

**IN THE DISTRICT COURT
AT WELLINGTON**

CIV-207-085-802

UNDER The Civil Aviation Act 1990
IN THE MATTER OF an appeal from the decision of the Civil
Aviation Authority
BETWEEN IAN DOUGLAS ANDREWS
Appellant
AND CIVIL AVIATION AUTHORITY
Respondent

Hearing: 15, 16, 17, 18 December 2008

Appearances: C S Withnall QC for Appellant
D R Ferrier and SJR Jennings for Respondent

Judgment: 9 April 2009

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction:

[1] This is an appeal under s 66 of the Civil Aviation Act 1990 (the Act) against a decision under s 271(7) of the Act imposing conditions on the appellant's medical certificate.

Background:

[2] The appellant, who is now aged 65, first obtained his private pilot's licence in 1986. In May 1991 he suffered a "*medical event*", which was probably a minor stroke and ceased flying until late 1994.

[3] At that time, because of the 1991 event, he was seen by Dr Kevin Lee, an aviation medical examiner not employed by the CAA, who issued a Class 2 (non-commercial) medical certificate. Dr Lee notified the history of suspected stroke to CAA at the time. Subsequently the appellant's medical certification was regularly renewed by Dr Lee, up until the last relevant certificate in November 2006. During the period 1998 – 2003, the certificate was Class 1 (commercial pilot) and Class 2. The 2 November 2006 certificate was a Class 2 certificate valid for 24 months signed by Dr Lee pursuant to his delegated authority.

[4] On 7 February 2007, a Senior Medical Officer of the CAA, Dr Claude Preitner, sent two letters to the appellant. The covering letter conveyed that:

- the appellant's file had been reviewed as part of a monitoring and quality assurance programme;
- the record of stroke in 1991 had been noted on review;
- this results in an increased likelihood of further stroke and also an increased risk of a cardiovascular event which increases with time;
- the Director had therefore decided to require the appellant, at his own cost, to undergo a stress echocardiogram to ensure that he did not have a compromised supply of blood to his heart;
- the Director had decided to issue a notice of conditions, restrictions and endorsements on the appellant's medical certificate to the effect that it was not valid for the carriage of passengers, glider towing, flight over built-up areas (circuit exempt), IFR flying, international navigation;
- the notice had a maximum validity of 10 working days, therefore the issue of a further notice was anticipated. This would be reviewed in the light of the cardiac investigation result.

[5] The accompanying Notice, signed by Dr Preitner, was purportedly issued under s 27I(1)(b) of the Act. It stated that it was issued on the grounds of “*history of stroke*”. Its duration was specified as:

Until I have determined what action is to be taken under s 27I(7) but may not exceed 10 working days unless I extend the period of the conditions, restrictions and endorsements for a further specified period not exceeding 10 working days. Accordingly the total period of this notice will not exceed 20 working days.

Dr Preitner was not at the time a medical examiner in terms of the Act but held delegated powers from the Director.

[6] With the letter and Notice was a new medical certificate signed by Dr Preitner as “*Director or Delegate*”. The certificate was subject to the conditions outlined in the letter of 7 February.

[7] On 16 February 2007, the appellant underwent the required stress echocardiogram. The result was “*normal with no evidence of ischaemia*”. The resting echocardiogram done at the same time recorded features of mild LVH (left ventricular hypertrophy) but otherwise was within normal limits, this being stated to be consistent with treated hypertension.

[8] On 19 February, Dr Preitner issued a further Notice pursuant to s 27I(7) imposing the same restrictions as contained in the 7 February Notice, but this time “*for the duration of your medical certificate dated 7 February 2007*”. The Notice stated that the conditions were imposed because Dr Preitner had reasonable grounds to believe that the appellant might be (not was) unable to exercise safely the privileges to which the certificate related. The appellant was required to surrender his certificate dated 2 November 2006. A further certificate expiring on 2 November 2008 and signed by Dr Preitner was issued endorsed with the conditions.

[9] In a covering letter Dr Preitner stated that this Notice was issued because the previous Notice had a validity that could not exceed 10 working days. It was issued prior to any consideration of the stress echocardiogram results.. The effect of the conditions was to severely restrict the practical usefulness of the appellant’s pilot’s licence.

[10] After the echocardiogram results were received by CAA, they referred his file to an Auckland neurologist, Dr William Wallis, who on 8 March gave his opinion that the appellant was neurologically unfit to fly.

[11] Over the next three months, the appellant sought other specialist opinion and entered into various communications with CAA in an effort to persuade them to remove the conditions. The lack of success of those efforts was confirmed in an e-mail of 6 June 2007 to the appellant from Graeme Harris, CAA's General Manager, Personnel Licensing and Aviation Services.

[12] The action under s 27I followed upon a routine CAA administrative review of the appellant's medical file in which the past history of stroke in 1991, which had been recorded on all subsequent applications, was noted. The evidence of Dr Watson, Principal Medical Officer of the CAA, made clear that the decisions of 7 and 19 February were made because the medical officers of the CAA believed that, because of that history, the appellant was unable to exercise safely the privileges of his Class 2 licence without the imposition of the conditions because there was an excessive risk that he might suffer a cardiovascular event. They considered the appellant had a five year risk of a cardiovascular event of more than 10%, in the order of 10 – 20%. It had been calculated by Dr Lee at 6%.

