the meaning of this requirement, Mr. Lowe submits that I should regard myself as obliged to accept that of the CAACI being that of the expert regulator. The Court may not simply substitute its own contrary view, even if arrived at by reliance on different views expressed by Mr. Connolly (as indeed there were).

400. While I would ordinarily be obliged to accept this submission having regard to the case law discussed above, I am obliged nonetheless to regard acceptance as being heavily qualified by two considerations in particular.

401. The first is that not even Mr. Dick, adamant as he is, presents his interpretation of this OTAR requirement as being definitive. At highest, his reliance on CAR 325.29 is by logical assimilation. Neither the OTARs nor ICAO Annex 14 provides a definition for "one side of a FATO". Neither makes reference to "operational" and "non-operational" side to the FATO as one would expect had that been the intended meaning. Rather, the competing views are all based on subjective understanding of what appertains in practice over what is said to be different and long experience in different locales.

402. Thus, in reality, there is no definitive answer.

403. Secondly and consequently, the Court must be well placed to arrive at the correct construction of what are, by any measure, provisions that carry not only practical but also legal implications in the sense that ultimately, certification of a heliport must be in compliance with the requirements of the ANOTO.

404. In this regard, context is again everything and the context here is incontrovertibly that in which the paramount legislative policy objective is air navigation safety. It is a context which to my mind, dictates that the proper construction must be one that instills a meaning to the requirement that ensures or at least fosters, rather than detracts from, the legislative policy objective. Taking that view, it follows that "one side of the FATO" means one of four geographical sides into only one of which

obstacles may be allowed to penetrate the 45 degree side slope of the Secondary Safety Area.

405. Whether the FATO at the Heliport is regarded as a circle or the square helipad itself matters not for these purposes. As Mr. Connolly said, measured from the centre, either configuration can be divided into four geographical sides, each covering 90 degrees. He pertinently observed that by allowing obstacles to one side only, a helicopter having to execute an emergency go around would have two paths of escape open to it instead of only one as would be defined by an "operational" side.

406. There were also a number of other illustrative arguments raised by Mr. Brook Smith which run counter to the viability of the argument for notional operational/non-operational sides of a FATO. Perhaps the most compelling were those in which Mr. Brook Smith rhetorically asked: (1) what of a FATO which is divided by a 180 degree separation angle to its approach/departure surfaces thus running straight across its centre; which side then would be the "operational" and the "non-operational"? And (2) what of a FATO with a straight-in/straight-out or single approach/departure surface; what then would be the operational side? As in such a scenario there would not be a discernible operational side, obstructions would be allowed, on the construction the CAACI seeks to advance, anywhere on such a FATO except on the "operational" approach/departure surface itself.

407. In other words, the narrower the separation angle of the approach/departure surfaces and so the more confined the "operational side" of a Secondary Safety Area, the greater the area into which obstacles may be allowed to infringe. This seems an absurd proposition, one that runs counter to the obvious concern that the more

constrained the approach/departure surfaces, the less obstructed should be the routes of escape provided by the Secondary Safety Area.

408. For such reasons, I am compelled to the conclusion that the obstructions to the 45 degree slope of the Secondary Safety Area of the Heliport are presented not to one side only of the FATO, but to two sides and so the Heliport is not in compliance with OTAR 139.1.127(d). There being no application for an exemption in this regard, and none expressly granted by the CAACI, it cannot be said that an alternative means of ensuring an equivalent standard of safety as that provided by OTAR 139.1.127(d) is in place at the Heliport.

409. Whether or not the grant of the Certificate in such circumstances (taken together with other infractions) was "irrational", is the further matter to which I will come at the end of this Judgment when regard must be taken of the residual discretion in the CAACI for which Mr. Lowe contends.

The Alleged obstacles in the Approach and Departure Surfaces

410. This and the concerns about the 90 degree separation angle are interrelated. I accept the submission presented by Mr. Lowe in relation to them as follows, but qualified by my added comments.

411. OTAR 139.1.113(d) and (e) require an approach and departure slope of 8 % for 245 metres or 735 ft along the two approach and departure surfaces of the Heliport (see ICAO Annex 14 Vol. II Ch 4 p4-19 to 4-21).

412. Axis' allegation is that the approach and departure surfaces are compromised by a 33 foot utility pole to be found around 285 feet from the Heliport and a tree located along the northerly approach and departure path[88].

413. Mr. Dick identified no infringement at the time of his inspection although Axis properly complains that he should have done so by the time of certification.

414. However, when it was understood later in 2012 post certification that there was a discrepancy between the CAACI diagram (see C1/172) and CIHL drawings[89], the CAACI pointed this out. CIHL's subsequent drawing of 15 June 2012 re-aligned the FATO by 3½ ft across and 3½ ft upwards and thereby at least notionally, excluded the utility pole from the approach/departure paths, whilst prescribing the 90 degree separation angle. CIHL was then asked to modify its drawing to reflect the approved alignment to ensure technical consistency even if by reference only to Mr. Dick's crude Google Earth drawing[90].

415. The Evans survey diagrams (CIHL's drawings) confirm by reference to the 90 degree separation alignment that there is now no discernible or properly measurable infringement by either a tree or pole as alleged.

416. Axis also points out, however, that the take off and departure paths to the south remain compromised by the link fence on OCH, a claim that is at least notionally, refuted by CIHL's drawings from the Evans Survey numbers 14 and 15.

417. There is no explanation from Axis as to why it is said that the CAACI acted perversely when it granted the Certificate or subsequently when it purportedly

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[88] A/6: ANM para. 6.2(a).

[89] The utility pole lies outside the Secondary Safety Area in this diagram. A utility pole does appear on CIHL's diagram.

