IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2013-425-310
[2016] NZHC 976

BETWEEN	HELI HOLDINGS LIMITED Plaintiff
AND	THE HELICOPTER LINE LIMITED First Defendant
AND	TOTALLY TOURISM LIMITED Second Defendant

Hearing:	6, 7, 11-15 and 18-22 May 2015 15-20 and 24 June 2015 6 July 2015
Appearances:	D J Heaney QC, A K Hough, S J Wethey for the Plaintiff T C Weston QC, R S Cunliffe, O B Wensley for the Defendants
Judgment:	16 May 2016

JUDGMENT OF NATION J

Contents

Introduction

[1] In 2002, Heli Holdings Limited (Heli Holdings) and The Helicopter Line (THL) entered into a business relationship that could have continued for 20 years. Heli Holdings was to own, maintain and lease to THL eight helicopters. THL was to fly those helicopters in its tourism business in the South Island. The relationship broke down in July 2013. On the basis of claimed concerns about maintenance and safety, THL refused to continue flying the helicopters. In this judgment I must decide what, if any, liabilities result from that situation.

[2] The major issue in this case relates to Heli Holdings' claim for damages against THL and Totally Tourism Limited in respect of unpaid use charges for the helicopters and the loss of future income. There are two other discrete claims arising out of the contractual arrangements between Heli Holdings and THL. I will deal with the subsidiary claims after first dealing with the major claim.

The main participants

[3] Heli Holdings is the plaintiff company. It owns and leased eight helicopters to the defendants. The shares in Heli Holdings are owned by Airwork Holdings Limited. Its maintenance obligations, in terms of the lease, were performed by Airwork (NZ) Limited.

[4] Airwork (NZ) Limited provides helicopter maintenance and engineering support. It operated from maintenance bases at Queenstown, Timaru and Glentanner near Mount Cook.

[5] Airwork Holdings Limited provides maintenance and engineering services for fixed wing aircraft and helicopters in the North Island. In New Zealand, in that business, it is second in size to Air New Zealand. It has a major engineering base at Ardmore in Auckland and employs approximately 400 people. It also maintains and leases helicopters to major overseas businesses in places such as Australia, Papua New Guinea, South Africa and Germany. Airwork Holdings Limited was listed as a public company in November 2013.

[6] Airwork (NZ) Limited and Heli Holdings have pooled resources and personnel in dealing with the business and operations involved in the leasing of the eight helicopters to the first defendant. In this judgment I will often refer to Airwork in describing how Heli Holdings, in conjunction with others, dealt with particular issues.

[7] Mr Hugh Jones qualified as a pilot in 1968. He started Helicopter Specialties Limited, a helicopter services business, in 1974. Mr Jones, with another investor, established Airwork (NZ) Limited in 1984. The company has changed its name twice and is now Airwork Holdings Limited. Mr Jones was the managing director of Airwork Holdings Limited from 1984 until 2006, an executive director until 2013 and is now a non-executive director. He, or entities associated with him and his family, still has a majority share interest in Airwork Holdings Limited.

[8] Mr Chris Hart had commercial roles within Heli Holdings and Airwork before 2010. From 2010, he was chief operating officer for Heli Holdings and Airwork. In late 2013, he became chief executive officer (CEO) of both Heli Holdings and Airwork.

[9] THL is the first defendant. This company's business is in the tourism sector. It has concessions from the Department of Conservation allowing it to land in national parks in the South Island. It offers scenic trips to the Mount Cook, Mount Aspiring and Fiordland National Parks from bases at Glentanner near Mount Cook, Twizel, Queenstown and Franz Josef. It offers private charters, undertakes commercial work and also ferries skiers to various mountain areas for heli-skiing activities. It provides helicopters to the Police for search and rescue work.

[10] Mr Mark Quickfall and his wife acquired THL in 2002 to lease eight helicopters from the plaintiff and to engage in the helicopter-based tourism industry. In 2011, Mr and Mrs Quickfall sold their interest in this company and other businesses to the publicly listed company Skyline Enterprises Limited (Skyline). Mr Quickfall remains as a director of THL.

[11] Totally Tourism Limited is the second defendant and is a tourism-based company situated in Queenstown. It was originally owned by the Quickfall interests but, as with THL, is now owned by Skyline. It was through this company that Mr and Mrs Quickfall had an interest in a number of tourism businesses including THL. It is the guarantor of THL's contractual obligations.

[12] Skyline now owns the shares in Totally Tourism Limited and thus controls the shares in THL. One of its directors, Mr Ken Matthews, is, along with Mr Quickfall, a director of THL. Its CEO, Mr Jeffrey Staniland, is also CEO of THL.

[13] Mr Grant Bisset is an experienced helicopter pilot. He began flying for THL in 2005. He subsequently became lead pilot. In 2010, he became operations manager for THL. He is also general manager, Aviation, Operations and Tourism for Totally Tourism Limited.

[14] The Civil Aviation Authority of New Zealand (CAA) is not a party to the proceedings but was often referred to in evidence. Pursuant to the Civil Aviation Act 1990, it effectively regulates the civil aviation industry in New Zealand, licenses those who are permitted to fly aircraft and those who are able to maintain or provide engineering services to aircraft operators. It audits the performance of all those who are involved in the aircraft industry, whether in flying aircraft or in servicing them. The aircraft industry, whether for fixed wing or helicopters, is intensively regulated and controlled to ensure that all those who use aircraft are safe.

[15] The eight helicopters initially leased by the plaintiff to THL were AS355F1 helicopters ("the twins") built by Eurocopter, now known as Airbus, a business in France. They are twin engine helicopters.

[16] At various times, when THL was flying Heli Holdings' helicopters, it wanted to replace some or all of the twins with Eurocopter single engine helicopters ("the singles"). As at July 2013, one of the twins had been replaced by a single, an AS350SD helicopter.

The major claim

The plaintiff's case - overview

[17] Heli Holdings' claims that in 2002 it leased eight helicopters to THL. With Heli Holdings having the right to renew the contractual arrangements, the lease of the helicopters could have continued until 22 August 2022. In terms of the lease, THL was to pay for the hours the helicopters were flown but with payment for a specified minimum number of hours each year.

[18] I refer to the claimed liability for the difference between hours flown and the minimum hours required as a claim for "shortfall hours".

[19] Heli Holdings claims $6,059,666.60 for shortfall hours due in terms of the lease for the years from 1 July 2008 to 24 March 2015. Heli Holdings denies it repudiated its contract with THL in early July 2013 but says that, if it was in breach of its contract, THL cannot rely on such a breach or repudiation because it affirmed the contract with knowledge of Heli Holdings' alleged breaches of the contract. Heli Holdings claims that THL wrongly repudiated the contractual arrangements by cancelling the contract in writing on 20 February 2015. In response to that wrongful repudiation, Heli Holdings cancelled the contractual arrangements on 24 March 2015. Heli Holdings claims $10,147,097 for the loss of expected profits and additional expenses for the period from 24 March 2015 to 22 August 2022.

The defendants' case - overview

[20] THL claims:

(a) The contractual arrangements with Heli Holdings required Heli Holdings to provide maintenance support to "best industry standards" and to deal with THL in good faith so THL could be confident its pilots and passengers could fly in the helicopters safely.

(b) Heli Holdings, in terms of the contractual arrangements, was required to negotiate with THL reasonably and in good faith to replace the

leased helicopters with different models that would be better suited for use in THL's market.

(c) Pursuant to an agreement reached in 2008, Heli Holdings was required to negotiate in good faith with THL to change the system for charging THL for shortfall hours and the formula for dealing with unscheduled unavailability.

(d) Pursuant to an implied term of the agreement, Heli Holdings had to ensure the weight of the leased aircraft did not increase during the term of the lease so as to reduce the passenger-carrying capacity of the aircraft.

[21] THL claims that Heli Holdings failed to meet these obligations, under the lease arrangements for the period after 1 July 2008, so THL should not have to pay for shortfall hours for the period from 1 July 2008 to 30 June 2013.

[22] THL claims that by 4 July 2013 Heli Holdings was in breach of its contractual obligations to such an extent that it had either repudiated its contract with THL or was so significantly in breach as to justify THL cancelling the contract. THL claims it cancelled the contract through grounding the leased helicopters on 4 July 2013, putting the helicopters under the control of Heli Holdings and refusing to either fly them or make any further lease payments for them. Irrespective of whether there was a cancellation, THL says Heli Holdings is not entitled to claim for shortfall hours after 4 July 2013 because of Heli Holdings' repudiation/breach of the contract. THL and Totally Tourism Limited, as guarantor for THL, accordingly say they do not have to pay for shortfall hours after 4 July 2013.

[23] THL and Totally Tourism Limited claim THL's written cancellation of the contractual arrangements on 20 February 2015 was justified if there had not been an earlier cancellation by conduct. Accordingly, THL and Totally Tourism Limited say they are not liable to Heli Holdings for any loss Heli Holdings may suffer in respect of lost income beyond 20 February 2015.

The issues

[24] THL claims that any obligations it had under the contract ended at the latest on 4 July 2013. Heli Holdings' claim relates to financial years beginning 1 July 2008. Because 4 July is so close to the end of the financial year, I deal with the relevant demarcation of the claim period as being to 30 June 2013 and from 1 July 2013.

[25] In summary, the issues for me to determine are:

(i) In the period from 1 July 2008 to 30 June 2013, was Heli Holdings in breach of its obligations to THL?

(ii) If Heli Holdings was in breach of its obligations, did that entitle the defendants to avoid paying for the shortfall hours for the period from 1 July 2008 to 30 June 2013?

(iii) If THL is liable for shortfall hours for the period from 1 July 2008 to 30 June 2013, what damages is Heli Holdings entitled to?

(iv) By 4 July 2013, had Heli Holdings repudiated the contract or was it in breach to the extent THL was entitled to cancel the lease?

(v) Did THL cancel the contractual arrangements by conduct through its actions in grounding the fleet of helicopters and associated actions on or after 4 July 2013?

(vi) If not, was Heli Holdings entitled to payment for the shortfall hours from 1 July 2013 to 20 February 2015?

(vii) If it had not cancelled the contractual arrangements earlier, was THL entitled to cancel the contract on 20 February 2015?

(viii) If THL was not entitled to cancel the contract on 20 February 2015, given Heli Holdings' cancellation of the contract on 24 March 2015,

what liability does THL have to Heli Holdings for the period from 20 February 2015 to 22 August 2022?

Summary of judgment

[26] The agreement to provide maintenance in accordance with "best industry standards" and in "good faith" required Heli Holdings to do more than just comply with the requirements of the aircraft manufacturer and the CAA. To provide maintenance in accordance with "best industry standards", Heli Holdings also had to abide by the principles of "just culture". This is a philosophy which is recognised in the industry as being of fundamental importance in ensuring that air transport is safe.

[27] In the circumstances of this case, it required Heli Holdings/Airwork to take concerns raised by THL over maintenance seriously, to initially treat them as valid, to investigate them carefully and to avoid attributing blame unless it was essential and then only after proper investigation. Adherence to the principles of "just culture" had to allow frank, open and respectful communication as to potential problems, and an objective and considered response to issues raised to ensure the aircraft operator could continue to have trust and confidence in the maintenance of its aircraft.