[13] The present appeal was filed on 7 July 2007. Presumably because of time limits, it is expressed to be an appeal against the respondent's decision of 6 June 2007 confirming the imposition of the conditions on the appellant's medical certificate. In substance, though, both parties have approached the appeal on the basis that it is against the original imposition of those conditions on 7 and 19 February 2007.

[14] The medical certificate on which the conditions were endorsed expired on 2 November 2008 prior to the hearing of the appeal. A fresh medical certificate has now issued containing the same restrictions.

The Court's Approach on Appeal:

[15] Pursuant to R 560 of the District Court Rules, an appeal under s 66 of the Act is by way of rehearing. On an appeal by way of rehearing the Court must reach its own independent findings and decision on the evidence which it hears or admits. Here the Director has purported to exercise his powers under s 27I to first impose restrictive conditions on an existing medical certificate before its expiry, then technically to revoke it and issue a more restricted one for the remaining duration of the original. In these circumstances the onus is on the Director to satisfy the Court that the statutory criteria for his actions have been made out because the Director is interfering with the enjoyment of a privilege that has already been granted: *Director of Civil Aviation v Paterson (No 3)* High Court, Wellington, CIV-2005-485-606, 23 June 2005, Wild J at para [20](d).

[16] Pursuant to s 66(2) of the Act, the Court may confirm, reverse or modify the decision appealed from; or remit the matter back to the Director for decision pursuant to R 561: *Director of Civil Aviation v Paterson (No 3)* (supra).

The Issues:

[17] Most of the appeal hearing was occupied with evidence from a daunting array of highly qualified medical experts on the issue of whether or not at the relevant time the medical condition of the appellant was such that he was “*unable to exercise safely the privileges to which his medical certificate related*”, to use the words of s 27I(1) of the Act. This was referred to as the medical issue or the substantive issue.

[18] There are, however, a number of legal issues concerning the proper construction of the complex provisions of Part 2A of the Act which must be resolved before the substantive issue can be addressed – because the answers to those legal questions control the proper approach to the substantive issue.

[19] The legal issues can be distilled into the following:

- what powers does the Director have to invalidate the medical certificate of 2 November 2006;
- what are the criteria for the formation of a reasonable belief that the appellant was unable (without the conditions) to safely exercise the privileges to which the medical certificate relates.
- can Dr Preitner, on behalf of the Director, issue a medical certificate?

An Academic Appeal?

[20] Before considering the legal and substantive issues, it is necessary to address a preliminary issue, that is whether the appeal is now academic so that the Court should not decide it at all. This issue was raised first by the Court but adopted by the Director in the closing submissions of his counsel.

[21] It is submitted on behalf of the Director that any relief granted if the appeal is successful, could relate only to the expired medical certificate and would have no practical effect because his current flight privileges are derived from a different medical certificate resulting from a different decision. It is submitted that the Court should not be used to provide substance for a collateral attack on the most recent medical certificate.

[22] Counsel for the appellant submitted that the fact that the relevant medical certificate has expired should not affect the Court's duty to give a decision. He submitted that there is practical significance and benefit in a finding that the Director was not entitled to impose conditions on the appellant's medical certificate. He submitted that the decision constituted a "*blot*" on his record with the CAA, that it had connotations for insurance purposes and in respect of future consideration of his licence.

[23] The principle was discussed by me in *Maritime Developments Ltd v Ward* (District Court, Wellington, MA 116/99, 31 August 1999) which was also an appeal under s 66 against a decision of the then Director. In that case, I said:

It is well settled that the Courts will not deal with questions which are academic, in the sense that any decision of the Court will no longer have any practical purpose or utility: *Finnigan v NZRFU (No 3)* [1985] 2 NZLR 190. In that case the Court of Appeal applied the decision of the House of Lords in *Sun Life Assurance Co of Canada v Jervis* [1944] AC111 in which Viscount Simon said (at p 114):

It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

In *Finnegan*, Somers J said:

This is a well recognised principle in appeals.

The present case is of course an appeal even though in the form of an originating application. A further recent example of the general principle is found in the judgment of McGechan J in *Tau v Durie* [1982] 2 NZLR 103; (1988) 11 PRNZ 417. That was an application for judicial review which had become “stale” because events had passed it by, in the sense that the remedy sought would no longer have any real practical utility. McGechan J dismissed the proceeding under r 477 of the High Court Rules.

[24] I am satisfied on reflection that although the relevant certificate has expired, there is a real controversy and some living issues to be decided here. It is not only the resources and effort which both parties have expended on this litigation which leads me to that view. I think that real practical consequences may flow whatever the result. If, as the appellant alleges, the Director’s decision was unlawful, there may be consequences in the terms of civil liability^[11]. There may be consequences for the appellant’s insurance whatever the outcome. It is also unrealistic to expect that any findings on both the legal and the medical (or substantive) issues would not have consequences in respect of the current or any future medical certificates for the appellant. I do not therefore accept the submission that the appeal should be dismissed because it is academic.