[90] Dick 3rd Affidavit, paras. 10-11, B/4.

resolved this issue by allowing the realignment of the surfaces in keeping with the separation angle of 90 degrees. Even if the Plaintiff was right about the encroachment of the utility pole on the reconfigured area, such encroachment would now at most be *de minimis,* assuming that the reduced separation angle and the realignment of the surfaces are acceptable – the separate issue to be next discussed.

418. I recognise that the very fact that the FATO was re-aligned gives rise to a further concern that the re-designation of the approach and departure surfaces by the shifting of the FATO in 2012 to rectify this problem, shows that the original assessment on which certification was based was wrong. But I accept that that does not show that the CAACI's original certification was *Wednesbury* unreasonable. In these regards especially, I feel obliged to bear in mind the ongoing nature of the regulatory process contemplated by ANOTO Article 122, in particular.

419. Axis' Evans Survey Drawing No. 2 suggests that the northerly surface is still obstructed by a tree. If the OTAR standard is applied correctly, I accept that any infringement by the tree would be minimal and likely to represent natural growth of the tree since certification some 13 months ago. CIHL arranged for the encroaching trees to be pruned after Evans identified the encroachment and this should be an ongoing requirement of certification (which the CAACI could impose in the Revised Manual.)

THE 90 DEGREE SEPARATION ANGLE AND THE STUDY.

Was a 90 degree Angle Capable of Being Safe?

420. OTAR 139.1.123(f) requires a 150 degree separation angle between the surfaces or paths for take-off and landing. ICAO Annex 14 requires that for Class 3 helicopters,

the paths be selected to permit a safe forced landing or a one-engine inoperative landing "such that injury to persons on the ground or water or damage to property are minimalized".

421. The Heliport now has prescribed for it a separation degree of 90 degrees. This was why CIHL applied for an exemption (I say mistakenly) under Article 146 of ANOTO from the OTAR requirement.

422. As we see from the history, it was the CAACI who identified the need for CIHL to apply for an exemption. In light of Mr Richard Smith's warning in his letter of 18th April 2011, that only minor variations from the requirement would be allowed, and having regard to Mr. Begot's history of apparent indifference to risk, it is, to say the least, surprising that Mr. Dick should have instigated an application by CIHL for a reduction of the separation angle in the manner he did by suggesting to Mr. Begot that such an application could be made and implicitly, would be entertained by CAACI. 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.

423. It was already apparent to Mr. Dick at latest from the time of the SER that the site would not be capable of compliance with the OTARs in this regard. The question therefore fairly arises whether the objective of exemption would be to ensure safety or to accommodate the commercial viability of the site.

424. These are questions that reasonably give rise to the kinds of concerns raised by Axis in this case. They are concerns that are only exacerbated by the CAACI's acceptance of the Study notwithstanding its lack of specificity about comparables on which it

purported to rely and the inappropriateness of the single comparable (the Monaco heliport) on which it specifically relied. In the end the Study offered no explanation for the incremental reductions from 150 – 135-130-110- 90 degrees, other than the need to allow the commercial operation of the Heliport from the site. It is plain that at the time of the Certificate, no true rational basis in safety was presented for the exemption.

425. Nonetheless there are contravening factors, Mr Dick has explained that the CAACI has concluded by reason of the work undertaken in Canada by the CARAC that a 90 degree angle was safe. While it may be a fair criticism to say that this was ex post facto rationalisation (Mr Dick having earlier mentioned only a "Western Ontario" heliport as his exemplar) he had obviously taken account of OTAR 139.1.123(f) because that is precisely why the CAACI granted an exemption.

426. Nobody has suggested that it was factually wrong in its assessment of the Canadian regulations. Nor does the Plaintiff explain why it is now *Wednesbury* unreasonable for the CAACI to follow the Canadian precedent.

427. The "slight shift" of the FATO by 3ft enabled the separation angle to be sufficiently adjusted so that the approach/departure paths were clear, at least notionally, of obstruction.

428. Mr. Connolly accepts[91] that he has indeed seen a heliport with a 90 degree separation angle. Mr. Dick has come to rely[92] on the fact that there are numerous heliports in Canada which have a 90 degree separation angle and the CAACI did insist upon the presentation of the Study, however inadequate it obviously was.

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[91] Connolly's 1st Affidavit, paragraph 39.1. B/9.
[92] Dick's 4th Affidavit, paragraphs 65-66. B/7

429. Whether or not the CAACI could invoke Article 146, the fact it purportedly went through the process of doing so for granting an exemption, shows that it did consider OTAR 139.1.123(f).[93]

430. The purpose of the separation angle required by OTAR 139.1.123(f) is to minimise the risk of accident (and resultant injury or damage) in the event of a baulked landing or emergency go around. Thus, it is recognised that the wider the separation angle, the easier should be the manoeuvre for a go around and for avoiding an accident at or in the area of the Heliport. But given that the CAACI was entitled to examine alternative methods of achieving this, it is inevitably a matter of judgment how it satisfied itself as to the degree of risk. Axis may therefore establish a *Wednesbury* case only by making substantial, not insubstantial, complaints about the Study.

431. Mr. Begot could hardly have been regarded as having the expertise or objectivity to write an expert aeronautical study. In addition to his personal commercial interests and notorious attitude as a pilot, witness for example, his first proposed tail wind limitation of 30 knots presented to Mr. Richard Smith in his mid-September 2011 submission when he must have been aware of the limitation of 17 knots imposed by the Helicopter Operational Manual.

432. Mr. Dick insists that CIHL in the Study identified and explained the hazards by having regard to the intent of OTAR 139.I.123(f)[94]. He also deals with CIHL's proposals to adopt operational limitations in order to mitigate/reduce risk.