[28] In the period 2008 to June 2013, there were occasions when engineers and the most senior people within Heli Holdings/Airwork displayed an attitude towards THL which was inconsistent with "just culture" obligations.

[29] Adherence to the philosophy of "just culture" and the obligation to provide maintenance support in accordance with "best industry standards" required Heli Holdings to not only react appropriately to notice of potential problems but also to be proactive in ensuring problems did not arise. This required Heli Holdings to have the resources, engineering personnel and systems available in the South Island for the maintenance of the aircraft being flown by THL. In the period 2008 to 2013, that was not always the case.

[30] Over the years 2008 to 30 June 2013, there were a number of serious incidents where Heli Holdings had failed to comply with minimum standards.

[31] On five occasions in 2008 and 2009 a helicopter was released for service with serious and dangerous defects, resulting from maintenance being carried out in a manner which breached manufacturer and CAA requirements.

[32] In 2008, 2010 and 2011, there were four incidents of tools or other foreign objects being left in aircraft after maintenance was completed where they could either damage an aircraft or interfere with the pilot's ability to fly the aircraft.

[33] Incidents over 2008, 2009 and 2010 culminated in Heli Holdings having to withdraw from service an aircraft that was found to be flying with ex-military blades. The installation of ex-military blades is strictly prohibited, would render an aircraft non-airworthy and is potentially serious. The purchase of the blades at a heavily discounted cost had been approved by Mr Jones. Although Heli Holdings had been induced to make the purchase through fraud, Heli Holdings/Airwork should have had a system and personnel in place to avoid this happening.

[34] In the early months of 2011 and again in February 2012, on a number of occasions, pilots experienced a sudden loss of power in one of the twin's engines and what is known as a torque split. Such an event puts a pilot and their aircraft generally under stress. The pilot is required to compensate for a loss of power in one engine through making demands on the other engine which can result in safe operational limits for that engine being exceeded. These incidents resulted from a defect in a sealed unit which could not be attributed to poor maintenance. Heli Holdings, nevertheless, did not always deal with these problems in accordance with "best industry standards". On a number of occasions, comments were made within Airwork that THL was raising these concerns for commercial advantage in its negotiations with Heli Holdings. Heli Holdings did not always treat the concerns as valid and serious, impacting on the safety of THL's operation.

[35] In August 2012, Heli Holdings was significantly in breach of minimum standards in returning an aircraft to service after maintenance with the blades in the wrong sleeves.

[36] The number and seriousness of maintenance-related incidents and faults did reduce over 2011 and 2012 but, against the background of what had occurred previously, THL was justified, as at the end of 2012, in being vigilant and concerned as to the adequacy of the maintenance support it was receiving from Heli Holdings. It was apparent that senior people within Airwork considered THL's concerns around that time and the issues raised were not genuine but a fabrication or overstated for financial gain to assist THL in negotiating for the replacement of twins with singles and for a change to the commercial terms of their continuing relationship.

[37] On 3 January 2013, a pilot flew an aircraft with tourists to the Gorilla Creek landing site, a ledge at 7,000 feet on Mount Cook. When the pilot and passengers were out of the aircraft and the blades should have been locked in a stationary position, the blades moved and the aircraft began rocking backwards and forwards, shedding debris. The pilot and passengers had to be taken off the mountain in another aircraft. The next day, an Airwork engineer permitted a pilot to try and fly the aircraft back to base with a damaged starter motor and unidentified debris on the engine floor. The attempt to fly the aircraft was aborted when, during an initial hover check, there was an engine surge and it was found a fuel line had broken.

[38] Subsequent investigations confirmed there had been significant failings in the way the engineer had permitted this aircraft to be flown after 31 December 2012 without observed defects having been properly investigated. The engineer's decision to permit a pilot to fly the aircraft on 4 January 2013 was also a breach of Civil Aviation Rules and "best industry standards". The engineering failings associated with the Gorilla Creek incident had created serious avoidable risks, including a risk of fatalities, for all those who had been in the aircraft.

[39] Faced with concerns raised by THL over the incident, at the direction of Mr Jones, Heli Holdings had responded prematurely without adequate investigation, attributing what had happened, wrongly, to pilot error. Its response to the whole situation was the antithesis of what is required by "best industry standards" and adherence to the principles of "just culture".

[40] Following the findings of an independent engineering expert who had investigated the incident, THL lost confidence in the support being provided by Heli Holdings/Airwork.

[41] On 15 April 2013, there was a meeting between senior representatives from THL and Heli Holdings to discuss maintenance concerns and operational issues. Mr Jones did not attend that meeting. At that meeting, Heli Holdings' representatives acknowledged there had been problems in relation to maintenance support and that, with the history of all that had occurred and if there had been a fatality in connection with the Gorilla Creek incident, the parties would have had a lot to answer for. They agreed that Heli Holdings needed to address those concerns and take steps to restore THL's confidence in the maintenance and engineering support it was receiving.

[42] The directors and chief executive of THL proceeded on the assumption that Heli Holdings had acknowledged their concerns and was committed to improving the maintenance support which THL required and was entitled to.

[43] Over the period 1 July 2008 to 30 June 2013, THL had continued to fly the aircraft. Until an agreement was reached otherwise, the parties' rights and obligations remained as in the contract which was continuing. That contract required THL to pay for shortfall hours. The proved liability in respect of shortfall hours over that period was $2,015,724.72.

[44] THL did not seek, either through evidence or submissions, to establish that it suffered a financial loss as a result of breaches of contract over that period. It did not bring any counterclaim or seek any set-off on the basis of such a loss. Accordingly, Heli Holdings is entitled to judgment jointly and severally against THL and Totally Tourism as guarantor for $2,015,724.72 together with interest, under the Judicature Act 1908 on that sum as from 26 September 2013 when it filed proceedings.

[45] On 2 July 2013, Mr Jones made statements in a conference call to THL directors which showed he rejected any possibility that THL could have genuine concerns about the standard of maintenance provided by Heli Holdings/Airwork in the South Island. Mr Jones denied there was any need to improve that maintenance

support and dismissed the significance of the 15 April 2013 meeting in saying that Heli Holdings did not consider THL's minutes of the meeting were correct. He was adamant that Heli Holdings' obligation was only to be CAA-approved and THL's obligation was to fly the aircraft and pay all that was due. In making these statements, Mr Jones made it clear that Heli Holdings would not provide maintenance support in accordance with "best industry standards" or honour the obligations associated with adherence to the principles of a "just culture". He continued to do so after 2 July 2013, particularly through his dismissal of the validity of THL's complaints and his statements that Airwork had only to provide aircraft that were CAA-approved and airworthy. In that way, Heli Holdings continued to be seriously in breach of the contract. The parties had agreed that the obligation on Heli Holdings to provide maintenance support in accordance with "best industry standards" and in good faith was essential to THL.[1] Heli Holdings' breach of its obligations through the statements and conduct of Mr Jones substantially varied the benefit and burden of the contract to THL.[2]

[46] The conflict and distrust at operational level within the organisations created risks for the safety of THL's operation and the reputation of its business. Given Mr Jones' attitude and the way it affected the maintenance and engineering support available to THL, THL was justified in refusing to fly the Heli Holdings' aircraft after 4 July 2013. THL thus obtained no benefit from the contract.

[47] THL did not cancel the contract by conduct before 20 February 2015. Nor did THL, with knowledge of the continuing breach, affirm the contract. Because Heli Holdings continued to be in breach of contract, THL was entitled to cancel the contract, as it did, on 20 February 2015.

[48] Because Heli Holdings had continued to be seriously in breach of contract and THL had obtained no benefit from the contract, THL has no liability for shortfall hours, loss of profits or other expenses for the period after 2 July 2013.

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1 Contractual Remedies Act 1979, s 7(4)(a).
2 Section 7(4)(b)(iii).

[49] It was an implied term of the contract that the weight of the aircraft would not increase so as to reduce the passenger-carrying capacity of the aircraft and thus have a negative impact on THL's tourism and other operations with the aircraft in the South Island. Over the period 2008 to 2013, THL complained over actual or potential weight increases. It did not ask for the weight of the aircraft to be reduced but referred to weight increases as a further reason why some or all of the twin engine aircraft originally leased to THL should be replaced with single engine aircraft as the contract contemplated might be appropriate. In April 2013, the issue of weight increases was discussed at the meeting of senior representatives from THL and Heli Holdings. Heli Holdings took steps to reduce the weight of the aircraft to a level that THL's chief pilot indicated would be acceptable, at least in the interim. There was no evidence that Heli Holdings would not continue with that work after the April meeting. THL did not pursue any claim for loss suffered as a result of the increase in the weight of the aircraft. The increase in the weight of the aircraft did not avoid or reduce THL's liability for unpaid charges for the period from 1 July 2008 to 30 June 2013. To the extent any weight increase with the aircraft may have continued after 1 July 2013, it was not a breach which justified THL refusing to fly the aircraft after 4 July 2013 or to cancel the contract on 20 February 2015.

[50] The contract between Heli Holdings and THL was recorded in the original 2002 agreement and two further agreements resulting from mediations in 2006 and 2007. Those agreements required Heli Holdings and THL to review and negotiate in good faith over the mix of aircraft that Heli Holdings was to make available to THL and thus their suitability, having regard to the nature of THL's operations, including market requirements. They had also agreed to review a formula in the contract for dealing with the unavailability of aircraft and the system for charging for THL's shortfall hours.

[51] The parties negotiated over these issues during the period 1 July 2008 to 30 June 2013, not strictly in the manner or within the timeframe they had agreed to but in a manner which both parties tolerated. Heli Holdings did not invoice THL for shortfall hours at the end of each financial year. The negotiations intensified after the public company Skyline became the owner of THL and Totally Tourism Limited

in 2011. In late 2012 and through to 21 June 2013, it appeared the parties had made considerable progress in these negotiations.

[52] The proposals and counter-proposals made by Heli Holdings were always conditional on obtaining Board approval. In the circumstances, in a practical sense, that meant subject to the approval of Mr Jones. Heli Holdings also repeatedly made it clear that the negotiations were without prejudice and that the terms of the contract were continuing to apply until the parties had agreed otherwise.

[53] With the way these discussions proceeded over the years 1 July 2008 to 30 June 2013, Heli Holdings was meeting its obligations to review certain aspects of the contract. There was no claim, evidence or submissions as to any loss suffered by THL in relation to any breach of these obligations over this period. THL could not avoid or reduce its liability for the minimum hour charges for the period through to 30 June 2013 because of Heli Holdings' conduct with regard to the negotiations over that time.