The Statutory Scheme:

[25] Part 2A was inserted into the Act as from 1 April 2002 by s 5 of the Civil Aviation (Medical Certification) Amendment Act 2001. It is a code for medical

certification of pilots. It was a direct response to the judgment of John Hansen J in *Aviation Industry Association of New Zealand (Inc) & Ors v Civil Aviation Authority* (High Court, Wellington, CP 289/00, 24 August 2001). In that judgment John Hansen J held, among other things, that the Director had no power under the Act as it was then to himself issue medical certificates, contrary to the view of the CAA. That function belonged to Aviation Medical Assessors, who were not employees of the CAA.

[26] It is unfortunately necessary to set out large parts of Part 2A as frequent reference to the relevant provisions is necessary to understanding the discussion which follows:

...

27B Power of Director to issue medical certificate

(1) After considering an application for a medical certificate, the Director must, as soon as practicable but no later than 30 working days after the date of receiving the report of the medical examiner, issue the medical certificate if he or she is satisfied that the applicant meets the medical standards prescribed in the rules, unless the Director has reasonable grounds to believe that the applicant has any characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates.

(2) Despite subsection (1), the Director may, relying on flexibility, issue a medical certificate to the applicant.

(3) In subsection (2), flexibility means the use of medical judgment to issue a medical certificate if the following conditions are fulfilled:

- (a) an accredited medical conclusion indicates that in special circumstances the applicant's failure to meet any medical standard prescribed in the rules is such that the exercise of the privileges to which a medical certificate relates is not likely to jeopardise aviation safety; and
- (b) the relevant ability, skill, and experiences of the applicant and operational conditions have been given due consideration; and
- (c) the medical certificate is endorsed with any conditions, restrictions, or endorsements when the safe performance of the applicant's duties is dependent on compliance with those conditions, restrictions, or endorsements.

(4) The Director may impose any conditions, restrictions, or endorsements on a medical certificate issued under this section.

- (5) Before issuing a medical certificate, the Director—
- (a) must have regard to the report of the medical examiner and any other information that may be relevant; and
 - (b) may require the applicant, at the applicant's expense, to undertake any other tests, examinations, or re-examinations conducted by any suitably qualified and experienced person, or to provide any medical information, as the Director reasonably considers necessary to assess the applicant.
- (6) If the Director requires an applicant to undertake any other test, examination, or re-examination, or to provide any medical information, the period in which the Director must make a decision in relation to the medical certificate under this section does not include the number of days that are required to conduct and deliver the results of the test, examination, or re-examination, or to provide the medical information, to the Director.
- (7) The Director must maintain a register of current medical certificates issued under this section.
- (8) Any decision made under this section by the Director in relation to a medical certificate other than a decision under sub-section (5)(b) is subject to section 27L (review of decisions regarding medical certificates or applications).

27C Changes in medical condition of licence holder

- (1) Subject to any directions that the Director may issue under section 27G(1)(b), if a licence holder is aware of, or has reasonable grounds to suspect, any change in his or her medical condition or the existence of any previously undetected medical condition that may interfere with the safe exercise of the privileges to which his or her medical certificate relates, the licence holder—
- (a) must advise the Director of the change as soon as practicable; and
 - (b) may not exercise the privileges to which the licence holder's medical certificate relates.
- (2) Subject to any directions that the Director may issue under section 27G(1)(b), if an aviation examiner or medical examiner or operator is aware of, or has reasonable grounds to suspect, any change in the medical condition of a licence holder or the existence of any previously undetected medical condition in the licence holder that may interfere with the safe exercise of the privileges to which the licence holder's medical certificate relates, the aviation examiner or medical examiner or operator must advise both the licence holder and the Director of the change as soon as practicable.
- (3) Subject to any directions that the Director may issue under section 27G(1)(b), if a ... medical practitioner has reasonable grounds to believe that a person is a licence holder and is aware, or has reasonable grounds to suspect, that the licence holder has a medical condition that may interfere

with the safe exercise of the privileges to which the licence holder's medical certificate relates, the ... medical practitioner must, as soon as practicable,—

- (a) inform the licence holder that the Director will be advised of the condition; and
 - (b) advise the Director of the condition.
- (4) An aviation examiner or medical examiner or a ... medical practitioner is not subject to any civil or criminal liability for—
- (a) doing an indemnified act in good faith in the course of carrying out his or her functions under this Part; or
 - (b) doing an indemnified act in good faith in the course of answering any questions put to him or her by the Director that—
 - (i) concern a licence holder; and
 - (ii) are relevant to any action the Director may take under this Part.

...

27D Medical examination, report, and disclosure

- (1) Before the Director issues a medical certificate, an applicant must have a medical examination by a medical examiner who must forward his or her report to the Director.
- (2) The Director may, by written notice, require any applicant to disclose, or authorise the disclosure of, any information relevant to his or her medical condition or history for the purpose of determining whether or not the applicant is eligible for a medical certificate under section 27B.

...