433. CIHL's case for a 90 degree separation angle for the two approach/departure surfaces (and not 150 degrees as per OTAR 139.1.123(f)(p.162) was based on Canadian

[93] That which requires that a surface level heliport shall have at least two take-off climb and approach surfaces, separated by not less than 150 degrees.
[94] See B/3 paragraph 56 ff.

regulation CAR 325.29 (2b)[95]. The CARAC was then considering a revision of its regulatory requirements vis-à-vis the 150 degrees separation angle.

434. I think it must be accepted that the Canadian standard may be regarded as compliant with the international standards for the purpose of supporting an aeronautical study when viewed in the light of the proposed ICAO reform which, although likely to maintain the recommendation for at least two separate approach/departure surfaces, would nonetheless allow for a reduction of the recommended 150 degrees separation angle between them. The CAACI concluded that a 90 degree alignment separation was reasonable and appropriate to support CIHL's request for an exemption.

435. Paragraph 5.3(b) to (g) of the ANM makes a number of detailed criticisms of the Study[96]. These are all addressed in Mr Carey's evidence[97] where he confirms that, in his view as an experienced regulator, the Study complied with OTAC 139-5.

436. With all of those countervailing factors in mind and subject to the remaining concerns about the impact of wind upon the Helicopter, I am unable to conclude that the allowed reduction to 90 degrees of the separation angle was in and of itself irrational. It is nonetheless, the fair conclusion that the exemption was not given with all the necessary safety concerns paramount in mind, a conclusion that is reinforced by the further considerations to follow.

BOATS

437. Another complaint is that the potential hazards and risks caused by forced landings were neither fully nor properly identified particularly when the take off and climb

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[95] C1/131.
[96] Criticisms that Axis was in a position to make when it received documents in December 2011
[97] B/10 paragraphs 39.2 to 39.6.

approach over water was regularly frequented by boats (see ANM 5.3(d)). This was, however, the subject of a condition of certification so it may not be said that the CAACI failed to have regard to it. There are, nonetheless lingering concerns about the presence of boats if the Helicopter must routinely fly " within (ie:below) the height velocity curve" (as proposed by Mr. Begot and as Mr. Lowe suggested in closing) when taking off to the west or northwest with a tail wind. This is a concern that must be specifically addressed when I come to consider the wider concerns about the impact of wind upon the performance capabilities of the Helicopter.

Wind Factors

438. As already noted, an important area of the evidence in which the competing experts largely agreed is that to do with the effect of wind on the operational capabilities of a helicopter, especially as in case here, a single-engined helicopter.

439. Taking-off and landing into a headwind is inherently safer than with a tailwind. Put simply, with a tailwind, more time and distance is required to take off or land safely than taking off or landing into a headwind.

440. Mr. Connolly, in particular, went to some length in his affidavit evidence to explain the dynamics by reference to the Height Velocity Curve danger area - that which a helicopter must avoid to become safely airborne or descend to a safe landing.

441. In order to determine the safe rate of ascent or descent and the distances needed, the performance capabilities of a helicopter must obviously be known. It is especially for this reason that Axis expresses concern that Mr. Dick, in his evaluation of the site for certification and in particular for his calculation of the approach/departure surfaces,

by his own admission, did not apprise himself of the performance characteristics of the Helicopter.

442. For the purposes of his evidence, Mr. Connolly did, however, apprise himself of that information from the Helicopter Flight Manual and at paragraph 51 of his 1st Affidavit, he reports as follows:

> *"...the recommended take-off profile (for the Helicopter) is an acceleration to 40 knots airspeed not exceeding 25 feet (elevation) until this point, and then an increase in speed to 55 knots climbing speed.*
>
> *The profile is shown, although not to scale, in Figure 6* (See Schedule 3). *The recommended approach profile is to maintain 65 knots airspeed until descending through 100 feet, thereafter co-coordinating the descent and deceleration to achieve a safe hover. This is in order to avoid the Height Velocity Curve danger area. Additionally, using the recommended take-off and landing profiles from the Flight Manual, then according to the Flight Manual the distances required to and from 50 feet are 300 metres and 260 metres respectively, irrespective of gross weight, in nil wind, at sea level and with an outside air temperature of plus 20 degrees Celsius.*
>
> *At plus 30 degrees Celsius [or 86 degrees Fahrenheit, a more common temperature in the Cayman Islands], these distances increase to 315 metres and 280 metres [See Figure 7 in Schedule 3]. Landing in these latter conditions with a 10 knot headwind could reduce the distance required from 50 feet height to 180 metres distance.*
>
> *A tailwind take-off or landing is likely to greatly increase the distances required, but no manufacturer's data is given, as it is anticipated that operations would normally be conducted with a headwind component."*

443. It becomes immediately apparent from the foregoing also, that evaluations of the site as suitable for the Heliport, would have involved not only an evaluation of the availability of obstacle free paths of flight, but also the likely impact of the prevailing ambient conditions, especially the wind.

444. Apart from himself not taking into account the performance characteristics in that process (surprisingly deeming them irrelevant), the further criticism of Mr. Dick in this context is that he has failed to recognise the risks associated with the proposed operation of the Helicopter routinely near or at its maximum levels of tolerance or capabilities while taking off with a tail wind.

445. Mr. Lowe, in his fulsome response, on behalf of the Defendants, to these criticisms, says that a take-off downwind is very different from an approach to landing downwind. The pilot is stationary and can determine safety before a take off. Nobody disputes that a downwind take-off is affected. However, given the location of the take-off/departure surfaces of the Heliport over the sea, there is no reason why the CAACI should not have concluded that there was a qualitative difference. Mr. Connolly does not say that the take-off from the Heliport with a tailwind is unsafe or that it requires the imposition of a condition. What he says is that taking-off with a headwind is inherently safer than taking-off with a tailwind. He concludes that that is a truism and nobody disputes this.

