

**IN THE DISTRICT COURT  
AT MANUKAU**

**CRI 2007-092-004918  
CRI 2007-092-004922**

**CIVIL AVIATION AUTHORITY**  
Informant

v

**HELI CAM AVIATION LIMITED AND  
STEVEN CHARLES JOHNSTON**  
Defendants

Hearing: 29 October 2007

Appearances: Mr Woolford for Informant  
M A Muir for Defence

Judgment: 2 November 2007

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**RESERVED ORAL DECISION OF JUDGE M LEE**

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[1] Steven Charles Johnston and Heli Cam Aviation Limited face three charges each of operating an aircraft on 8 and 9 April and 7 May 2006 without holding the appropriate aviation document, namely an Air Operator Certificate issued in accordance with Part 119 of the Civil Aviation Rules. The charges are laid by the Civil Aviation Authority under s 46 of the Civil Aviation Act 1990. The aircraft concerned is a Robinson R44 helicopter. Mr Johnston is the company's chief executive officer and the pilot on the relevant dates.

[2] The facts are agreed and are as follows:

- The helicopter had a factory-fitted gyro stabilised film camera mounted just behind the front screen.
- In January 2006 the company applied for the requisite air operator certificate.
- An air operator certificate was issued on 31 May 2006.
- On the 8 and 9 April 2006 Mr Johnston flew the helicopter for the purpose of taking film footage of a boat race in the Hauraki Gulf. The company was engaged by the Takapuna Boating Club and charged \$3,900.00 plus GST for the two flights.
- On both flights Mr Hunter was on board as camera operator engaged by the company. On 9 April Mr Martin, a member of the boating club, was also on board.
- On 7 May 2006 Mr Johnston flew the helicopter for the purpose of taking film footage of the Finn brothers on a boat in the Auckland Harbour. The company was engaged by 60 Minutes of Channel Nine Australia and charged \$2,337.50 for the flight. Ms Illingworth was on board as the camera operator hired by the company.

[3] Mr Johnston's evidence was that he had always understood that under the Civil Aviation Rules the helicopter could be flown for a commercial purpose without a certificate. This was where he was not carrying passengers for hire or reward, as for example when only the pilot or the pilot and crew members were on board. Since the helicopter was a purpose built photographic platform with built in photographic equipment he had always understood that a photographer employed by the company to operate that equipment would be within the definition of 'crew member' in the Rules.

[4] Prior to the arrival of the helicopter he had sought clarification from the informant to ensure that his understanding was correct. His exchange of emails with

the informant, produced as annexures 1 and 2 to his brief of evidence, confirmed his understanding that:

- i) The rules permitted uncertified commercial operations under Part 91 where he was not carrying passengers for hire or reward.
- ii) If he carried a camera operator or a director of photography or presenter employed by the customer, he would need a certificate.
- iii) If the company provided its own camera operator the operation could be conducted under Part 91 without a certificate.

[5] This evidence was not challenged by the informant.

[6] It is common ground that the issues to be determined in this case are:

1. Was an Air Operator Certificate required in respect of each of the three flights?
2. If it is found that a certificate was required for the three flights, does an offence against s 46 of the Civil Aviation Act 1990 require proof of mens rea, or is it a strict liability offence with the onus on the defendant to prove absence of fault?

#### **Passenger or Crew**

[7] It is accepted by the defence that both Mr Johnston and the company 'operated' the helicopter on the relevant dates. The informant alleges that Mr Hunter, Mr Martin, and Ms Illingworth were all passengers carried for hire or reward and a certificate was required for the three flights. The defendants argue that Mr Hunter and Ms Illingworth were crew members within the meaning of the definition in Part 1 of the Civil Aviation Rules, and that Mr Martin was a passenger

but not carried for hire or reward. Therefore no certificate was required in respect of any of the flights.

[8] The relevant words of the relevant definitions in the Civil Aviation Rules are:

*Air operation* means an air transport operation or a commercial transport operation.

*Air transport operation* means an operation for the carriage of passengers ... by air for hire or reward except (1) a commercial transport operation, ...

*Commercial transport operation* means an operation for the carriage of passengers ... by air for hire or reward (1) where (i) each passenger is performing ... a task or duty on the operation.

*Crew member* means a person carried by an aircraft who is (1) assigned by the operator ... (ii) to perform a duty associated with the operation of the aircraft during flight time ...