27F Designation of aviation examiners and medical examiners

- (1) The Director must designate, by issuing an aviation document under section 9, 1 or more medical examiners to conduct examinations under section 27D.
- (2) The Director may designate, by issuing an aviation document under section 9, 1 or more aviation examiners to conduct specified examinations that the Director may require under this Part.

27G General directions and emergency directives

- (1) The Director may, by notice in the Gazette, issue general directions in relation to—
- (a) conducting examinations of applicants and licence holders, and reporting the results of those examinations to the Director; and

- (b) providing exceptions for temporary medical conditions to the reporting requirements set out in section 27C; and
- (c) specifying the requirements of examinations or other clinical matters, which must be reasonable, including, but not limited to,—
 - (i) the medical content of examinations:
 - (ii) the interpretation and analysis of results of examinations:
 - (iii) the significance of results of examinations for the purpose of determining whether or not an applicant is eligible for a medical certificate under section 27B.

(2) Before issuing general directions under subsection (1), the Director must consult with those persons, health professionals with aviation medical experience, representative groups within the aviation industry or elsewhere, government departments, and Crown agencies that he or she considers appropriate.

(3) General directions issued in relation to the matters specified in subsection (1)(a) or (c) must be—

- (a) notified in writing to aviation examiners or medical examiners; and
- (b) incorporated in a medical manual issued by the Director^[12].

...

27H Investigation of medical condition of licence holder

(1) The Director may, by written notice, require any licence holder, at the licence holder's expense, to undertake any tests, examinations, or re-examinations conducted by any suitably qualified and experienced person, or to provide any medical information, at any time before the expiry of his or her medical certificate, if the Director has reasonable grounds to believe that the licence holder—

- (a) may be unable to exercise safely the privileges to which the medical certificate relates; or
- (b) has obtained his or her medical certificate fraudulently.

(2) If the Director has delegated under section 27O the authority to issue medical certificates to any medical examiner, the Director may, by written notice to the relevant licence holder, withdraw any medical certificate that the medical examiner has issued under that authority within 60 days after the date it was issued if the Director requires the licence holder to supply additional medical information, in which case the Director must decide whether to reissue the medical certificate in accordance with section 27B.

(3) The Director may, by written notice, require any licence holder, at the Authority's expense, to undertake any tests, examinations, or re-examinations conducted by any suitably qualified and experienced person, or to provide any medical information, at any time before the expiry of his or her medical certificate if—

- (a) the Director—
 - (i) is monitoring licence holders on the basis of random selection from the register of current medical certificates that is required to be maintained under section 27B(7); or
 - (ii) has reasonable grounds to believe that the licence holder's medical certificate was issued in error; or
 - (iii) is monitoring aviation examiners or medical examiners for compliance with the requirements of this Act or the rules; and
- (b) the Director has reasonable grounds to believe that any of those tests, examinations, re-examinations, or medical information are necessary to investigate the matters specified in paragraph (a).

(4) The Director may, by written notice, require any licence holder to disclose, or authorise the disclosure of, any relevant information for the purpose of determining whether or not the licence holder—

- (a) meets the medical standards prescribed in the rules; or
- (b) is able to exercise safely the privileges to which the medical certificate relates.

27I Revocation, suspension, amendment, and surrender of medical certificate

(1) If the Director has reasonable grounds to believe that a licence holder may be unable to exercise safely the privileges to which the licence holder's medical certificate relates, the Director may, by written notice to the licence holder,—

- (a) suspend any medical certificate issued to the licence holder; or
- (b) impose or amend any conditions, restrictions, or endorsements on any medical certificate issued to the licence holder.

(2) If the Director has reasonable grounds to believe that a licence holder is unable to exercise safely the privileges to which the licence holder's medical certificate relates, the Director must, by written notice to the licence holder,—

- (a) suspend any medical certificate issued to the licence holder;
or
- (b) revoke any medical certificate issued to the licence holder;
or
- (c) impose or amend any conditions, restrictions, or
endorsements on any medical certificate issued to the licence
holder.

(3) If the Director has reasonable grounds to believe that a person who has been delegated authority under section 27O to issue a medical certificate has issued a medical certificate other than in accordance with this Part or the terms of the delegated authority, the Director—

- (a) may, by written notice to the licence holder,—
 - (i) suspend any medical certificate issued to the licence
holder; or
 - (ii) revoke any medical certificate issued to the licence
holder; or
 - (iii) impose or amend any conditions, restrictions, or
endorsements on any medical certificate issued to
the licence holder; and
- (b) may, by written notice to the person with delegated
authority, revoke that person's delegated authority.

(4) Any notice issued under this section must state the grounds for the Director's decision.

(5) A notice of suspension issued under subsection (1)(a) or subsection (2)(a) or subsection (3)(a)(i) remains in force until the Director determines what action, if any, referred to in subsection (7) is to be taken, but any such suspension expires 10 working days after the date that the suspension is imposed unless, before the expiry of that 10-working-day period, the Director extends the suspension for a further specified period not exceeding 10 working days (the aggregate suspension period may not exceed 20 working days after the date on which the suspension is imposed).