446. There is indeed a world of difference between flying out with a tailwind and flying in/approaching with a tailwind. As Mr. Dick explains[98], in a departure the pilot who is required to be experienced has the expanse of the sea as his horizon. This means that he can, subject to avoiding visual obstacles, climb the height velocity curve slowly before ascending. That there is no suggestion that he could not rise over the 8 % approach/departure paths with or without a full load. Mr. Dick says in his evidence that he had taken account of the limitation on operational capability by the condition of the licence (although this is not in keeping with his contrary admission in

[98] Dick's 4th Affidavit, paragraphs 61-64

his 7th Affidavit). The Court cannot conclude, says Mr Lowe, that on the basis of Mr. Connolly's evidence it is unsafe to fly with a tail wind.

447. Mr. Lowe also emphasized that Mr. Dick examined the wind data and found that most of the wind has an easterly component. There are no prevailing winds that would create downwind speed greater than 12 knots. The usual wind direction is aligned with the wind on one of the paths[99]. Mr. Connolly has not commented on the evidence that 12 knots south westerly winds are comparatively rare. The wind does not reach more than 12 knots with any high degree of frequency.

448. Both Mr. Connolly and Mr. Carey acquainted themselves with the Flight Manual of the Helicopter, as no doubt Mr. Dick by the time he came to give his evidence at trial. Certainly, Mr. Connolly and Mr. Carey had considerable prior experience with helicopters of the same type as the Helicopter.

449. All are agreed that there is a certification specification for the Helicopter that limits it to operating with tailwinds of no more than 17 knots.

450. While Mr. Connolly accepts[100] that the Helicopter can make an approach to landing (and it seems implicitly take-off) with a tailwind of 17 knots, the key issue, he says, is "*bearing in mind the effects of the tailwind resulting in prolonged experience within the Height Velocity Curve, whether the Helicopter can be operated safely in such a way for purposes of public transportation. In my opinion, it cannot. Even with only a 12 knot limitation, there will be prolonged exposure within the Height Velocity curve, leading to operational safety issues*".

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[99] Dick's 1st Affidavit, paragraphs 67-68. B/3
[100] Connolly's 2nd Affidavit, paragraph 42. B/11/12

451. This, to my mind, is an undeniable argument for the imposition of operational limitations with respect to the potential impact of tailwinds from all directions at the Heliport. To the extent that the Study failed to address this issue, it failed to address an important area of risk and so failed to address mitigating factors.

452. Mr. Connolly understates the position when he observed[101], with respect to the impact of tailwinds, that in connection with grant of an aerodrome certificate the types of helicopter which are due to operate from the relevant heliport are to be considered and, impliedly a consideration of their safe operation.

453. Whether or not due to his failure to take specifically into consideration the performance specifications of the Helicopter, Mr. Dick's failure to impose an operational limitation in respect of tailwinds upon take-off from the Heliport is unacceptable in a context where safety must be the paramount concern. While easterly or north-easterly tailwinds of more than 12 knots may not be typical at the Heliport, they certainly are not unknown. The CINWS windrose shows prevailing winds above 11 knots, from the northeast[102]. It is obvious to the Court (having had the benefit of education upon which all the experts agree) that it is no solution to assume - as it appears Mr. Dick does - that the Helicopter routinely taking-off with tailwinds, will always be safe because the pilot will have the expanse of the sea over which to fly to overcome the Height Velocity Curve. For one thing, as Mr Connolly emphasised, prolonged exposure of that kind to tailwinds is not the recommended mode of operation for any helicopter. For another, given the presence of the busy Lobsterpot docks and the probable, if not likely, sudden appearance of boats along

[101] Ibid.
[102] C1/9

that area of the sea, its availability for low flying is not always to be assumed. And finally on this issue, as Schedule Three shows, prolonged exposure within the Height Velocity Curve is not in keeping with the Recommended Take off Profile for the Helicopter.

454. For all these reasons, I am compelled to the conclusion that it was an irrational failure on Mr. Dick's part not to have taken into consideration the performance specifications of the Helicopter and so not to have imposed a limitation in the Manual on the tailwinds with which the Helicopter could take-off and depart from the Heliport.

Routinely flying outside the approach/departure surfaces

455. It is implicit in the CAACI's allowance that the Helicopter may prolong its flight within or below the Height Velocity Curve, that the Helicopter is not obliged to adhere to the approach/departure surfaces with their 8 % slopes. Indeed, it is the argument on behalf of CIHL that it is allowed to fly in that way and so within the arc of the separation angle between the approach/departure surfaces.

456. Although Mr. Carey challenged Mr. Connolly to support his concerns that the Helicopter should stick to the approach/departure surfaces by citing a relevant requirement to that effect, in his report of his own observations of the manner of flying at the Heliport, Mr. Dick was at pains to say (at 3rd Affidavit paragraph 11) that this was what he invariably observed. This is diametrically opposed to what Mr. Connolly said he observed during his site visit in April 2011.

457. As shown above[103] ICAO Annex 14 Volume 2 Section 4.1 says it "*...is intended that approach paths be selected so as to permit safe forced landing or one-engine-inoperative landings....*"

458. Schedule One shows how this requirement is adopted into OTAR 139.1.113(d) and (e) which specify the inclined planes and other dimensions of the surfaces.

459. Although the OTARs do not specify that a helicopter approaching or departing from a heliport must invariably or even routinely adhere to the respective surfaces, it would make a practical nonsense of the requirements if a helicopter were free routinely to depart from them. Such a practice would eliminate the important margins of safety the surfaces are intended to provide in the event of an emergency go around or forced landing.