[9] The informant says the three flights were commercial transport operations because each passenger was performing a task or duty associated with the operation. However in my view the operation must be an operation for the carriage of passengers for hire or reward in the first place. The fact that the helicopter was flown for reward did not make every person carried on it (barring the crew) a passenger for reward.

[10] In the present case, where the client is supplying the camera operator, the company is paid in my view to fly the client's camera operator as a passenger so that he or she can take the footage for the client. Where the company is supplying the camera operator the company is paid for the aerial footage which it procures by hiring its own camera operator. In my view the company is not carrying its own camera operator for reward. Quite the contrary, as Mr Muir pointed out, it has to pay the camera operator to get him or her to come on board.

[11] I accept the defendants' argument that the two camera operators were 'crew members' within the meaning of the definition. The helicopter was being operated for the purpose for which it was specially adapted, that is, the taking of aerial photography or film footage. In this context 'the operation of the aircraft' included not only the flying of the helicopter but also the operation of its camera equipment. In each case, the camera operator had been assigned by the company and/or Mr Johnston to perform the duty of camera operator, which was a duty associated with the operation of the aircraft.

[12] Mr Martin was in a different category. He was a member of the boat club who came along for the ride. But was he a passenger for hire or reward? The helicopter was paid to provide aerial footage. Mr Martin got a free ride. The fact he may have helped by pointing things out to the company's camera operator did not increase the fee paid to the company. He was not in my view carried for reward.

[13] I find that none of the three flights was an air transport operation or a commercial transport operation, and an air operator certificate was not required to operate any of the three flights.

#### **Mens rea/strict liability**

[14] That is enough to dispose of the case, but fortuitously His Honour Judge Blackie has just delivered a reserved judgment on the very issue whether an offence against s 46 is a strict liability offence or an offence requiring proof of a mental element. Much the same points were made to His Honour as were made to this Court. I am supplying a copy of His Honour's judgment to each side in this case. Rather than reinvent the wheel, I adopt Judge Blackie's careful and comprehensive analysis of s 46. For the reasons set out in his judgment, I conclude like him that an offence under s 46 requires proof of mens rea, in this case knowledge, at the very least, that a certificate was required in relation to each of the three flights.

[15] Mr Woolford has submitted that s 5(1) of the Interpretation Act 1999 has created a stronger emphasis towards purposive interpretation than its predecessor, s 5(j), so that the universal principle in *Sweet v Parsley* no longer applies. I have

since received from him photocopied pages from Brooker's Acts Interpretation. The learned authors express the view that where the purpose of the legislation is clear, its remedial intent should not be thwarted. They do not, however, go so far as to say that the Courts must strain to construe a legislative intent no matter how ambiguously expressed. I do not read s 5(1) as having the effect urged by Mr Woolford.

[16] Even if an air operator certificate was required on each of the flights, the facts are nowhere near establishing to the requisite standard that either defendant knew a certificate was required to be carried. The evidence is to the contrary, and the informant should have known that. Even if I were to find that s 46 creates a strict liability offence, I would have found total absence of fault on the part of the defendants in relation to the carriage of the two camera operators. I would have discharged the defendants under s 106 in relation to the flight of 9 April when Mr Martin joined the flight.

[17] The wording of s 46 and the relevant definitions in the rules are to say the least ambiguous and confusing. The informant could not have been unaware of this, considering the number of cases which have been taken under that section over the years, and the arguments that have been raised. In the present case any reasonable person would have read the Authority's response to Mr Johnston's enquiry as confirming his understanding of the law as I myself did as a matter of necessary application.

[18] It was suggested in cross-examination that he should have made further enquiries because the response did not say expressly that if the company hired its own camera operator then no certificate was required. I do not agree with the import of this cross-examination. In my view it was incumbent for the authority to make its response as clear as possible.

[19] I find it astonishing in the circumstances that the authority has initiated this action against the defendants. I am tempted to say the action is mean-spirited and even indicative of bad faith. The Authority would have done better to have spent its time and money on improving its governing legislation and associated rules, rather

than prosecute well-meaning aircraft operators who have taken that extra step to keep within the law.

[20] If counsel wish to make submissions on costs, I will hear them.

[21] All charges are dismissed.

A handwritten signature in cursive script, appearing to read 'M Lee', written over a horizontal line.

M Lee  
District Court Judge

gm