(6) Any conditions, restrictions, or endorsements that are imposed or made under subsection (1)(b) or subsection (2)(c) or subsection (3)(a)(iii) remain in force until the Director determines what action, if any, referred to in subsection (7) is to be taken, but any of those conditions, restrictions, or endorsements expire 10 working days after the date that they are imposed unless, before the expiry of that 10-working-day period, the Director extends the conditions, restrictions, or endorsements for a further specified period not exceeding 10 working days (the aggregate period may not exceed 20 working days after the date on which the conditions, restrictions, or endorsements are imposed).

(7) If a notice is issued under subsection (1) or subsection (2) or subsection (3), the Director may, by written notice, take 1 or more of the following actions:

- (a) impose or amend conditions, restrictions, or endorsements for a specified period:
- (b) withdraw any conditions, restrictions, or endorsements:
- (c) disqualify the licence holder from holding the medical certificate for a specified period:
- (d) revoke the medical certificate:
- (e) cancel the suspension.

(8) If the Director revokes a medical certificate under subsection (2)(b) or subsection (3)(a)(ii) or subsection (7)(d) or subsection (11) or imposes any conditions, restrictions, or endorsements on a medical certificate under subsection (7)(a) or disqualifies a licence holder under subsection (7)(c), the licence holder has 20 working days from the date of the decision to ask the convener to review the decision under section 27L, after which time the decision may not be referred to the convener.

(9) A person who has had his or her medical certificate revoked, withdrawn, or suspended or who is disqualified from holding the medical certificate for a specified period must surrender the medical certificate to the Director, a person authorised by the Director, or a member of the police.

(10) If the Director issues a notice under this section, the Director—

- (a) must also, if practicable, notify any aviation document holder affected by the notice, other than the licence holder, if the Director reasonably considers it necessary for reasons of aviation safety; and
- (b) may notify any other affected aviation document holder.

(11) The Director may, by written notice, revoke a medical certificate if a licence holder fails, without reasonable excuse, to comply with a demand under section 27H(1) or section 27H(3) or section 27H(4) within a reasonable period of time.

(12) Any licence holder may return his or her medical certificate to the Director and ask the Director, in writing, to cancel the medical certificate.

(13) If a licence holder asks the Director to cancel his or her medical certificate, the Director must—

- (a) cancel the medical certificate; and
- (b) update the register of current medical certificates.

...

27N Delegation of Director's powers under this Part to ... medical practitioners who are employees of Authority

- (1) The Director may, either generally or particularly, delegate to any suitably qualified ... medical practitioner who is an employee of the Authority any of the Director's functions and powers under this Part or under the rules relating to medical certification.
- (2) Every delegation under this section must be in writing.
- (3) Repealed.
- (4) Section 23A applies to a delegation under this section.
- (5) Any delegation under this section may be made to a suitably qualified ... medical practitioner who is the holder of a specified office of the Authority.

27O Delegation of Director's power under this Part to medical examiners who are not employees of Authority

- (1) The Director may, either generally or particularly, delegate to any suitably qualified medical examiner who is not an employee of the Authority any of the Director's functions and powers under this Part or under the rules relating to medical certification other than the power under this Part to revoke medical certificates.
- (2) Despite subsection (1), the Director must delegate to suitably qualified medical examiners who are not employees of the Authority the power to issue medical certificates to any person who qualifies for a medical certificate under section 27B(1) or who otherwise meets the criteria for a standard medical assessment as prescribed in the rules or by the Minister under section 27Q(3).
- (3) Every delegation under this section must be in writing.
- (4) Subject to any general or special directions given or conditions imposed by the Director, any medical examiner to whom any functions or powers are delegated under this section may exercise those functions and powers in the same manner and with the same effect as if they had been conferred or imposed on that person directly by this Act and not by delegation.
- (5) Any delegation under this section may be made to a specified medical examiner or a specified class of medical examiner or to the holder or holders of a specified office.
- (6) Every delegation under this section must be given for a specified period but in any event must be revocable at will.
- (7) No delegation under this section may—
 - (a) affect or prevent the exercise of any function or power by the Director; or

- (b) affect the responsibility of the Director for the actions of any person acting under the delegation.

[27] In^[13] construing the statutory scheme as a whole, it is important to first clarify who has the power to issue medical certificates. On behalf of the appellant, it was suggested that the meaning of s 27O(2) is that the Director's power under s 27B to issue medical certificates may be exercised **only** through delegated medical examiners who are not employees of the CAA (non-CAA examiners). In other words that s 27O(2) impliedly deprives the Director (including his employee delegates) of the power to issue certificates so Dr Preitner had no power to issue the replacement certificate.

[28] I do not think that was the intention of the legislature. Section 27B(1) unequivocally gives the Director the power to issue medical certificates. Section 27O(1) (which uses the word "*may*") gives him the power but not the obligation to delegate any of his functions or powers under Part 2A to non-CAA examiners. By contrast, s 27O(2) (which uses the word "*must*") imposes an obligation on him to delegate his particular power to issue medical certificates to non-CAA examiners who are suitably qualified.