460. While it must be accepted that the ultimate day to day responsibility for the safe operation of the Helicopter at the Heliport must rest with the pilot and in this regard, the importance of the conditionality imposed by the CAACI that any pilot flying from the Heliport must be very experienced, should not be overlooked; such considerations are no basis for ignoring an important OTAR requirement. No exemption has been sought and none given in this regard. On the contrary, the whole point of the reduced separation angle was presented on the basis that if adhered to, the new approach/departure surfaces would allow for the avoidance of obstacles. Why, one may ask rhetorically, the need for an exemption if no such surfaces need be established at all?

461. The fact that Mr Dick would now countenance the Helicopter routinely flying within the arc of the separation angle rather than along the paths defined by it, is yet another

[103] at paragraph 62

example of an unreasonable willingness to accommodate the operations of the Heliport above the paramount interests of safety.

Nuisance

462. It was manifestly unreasonable of the CAACI not to have had regard to the impact of nuisance upon adjacent properties when considering the grant of certification of the Heliport. The obvious impact that the presence of the Heliport would have upon the adjacent properties is the reason for the provision in section 41(4) of the 1949 Act that no action may lie in nuisance for reason only of the noise and vibration caused by aircraft on an aerodrome so long as the provisions of the ANOTO are duly complied with.

463. Article 105(1) (b) of the ANOTO requires the CAACI to be first satisfied that it is in the public interest that an aerodrome is certificated before doing so.

464. One of the reasons for the provision is the recognition of the fact that adjacent property rights will be negatively affected by noise and vibration and so, only justifiable where the greater public interest is to be served by the certification of an aerodrome.

465. It is no answer for the CAACI to say that such concerns were to be addressed by the CPA. The CAACI may not abdicate its responsibilities imposed by Article 105(1) (b) to the CPA. The unreasonableness of doing so in this case is only emphasized by the fact that Mr. Cushman's anticipatory letter of the 5th May 2010 to the CPA would have signaled to the CPA that overall public interest concerns relating to the certification of the site were to be addressed to the satisfaction of the CAACI and any such concerns that the CPA might have had would have been doubtless ameliorated.

466. Mr. Alastair Robertson's letter of 11 August 2010 inviting the CPA to defer its hearing of CIHL's application to allow for CAACI's evaluation of "further information which has come to our attention" does not detract from this view. If anything, the CAACI's subsequent acceptance of the site as suitable would have served only to confirm that it had taken the overriding public interest into account as required by ANOTO Article 105(1)(b). When the CPA granted its approval on 15 September 2010, it had before it Mr. Richard Smith's letter of 3 September 2010 which informed Mr. Schneider of the CPA that the CAACI had no objection to the grant of planning permission and the CPA relied upon that assurance in taking its decision[104]. It is a reasonable inference to draw that the CPA in its subsequent refusal to enforce the set-back requirements imposed for the helipad would have been influenced by such considerations.

467. It is, however, implicit from Axis's reliance upon the affidavit of Mr. Hindle[105] that Axis does not say that noise and vibration have adversely impacted Whitehall House so as to diminish its value or usability. Axis points to that kind of impact upon OCH (whose owner Coastal Two Limited is said to support Axis' complaint) as proof of nuisance. Coastal Two has not, however, seen fit to be joined to the action and so has no standing in its own right to complain by way of judicial review.

468. It is nonetheless clear that the CAACI has failed to meet its duty imposed by the ANOTO by not having considered the impact of nuisance upon the adjacent properties.

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[104] Affidavit of Andrea Ruth Williams, paragraph 23. B1/6.
[105] Per Andrea Ruth Williams, paragraph 65, B21/15.

Conclusion

469. It is apparent from the evidence that the CAACI allowed itself to become unduly influenced in the process of certification by its willingness to accommodate the commercial objectives of CIHL. Indeed, it may have felt embarrassed and obliged to do so on account of its own early and premature expression of satisfaction as to the suitability of the Heliport site[106]. From the evidence, this is most revealingly shown by the CAACI's willingness to depart from the obviously prudent position taken and forewarned in Mr. Richard Smith's letter of 18 April 2011, to the gradual allowance of an erosion of the safety standards imposed by OTAR 139.1.123(f) for a separation angle of 150 degrees to 135 degrees to 130 degrees to 110 degrees, to 90 degrees and the still further relaxation of the requirements by allowing the Helicopter routinely to fly within the arc of the separation angle.

470. The gradual erosion can be explained only in terms of the willingness (I state it no more pejoratively than that) on the part of the CAACI to accommodate CIHL's commercial objectives; a position into which the CAACI was pushed by its own premature "approval" of the site expressed to the CPA and Mr Begot's hurried and strategic development of the site thereafter. This view is only reinforced when Mr. Dick's earlier remonstration with Mr Begot – that CIHL would never operate out of the site so long as the fence to OCH remained an obstacle – is remembered.

471. The decision to allow a 90 degree separation angle is not one, for reasons already explained, which the Court can say is in and of itself unsafe and so not one that may fairly in and of itself, be described as irrational.

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[106] As expressed in Mr. Cushman's letter of 5 May 2010.

472. There are, however, the number of other respects in which the decision to certify the Heliport has been found not to be in compliance with the standards imposed by the OTARs and where the CAACI, by it seems having taken a contrary view or failed to consider the respective issues at all, has also failed to require an alternative means of ensuring an equivalent level of safety.

473. These, primarily are:

(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) 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.

For this reason also, it may not be said that the Manual or Revised Manual is "adequate" within the meaning of ANOTO Article 105(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.

