

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 56 OF 2012

BETWEEN:

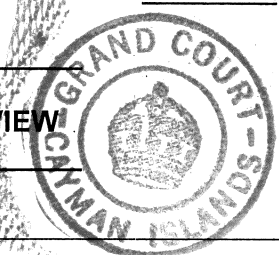
AXIS INTERNATIONAL LTD

Plaintiff

CIVIL AVIATION AUTHORITY OF THE CAYMAN ISLANDS

Defendant

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW



To the Clerk of the Court Law Courts, George Town, Grand Cayman, Cayman Islands	
Name, address and description of applicant(s)	Axis International Ltd. c/o UBS Trustees (Cayman) Ltd 227 Elgin Avenue, George Town PO Box 2325 Grand Cayman KY1-1106 Cayman Islands
Judgment, Order, decision or other proceeding in respect of which relief is sought	Grant of Aerodrome Certificate ANS14/AD/04/2011 to Cayman Islands Helicopters Limited ("CIHL") on 10 November 2011
Relief Sought	
1	An order for Certiorari to quash the decision of the Civil Aviation Authority of the Cayman Islands ("CAACI") to grant an Aerodrome Certificate to CIHL pursuant to the Air Navigation (Overseas Territories) Order 2007.
2	Costs of these proceedings.
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Maples and Calder of PO Box 309, Ugland House, South Church Street, George Town, Grand Cayman KY1-11-4, Cayman Islands
Signed: <i>Maples and Calder</i>	Dated: 9 February 2012

Grounds on Which Relief is Sought

1 **The Aerodrome Certificate**

- 1.1 By a letter dated 10 November 2011, the CAACI approved an application by CIHL (dated 27 December 2010) for an aerodrome certificate under Article 105(1) of the Air Navigation (Overseas Territories) Order 2007, as amended, (the "**ANO**"), for a George Town heliport site, Aerodrome Reference point Coordinates N 19 18" 10.25", W 81 22" 59.01" (the "**Heliport**"), granting such application (Aerodrome Certificate ANS14/AD/04/2011 (the "**Certificate**")) subject to the conditions listed therein and by reference to the submitted Cayman Islands Helicopters Operations Manual George Town Heliport (the "**Manual**").
- 1.2 The CAACI breached its statutory duty and/or acted perversely and/or irrationally and/or failed to take material matters into consideration and/or considered and was influenced by irrelevant material in granting the Certificate to CIHL (and in its flawed decision-making in relation thereto), as set out below. The CAACI's decision should therefore be quashed.

2 **The Plaintiff**

- 2.1 The Plaintiff is and was at all material times owner of Whitehall House, the property located to the north-east of the Heliport on North Church Street at Block 13EH, Parcel 192.
- 2.2 Notice of the grant of the Certificate was first provided to the Plaintiff on 29 November 2011 by letter from CIHL's attorneys. Further details of the Certificate were provided when its existence was pleaded in CIHL's Defence to Grand Court Cause No. 452 of 2011, served on the Plaintiff on 5 December 2011.
- 2.3 A request for a copy of the Certificate was made by the Plaintiff to CIHL by a letter from its attorneys dated 8 December 2011 pursuant to Article 105(4) of the ANO and/or Grand Court Rules, Order 24, rule 10, but it remains unanswered.

- 2.4 The Plaintiff's request to the CAACI pursuant to the Freedom of Information Law, 2007, in which a copy of the Certificate was sought, was not answered until such request was referred to the Information Commissioner.
- 2.5 Copies of the Certificate and the Manual were finally provided to the Plaintiff by the CAACI on 20 December 2011.

3 **Statutory and Regulatory Background**

- 3.1 The CAACI has the statutory functions conferred upon it under the Civil Aviation Authority Law (2005 Revision) including, pursuant to section 5(1) thereof, such functions as are, for the time being, conferred on the Governor by or under the ANO or other regulations of a similar nature made under any United Kingdom Act with respect to the regulation of civil aviation in the Cayman Islands.
- 3.2 Article 105(1) of the ANO confers on the Governor the power to grant an aerodrome certificate in the Cayman Islands, including where the Governor considers that it is in the public interest to so require (Article 105(1)(b)). The Certificate is understood to have been granted under Article 105(1)(b) of the ANO.
- 3.3 Article 105(2) requires the Governor to be satisfied with respect to three matters before granting an aerodrome certificate:
 - (a) The applicant's competency (Article 105(2)(a));
 - (b) That the aerodrome is safe for use by aircraft having regard in particular to the physical characteristics of the aerodrome and of its surroundings (Article 105(2)(b)); and
 - (c) That the required aerodrome manual submitted under Article 105(7) is adequate (Article 105(2)(c)).
- 3.4 The aerodrome manual must include provisions for the implementation of a safety management system acceptable to the Governor (Article 105(7)) and all information and instructions as may be specified by the Governor, including those specified in Schedule 11 to the ANO.