[29] While s 27O(2) compels the Director to delegate that particular power to non-CAA examiners, it does not of itself deprive him of the power delegated. Nor is there any basis for reading that meaning into the section. That conclusion is strengthened by the terms of s 27O(7).

[30] The legislative intention evidenced by ss 27B, 27N and 27O is that there are two separate categories of persons who have the power to issue medical certificates:

- (i) the Director and any suitably qualified medical practitioner employed by the CAA to whom such power has been lawfully delegated under s 27N(1); and
- (ii) suitably qualified medical examiners who are not employed by the CAA to whom such power has been (mandatorily) delegated under s 27O(2).

[31] The result is that a pilot has a right to obtain medical certification from a non-CAA examiner while the Director retains his own power of certification which may be exercised by his employee delegates. The^[14] mandatory requirement to give suitably qualified medical examiners from outside the CAA the power to issue medical certificates indicates an intention by Parliament for pilots to retain the ability to seek and obtain medical certification from medical examiners who are not under the direct control of the Director. This interpretation is consistent with the extracts from Hansard placed before the Court as well as the wording of the relevant sections.

[32] The next matter to consider is the criteria for the issue of medical certification. The primary provision is s 27B(1). Section 27O(4) makes it clear that a non-CAA examiner has the same powers and duties as the Director does under s27B. The use of the word “must” in s 27B(1) indicates that an applicant has the right to the issue of a medical certificate if he is able to establish to the satisfaction of the issuer that he meets the medical standards prescribed in the rules (unless the issuer has reasonable grounds to believe that the applicant has any characteristic which may interfere with the safe exercise of the privileges to which the certificate relates). This is so whoever the application is made to. “The rules” refers to rules made by the Minister under Part 3 of the Act: see s 2.

[33] The rule relevant to medical certification is Part 67.105 of the Civil Aviation Rules. The parts of it which are directly relevant to the medical issue in this case are set out below:

67.105 Class 2 medical certificate

- (a) An applicant who satisfies the standards in paragraphs [\(b\)](#) to [\(m\)](#) meets the medical standards for a class 2 medical certificate.

General

- (b) An applicant must—
 - (1) have no medical condition that is of aeromedical significance;

...

Cardiovascular system

- (d) An applicant must—

- (1) have no history or diagnosis of any condition of the heart or circulatory tree that is of aeromedical significance; and
- (2) without limiting paragraph [\(d\)\(1\)](#), have no history or diagnosis of any of the following specific medical conditions, to an extent that is of aeromedical significance:
 - (i) coronary artery disease;
 - (ii) left bundle branch block;
 - (iii) right bundle branch block unless ischaemic causes have been excluded;
 - (iv) uncontrolled hypertension;
 - (v) abnormality of the muscle, valves, or conduction system of the heart;
 - (vi) abnormality of the rhythm of the heart; and
- (3) without limiting paragraph [\(d\)\(1\)](#), have no disorder requiring a cardiac pacemaker; and
- (4) have no excessive cardiovascular risk factors unless normal myocardial perfusion can be demonstrated.

[34] Part 67 has to be read in the light of the Civil Aviation (Examination Procedures) General Direction Notice 2006. This was issued by the Director pursuant to his powers under s 27G set out above. It has a section relating to cardiovascular risk estimation. It provides relevantly:

Section 4 : Cardiovascular Risk Estimation

4.1 Definition

Cardiovascular risk estimation, in relation to an applicant, means the calculation of the applicant's 5 year risk of a cardiovascular event based on medical information.

...

4.3 Interpretation of Results

- 4.3.1 A 5 year risk of less than 10% may be interpreted as not being of aeromedical significance.
- 4.3.2 A 5 year risk of over 10% must be interpreted as being of aeromedical significance unless the presence of ischaemic heart disease has been excluded.

[35] These extracts illustrate the regulatory mechanisms available to the Director to control in some degree of detail the process under which medical examinations are conducted and their results interpreted for the purposes of the assessment by non-CAA examiners of whether medical standards have been met. The existence and use of those mechanisms is in accord with the functions and powers of the Director as set out in s 72I of the Act. Both the Rule and the General Directions apply generally to all applicants^[15]. Under s 27G(2) the Director must consult with industry stakeholders before issuing a general direction. The Director has no power to intervene in an individual case where the application has been made to a non-CAA examiner. That is consistent with the legislative intention that pilots should have the ability to apply to and obtain certification from examiners who are independent of the direct control of the CAA.

[36] The standards contained in the Rule and the Directions together constitute a transparent and objectively verifiable process for an examiner to decide whether he or she is satisfied that an applicant meets the medical standards. That is consistent with the mandatory requirement to issue a certificate if those standards are met. It is also consistent with the rights of review to an independent panel and appeal to the District Court given by ss 27L, 27M and 27P (not reproduced).

[37] It is against that statutory background in relation to the issue of medical certificates by non-CAA examiners, that the question of the Director's powers in respect of current certificates issued by them needs to be examined.

[38] Section 27C places an obligation on licence holders, aviation and medical examiners and even medical practitioners to advise the Director if they are aware of or have reasonable grounds to suspect any change in a licence holder's medical condition or the existence of any previously undetected medical condition that may interfere with the safe exercise of the privileges to which his medical certificate relates.