[54] Heli Holdings was under an obligation to continue negotiating with THL over the mix of aircraft, the system for charging for shortfall hours and the formula for dealing with unavailability after 21 June 2013. Mr Jones' refusal to engage with THL over reasons for rejecting proposals that had been presented to Heli Holdings as at 21 June 2013 and his dismissing those proposals without adequate consideration of the correspondence and discussions which had taken place between THL and Heli Holdings up to that point was in breach of the obligations on Heli Holdings to review these matters in good faith. There was no indication that Mr Jones would deal with these issues in any different way over the period between 1 July 2013 and 20 February 2015. On that basis also, Heli Holdings continued to be in breach of contract. Although this was not the reason for THL refusing to fly the aircraft after 4 July 2013, this provided a further defence to the claim for payment for shortfall hours after 4 July 2013 and justification for the cancellation of the contract on 20 February 2015.

[55] Heli Holdings claimed $151,762.74 for the cost of repairing an engine after it had overheated due to pilot error. Allowing for betterment and Heli Holdings'

obligation to pay half the costs, THL's maximum liability, in respect of this incident, was $54,418.70.

[56] On the pilot's account of his actions at the time, he had not been in error. Heli Holdings could prove pilot error only through proving that what occurred was not caused by a defect in an engine component, namely the fuel control unit (FCU). There was a report that this unit had been checked without any defect being apparent. Neither the pilot nor any engineer associated with the checking of the FCU was called as a witness. In other instances, there were problems with a component, including a FCU, without the actual defect having been identified. In these circumstances, the evidence was insufficient to prove that, on the balance of probability, the damage resulted from pilot error. Heli Holdings' claim as to the over-temperature incident is dismissed.

[57] THL claimed $383,437.42 on account of what it argued had been an over-payment for the hours flown in the 2006/2007 year. THL argued that, in accordance with the contract, the hourly rate for use of the aircraft had to be discounted by 12 per cent per hour if the hours actually flown were more than 3,500. Heli Holdings argued that the discount applied only to the hours in excess of 3,500. The interpretation advanced by Heli Holdings is correct. THL was thus not entitled to any credit based on the interpretation it advanced. On that basis, its counterclaim for this amount must be dismissed. Although I did not finally decide the point, it is also possible its claim could have been barred by the Limitation Act 1950.

[58] Heli Holdings is thus entitled to judgment against THL and Totally Tourism Limited for $2,070,143.42 plus interest. THL and Totally Tourism are entitled to a declaration that they have no liability to Heli Holdings on the basis of the contract between them for any period after 4 July 2013.

The contractual arrangements

[59] In 1998 Mr Jones, through Airwork (NZ) Limited, and Tourism Holdings Limited were involved in a joint venture company, Heli Holdings. Mr Quickfall had been general manager of the leisure division of Tourism Holdings Limited. Heli Holdings acquired eight twins operated in the South Island by Tourism Holdings

Limited. Airwork, through an associated company, provided maintenance support for the twins.

[60] In 2002, Tourism Holdings Limited wished to exit the joint venture. It sold its interest in Heli Holdings to Airwork (NZ) Limited. It sold its helicopter operations business to THL.

The 2002 agreement

[61] By an agreement dated 22 August 2002, Heli Holdings agreed to lease the eight twins to THL. Totally Tourism Limited guaranteed the performance of all of THL's obligations under the agreement. Relevant terms of the agreement included:

(a) The agreement was to commence from the time THL took over the business known as The Helicopter Line.

(b) THL agreed to pay a rent for the aircraft of $925 plus GST per flying hour.

(c) The rent was to cover all costs relating to:

i. rent;

ii. maintenance costs (except for minor maintenance work); and

iii. hull liability insurance for the helicopters and public liability insurance with respect to the aircraft.

(d) The price per hour was to be reviewed in June of each year so that it was an amount equal to the initial price per hour or an amount equal to that initial price plus an amount agreed to by the parties (such agreement not to be unreasonably withheld):

i. with reference to any increased third party costs incurred by Heli Holdings (including, but not limited to, insurance); and

ii. not greater than the weighted percentage increase (if any) over the retail adult ticket prices of the helicopters' scenic flights for the most recent past year.

(e) THL was to pay the price for actual flying hours of the aircraft used in a calendar month on the 20th of the succeeding month. THL had to provide Heli Holdings with an operational report on a weekly basis detailing hours flown and a copy of the aircraft trips record for the previous month within two business days from each month's end.

(f) THL had to "achieve minimum use" of the twins for 3,825 hours per annum (1 July to 30 June).

(g) The amount payable for shortfall hours was to be the amount equal to the shortfall hours multiplied by 75 per cent of the agreed price per hour. Such amount was payable by THL as soon as practicable and, in any event, no later than 31 July for the period 1 July to 30 June of the preceding year.

(h) In determining the shortfall hours, no account was to be taken of flying hours for which aircraft were not available to THL because of non-scheduled maintenance or for any other non-agreed maintenance. This provision was not to apply where the reason for such unavailability was beyond the reasonable control of Heli Holdings. The parties were to agree such hours, if any, on a monthly basis and if necessary in June of each year.

(i) THL was to use its best endeavours during the term of the agreement to maintain any permit, licence or other authority from any party to operate scenic or other flight operations.

(j) If THL intended to sell any of its concessions or if it had to because of financial constraints, insolvency, liquidation or receivership, then Heli Holdings was to have a first right of refusal to take over such

concessions except for options already granted to Glentanner Park (Mount Cook) Limited and Glentanner Station Limited. If THL's business was adversely affected by a loss or change to the concessions, then "without limiting either party's other rights or remedies, the parties may agree to review and renegotiate the number of helicopters to be supplied and hours to be flown on terms and prices as mutually agreed" (such prices not to be less than the then current price per hour).

(k) Subject to the existing options granted to Glentanner Park (Mount Cook) Limited and Glentanner Station Limited, if THL at any time wished to sell all or any part of its business or if Heli Holdings wished to sell all or any of the aircraft to an independent third party, each was to give the other the option to purchase the business or the aircraft on the same terms as there could be a sale to a third party.

(l) Heli Holdings had to maintain and insure the helicopters.

(m) Heli Holdings was to maintain third party legal liability insurance cover of US$20 million with both Heli Holdings and THL noted on each policy as co-insured in respect of all liabilities.

[62] The agreement included the following clauses:

> **5. Review of Aircraft requirements**
>
> 5.1 The parties will meet prior to 30 June in each year during the Term to review the Aircraft mix to determine the seasonal capacity requirements of The Helicopter Line. The parties may mutually agree in writing to change the mix of aircraft comprising the Aircraft, the Base Price, relocation costs and other terms of this Agreement.
>
> 5.2 The parties acknowledge that further helicopters by mutual consent may be added to and be subject to the terms of this Agreement. The Helicopter Line and the Guarantor each further acknowledge that if either requires to hire helicopters additional to the Aircraft for the purposes of its, or any of its subsidiaries' or related companies' or companies which are associated by having common shareholders, scenic or other flight operations then The Helicopter Line and/or the Guarantor (as the case may be) shall offer, or shall procure to have offered to, Heli Holdings a first right of refusal to supply such helicopters or aircraft to The Helicopter Line and/or the Guarantor (as the case may be) on commercial terms and conditions (and in any

event on terms and conditions no less favourable to Heli Holdings as offered by any third party).

5.3 For the avoidance of doubt, Heli Holdings may replace the number and mix of Aircraft at any time in its sole discretion provided that the total seat capacity available to The Helicopter Line remains at least the same as at the Commencement Date and such replacement helicopters are suitable for the Business and that The Helicopter Line is not disadvantaged in terms of the price or financial returns it would otherwise have received under this Agreement.

5.4 The parties acknowledge that during the Term environmental laws or regulations or market demand could impact on the Ability to operate AS355 F1 helicopters under the terms of one or more of the Concessions. In such circumstances, the parties agree to negotiate a mutually acceptable plan to deal with such situation with a view to protecting the interests of both parties.

6. Maintenance of helicopters

6.1 Subject to The Helicopter Line's obligations to undertake and meet the costs of Minor Maintenance Work, all maintenance work with respect to the Aircraft will be provided by Heli Holdings.

6.2 Subject to any provision of this Agreement, Heli Holdings shall:

(a) maintain, service, repair, modify and overhaul the Aircraft:

(i) as required to meet the standards applied by either the Manufacturer or the Aviation Authority with respect to aircraft of the same type;

(ii) so as to keep the Aircraft in good working order, condition, state and repair, in efficient operating condition and airworthy in all respects in accordance with the requirements of the Manufacturer and the Aviation Authority including without limitation air transport requirements;

(iii) so as to ensure that the Aircraft remains certified by the Aviation Authority with appropriate airworthiness certificates provided that the Aircraft is in an airworthy state;

(iv) in accordance with the Approved Maintenance Programme;

(b) comply, or procure compliance, in relation to all matters concerning the repair, maintenance, modification, overhaul and servicing of the Aircraft or otherwise howsoever with all applicable laws, directives, mandatory bulletins and requirements of the Aviation Authority and government agencies, all mandatory requirements of manufacturers, including mandatory servicing bulletins and airworthiness directives; and

(c) maintain, complete and keep current the Manuals and Technical Records (except to the extent such Manuals and Technical Records are required to be maintained by The Helicopter Line or any pilot who is employed, contracted or otherwise engaged by The Helicopter Line).

…

8. Concessions

…

8.3 If:

(a) The Helicopter Line fails to renew any of the Concessions; or

(b) any of the Concessions are revoked or withdrawn; or

(c) The Helicopter Line's rights under any Concession are, in the reasonable opinion of Heli Holdings, adversely affected, or

(d) any other event, in the reasonable opinion of Heli Holdings, affects The Helicopter Line's rights under the Concession then, without limiting either party's other rights or remedies, the parties may agree to review and renegotiate the number of helicopters to be supplied and hours to be flown on terms and prices as mutually agreed (such prices not to be less than the then current Base Price).

…

10. Heli Holdings' representations and warranties

10.1 Heli Holdings represents and warrants to The Helicopter Line that:

(a) …

(b) it will at all times perform its duties under this Agreement diligently and in good faith and in accordance with best industry standards and use best endeavours to ensure the Aircraft are available for use by The Helicopter Line as and when reasonably required for commercial operation subject to scheduled maintenance requirements of the Aircraft.

[63] The agreement could be terminated at any time by mutual consent in writing. Otherwise, it was to continue in force for an initial term of ten years with either party having the right to "extend the initial term by up to two periods of five years each by giving notice in writing to the other party not less than 30 days prior to the expiry of the relevant term".

[64] Between 2002 and 2006, THL flew the eight twins but for less than the minimum hours required by the 2002 agreement. There were certain disputes over maintenance and availability issues. Mr Quickfall began raising issues as to the suitability of the twins for THL's operations.

[65] With the disputes over these issues and Heli Holdings' demands for payment in respect of shortfall hours, a mediation took place in Queenstown on 25 May 2006.

The 2007 agreement

[66] On or about 8 May 2007, a variation agreement was signed implementing agreements that had been reached at mediation.

[67] In the introduction to the 2007 agreement, the parties acknowledged that it was their "wish to vary the original agreement with the intention of promoting the long-term relationship amongst them for the operation and use of the helicopters, the subject of the original agreement".