474. These failings on the part of the CAACI (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.

475. As to the remedy to be imposed, I consider it appropriate, however, that the Court should recognise the ongoing remit of the CAACI as the body duly authorised and responsible for ensuring air navigation safety within the Islands. This is not a function that the Court should override if there is another appropriate remedy. The CAACI has an ongoing ability under Article 122 of ANOTO to monitor and reassess the Heliport and decide whether or not to vary, suspend or revoke certification. Rather than quashing the Certificate, the Court should allow the CAACI to exercise this function now in light of the clarifications of its responsibility and the issues for its assessment which are provided by this judgment. I add that the CAACI should not consider itself obliged to maintain certification simply because of CIHL's commercial interests against the background of CIHL having proceeded with the development of the site despite the cautionary advice given in Mr Richard Smith's letter of 18th April 2011.

476. It will therefore suffice that I declare, for the reasons explained in this judgment that the certification of the Heliport is not in compliance with the ANOTO and the standards of the OTARs; nor is the Manual "adequate" within the meaning of ANOTO Article 105(2)(c). For those reasons also, the Heliport may not be considered

to be safe for the purposes of the ongoing operation of the Helicopter in the manner that it is being operated.

477. I will hear submissions as to the costs.

Hon. Anthony Smellie
Chief Justice

May 24th, 2013.

SCHEDULE ONE

OTAR Part 139.I.113(d) states with regard to Approach Surfaces:

"(d) Approach Surface:

(1) The approach surface is an inclined plane or a combination of planes sloping upwards from the end of the safety area and centred on a line passing through the centre of the FATO.

(2) The limits of an approach surface shall comprise:

(i) an inner edge horizontal and equal in length to the minimum ..... specified width of the FATO plus the safety area, perpendicular to the centre line of the approach surface and located at the outer edge of the safety area; and

(ii) for other than a precision approach FATO, two side edges originating at the ends of the inner edge which diverge uniformly at a specified rate from the vertical plane containing the centre line of the FATO; or

(iii) for a precision approach FATO [.....]; and

(iv) an outer edge horizontal and perpendicular to the centre line of the approach surface and at a specified height above the elevation of the FATO.

(3 The elevation of the inner edge shall be the elevation of the safety area at the point on the inner edge that is intersected by the centre line of the approach surface.

(4) The slope(s) of the approach surface shall be measured in the vertical plane containing the centre line of the surface.

(5) For heliports used by performance class 2 and 3 helicopters, it is intended that approach paths shall be selected so that any forced or one-engine-inoperative landings shall minimise injury to persons on the ground or water, or damage to property. Provisions for forced landing areas are expected to minimise risk of injury to the occupants of the helicopter. The most critical helicopter type for which the heliport is intended and the ambient conditions will be factors in determining the suitability of such areas."

OTAR Part 139.1.113(e) states with regard to Take-Off Climb Surfaces:

(e) Take-Off Climb Surface (TOCS):

(1) The TOCS is an inclined plane, a combination of planes or, when a turn is involved, a complex surface sloping upwards from the end of the safety area and centred on a line passing through the centre of the FATO.

(2) The limits of a take-off climb surface shall comprise:

(i) an inner edge horizontal and equal in length to the minimum specified width of the FATO plus the safety area, perpendicular to the centre line of the take-off climb surface and located at the outer edge of the safety area or clearway; and

(ii) two side edges originating at the ends of the inner edge and diverging uniformly at a specified rate from the vertical plane containing the centre line of the FATO; and

(iii) an outer edge horizontal and perpendicular to the centre line of the take-off climb surface and at a specified height above the elevation of the FATO.

(3) The elevation of the inner edge shall be the elevation of the safety area at the point on the inner edge that is intersected by the centre line of the take-off climb surface, except that when a clearway is provided, the elevation shall be equal to the highest point on the ground on the centre line of the clearway.

(4) In the case of a straight take-off climb surface, the slope shall be measured in the vertical plane containing the centre line of the surface.

(5) In the case of a take-off climb surface involving a turn, the surface shall be a complex surface containing the horizontal normal to its centre line and the slope of the centre line shall be the same as that for a straight take-off climb surface. That portion of the surface between the inner edge and 30 m above the inner edge shall be straight.