[39] Section 27H(1) gives the Director the power to require a current licence holder (at his expense) to undertake any test or examinations, or provide any medical information if the Director has reasonable grounds to believe that the licence holder

may be unable to exercise safely the privileges to which the certificate relates or has obtained it fraudulently. Obviously this power could sensibly be used following a notification under s 27C.

[40] Section 27H(2) is important because it relates specifically to the Director's powers in relation to medical certificates issued by non-CAA examiners. It enables the Director to withdraw a certificate within 60 days after its issue if the Director has required additional medical information. Although not specifically stated, the natural reading of this subsection is that it refers to medical information required pursuant to the power to do so in subs (1). In the event that the certificate is withdrawn under this power, the Director must decide whether to reissue it (himself) in accordance with s 27B.

[41] It follows that the power under s 27H(2) for the Director to withdraw a non-CAA examiner's certificate can only be exercised if:

(i) the Director has reasonable grounds to believe that the licence holder may be unable to exercise safely the privileges to which the medical certificate relates or that it has been obtained fraudulently **and**

(ii) the Director has consequently required the provision of additional medical information, that is, additional to what had previously been provided **and**

(iii) it is within 60 days of the issue of the certificate

If the power is exercised, the s 27B criteria must be applied by the Director in relation to its reissue i.e. subject to the specific exception in s 27B(1), it must be reissued if the Director is satisfied that the medical standards prescribed by the rules have been met.

[42] Section 27H(3) empowers the Director to require any current licence holder (at the CAA's expense), to undertake any test or examinations, or to provide any

medical information if the Director “*is monitoring licence holders on the basis of random selection*” from the register of current medical certificates or has reasonable grounds to believe the certificate “*was issued in error*”, or is monitoring examiners for compliance with the Act or rules.

[43] Under s 27H(4) the Director may require the disclosure by the licence holder of any relevant information for the purposes of determining whether or not he meets the medical standards prescribed in the rules or is able to exercise safely the privileges to which the certificate relates. In contrast to the three preceding subsections, there are no express preconditions required for the exercise of the power in s 27H(4). Nor is the subsection expressly limited to current licence holders. However, its position as the last subsection in s 27H suggests that the power is intended to be incidental to the exercise of the powers in the previous subsections rather than a separate and unfettered power.

[44] The final provision relevant to the Director’s powers in respect of current certificates is s 27I, the one relied upon by the Director in this case. There are a number of salient features of the section:

- (i) the powers in subs (1) are dependent on the Director having reasonable grounds to believe a licence holder **may** be unable to exercise safely the privileges to which the certificate relates.
- (ii) the powers in subs (2) are dependent on the Director having reasonable grounds to believe that the licence holder **is** unable to exercise those privileges safely.
- (iii) Subs (1) in contrast to subs (2) and (3) does not contain the power to revoke a certificate.
- (iv) The powers in subs (3) are confined to certificates issued by non-CAA examiners and are dependent on the Director having reasonable grounds to believe that the examiner has issued a medical certificate

other than in accordance with Part 2A, or the terms of his delegated authority.

- (v) once a notice of suspension or imposition or amendment of conditions has been given under subs (1), (2) or (3), it may be extended for up to 20 working days under subs (5) and (6). Unless the Director has earlier determined to take an action under subs (7), it then lapses.
- (vi) Subs (7) contains no express preconditions which must be established before the Director can take any of the actions in (a), (c) or (d). However it follows from the structure of the section as a whole that he may not do so unless he has formed a belief that the licence holder is unable to exercise safely the privileges to which his certificate relates where the action follows a notice under subs (1) or (2); or a belief that a non-CAA examiner has issued a medical certificate other than in accordance with Part 2A or the terms of his delegated authority where the action follows a notice under subs (3).
- (vii) there are rights of appeal to the District Court and review by an independent panel in respect of a decision under s27I(7).

[45] This survey of the relevant provisions demonstrates that Parliament has granted extensive powers to the Director to investigate and take action in relation to the current medical certification of a licence holder in respect of whom safety issues may have arisen. But although extensive, the Director's powers are not broadly expressed. Rather they are circumscribed by various detailed conditions and in some instances Parliament has made specific reference to the case of non-CAA examiner's certificates. That is consistent with a statutory scheme which draws a fine balance between giving the Director the powers necessary to generally control and supervise the medical certification process while ensuring that individual licence holders continue to have the protection from arbitrary treatment afforded by a transparent and objectively verifiable process encompassing a measure of independence from the CAA.

Discussion

[46] It was not suggested on behalf of the CAA that Dr Lee issued the certificate “*in error*” (see s 27H(3)(a)(ii)), or that it was obtained fraudulently (see s 27H(1)(b)), or that there had been any change in the appellant’s medical condition since the issue of the certificate (see s 27C(1), (2) and (3)), or that a previously undetected medical condition has been discovered (see s 27C(1), (2) and (3)) or that it has been issued other than in accordance with Part 2A (see s 27I(3)) or with the terms of Dr Lee’s delegated authority (see s 27I(3)). Nor was it suggested that any major advance in medical knowledge took place between November 2006 and February 2007.