[68] The 2007 agreement set out various procedures to try and improve communication between the parties and included a provision that, if any issue between the parties could not be resolved through such communication, the parties would submit the issue to resolution by mediation. If an issue could not be resolved by mediation, the issue was to be determined by Court proceedings.

[69] Pursuant to the 2007 agreement, THL agreed to pay Heli Holdings $265,000 plus GST in respect of amounts due for shortfall hours up until 30 June 2006 and in respect of Heli Holdings' claim for damage to a rotor blade.

[70] Pursuant to clause 7.1 of the 2007 agreement, THL agreed to fly the original eight helicopters for a minimum of 3,500 hours per annum from 1 July 2006. The hourly rate was to be $1,000 plus GST as from 1 July 2006. This clause continued:

> 7.1 … In relation to review clause 5.1 and 8.3 in the original agreement, the parties undertake to make available information that will assist to confirm the true position relating to helicopter requirements and the hours that may realistically be achieved using the aircraft relating to this agreement. Should Heli Holdings fail to take part in the review within

> 2 months of the 30 June review date in each year following such written request by The Helicopter Line then the minimum number of hours required to be flown will be automatically waived.

[71] If an aircraft was unavailable for use by THL, because of a need for unscheduled maintenance, and this occurred before midday, THL was to get a credit against shortfall hours of two hours. If the unavailability occurred after midday, the credit was to be one hour. This was subject to immediate notification, maximum credits and THL's actions not being the reason for the unavailability. THL and Heli Holdings were both to maintain schedules recording the hours of unavailability for the purpose of adjusting minimum hours.

[72] It was further agreed that, if the helicopters were unavailable solely for the purposes of upgrading the fleet to an agreed standard, then that unavailability would be deducted against the minimum hours requirement. The deduction would be based on the average number of hours flown by the aircraft in the corresponding period of the previous year. A simple formula was established for such calculations.

[73] Heli Holdings was to upgrade two of the twins "as soon as practically possible" if the parties agreed the upgrade was economically feasible, the timing of the upgrade and which two of the existing fleet were available for upgrade. If one or more of the twins was upgraded, the hourly charge in respect of that aircraft would be $1,050 per hour plus GST.

[74] In the period 2006 to 2008, there continued to be issues between the parties over maintenance/availability, THL's requests for upgrading or replacement of some or all of the twins and Heli Holdings' demands for payment for the shortfall hours.

The 2008 agreement

[75] On 11 June 2008, there was a further agreement reached as a result of another mediation (the 2008 agreement). Amongst other matters, THL agreed to pay $1,030 plus GST per hour for the year ending 30 June 2008 and $1,050 plus GST per hour for the twins from 1 July 2008.

[76] The 2008 agreement included the following further clauses:

4. Upgrade of Helicopters/Project Rotate

4.1 Heli Holdings Limited and The Helicopter Line will within 90 days explore together "Project Rotate".

4.2 "Project Rotate" shall refer to the possibility of The Helicopter Line purchasing an exit from the original agreement and the variation of agreement including the helicopters and ongoing maintenance arrangements.

4.3 If no agreement is reached on Project Rotate, the parties will explore together the refurbishment and/or renewal of the helicopters. If no agreement is reached within 60 days (in addition to the 90) then the parties agree to mediate that issue.

5. Minimum hours

5.1 The parties will within the next 30 days review the unavailability allowance in clause 7.2 of the variation of agreement. The parties will also review the system. This review will be for the years ended 30 June 2008 and 30 June 2009. If not resolved then the issue will be referred to the mediation contemplated in clause 3.

[77] By necessary implication, I find that any review put in place for the year to 30 June 2009 would also apply for subsequent years. If that was not resolved, the issue was to be dealt with in the mediation which would also deal with issues of refurbishment and/or renewal of the helicopters.

[78] The 2007 and 2008 agreements recognised that, but for the changes recorded in these agreements, the 2002 agreement remained in effect.

"Best industry standards" and "just culture"

[79] In deciding what is required by the terms of this contract, the objective must be to give effect to the intention of the parties primarily by reference to the language used in the contract.

[80] In situations of uncertainty or ambiguity, it can be appropriate to have regard to relevant business practices in determining what a contract meant and required of the parties.[3] The expert witnesses called for both Heli Holdings and THL,

[3] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Lumley General Insurance NZ Ltd v Body Corporation No. 205963* [2010] NZCA 316, (2010) 16 ANZ Insurance Cases 61-853.

experienced either in providing maintenance support for aircraft or in operating aircraft, did not agree on what would be meant by "best industry practice" in these industries.

[81] Mr Brent Earnshaw gave evidence as an expert for Heli Holdings. He worked for Air New Zealand for almost 30 years. From September 2003 to August 2013 he worked for Qantas as a general manager then regional manager, Aircraft Maintenance Services, Queensland. He said:

> "Best industry standards" could mean that a company not only carries out its daily duties and obligations in a manner that meets all imposed requirements from manufacturers or regulators but also seeks continuous improvements on how they carry out those obligations. The aviation industry is constantly learning from its mistakes and as a result of that is continuingly [sic] changing. It could be said that today's "Best Industry Standards" are tomorrow's common practices.

[82] Mr Logan Cudby had extensive and high level experience with the RNZAF over 26 years. He had been helicopter fleet operations manager for Heli Holdings and Airwork since July 2012. He referred to and approved a statement from the CAA website "it is in the best interests of all aviation participants to perform to a standard above the minimum".

[83] Mr John Fogden and Mr Allan Murtagh were called as experts for THL.

[84] Mr Fogden was formerly the manager of the CAA rotary wing and agricultural operations unit of the General Aviation Group in the CAA. In that capacity he was responsible for the safety, surveillance and regulatory oversight of all certificated maintenance organisations providing maintenance services to helicopter operators in New Zealand. Those organisations included Airwork in the South Island. He said that he considered Mr Earnshaw's definition of "best industry standard" referred more accurately to today's "common industry practice". He said:

> There is no one definition of the term "best industry standard", as it is accepted that the criteria will vary depending on the context. In the aviation context I believe it to mean "*the achievement of continually improving standards that use quality and satisfaction as the measure over and above mandated legislative standards*". Another major New Zealand aviation service provider is quoted as saying "*Our customers are telling us that just performing to the minimum is no longer an acceptable benchmark. It really*

is about going beyond and ensuring the customer gets what they want. When you operate in a highly competitive market you try and align yourself with others who have the same brand values. If these are your customers, you simply have to over-deliver because that's what brings them back". That might be another way of describing "best industry standards".

[85] He also said "following manufacturers' requirements and Civil Aviation Regulations is not industry best standard. These are simply the minimum requirements for operating within the aviation system".

[86] Mr Murtagh has been involved in the aviation industry since 1972. Since 2002, he has been the director of a company that provides independent aviation maintenance control and maintenance management to the general aviation industry. In that role he conducts external audits of maintenance providers and has had extensive exposure to CAA audits and rule requirements. He said, in relation to "best industry standard":

> [27] Best industry standard could be described in a number of different ways and will vary according to the sector and the environment in which the industry operates. In the aviation sector to me it means achieving standards which are significantly higher than the minimum standard set by the CAA. It means trying to achieve the highest safety standard possible. If those standards are lowered, then the risk starts to increase. The risk profile of an organisation achieving best industry standard will be less than one that is not.
>
> [28] From THL's point of view I would view best industry standard as giving rise to an expectation on its maintenance service provider of a high level of reliability and high level of safety and excellence in all aspects of maintenance services. That would include:
>
> [a] An appropriate management structure which has personnel with the skills and experience to fulfil their obligations in Senior Persons roles and management;
>
> [b] That management aspire to provide "Just Culture" principles and embrace the concept;
>
> [c] Using experienced and qualified staff;
>
> [d] Having first rate tooling control (meaning clearly defined expectations and procedures in the maintenance provider's Exposition which is regularly checked and ensures no tooling is left in aircraft);
>
> [e] Using appropriate tooling as supplied by the manufacturer or equivalent tooling acceptable to the manufacturer;

[f] Parts supply – using new or near new serviceable parts; that have been purchased through a known or reputable supplier;

[g] Sufficient and appropriate resources, i.e. adequate facilities maintained to a high standard;

[h] Adopting the concept of "Just Culture".

[87] All the experts and key operations managers for both Heli Holdings and THL, and Mr Jones of Airwork, recognised the fundamental importance of promoting, following and implementing the concept of "just culture" in air transport operating and maintenance businesses.

[88] Mr Hart said in his evidence:

> Airwork (NZ) promotes a "Just Culture" as part of its safety management, whereby staff are encouraged to report errors (or situations which could lead to errors) in the interest of aviation safety and continuous improvement. Just culture is defined as a culture in which all incidents will be investigated but staff are not punished for actions, omissions or decisions taken by them that are comparable with their experience and training. Staff actions of gross negligence, wilful violations and destructive acts may be punished. Through the Just Culture, Airwork (NZ) ensures that there exists an environment where occurrences are reported and people are confident to contribute to the investigation openly. Airwork (NZ) also ensures the necessary processes are in place for review investigation and for the development of necessary preventative actions such as re-training and improved supervision.

[89] Mr Cudby, in his evidence for Heli Holdings, reviewed the 24 maintenance incidents that THL had highlighted. Mr Cudby explained that, with a "just culture", people have to feel free to communicate, to raise issues and talk them through. He said that, with a "just culture", issues might be talked through face-to-face, at manager level or elevated to a safety and quality management study as well. As he put it:

> If people think they have to have a blame culture then what happens is nobody is going to own up for anything and all they're going to [do] is … sit tight and let the other people prove what happened and [you] could imagine how that would be very, very dangerous in an aviation organisation.

[90] Under cross-examination, Mr Cudby made the comment that, in a safety-conscious environment, if THL considered the issues as serious, they had to be treated as such.

[91] Mr Bisset said, and I accept, that a key element of "just culture" is openness, honesty and transparency.

[92] I consider there was general acceptance that the promotion of "just culture" was important in ensuring commercial helicopter operations were safe. As part of that, it was important that staff and all involved in the businesses were encouraged, in the interests of aviation safety and continuous improvement, to report mishaps, errors or incidents which could have led to problems in the operation of aircraft or compromised passenger or pilot safety. I also find there was general acceptance that, with "just culture", all those involved in a business such as THL needed to be confident that, if such incidents and concerns were reported, they would be treated seriously, investigated carefully and addressed appropriately to ensure the safety of THL's helicopter flights.

[93] In providing maintenance support to "best industry standards", Heli Holdings/Airwork had to honour the principles of "just culture" not just within their own businesses but as between them and THL.

[94] There was no dispute that, with THL's business, the safety of passengers and pilots always had to be a paramount consideration. THL's helicopters were often flying in alpine environments where operational error or any mechanical, structural or electrical fault affecting the operation of a helicopter could have disastrous consequences for the aircraft and those on board. It was express or implicit in the evidence of all the experts and key managers for both parties that THL and its pilots, in operating the aircraft leased to it by Heli Holdings, had to have trust and confidence in the maintenance support that was available from Airwork. What they could not agree on was whether or not, in the context of the documents they had examined, THL should have had such trust and confidence.