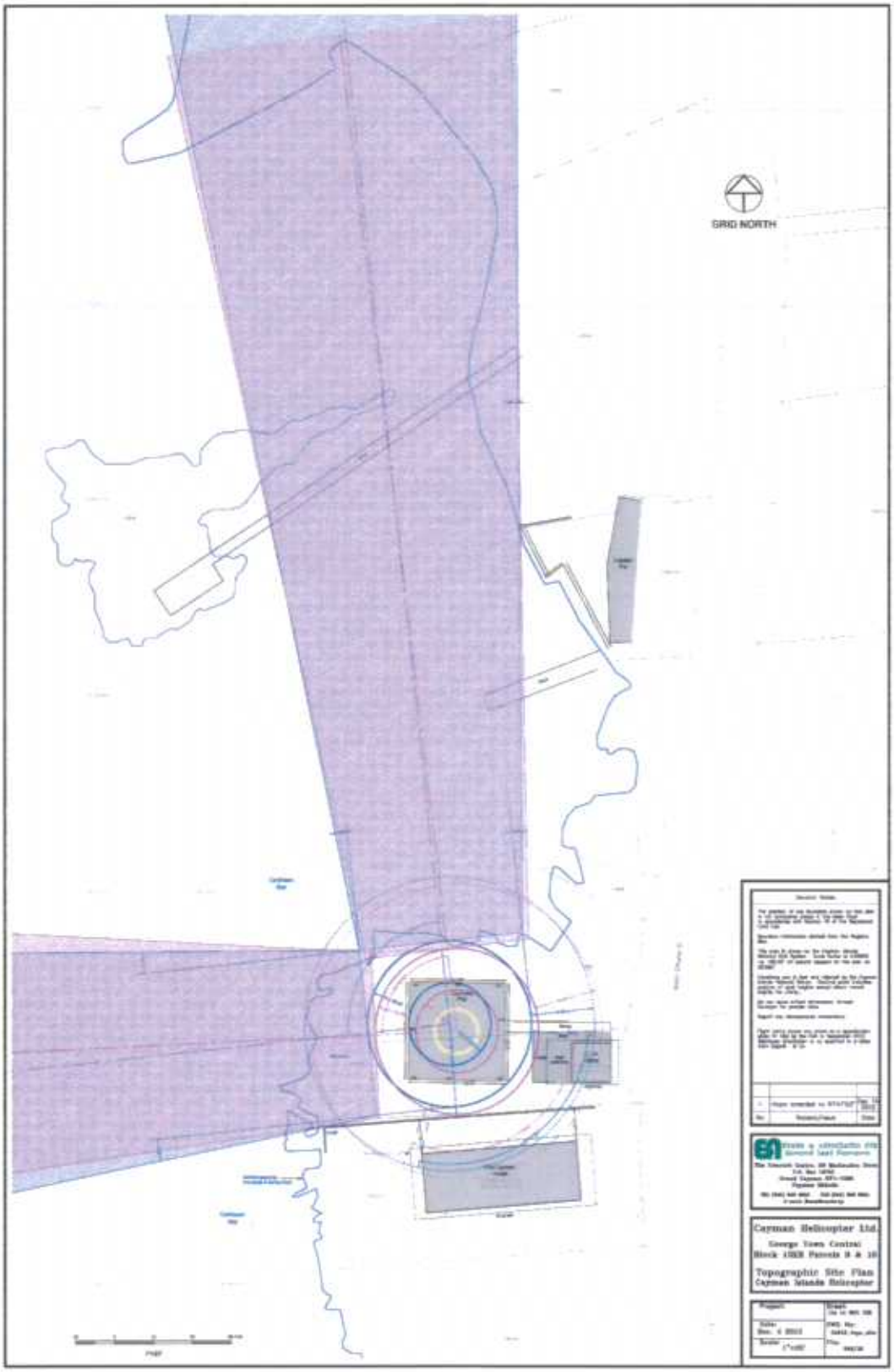
(6) Any variation in the direction of the centre line of a take-off climb surface shall not have a turn with a radius of less than 270 m.

(7) For heliports used by performance class 2 and 3 helicopters, it is intended that departure paths shall be selected so that any forced or one-engine-inoperative landings shall minimise injury to persons on the ground or water, or damage to property. Provisions for forced landing areas are expected to minimise risk of injury to the occupants of the helicopter. The most critical helicopter type for which the heliport is intended and the ambient conditions will be factors in determining the suitability of such areas."

ICAO Annex 14, Chapter 4, paragraph 4.1.15-20 and its accompanying Note are the source of these provisions.

