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# Federal Court of Australia

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## Lloyd Helicopters Pty Ltd v Civil Aviation Safety Authority (No 2) [2014] FCA 1070 (2 October 2014)

Last Updated: 3 October 2014

**FEDERAL COURT OF AUSTRALIA**

**Lloyd Helicopters Pty Ltd v Civil Aviation Safety Authority (No 2) [2014] FCA 1070**

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| Citation: | Lloyd Helicopters Pty Ltd v Civil Aviation Safety Authority (No 2) [2014] FCA 1070 |
| Parties: | **LLOYD HELICOPTERS PTY LTD v CIVIL AVIATION SAFETY AUTHORITY, DESMOND JOHN BYFIELD and GREG DEAL** |
| File number: | NSD 828 of 2014 |
| Judge: | **GRIFFITHS J** |
| Date of judgment: | 2 October 2014 |
| Catchwords: | **ADMINISTRATIVE LAW** – practice and procedure – interlocutory application to strike out points of claim |

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| | –discovery categories sought to be set aside – application dismissed |
| Legislation: | *Civil Aviation Act 1988* (Cth) s 9A |
| Cases cited: | *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337<br>*Lloyd Helicopters Pty Ltd v Civil Aviation Safety Authority* [2014] FCA 1009<br>*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24<br>*NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328; (2004) 214 ALR 264 |
| Date of hearing: | 2 October 2014 |
| Place: | Sydney |
| Division: | GENERAL DIVISION |
| Category: | CATCHWORDS |
| Number of paragraphs: | 18 |
| Counsel for the applicant: | Mr A Sullivan QC with Mr T Brennan |
| Solicitors for the applicant: | Norton White |
| Counsel for the respondents: | Mr B Shields |
| Solicitors for the respondents: | Legal Branch Civil Aviation Safety Authority |

**IN THE FEDERAL COURT OF AUSTRALIA**
**NEW SOUTH WALES DISTRICT REGISTRY**
**GENERAL DIVISION** **NSD 828 of 2014**

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| **BETWEEN:** | **LLOYD HELICOPTERS PTY LTD**<br>**Applicant** |
| **AND:** | **CIVIL AVIATION SAFETY AUTHORITY**<br>**First Respondent** |
| | **DESMOND JOHN BYFIELD**<br>**Second Respondent** |
| | **GREG DEAL**<br>**Third Respondent** |
| **JUDGE:** | **GRIFFITHS J** |
| **DATE OF ORDER:** | **2 OCTOBER 2014** |
| **WHERE MADE:** | **SYDNEY** |

**THE COURT ORDERS THAT:**

1. The interlocutory application is dismissed.
2. The applicant on the interlocutory application pay the respondent's costs.
3. The respondent is to file and serve points of defence by 8 October 2014.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA**
**NEW SOUTH WALES DISTRICT REGISTRY**

**GENERAL DIVISION** **NSD 828 of 2014**

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| **BETWEEN:** | **LLOYD HELICOPTERS PTY LTD**<br>**Applicant** |
| **AND:** | **CIVIL AVIATION SAFETY AUTHORITY**<br>**First Respondent** |
| | **DESMOND JOHN BYFIELD**<br>**Second Respondent** |
| | **GREG DEAL**<br>**Third Respondent** |
| **JUDGE:** | **GRIFFITHS J** |
| **DATE:** | **2 OCTOBER 2014** |
| **PLACE:** | **SYDNEY** |