[95] Heli Holdings, through Airwork, was under a contractual obligation to maintain, service, repair, modify and overhaul the twins and any replacement helicopters in the terms set out in clause 6.2 of the 2002 agreement. It was also required to perform those duties in accordance with "best industry standards" and to use best endeavours to ensure the twins and any replacement aircraft would be

available for use when reasonably required for commercial operation as required by clause 10.1(b) of the 2002 agreement.

[96] I am satisfied that, with the 2002 agreement in clause 10.1 expressly referring to Heli Holdings having to perform its duties under the agreement "in accordance with best industry standards", while elsewhere in clause 6.2 it was required to provide maintenance to the standard and in accordance with the requirements of the manufacturer and the CAA, the parties intended that Heli Holdings should provide maintenance support in a way that exceeded the minimum requirements of either the CAA or the manufacturer. I am satisfied that Heli Holdings was under a contractual obligation to provide maintenance support in the manner described by Mr Murtagh.

[97] I am thus satisfied that, in terms of providing maintenance engineering support, Heli Holdings' contractual obligation required more of it than simply ensuring the eight aircraft were airworthy and CAA-approved to fly.

A contractual duty of good faith

[98] In its counterclaim, THL pleaded that the terms of the 2002 agreement, 2007 variation and 2008 agreement:

> … required that the parties deal with each other at all times for the term of the contract in good faith and as a consequence the plaintiff owed the first defendant a contractual duty of good faith to carry out its contractual duties and to exercise its contractual rights honestly, fairly, co-operatively and with integrity.

[99] Heli Holdings denied this pleading, denied the parties had to deal with each other in good faith, denied the particulars on which that obligation was asserted and denied there had been any breach of such an obligation by Heli Holdings in the way THL had particularised.

[100] I am satisfied that, at all material times, Heli Holdings did owe THL a contractual duty of good faith to carry out its contractual duties and to exercise its contractual rights honestly, fairly, co-operatively and with integrity.

[101] I reach that conclusion, firstly, on the basis of the contract as set out in the 2002, 2007 and 2008 agreements. Depending on circumstances and drafting, an agreement with an express term of good faith "can be, and will be, given effect to" by the courts.[4]

[102] In clause 10.1(b) of the 2002 agreement, Heli Holdings warranted that it would perform its specified duties "diligently and in good faith". This warranty remained in effect with the 2007 and 2008 agreements.

[103] In the agreements, the parties assumed obligations and granted one another certain benefits in ways that could only be of value if they were required to deal with each other in good faith. Clauses 5.1 and 5.4 of the 2002 agreement recognised there would be the opportunity during the currency of the agreement to negotiate a change to essential elements of the agreement. The 2008 agreement required the parties to review the unavailability allowance in clause 7.2 of the 2007 variation and to review the whole system for charging of shortfall hours under the 2002 agreement and 2007 variation. The agreements provided for the parties to have a long term business relationship. The parties agreed that, although not in partnership, they would work co-operatively so that they could benefit from the ongoing relationship. Mutual good faith obligations were implicit in these contractual obligations.

[104] I can also have regard to the way the parties subsequently acted in determining how the agreements they entered into are to be interpreted and applied.[5]

[105] Although there are claims and counterclaims from both parties as to ways in which the other party has breached contractual obligations (including the mutual obligations of good faith), there were ways in which the parties accepted there were good faith obligations or acted in a way which was consistent with them, as set out in the agreement. Hence, there were compromises in respect of claims made for shortfall hours in 2007 and 2008. The parties did actively discuss, firstly, the

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4 *New Zealand Licensed Rest Homes Associated Inc v Midland Regional Health Authority* HC Hamilton CP34/97, 15 June 1991 at [140], affirmed in *Residential Care (New Zealand) Inc v Health Funding Authority* CA170/99, 17 July 2000.

5 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [52]-[53] and [63] per Tipping J, at [7] per Elias CJ; *Kiwi Freeholds Queen Street Ltd v Shanti Holdings Ltd* [2008] NZCA 177, [2008] 3 NZLR 69.

upgrading of the twins and then their potential replacement. They did agree in 2008 to review the way in which liability for shortfall hours was calculated.

[106] Mr Hart accepted that Heli Holdings was under an obligation to deal with THL in good faith. Mr Jones accepted that clause 10.1 of the 2002 agreement required Heli Holdings to act in good faith in undertaking the various obligations that existed under the contract.

[107] For THL, Mr Weston acknowledged that whether or not good faith obligations could be implied in contractual arrangements, because of the parties' circumstances, was controversial. He relied primarily on the express terms of the contract.

[108] Although the express terms of the agreements themselves were sufficient to impose good faith obligations on the parties, the particular nature and circumstances of the parties' relationship, in conjunction with the express provisions of the agreements, provide a further basis for holding that they owed each other duties of good faith.

[109] The authors of *Law of Contract in New Zealand* recognise that the common law of England and New Zealand has not traditionally implied an obligation of good faith and fair dealing into contracts.[6] The authors also recognise that "Judges are prepared to imply a term requiring good faith into certain types of contract, the question being essentially one of construction".[7] Thus, it has been held that such a term is to be implied in a joint venture and in a contract to engage a commission salesman. These are contracts which are "predicated upon mutual confidence".[8] The authors note that in New Zealand:[9]

> Parties sometimes expressly insert an obligation of "good faith" in their contracts – indeed there is an increasing tendency to do so – and if that is their will, the Courts are reluctant to find it has no meaning at all.

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6 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at [6.3.3(a)(ii)].

7 At [6.3.3(a)(ii)].

8 At [6.3.3(a)(ii)], citing *JL Stanley Ltd v Fuji Xerox NZ Ltd* HC Auckland CP479/96, 5 November 1997.

9 At [6.3.3(a)(ii)].

[110] All the circumstances around the contractual relationship between THL and Heli Holdings, as well as the express terms of the contract, required the parties to deal with each other in good faith.

[111] With THL flying the aircraft and carrying passengers, when safety of the aircraft and those passengers was a paramount consideration, the maintenance support available from Airwork and Heli Holdings was of such importance that compliance with minimum standards was not sufficient. This was recognised by the parties with the requirement for Heli Holdings to provide maintenance support to "best industry standards". THL and its pilots had to have trust and confidence in the maintenance support from Heli Holdings. Heli Holdings also needed to be confident that the pilots of THL would meet their obligations in terms of ensuring aircraft safety, particularly with regard to post-maintenance checks and the reporting of incidents and concerns that would require Airwork to deal with potential maintenance issues. Those needs required the parties to deal with each other in good faith.

[112] Although it clearly connotes "fairness, honesty and reasonableness",[10] a contractual obligation of good faith is perhaps best conceptualised as an "excluder" – a promise to abstain from various forms of bad faith, rather than a promise to surmount some vague threshold of good faith.[11]

[113] It has been noted that such a term may add little to the parties' general contractual obligations.[12] Certainly, a good faith obligation does not necessarily require a party to abandon or de-prioritise its own commercial interests in order to pursue the common interests of both.[13] However, it does require fidelity to the agreed common purpose and consistency with the justified expectations of the other

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10 *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA) at [41]. Although compare Tipping J's comment that "the requirement for good faith is not commensurate with a requirement for reasonableness": *Topline International Ltd v Cellular Improvements Ltd* HC Auckland CP144-SW02, 17 March 2003 at [50].

11 *Symphony Group Ltd v Pacific Heritage (Auckland) Development Ltd* HC Auckland CP362/98, 17 August 1998 at 16-17, citing *Mogridge v Clapp* [1892] 3 Ch 382 (CA).

12 *Topline International Ltd v Cellular Improvements Ltd*, above n 10, at [102].

13 At [103], citing *Bobux Marketing Ltd v Raynor Marketing Ltd*, above n 10, at [41].

party. In other words, the parties must show loyalty to "the promise implicit in a continuing, relational commercial transaction".[14]

[114] This aligns with recent authority from the Supreme Court of Canada, which in *Bhasin v Hrynew* characterised good faith as "a general organising principle of the common law of contract".[15] Cromwell J, delivering the judgment of the Court, said that this organising principle is "simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily".[16] Good faith involves having appropriate regard to the legitimate interests of the contracting partner. While that "appropriate regard" will vary depending on the context of the particular contract, it does not require a party to subordinate its own interests to the other's in all cases. Rather, it requires that a party must not seek to undermine those interests in bad faith.[17]

[115] Burrows, Finn and Todd write that New Zealand Courts have tended to regard the content of good faith as being context-specific and as depending on the type of contract and the kinds of express obligations it places on the parties.[18] Consistent with the statements of principle I have referred to, that is how I will consider good faith obligations in relation to the issues that I have to deal with.

[116] In accordance with its good faith obligations and the maintenance obligations set out in clauses 6.2 and 10.1(b) of the 2002 agreement, Heli Holdings was obliged to accept concerns of THL as to maintenance and safety issues, at least initially, as being genuine. It was obliged to take those concerns seriously and to demonstrate it was ready and willing to respond to them proactively with a view to taking any remedial action that might be appropriate.

[117] I also find that, pursuant to clauses 5.1 and 5.4 of the 2002 agreement and their mutual obligations of good faith, the parties were required to meet and discuss

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14 At [102], citing *Bobux Marketing Ltd v Raynor Marketing Ltd*, above n 10, at [44]. See also D W McLauchlan "The Justiciability of an Agreement to Negotiate in Good Faith" (2003) 20(3) NZULR 265 at 283.

15 *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494 at [33].

16 At [63].

17 At [65]. See also [69], emphasising the necessarily context-contingent nature of contractual good faith.

18 Burrows, Finn and Todd, above n 6, at [6.3.3(a)(ii)].

in an honest, fair and co-operative way and with integrity, the appropriate aircraft mix for THL's seasonal capacity requirements and to deal with matters impacting on the ability of THL to most efficiently operate the twins under one or more of its concessions.

[118] In a similar way, I find Heli Holdings was required, by clause 5.1 of the 2008 agreement, to review the unavailability allowance in clause 7.2 of the 2007 variation and the whole system for charging of shortfall hours under the 2002 agreement and 2007 variation.

Implied term as to maintaining weight of aircraft

[119] I also find it was an implied term of the 2002 agreement that the performance characteristics and, in particular, the passenger-carrying capacity of the twins, would remain constant during the lease and that, accordingly, the weight of the twins would not increase to an extent that would affect load-carrying capacity, fuel efficiency and performance.

[120] I consider such a term should be implied into the contract because Heli Holdings was aware THL was leasing the twins mainly to provide a tourist helicopter passenger service in and around the southern half of the South Island, that load-carrying capacity, fuel efficiency and performance were important to THL in operating the helicopter passenger service and that an increase in the weight of the twins would detrimentally affect carrying capacity, fuel efficiency and performance.

[121] Implication of such a term is justified in terms of the five point test laid down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[19]

The potential for conflict

[122] I refer to the parties' legal obligations and entitlements, as provided for in the various agreements, as "the contract".

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[19] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 180 CLR 266 (PC).