- 3.5 By Article 152 of the ANO, the Governor's satisfaction as to the matters required for the grant of an aerodrome certificate together with the contents of the Manual for such purposes are described in the Overseas Territories Aviation Requirements ("**OTARs**"), and he is required to take into account those requirements. Together with the relevant Regulations of the ANO, OTAR Part 139 governs the requirements for the grant of an aerodrome certificate with respect to heliports in the Cayman Islands.
- 3.6 By Article 146 of the ANO, the Governor is empowered to exempt from any of the provisions of the ANO or any regulations made thereunder, any aircraft or persons or classes of aircraft or person, either absolutely or subject to such conditions as he sees fit.
- 3.7 Overseas Territories Aviation Circulars ("**OTACs**") set out practical guidance on meeting requirements contained in the OTARs. OTAC 139-5 ("**OTAC 139-5**") provides guidance on the production of an Aeronautical Study in accordance with OTAR 139 where an aerodrome is unable to meet the OTAR requirements and needs to identify alternative means to achieve an equivalent level of safety.

4 **Grounds for Judicial Review: Safety Area**

- 4.1 A Final Approach and Take-Off area ("**FATO**") on a heliport is a defined area over which the final phase of the helicopter's approach to a hover or a landing is completed and from which take off is initiated. The greatest overall dimension of the largest helicopter the FATO is intended to serve is defined in OTAR 139.1.21(d) as "**D**".
- 4.2 A safety area on a heliport is a defined area surrounding the FATO intended to reduce the risk of damage as a result of helicopters accidentally diverging from the FATO.
- 4.3 By the Certificate and the Manual, the only aircraft to be permitted to use the Heliport was (and remains) CIHL's Eurocopter AS-350 B2 Helicopter (the "**Helicopter**"). The Manual states the overall length of the Helicopter to be 42.45 feet ("**D**"). The Helicopter, being a single engine helicopter, carries a Performance Class 3

designation under the OTARs, meaning that: "...in the event of an engine failure at any time during the flight, the helicopter will be required to carry out a forced landing."

4.4 OTAR 139.I.27(c) requires a minimum safety area for a heliport used by a Performance Class 3 helicopter to extend outwards from the periphery of the FATO for a distance of at least 3 metres or 0.5D, whichever is the greater, of the largest helicopter the FATO is intended to serve (0.5D is 21.23 feet).

4.5 OTAR Part 139.I.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."

4.6 The Manual states the FATO diameter for the Heliport to be 50 feet x 50 feet (the "**Heliport FATO**"). The Manual further states the safety area diameter for the Heliport to be 2D (i.e. 84.9 feet), which must have been measured from the centre of the 50 feet x 50 feet concrete pad ("the **Heliport Safety Area**").

4.7 The distance from the periphery of the Heliport FATO to CIHL's property boundary with its neighbour to the south, One Cayman House (which is owned by Coastal Two Ltd), is, according to CIHL, approximately 12 feet.

4.8 The requirement for a safety area within the meaning of OTAR Part 139 was (and remains) compromised in the following serious and irremediable respects (as to which the CAACI paid no or no proper regard):

(a) The Heliport Safety Area (both as specified in the Manual and in the minimum dimensions specified in OTAR Part 139) extended (and extends) over the boundary onto One Cayman House;

(b) The Heliport Safety Area was (and remains) not free from impediments extending 10 metres at a 45 degree angle measured from the edge of the Heliport FATO on at least three sides, instead being compromised (to the

south) by the building at One Cayman House, and (to the east) by the building on the Heliport site itself;

- (c) There had been no Article 146 of ANO exemption to these safety area compromises either requested by CIHL or granted by the CAACI;
- (d) There had been no OTAC 139-5 Aeronautical Study submitted by CIHL (or otherwise available to the CAACI) to justify the grant of an Article 146 exemption as regards these compromises; and
- (e) In the Manual (page 21), CIHL stated that no other requests for deviations (apart from that with respect to the minimum separation angle between the two take off and climb approach surfaces) to the heliport certification standards would be requested (nor were any).

4.9 The CAACI could not, therefore, properly be satisfied that the Heliport was "safe" having regard in particular to the physical characteristics of the aerodrome and of its surroundings (within the meaning of Article 105(2)(b) of the ANO) so as to justify the grant of the Certificate. Nor could the CAACI properly be satisfied that that the required aerodrome manual submitted under Article 105(7) was adequate, given the matters relied on above. Accordingly, the CAACI acted unlawfully and/or perversely and/or irrationally in granting the Certificate and in its flawed decision-making in relation thereto.

4.10 Further, to the extent that the CAACI considered and was influenced by the terms of the assistance it had given to CIHL, concerning safety area issues, in and around the making of CIHL's application for the Certificate, such matters were irrelevant.