**REASONS FOR JUDGMENT**

1. The Court has before it an interlocutory application filed by the respondent in the proceeding. The proceeding is in the nature of a judicial review. The judicial review application challenges both the conduct of the Civil Aviation Safety Authority (**CASA**) and also a decision by **CASA** which resulted in the cancellation of an exemption which had been granted to the applicant. The nature of the exemption was that the applicant be entitled to manage its rostering and deployment of a flight crew in accordance with a fleet risk management system and to be exempt from requirements which would otherwise apply under Civil Aviation Order No. 48.
2. The substantive application is to be heard over a five day period commencing 10 November 2014. The applicant has filed an amended originating process and amended points of claim. The points of claim which are the subject of the interlocutory application today are dated 22 September 2014. These points of claim are, as Mr Shields (who appeared for **CASA**) pointed out, somewhat unusual for a judicial review application, particularly by reference to their length. The points of claim are some 58 pages long and contain some 475 paragraphs.
3. In view of **CASA**'s interlocutory application, **CASA** has not yet filed a defence in response to those points of claim. Under the orders made on 5 September 2014, **CASA** was directed to serve points of defence by 26 September 2014. I also directed that an amended originating process and points of claim be filed and served by the applicant by 19 September 2014. As I have indicated, the points of claim which are the subject of the existing dispute were not filed and served until 22 September 2014.
4. The interlocutory application seeks to strike out many of the paragraphs of the points of claim on various grounds. I will return to these in a moment. It also seeks to set aside the Court's order by consent that discovery proceed by way of categories. I will also deal with this in a moment.
5. Mr Shields' objections to the pleading fall into various categories. The first category of paragraphs about which he complains, [96]-[117], contain allegations which are directed at an officer of **CASA** who was involved in the conduct of the audit which culminated in the cancellation decision. Some serious allegations are made against that officer arising from his prior employment with the applicant and which resulted in him being terminated

in 2005. The events leading up to that decision – and I express no view at this stage as to whether there is any substance in the allegations made – do raise some serious matters. The authorities are clear at this stage of the proceedings that the Court should proceed on the basis that allegations of fact pleaded ought to be accepted as having substance, particularly in the absence of any points of defence on the part of the respondent. It seems to me that the proper approach is for the Court to proceed on the basis that these allegations of fact will be made good; whether or not this is the case, of course, I hasten to add, remains to be seen.

6. Accepting this is the proper approach at this stage, the Court cannot accept **CASA**'s submission that the allegations which are made under the rubric of actual or ostensible bias are unarguable and ought to be struck out. Mr Shields argued that at the heart of the bias claims as directed at Mr Skeldon is the proposition that he has "enmity" towards the applicant. Mr Shields said that enmity alone would not be sufficient to make good a case of actual or ostensible bias.
7. I do not accept this is sufficient to disable the applicant from relying on the pleadings concerning actual and ostensible bias in this part of the points of claim. It will of course be a matter for the applicant at the trial to make good not only the factual matters pleaded against Mr Skeldon, but also to persuade the Court that the factual matters produce an actual or ostensible bias on the decision-maker's part. The Court can expect to hear argument on issues such as the nature and extent of Mr Skeldon's involvement in the conduct leading up to the making of the cancellation decision and the impact of any involvement he had on Mr Byfield, the ultimate decision maker. There is clear and ample scope for the parties to take a different viewpoint on these types of matters, but it seems to me that they are matters which are arguable and should be permitted to go to trial.
8. The second category of paragraphs to which objection was taken are those relating to the safety of the air navigation and, in particular, [456]-[466] of the points of claim. Those paragraphs, on one view, appear to raise matters going to the merits of choosing between an approach to the safety of air navigation which prefers compliance with Civil Aviation Order No. 48 in contrast with the approach reflected in an exemption which the applicant enjoyed until it was cancelled. Having regard to [466] of the pleading, it is evident that the applicant's intention is to raise a *Peko-Wallsend* inspired failure to take into account a mandatory relevant consideration argument (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24) by reference to the obligation of **CASA** under s 9A of the *Civil Aviation Act 1988* (Cth) to regard the safety of air navigation as the most important consideration in the exercise of its regulatory powers and functions.
9. Referring again to the approach to be taken at this stage of proceedings to pleadings for which no defence has been issued, I am not prepared to find at this stage that the allegation of failure to take into account mandatory relevant considerations is without substance. The matter ought to go to trial without me expressing any view as to the ultimate prospects of the argument succeeding.
10. The third category of paragraphs to which objection is taken are [36]-[95] of the points of claim. Those paragraphs are in many ways similar to the paragraphs relating to Mr Skeldon. They raise a series of matters concerning other **CASA** employees whom it is alleged had some role in the conduct of the audit or in the process leading up to the making of the cancellation decision. Mr Shields says that they ought to be struck out because they relate to events which are not directly concerned with the decision the subject of the challenge. I consider, however, that the matters appear to be raised in support of an argument as to a pattern of conduct which informs the applicant's case of actual or ostensible bias.
11. For similar reasons to those given above regarding Mr Skeldon, I am not satisfied that these paragraphs of the points of claim ought to be struck out. I drew the parties' attention in this respect to *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328; (2004) 214 ALR 264 at [115]. It remains to be seen whether Mr Sullivan QC can persuade the Court that his client's case fits within the principles to which Allsop J (as his Honour then was) alluded to in that decision in the context of ostensible bias, but, nevertheless, I consider that the allegations ought to be allowed to go forward. The applicant should be given the opportunity to persuade the Court that if the allegations are made good, the other relevant requirements laid down in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 are satisfied here.
12. The fourth category of paragraphs to which objection is taken is [141]-[161] of the points of claim. Those paragraphs relate in the main to events concerning the conduct of the 2014 audit. Mr Shields complains that, in substance, they are pleadings going to evidence, rather than material facts. It