[123] With the terms of the 2002 agreement and the views which the principals had with regard to their relationship, there was certainly the potential for conflict and tension of the sort that was evident throughout the parties' relationship.

[124] It was Mr Quickfall's evidence that he entered into the 2002 agreement confident that the arrangements would allow for a change in the aircraft if this became necessary or desirable through a change in circumstances, including market conditions. He believed the agreement he was entering into did not legally commit THL to fly the twins, which it leased at the outset, for the next 20 years.

[125] Mr Jones' attitude, as it emerged from all the evidence, was that, so long as the aircraft were airworthy and maintenance was CAA-approved, THL's obligation was to fly the aircraft and to pay what was due.

Was Heli Holdings in breach of its contractual obligations to THL in the period from 1 July 2008 to 30 June 2013?

Basic outline of developments

[126] During the period 2008 to 2013, THL continued to fly the twins and paid for the hours flown. THL continued to raise issues over availability, the suitability of the twins for its operations and potential upgrading or replacement of the aircraft. THL did not fly the helicopters for the minimum hours and there continued to be issues over Heli Holdings' demands for payment for shortfall hours. There were various incidents where it appeared to THL that Heli Holdings/Airwork had been in breach of CAA and manufacturers' requirements in the maintenance support they provided to THL.

[127] The last of these was the Gorilla Creek incident which occurred on 3 January 2013. As a result of that incident, THL engaged a respected engineer, Mr Nick Marwick, to investigate what had happened in the Gorilla Creek incident. His report identified significant failings in aircraft maintenance and investigation. Mr Marwick considered that the aircraft, passengers and crew were exposed to an unacceptably high level of risk by the operation of the particular aircraft with latent defects. In his report, he emphasised that it was essential for operators and maintenance providers

to have a sound, respectful and professional relationship to foster safety. He described the THL and Airwork relationship as "dysfunctional" and said this represented "a safety concern in itself".

[128] After receiving Mr Marwick's report, on or around 31 January 2013, THL issued an operations notice telling its pilots that they should be on high alert to ensure that their Airwork-maintained aircraft were safe to fly.

[129] In February 2013, THL issued a contract breach notice referring to 24 incidents and claiming there had been significant defaults in the maintenance which Airwork had provided for the THL helicopters.

[130] On 15 April 2013, there was a high-level meeting between representatives of THL and Airwork in which they discussed THL's maintenance concerns and agreed on an action plan to address those concerns. THL provided Airwork representatives with its minutes of the meeting which referred to Airwork's apparent acceptance of THL's concerns and Airwork's commitment to addressing them.

[131] Running alongside those developments, there had been continuing negotiations between THL and a Heli Holdings representative over Heli Holdings' claim for a payment in respect of shortfall hours for the period 2008 to 2012, the potential replacement of all or some of the twins and the terms on which THL would continue to lease eight aircraft from Heli Holdings. Although there were some significant differences, it appeared that considerable progress had been made in resolving those issues.

[132] In June 2013, Mr Jones assumed responsibility, in place of Mr Hart, for management of the relationship between Heli Holdings and THL. On 2 July 2013, he participated in a telephone conference with the directors and other senior managers of THL. According to evidence from the THL directors, when they raised the issue of their safety and maintenance concerns, Mr Jones said that THL's minutes of the meeting of 15 April 2013 were not correct; Airwork was CAA-approved, THL was thus obliged to fly the leased Heli Holdings helicopters and was legally obliged to pay all sums due in terms of the contractual arrangements between the parties.

[133] The THL directors considered that, in making these statements, Mr Jones had rejected that there was any proper basis for the concerns they had with regard to safety. They considered this meant that there were unacceptable risks with regard to the continued safety of their operations with the leased aircraft, which meant they had no option but to cease using the aircraft. They engaged an independent expert, Mr Fogden, to give some preliminary advice as to whether there was a reasonable basis for their concerns based primarily on the 24 incidents which they had highlighted in their breach notice, the report provided by Mr Marwick, the THL minutes of the meeting of 15 April 2013 and the agreed action plan.

[134] Mr Fogden, on 3 July 2013, provided an initial opinion (based on the limited information provided to him) confirming the validity of THL's serious concerns around the quality of maintenance provided by Airwork. Mr Fogden agreed with the conclusions of the earlier Marwick report.

[135] On 4 July 2013 THL grounded the eight Heli Holdings aircraft. It has refused and failed to fly them since.

The parties' dealings over mix of aircraft, review of unavailability allowance and system for charging for shortfall hours

[136] THL witnesses were clear that their decision to ground the aircraft and not to fly them from July 2013 onwards was because of their concerns over safety and maintenance. Nevertheless, in pleadings, THL asserted that, in breach of the term of good faith, Heli Holdings:

(a) failed to agree reasonable and commercial terms for the supply of different helicopters to the twins in terms of clauses 5.1 and 5.4 of the 2002 agreement, thereby "putting its own commercial interests above those of THL";

(b) in the telephone conference call of 2 July 2013, through Mr Jones, advised THL it was not interested in discussing any issues as to the twins' suitability or weight; and

(c) failed to reach agreement over replacement of aircraft in 2011 and 2012 then broke off negotiations abruptly and without justification on 2 July 2013, making it clear to THL that it was not interested in any ongoing negotiation or discussion.

[137] THL also pleaded that, with the parties having agreed they would review the system for charging of shortfall hours in 2008, Heli Holdings was not entitled to pursue any claim for those shortfall hours until the review of the system had taken place.

[138] The parties did not, between 2008 and July 2013, implement the 2008 agreement strictly according to its terms. There were no discussions in 2008 as to the terms on which THL could exit the contract. There were no further discussions in 2008 as to the refurbishment or replacement of aircraft, or the formula for dealing with unavailability. Neither party sought to participate in a mediation as contemplated by the 2008 agreement. THL continued to fly Heli Holdings aircraft and to pay for the hours actually flown and to pay the rates agreed to in the 2008 agreement. Although from time to time Heli Holdings said it wanted to deal with shortfall hours, it did not issue any invoice for shortfall hours until 1 February 2013 when it issued invoices for the 2009, 2010 and 2011 years. Over the intervening period, the parties did not discuss or resolve what credits had to be given for unavailability.

[139] On a number of occasions, THL representatives, but mainly Mr Quickfall, raised issues over the availability of helicopters, the suitability of the twins for THL's business and the way the retraction in the world economy in 2008 and later the Canterbury earthquakes were affecting their business. These issues were also raised in meetings. Heli Holdings representatives responded to these concerns. Proposals were made which would have involved a significant reduction in the amount Heli Holdings would claim for shortfall hours. It was through those discussions that THL and Heli Holdings negotiated over the mix of aircraft and a variation of the commercial arrangements. Inherently, to the extent they discussed the potential settlement of the claim for past shortfall hours, they were dealing with the system for charging for shortfall hours over the intervening period.

[140] In August 2010, Mr Nick Hanson, the then business manager for Heli Holdings, sought information from THL to calculate the appropriate claim for shortfall hours. Mr Quickfall responded to the effect that it was not a situation where Heli Holdings could simply issue an invoice and they needed to resolve all issues.

[141] Heli Holdings never waived its entitlement to claim for shortfall hours in accordance with the written contractual arrangements. Heli Holdings representatives also regularly made it clear their proposals or responses would be subject to Board approval.

[142] Around August 2011 the Quickfalls' interests in Totally Tourism Limited, and through that company THL, were acquired by Skyline. The CEO of Skyline, Mr Staniland, and one of the directors, Mr Ken Matthews, became involved in the negotiations between Heli Holdings and THL.

[143] Between June 2012 and 21 December 2012, there was significant correspondence between Heli Holdings representatives and Mr Staniland over a new lease, the timing and terms of replacement of four twins with singles, new hourly lease rates and minimum hours. In August 2012, Mr Staniland indicated that any new agreement would have to address THL's concerns over the standard of maintenance. Mr Hart responded to the effect that there was no justification for such concerns.

[144] On 30 November 2012, Mr Wayne Christie, who had replaced Mr Hanson as business manager of Heli Holdings, provided Mr Staniland with a draft memorandum of understanding (MOU) for a future lease arrangement for 20 years. It was a document for discussion. It contemplated the potential replacement of all twins with singles and THL undertaking to use the replacement aircraft in preference to any other aircraft on a best endeavours basis. It also proposed lease rates and a minimum of 350 hours per aircraft per annum. Mr Christie also provided Mr Staniland with a draft service level agreement.

[145] It is not clear whether the MOU, provided by Mr Christie, was to provide for a minimum hours payment for all aircraft leased to THL or just the replacement

singles. In one clause, referring to the replacement singles, it was said a minimum of 350 hours per annum would apply. Elsewhere there was a reference to THL using certain aircraft on a best endeavours basis.

[146] Mr Staniland sent the draft MOU back with marked-up changes that THL wanted. Those marked-up changes included provision for the future lease to terminate if the aircraft were no longer fit for purpose or provision of maintenance services did not comply with a service level agreement between the parties and different safe practices which the parties had identified. In the clause referring to aircraft lease rates, there continued to be the reference to a specific rate for the singles but with a change of the minimum of 350 hours per aircraft "to be aggregated across the whole fleet". There remained a separate clause dealing with twins utilisation, stating "the parties will agree a process to ensure the AS355 aircraft are utilised to the fullest extent possible".

[147] During December, Mr Ken Matthews, the Skyline director of THL, and Mr Jones both participated in a discussion over ongoing commercial arrangements. Heli Holdings indicated it sought a payment of around $125,000 to settle shortfall claims. It appeared that considerable progress was being made over new commercial arrangements which would deal with all issues.

[148] Subsequent correspondence, in particular an email from Mr Christie to Mr Staniland of 21 December 2012, indicated that the parties would be committing to an interim arrangement with regard to the twins until they were replaced on the basis that the twins would be "flown first" and the flying hours were to be maximised on a best endeavours basis with both parties cooperating to achieve maximum utilisation.

[149] On 3 January 2013, Mr Hart emailed Mr Staniland, referring to an earlier conversation and offer from THL and said "I do not have approval to accept this offer". He said the origin of the relationship and contract was relevant in interpreting the agreement, and that Airwork remained "open to discussions around replacing the twins but until such time as an agreement is reached we reserve all our rights and will expect compliance with our agreement".

[150] On 3 January 2013, the Gorilla Creek incident occurred. Maintenance and safety issues became the focus of attention. On 8 April 2013, Airwork made its draft report on the Gorilla Creek incident available to THL. At the same time, Mr Hart indicated to Mr Staniland that he had conditional approval to the swapping of four twins for singles, subject to selling twins and finding suitable new singles. He wanted to hold a meeting to deal with maintenance issues.

[151] The meeting over maintenance issues took place on 15 April 2013. Following what THL thought was the progress made at that meeting, THL revisited the negotiations over commercial arrangements. Mr Quickfall emailed Mr Hart saying that the Board had asked him to address the supply issues and suggested they meet.