5 **Grounds for Judicial Review: Article 146 exemption with respect to take off climb and approach surfaces - minimum separation angle**

5.1 OTAR Part 139.I.123(f) requires a 150 degree separation between the two take off climb and approach surfaces.

- 5.2 The International Civil Aviation Organisation's Convention on International Civil Aviation, Annex 14, Aerodromes, Vol II, Heliports, (the international standards on which OTAR Part 139 is based) 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..."

- 5.3 The CAACI allowed, in the exercise of the Governor's power under Article 146 of the ANO, a minimum separation angle of 90 degrees, in the following circumstances:

- (a) The CAACI's site evaluation report of the Heliport from November 2010 stated that as a result of a fence on One Cayman House, there would be an *"...unacceptable separation of less than 90 degrees."* In a letter to CIHL dated 18 April 2011, the CAACI further stated that *"...the variations from standard need to be minor and the associated risks easily mitigated to allow me to grant an exemption."*
- (b) An "Aeronautical Study" accompanied CIHL's application for an exemption under Article 146 of the ANO, dated 25 October 2011, but did not comply, in substance or in form, with OTAC 139-5 although it purported to;
- (c) The identity, independence and qualifications of the author of the "Aeronautical Study" were not identified;
- (d) The potential hazards and risks involved in a 90 degree separation, particularly those caused by a forced landing, were neither fully nor properly identified in the "Aeronautical Study", particularly regarding the fact that the take off and climb approach surfaces were to be over water regularly frequented by boats and people;
- (e) 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 to the south of the Heliport, were not addressed;

- (f) The "Aeronautical Study" did not take into consideration the fact (as set out at page 25 of the Manual) that the Helicopter could not fly within 500 feet of a cruise ship;
- (g) Neither the "Aeronautical Study" nor the Manual considered problems which would arise when the Helicopter would be landing, particularly down wind, caused by the requirement in the Manual (page 21) that all touchdowns were to be made with the Helicopter aligned into the wind; and
- (h) The Manual stated (at page 25) that the Helicopter has "*pop out floats*". Although such pop out floats (which deploy from the Helicopter's landing skids) may provide over-water emergency landing capability for the Helicopter, they would not reduce the safety hazard of the Helicopter undertaking a forced landing on boats or people in the water.

5.4 Condition 5 of the Certificate states:

"Landings or take-offs are not to be conducted when boats in the adjacent water areas obstruct the approach/departure slopes."

This Condition could not properly alleviate safety issues as it does not deal with people, such as swimmers, snorkelers or scuba divers, in the adjacent water areas. Further, there is no sufficient definition of "*adjacent water areas*".

- 5.5 The CAACI failed to consider (properly or at all) any of the above safety issues raised and the deficiencies of the Aeronautical Study, in allowing the 90 degree separation. In the circumstances, it was unlawful, perverse and irrational for the CAACI to grant the exemption.

- 5.6 In any event, it was unlawful, perverse and irrational for the CAACI to grant an Article 146 exemption (at all) given the compromised Heliport Safety Area (as to which the CAACI had no or no proper regard).
- 5.7 The CAACI could not, therefore, properly be satisfied that the Heliport was "safe" having regard in particular to the physical characteristics of the aerodrome and of its surroundings (within the meaning of Article 105(2)(b) of the ANO) so as to justify the grant of the Certificate. Nor could it properly be satisfied that that the required aerodrome manual submitted under Article 105(7) was adequate, given the matters relied on above. Accordingly, the CAACI acted unlawfully and/or perversely and/or irrationally in granting the Certificate and in its flawed decision-making in relation thereto.
- 5.8 Further, to the extent that the CAACI considered and was influenced by the terms of the assistance it had given to CIHL, concerning separation angle issues, in and around the making of CIHL's application for the Certificate, such matters were irrelevant.

6 **Grounds for Judicial Review: Nuisance issue**

- 6.1 Under section 41(2) of the Civil Aviation Act 1947 (as extended to the Cayman Islands by way of Article 3 of the Civil Aviation Act 1949 (Overseas Territories) Order 1969), no action in nuisance caused by noise and/or vibration from an aircraft on a certificated aerodrome lies by operation of law.
- 6.2 It was wrong for the CAACI to grant the Certificate without first determining (or causing to be determined) the level of noise, vibration and encroachment to be caused by the operation of the Heliport on the Heliport's neighbours, in circumstances where the Heliport is located in the centre of George Town in close proximity to offices and residential dwellings. The CAACI failed to consider (properly or at all) any such factors when it granted the Certificate.

- 6.3 Further, to the extent that the CAACI considered that such factors were a matter exclusively for planning approval, and was influenced thereby, it was wrong, and it further failed (properly or at all) to consider that planning approval was under appeal.

**Maples and Calder
Attorneys-at-Law**

THIS APPLICATION was filed by Maples and Calder, attorneys for the Plaintiff, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: MJC/JJG/BWB/666668-02/22822020)