[47] This is a case where on random monitoring of the file, the Director’s medically qualified employees formed their own belief on the same clinical information that was available to Dr Lee that the appellant was unable to exercise safely the privileges of the licence to which the certificate related. It was clear from the evidence of Dr Watson that they did not address that assessment solely in terms of whether or not the appellant met the relevant medical standards. They did not consider that those standards controlled the question. But it was a matter covered by the medical standards, that is, the appellant’s risk of a cardiovascular event, which was the sole basis of their concern that the appellant was unable to exercise safely the privileges of his licence.

[48] It was also clear from Dr Watson’s evidence that they took the view that it was open to them (acting on behalf of the Director) to amend or revoke the certificate issued by Dr Lee at any time and without any intervening change of circumstance as long as there were reasonable grounds for the formation of a belief that the appellant was unable to exercise safely the privileges of the licence to which the certificate related. Mr Withnall for the appellant strongly disputed both those views of the Director’s powers under s 27I..

[49] There is no definition of the phrase “*unable to exercise safely the privileges of the licence to which the certificate relates*” despite its prevalence in this part of the Act. It is clearly a different concept to failing to meet the medical standards

prescribed by the rules. This is obvious not only from the fact that the two concepts are expressed in different language but also from the terms of s 27H(4) where the two phrases are juxtaposed.

[50] I consider that that an inability to exercise safely the privileges of the licence is a wider concept which includes a failure to meet the medical standards but encompasses more than that. As a matter of statutory interpretation that is made clear by the wording of s 27B(1) which indicates that an applicant may by reason of some particular characteristic be unable to exercise safely the privileges of the licence despite meeting the medical standards. It is also common sense that an applicant may have characteristics of a behavioural or psychological nature unrelated to the matters covered in the medical standards which might make him unfit to fly. But of course a failure to meet medical standards could of itself give rise to an inability to exercise safely the privileges of the licence.

[51] The Director has a specific power in s 27H(2) in respect of current medical certificates issued by non-CAA examiners. This was not relied upon in this case and could not have been at the time action was taken because that was more than 60 days after the issue of the medical certificate. (The initial review took place on 5 December 2006, well within the 60 day period). If action had been taken under that power, the Director would ultimately have had to decide whether the certificate should be reissued using the criteria in s 27B, that is, absent any particular characteristic, whether medical standards were met. Nor was the specific power in s 27I(3) relied upon. If it had been, the issue of whether Dr Lee was correct in finding that the appellant met the medical standards in the rules would also have had to be addressed head on.

[52] The existence of these specific powers militates against a construction of the more general power in s 27I(1) which would enable the limitations in the specific powers to be avoided. Furthermore the whole policy of Part 2A discussed above would be subverted^[16] if the section was construed in the way contended for on behalf of the Director. It would in effect enable the Director to exercise an unfettered power to review and overrule the assessment of a non-CAA examiner that an individual applicant met the medical standards and thus was entitled to a certificate

without even requiring the Director to make his decision on the basis of those criteria.

[53] I consider that when the safety issue is the medical condition of a licence holder whose certificate has been issued by a non-CAA examiner, the formation by the Director or his employee delegates of a different view to that of the examiner in respect of a matter covered by the medical standards cannot of itself amount to reasonable grounds for belief under s 27I(1) or (2) and therefore cannot found a notice under either of those subsections or any consequential action under s 27I(7). That is in effect what has happened in this case.

[54] That conclusion does not affect any of the other powers of the Director under Part 2A. The Director has the various specific powers in relation to such certificates under s 27I(3), s 27H and s 27C outlined above. Those powers were not invoked in this case and in most instances would not have been available because the various different preconditions for their exercise did not exist. The Director also retains the power under s 27G to issue General Directions after appropriate consultation with stakeholders as to how clinical data is to be interpreted by examiners.

[55] That conclusion is decisive of this appeal. There was no power under s 27I(1) or s 27I(7) for the Director to impose the conditions on 7 and 19 February 2007 because there was no legal foundation for the exercise of such powers. The^[17] appropriate course is to reverse those decisions.

[56] This judgment has in effect answered the 3 legal issues identified above but I am very conscious that it has not addressed the medical issue about which so much learned expert evidence was given, no doubt at considerable cost to the parties. I have considered whether it is appropriate to embark on a consideration of it. I have come to the firm conclusion that it would not be right to do so. It is truly academic. As the above discussion makes clear, under the legislation the decision as to whether the appellant meets the medical standards and therefore (absent any particular characteristic) should be issued with a medical certificate is to be made in accordance with the Rule and General Directions by the examiner he applies to. The Court's opinion as to whether he meets the medical standards or did so at the date of

hearing is of no import. The parties may need to address issues in relation to the current certificate in light of this judgment but that is not a matter before the Court.

[57] The appellant is entitled to costs. Leave is reserved for counsel to file memoranda within 30 days if the parties cannot agree between themselves.

C N Tuohy
District Court Judge