[152] At that time, the arrangements being discussed appear to have included:

(a) the potential for the relationship to terminate if there were defaults in the provision of maintenance and identification of unsafe practices;

(b) hourly rates of $1,350 plus GST for replacement singles;

(c) 350 minimum hours for singles with twins to be used on a best endeavours basis; and

(d) payment proposed by Heli Holdings for past shortfall hours at $125,000.

[153] On 7 May 2013, Mr Ken Matthews, Mr Staniland and Mr Quickfall spoke with Mr Hart. They were told that Airwork had an option on four singles.

[154] On 29 May 2013, Mr Hart emailed Mr Staniland with a draft agreement. It provided for the replacement of four twins with singles, proposed hourly rates of $1,350 plus GST for the new singles and $1,250 plus GST for the remaining existing aircraft, minimum of 360 productive hours for the replacement aircraft and a minimum of 300 productive hours for existing aircraft. The draft agreement also dealt with the terms on which THL would make the base at Queenstown available and the potential shutting down of some of the maintenance sites provided by Heli

Holdings. It proposed that claims in respect of minimum flying hours and aircraft damage would be progressed separately from that agreement. THL was invited to make an offer in that regard. As to maintenance, it simply said maintenance service levels were to be agreed.

[155] On 31 May 2013, Mr Staniland responded to Mr Hart over the contract variation proposals. The changes THL wanted were marked up on the draft. There was a new section about Heli Holdings meeting maintenance standards and protocols that matched industry best practice, provision to establish what that would mean and a requirement for disputes over maintenance to be referred to Eurocopter for resolution. This section also referred to the need for THL to see a demonstrable change in both the culture and provision of maintenance services to allay concerns, implementation of the action plan from the 15 April 2013 meeting and a reservation of the right for THL to change the maintenance provider if there was no substantive improvement in the provision of maintenance. There was also some variation in respect of the timing for replacement of three twins with singles, a reduction in the minimum hours for the singles to 300 hours, an adjustment for the hourly rate for the remaining existing aircraft from $1,250 plus GST to $1,073 plus GST and a deletion of any minimum hour requirement for the twins. The counter-proposal for free use of the Queenstown base was that this was to be available for just one year.

[156] On 6 June 2013, Mr Hart indicated in an email that he was prepared to consider the minimum hours' figure of 300 hours on an interim basis provided THL used best endeavours to utilise the aircraft more than this and gave priority to using these aircraft in preference to all other THL-operated helicopters. These proposals were without prejudice and subject to Board approval.

[157] On 11 June 2013, Mr Staniland in an email told Mr Quickfall and Mr Matthews that he had spoken to Mr Hart and 300 hours on the twins was subject to them being fit for purpose. I take it from that reference that Mr Hart and Mr Staniland were discussing a potential minimum of 300 hours on the existing aircraft that remained in the fleet. Mr Hart told Mr Staniland he would be discussing the counter-proposal internally, that he was meeting with Mr Jones the following day and would then respond.

[158] On 14 June 2013, Mr Hart emailed Mr Staniland with further proposals to deal with hourly rates and minimum hours. With regard to historic issues, he suggested that, if agreement was not forthcoming, the parties would commence arbitration on them once operational issues had been resolved. Depending on when the variation of agreement commenced, Mr Hart stipulated limits on payments to Airwork of either $250,000 or $600,000.

[159] On 21 June 2013, Mr Quickfall emailed Mr Hart to address the proposed variations in Mr Staniland's absence. With his email was a "contract variation proposal" with a number of detailed provisions which he invited Mr Hart to review, call about and discuss. The draft agreement included conditions for:

(a) Heli Holdings to provide maintenance to accord with industry best practice, the subject of which is to be established and agreed as between the parties. Any dispute over maintenance and service is to be referred to Eurocopter for determination;

(b) THL having to see a demonstrable change in the culture and provision of maintenance services with the right to instruct a change in maintenance provider if changes were not made;

(c) THL having the right to terminate the agreement if any serious incident involving the Heli Holdings fleet could be proved to have been caused by Airwork's poor maintenance, provided any such maintenance default had been confirmed by Eurocopter and an independent, suitably qualified third party agreed to by both parties;

(d) hourly rate of $1,400 plus GST for replacement singles for first 350 hours, $900 plus GST per hour above that;

(e) hourly rate for remaining aircraft of $1,073 plus GST;

(f) minimum 300 hours for the replacement aircraft;

(g) existing aircraft to be used in preference to all other THL-operated aircraft, provided they were suitable for the purpose but no minimum hours; and

(h) payment of $125,000 by THL to settle all claims under the contract by either party.

[160] On 24 June 2013, Mr Hart emailed Mr Quickfall as follows:

> It is clear from your response and significant withdrawal from what I had discussed with Jeff that we still have some way to go before we can come to an Agreement on the replacement of the twins. Our position remains as per the Current Agreement between our companies and we remain committed to ensuring we deliver the services and helicopters required under that contract.
>
> Due to the fact we have a number of projects on at present and noting the importance of your account to our business we have decided to assign the management of the THL relationship to Hugh Jones. Hugh will be in touch with you regarding the next steps.

[161] On 24 June 2013 Mr Quickfall emailed Mr Hart and Mr Jones asking them to inform him as to how the proposals in the amended draft agreement differed to the versions he had seen. In an associated email to Mr Jones, he invited him to review the proposed agreement and respond with the points Airwork wished to address. Mr Quickfall's email outlined the issues that he wished to address with Airwork as follows:

> 1/ A number of Twins are heavier than original resulting in reduced payload.
>
> 2/ The Twins are not fit for purpose for a high percentage of The Helicopter Line's work type resulting in loss opportunity for both companies.
>
> 3/ The Helicopter Line concerns around safety as a result of maintenance standards continues to be of major concern.
>
> 4/ Loss of confidence by The Helicopter Line Senior Management and pilots in Airwork maintenance provision will impact on the use of the aircraft.

[162] On 27 June 2013, Mr Jones emailed Mr Quickfall in response to these communications. He said in that letter that it seemed they had reached an impasse with the issues they had been discussing. He said that, in the course of those

discussions, "historic issues have sat in abeyance", that THL's reasons for non-payment of the amounts invoiced were not accepted as relevant in the context of the agreement and there were no valid reasons for non-payment. He said they were at a point where, in accordance with the agreement, it would be appropriate for the parties to go to mediation. He said:

> While I remain open-minded and hopeful of reaching agreement with you, I am mindful that a significant period of time has elapsed in which we are no nearer to receiving payment.

[163] This correspondence led to the telephone conference call of 2 July and a few days later THL's refusal to fly the Heli Holdings aircraft.

[164] I find that, until 24 June 2013, THL was continuing with the contract and accepting over that time that Heli Holdings was negotiating with it in good faith over claims for shortfall hours, the potential replacement of certain aircraft to better suit THL's requirements and the terms on which the Heli Holdings fleet would be leased.

[165] Through those negotiations, THL also accepted Heli Holdings was addressing the review as to the formula for dealing with unavailability and the system for the charging of shortfall hours post-2008. During those negotiations, provided it was responding in a bona fide way to the proposals that THL was advancing, Heli Holdings was entitled to put its interests before those of THL. It was not obliged to settle outstanding claims for shortfall hours on any basis other than its entitlement in terms of the contract which continued to determine the rights and liabilities of the parties.

Weight gains

[166] The helicopters, with their passenger loads, have to operate under a certain weight. There is additional weight with the twins because of the dual engine systems. This means that their passenger carrying-capacity can be more limited than with a single engine helicopter, particularly so if the helicopters are required for longer flights when they have to carry more fuel. For shorter scenic flights, the twins can be economical but for longer flights, singles can carry more passengers and will be more economical.

[167] Mr Dave Matthews, the quality assurance manager for THL, explained that each aircraft has a certain certified weight which cannot be exceeded. This is the maximum all-up weight (MAUW) which is determined by the designers and manufacturers of a given aircraft. He said that, with the twins, the combination of empty aircraft, fuel, people and their belongings will generally result in the MAUW being exceeded. This has to be compensated through carrying less than 100 per cent of fuel. He explained that helicopters are physically weighed to determine their empty weight and associated centre of gravity (COG). Helicopters have to be loaded in a certain way to ensure COG limitations are not breached. The empty weight and associated COG of an aircraft have to be accurately assessed otherwise there can be breaches of the MAUW and COG limits, contrary to Civil Aviation Rules and manufacturers' requirements and potentially also affecting the safe operation of the aircraft.

[168] Throughout the period 2008 to 2013, in correspondence with Heli Holdings/Airwork, Mr Quickfall regularly made an issue of the twins' suitability for THL's continuing operations, in terms of reliability, and their restricted carrying capacity for certain activities.

[169] On 26 September 2010, Mr Quickfall passed on to the Heli Holdings/Airwork business manager, Mr Hanson, emails from within THL referring to a problem where THL had quoted for three aircraft flights but had found they had to reduce the passenger loading down to five per aircraft, meaning they would have to make four flights. Mr Quickfall passed it on with a note that it was "in regard to the weight issues with the twins". In response, Mr Hanson asked for COG calculations for the flights listed, suggesting that there should have been sufficient capacity. In response, Mr Quickfall said the particular issue had been resolved but flights in general remained a worry due to "the extra weight with the twins", resulting in THL having to download for a range of flights. Mr Quickfall did not ask for any particular action to be taken but made a note of this in the context of the general issue as to the twins' suitability.

[170] In August 2012, Mr Quickfall corresponded with Mr Hart acknowledging that Heli Holdings (Airwork) wished to address all outstanding claims that pre-dated the

acquisition by Skyline. Mr Quickfall referred to the matters that had been an issue for THL during the Quickfalls' ownership of THL as relating to:

1. the standard of maintenance and level of service associated with it;
2. aircraft reliability and serviceability; and
3. aircraft suitability for the operation.

[171] As further advice of the issues which had to be addressed, Mr Quickfall sent to Mr Hart a list of issues Mr Bisset had provided. Mr Quickfall said they repeated what Mr Quickfall had communicated to Heli Holdings over many years. In this email to Mr Robert Wales and Mr Hanson of 28 March 2011, Mr Bisset had referred to the same three separate issues. Mr Bisset had said:

> The issue of aircraft suitability for the task has now become a serious one. The increase in average weight of our passengers to 80 kg and the increase in average weight of the helicopters has reduced our ability to carry full loads, for example, winter rafting, heli-skiing and extended Milford flights can no longer carry six pax with sufficient fuel. Therefore we are taking a revenue hit of 16.67%, which as you know the profit hit is far higher.

[172] Under Civil Aviation Rules, it was the operator who was responsible for ensuring weights were as they had to be, although THL would have depended on Heli Holdings to actually weigh the aircraft and to make any necessary modifications. The eight Heli Holdings aircraft had not been weighed in 2002 when they were first leased to THL.

[173] Two aircraft had been reweighed at THL's request on 2 December 2004 and again on 19 July 2005. Mr Quickfall did say that he asked for weights to be checked in 2010 because around that time weight requirements were changing under the regulations. There was no evidence that THL had expressly asked Heli Holdings to reduce the weight of the twins from 2008 to 2013. Rather, the assumed increase in weight of the twins, or at least some of them, was advanced as one of the reasons why they were no longer suitable for THL's operations. Mr Dave Matthews' evidence was that over this period there was a consistent level of "confusion, ignorance and inaccuracy, with regard to the empty weight of the twins" so that THL was left with a concern as to the accuracy of weights recorded in aircraft log books.