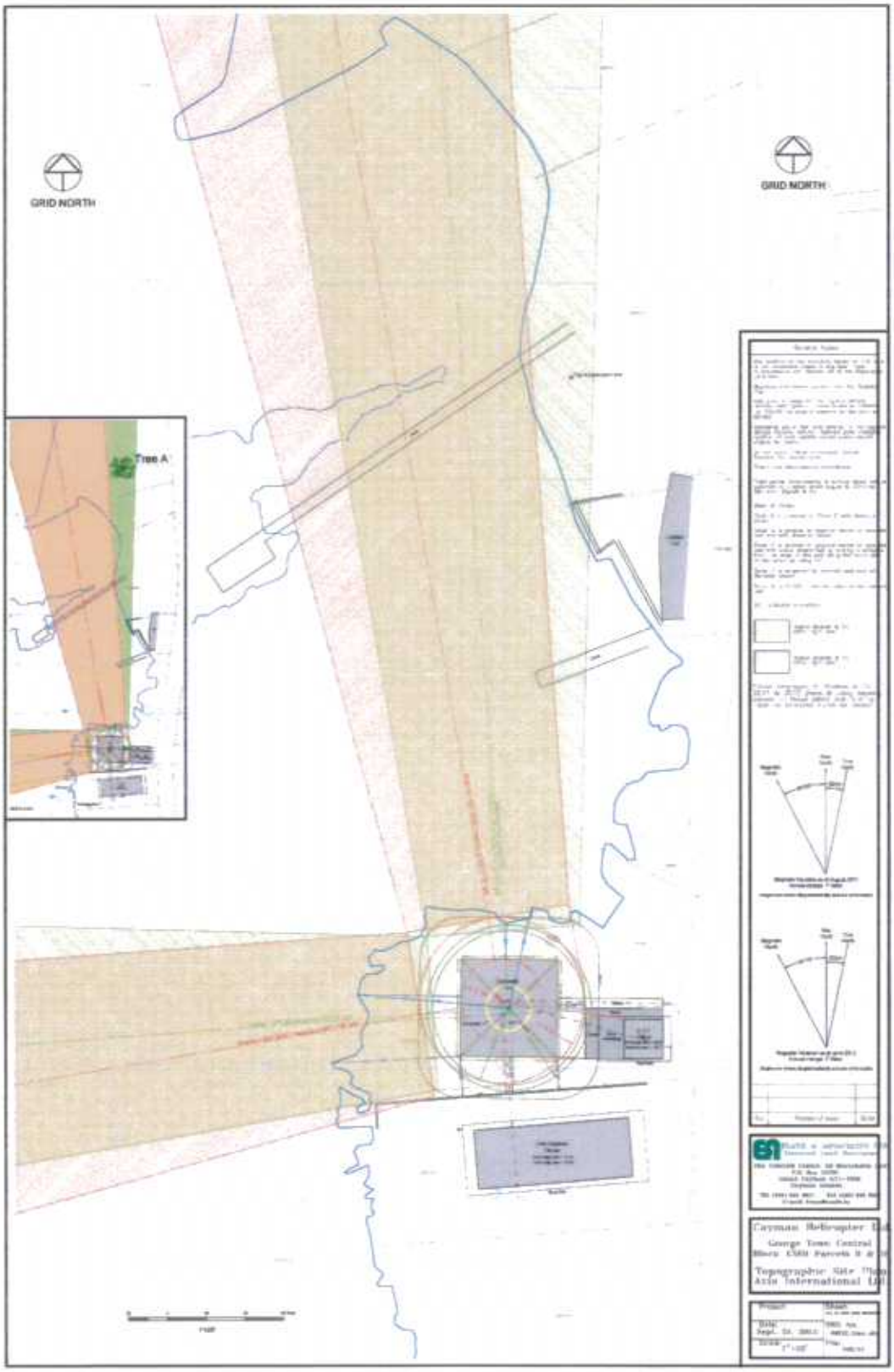
SCHEDULE TWO

Plan 1


GRID NORTH
Cayman Helicopter Ltd.
George Town Central
Block 43E8 Parcels 9 & 10
Topographic Site Plan
Cayman Islands Helicopter

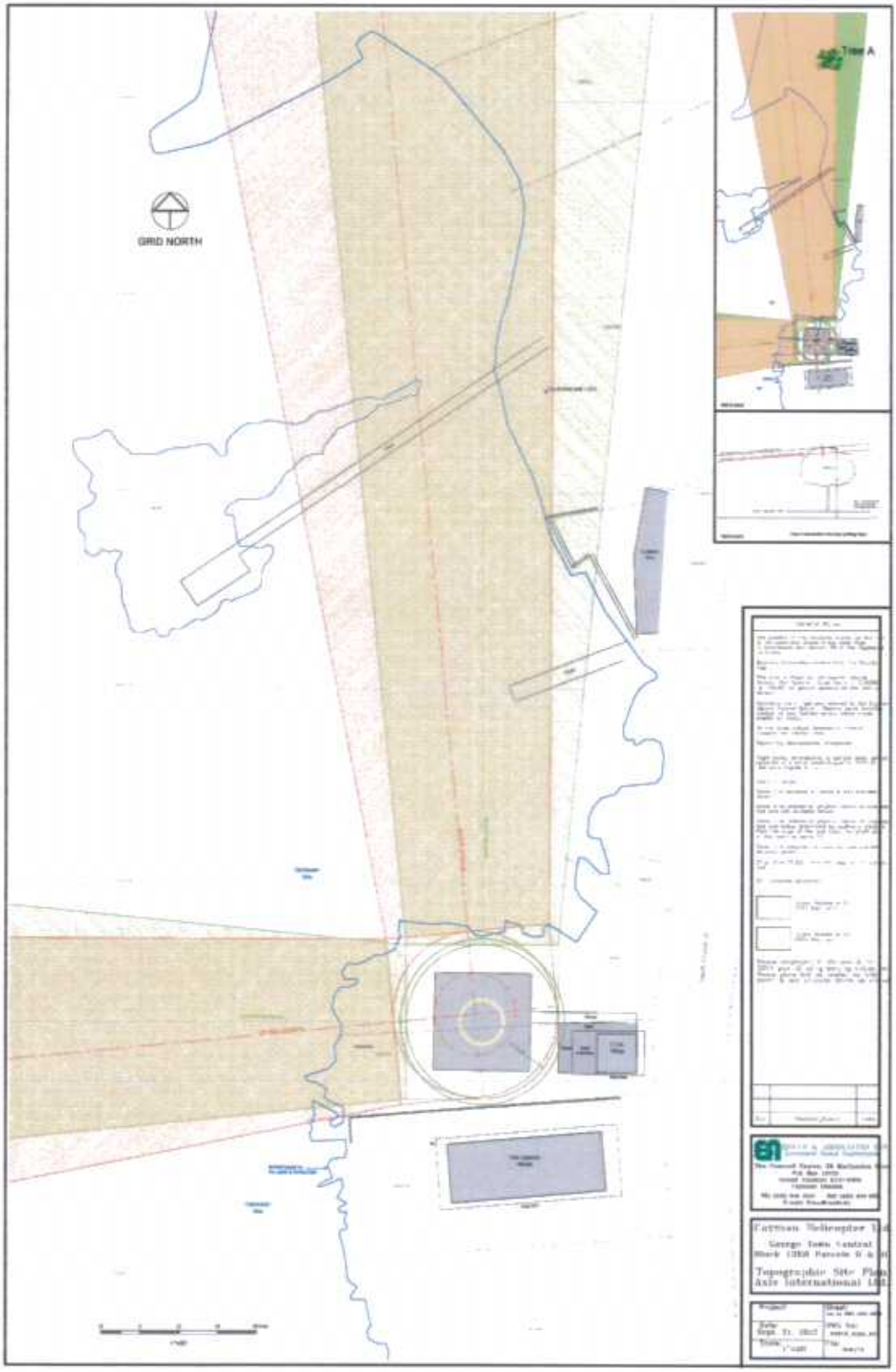
SCHEDULE TWO

Plan 2


GRID NORTH
GRID NORTH
Tree A

SCHEDULE TWO

Plan 3


GRID NORTH
Tree A

SCHEDULE THREE

Figure 6: Recommended Take-Off Profile for The Helicopter

Key: Point 1: Hover 5-8 ft; Point 2: Acceleration at hover height; Point 3: Not above 25 ft until airspeed 40 knots; Point 4: acceleration and Climb; Point 5: Steady Climb at 55 Knots airspeed.

Figure 7: Flight paths from the Heliport showing 300 metres distance along the authorised take-off/departure slopes showing distance from the Heliport required to achieve 50 feet height