appears that many of the paragraphs are in fact in the nature of a narrative chronology. It seems to me, however, that it is not unacceptable in a case where bias and unreasonableness are at the forefront of the judicial review challenge. I also consider that many events and matters raised there would appear to go to the question of the nature and extent of the participation of those against whom allegations of bias are directly made. I consider that these matters should be allowed to go forward to trial.

13. I fully understand Mr Shields' complaint that the consequence of allowing the matters to proceed to trial will require the Court to make findings of fact on a large range of matters. This is somewhat unusual in a judicial review case, but this is an unusual judicial review case because of the prominence given to bias, actual and ostensible, and multiple allegations of unreasonableness in decision making. The fact that the hearing and determination will take considerable time is not of itself sufficient to have the pleadings struck out in respect of the matters raised by the applicant.
14. I also take into account the indication given by Mr Sullivan QC (who appeared with Mr Brennan on behalf of the applicant) in his written submissions that as long as the parties adopt a disciplined approach the matter is capable of being heard and determined within the five days allocated. I trust that that assessment is correct, because I have made clear that the Court has only five allocated days for that purpose. Mr Sullivan QC included in his outline of submissions at [104] a timetable which is directed to ensuring that the matter is completed within five days. On the face of it, the timetable seems reasonable.
15. The second aspect of the interlocutory application relates to discovery. The applicant seeks to have the order for discovery made by consent on 5 September 2014 set aside. Reference was made to categories of discovery being unnecessary and burdensome. If I have understood the case correctly, Mr Shields says that the categories (or at least some of them) are unnecessary and relate to matters not directly concerned with the decision to cancel the exemption. Mr Shields acknowledged that these matters are the same in respect of which his earlier objection was directed to the points of claim, which relate to other regulatory engagement between the applicant's business and **CASA**. Just as I have indicated that I am not satisfied that the applicant should be precluded from taking its case to trial insofar as its allegations concerning bias and unreasonableness are concerned, it necessarily follows that the categories of discovery relating to those matters ought not be set aside at this point. All the more so in circumstances where, to date, the respondent has not filed points of defence.
16. As I have indicated in an earlier interlocutory application (see *Lloyd Helicopters Pty Ltd v Civil Aviation Safety Authority* [2014] FCA 1009), for disputes about discovery to be meaningful, they should be conducted within a proper pleading framework. This framework does not exist without the benefit of seeing **CASA**'s response to the points of claim.
17. I should also emphasise that Mr Shields emphasised in argument that many allegations of fact, especially those of a serious nature relating to actual and/or ostensible bias, will be contested.
18. For all these reasons, I would dismiss the interlocutory application and order the applicant on the interlocutory application to pay the respondent's costs.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths.

Associate:

Dated: 2 October 2014

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