He said that, although weight issues had been raised by THL over a number of years, they came to a head in 2013. It was his opinion that "there had been no real attempt in the past proactively to address the issue and look into THL's concerns".

[174] Mr Matthews prepared a detailed report over weights, dated 2 February 2015, for the purpose of the proceedings. The introduction of the report said that it was carried out by THL "to understand the empty weights, and resultant operational impacts" of the twins that were operated by THL prior to July 2013.

[175] The executive summary to his report, as with his evidence as briefed, raised the possibility that "inaccuracies in the twins weighing records inadvertently led to these aircraft being flown overloaded". His report also analysed how the weight of each of the aircraft as last recorded could reduce the passenger carrying capacity of each of the aircraft when carrying certain loads including 60 per cent gas loading, allowing for 1.2 hours of flight time.

[176] Consistent with Mr Matthews' evidence in this regard, Mr Quickfall explained that one of his concerns over weight gains for the aircraft was that, "if the weight information in the aircraft flight manual is inaccurate, this could result in the aircraft being flown overloaded, against Civil Aviation Rules and manufacturers requirements". He also said it could potentially affect the operational capabilities of the aircraft.

[177] By letter of 11 February 2013, THL gave notice that it considered Heli Holdings to be in breach of the agreement as a consequence of a failure to maintain, service, repair, modify and overhaul the aircraft in accordance with clause 6.2 of the 2002 agreement. In giving particulars as to that breach, THL referred to 14 incidents which it said were related to poor maintenance but did not raise the weight of the twins as an issue.

[178] The weight of the aircraft was however raised as a real issue at the meeting which took place on 15 April 2013. At that meeting THL made it clear it required the weight increase problem to be addressed. Heli Holdings agreed to do this.

[179] On 9 May 2013, in accordance with one of the items that had to be addressed as part of the action plan, Airwork provided THL with a report on weight issue concerns regarding the twins. The report indicated there had been significant increases to the fleet since the helicopters had arrived in New Zealand, indicated how much was attributed to the addition of equipment required by THL and suggested ways that weight might be reduced. There was a recommendation that Heli Holdings' operations manager, the THL chief pilot and Airwork South Island engineering manager work together to reduce helicopter weights whenever possible. THL queried the accuracy of some of the information in the report.

[180] THL picked up that Heli Holdings had made a significant mistake in its calculation of the weight gain on one aircraft which THL had looked at as a sample. Mr Cudby, for Heli Holdings, acknowledged and apologised for his mistake on 21 May 2013 and again indicated Heli Holdings wished to work with THL to address this issue. He accepted Mr Bisset had been correct in indicating that their records showed the weight gain with one helicopter had been 168 kg, not the 119.9 kg as stated in the Airwork report.

[181] Mr Cudby also gave evidence that, after the meeting of 15 April 2013, he worked with THL's then chief pilot, Mr Norman Kensington, over the weight issues. He said they agreed on what would be a suitable target weight for the aircraft, agreed to reduce the weight accordingly and achieved that reduction with the two heaviest aircraft by May 2013. That evidence was uncontradicted.

[182] Mr Cudby also prepared a further detailed report in late 2014 for evidence at the hearing. In that report, he analysed in detail the extent to which each aircraft had increased in weight from importation to 2013, what the particular increases could be attributed to and the extent to which they resulted from THL's requirements for its particular operations and maintenance, or were unexplained. In his evidence, Mr Dave Matthews raised questions as to the validity of some of Mr Cudby's base information, assumptions and conclusions. It is not necessary for me to deal with the detail of their evidence in this regard or to decide whether the conclusions which Mr Cudby had come to were justified.

[183] The Heli Holdings reports nevertheless indicated that, in breach of the implied term that Heli Holdings would maintain the aircraft so they would not increase in weight, the weight of those aircraft had increased. Heli Holdings had acknowledged it needed to reduce the weight of the aircraft. As at June 2013, THL was willing to work with Hel Holdings over this, even though the weight of the twins remained one of the reasons THL wanted to see Heli Holdings replace them with singles.

[184] In the summary judgment proceedings, THL referred to weight gains in denying liability for past shortfall hours. It claimed it would have a set-off or counterclaim for more than $5 million, in part because of losses suffered from being unable to carry five passengers in aircraft partly because of weight gains. THL did not pursue any such claim on the hearing of the substantive proceedings. If the aircraft had been operated inadvertently in breach of the rules in this way, on those occasions it would not have resulted in any loss of income.

[185] The weight of at least some of the aircraft did increase over the period through to June 2013 in breach of an implied term of the contract. THL had given Heli Holdings the opportunity to remedy this. Heli Holdings was genuinely attempting to do so. There is no evidence proving what, if any, loss resulted from the weight increase.

[186] While the increase in weight of the aircraft may have been in breach of an implied term of the contract, it was not a breach which reduced THL's liability for shortfall hours over the period to 30 June 2013.

Maintenance

Introduction

[187] Of importance to both THL and Heli Holdings were the commercial terms on which their relationship could continue. THL also claimed to have major and genuine concerns about the safety of its aircraft operations and the adequacy of the maintenance support provided by Heli Holdings/Airwork. It was clear from Mr Jones' evidence and some of the correspondence and documents that he did not

always consider such concerns were genuine or that there was any objective justification for those concerns.

[188] THL's concerns were based around its allegation that there had been a systemic failure in the provision of maintenance support, as evidenced by 24 incidents that had occurred over the period from 2008 to February 2013. Those incidents included 11 which had been highlighted in THL's notice of default dated 3 February 2013.

[189] The Civil Aviation Act 1990 and Civil Aviation Rules made under the Act set minimum standards that have to be met by participants in the aviation industry. A maintenance provider, such as Airwork, has to satisfy the CAA that it has adequate standard operating instructions which demonstrate how it will conduct its business to comply with relevant Civil Aviation Rules as well as an aircraft manufacturer's instructions for continued airworthiness. Only when it has done this will the CAA issue a certificate to operate within the aviation system. The CAA audited Heli Holdings' maintenance operations to check on apparent compliance with the Civil Aviation Rules, its standard procedure instructions and aircraft manufacturers' instructions. The CAA audit reports were not always made available to THL. THL also audited the facilities. Any apparent matters of concern would be referred to in the relevant reports.

[190] Consistent with "just culture" responsibilities, if the maintenance provider such as Airwork or an operator such as THL was aware of an incident that indicated there might have been a breach of required procedures, it was required to document it in a Quality Improvement Form (QIF) that would be distributed to all relevant parties. It would document what had happened and ultimately the action that had been taken to address the particular issue concerned so that the QIF could then be closed. In dealing with QIFs related to potential maintenance incidents, Airwork would investigate what had occurred and provide its report to THL.

[191] In its statement of defence and counterclaim, THL referred to 24 particular incidents that had been the subject of QIFs which it says justified its concerns over Heli Holdings' maintenance support. I heard a considerable amount of evidence in

relation to these incidents and have considered many contemporaneous documents that were produced in relation to those incidents.

Result of experts' conference

[192] Near the end of the first part of the hearing, with the agreement of counsel for both parties, I directed experts giving evidence as to maintenance issues, but excluding witnesses in the full-time employment of either of the parties, to confer and see what, if any, agreement could be reached on certain issues.

[193] I asked the experts to consider the issues on the basis of the documents contained in the bundles produced for the hearing and with regard to the 24 incidents which had been highlighted in the counterclaim of THL. The questions thus did not require the experts to give an opinion based on the oral evidence they may have heard during the trial.

[194] I asked them to consider the incidents on a calendar year by year basis and to have regard to previous incidents that had occurred. My first question was:

> Were the incidents such as to reasonably raise issues for THL as to either the standard of maintenance work being carried out on the leased helicopters or as to whether the leased helicopters were being kept in good working order, condition, state and repair, in efficient operating condition and airworthy in all respects, in accordance with the requirements of the manufacturer and the CAA?

[195] Messrs Scott and Anderson for Heli Holdings stated:

> 2008/9 incidents did reasonably raise issues for THL, but subsequently, taken overall there were not incidents such as to reasonably raise issues for THL.

[196] Mr Earnshaw's answer was that the incidents were not such as to reasonably raise issues for THL although this was with the qualification "[as] to some incidents there was cause for THL concern, but overall not such as to raise issues for THL for fleet maintenance".

[197] Messrs Murtagh and Fogden for THL said they considered that the incidents did reasonably raise issues for THL "[because] of the nature and number of incidents, on an overall assessment of all incidents where standards not met".

[198] My second question was:

> If THL did reasonably have concerns as to either of the above, as a result of any or all of these incidents, and if the plaintiff through Airwork was under an obligation to maintain the helicopters in the terms set out in paragraph [66] and [67] of the counterclaim (those pleadings referred to the obligation on Heli Holdings to maintain service and repair the aircraft in accordance with the standards required by the manufacturer Eurocopter and the CAA, and diligently and in good faith and in accordance with "best industry standards"), did the plaintiff deal with the incidents and with THL in a way that was consistent with the plaintiff's obligations as set out in paragraphs [66] and [67] of the counterclaim?

[199] Messrs Scott, Anderson and Earnshaw for Heli Holdings responded by indicating that they considered the plaintiff had dealt with the incidents and with THL in a way that was consistent with the plaintiff's obligations as set out in the contractual documents because "[both] parties accepted that plaintiff had met obligations pursuant to their respective quality systems". To them, it was "relevant that THL signed off the QIFs".

[200] In his response, Mr Fogden indicated Heli Holdings had not met its obligations and made the comment:

> Some of what has been described as human error (as accepted by THL) were conscious decisions to not follow prescribed safety measures, being at-risk behaviour (I am not alleging wilful neglect). But I do accept THL signed off QIFs.

[201] Mr Murtagh also indicated he did not consider Heli Holdings had met its obligations and made the comment "[do] not accept signing off QIFs is end of inquiry. More needs to have been done by Airwork in respect of some of the more serious incidents".

[202] The third issue I asked them to consider was:

> Given the nature of the incidents referred to, the way the plaintiff had dealt with them and the way the plaintiff had dealt with THL over those incidents, was it reasonable for THL to conclude on 11 February 2013 that there would be real risks for the safety of THL's pilots and the passengers if THL had to continue to rely on the plaintiff to maintain and service the helicopters THL leased from the plaintiff?

[203] Messrs Scott, Anderson and Earnshaw for Heli Holdings responded in the negative. Given the accumulated incidents, Mr Murtagh for THL was of the view that it was reasonable for THL to consider there would be such real safety risks. Mr Fogden also considered it was reasonable for THL to conclude there would be such safety risks "[unless] and until there was a restored confidence in the standard of maintenance provided by Airwork".

[204] The experts could not agree on one definition of "best industry standard". They agreed that CAA standards were the minimum standard.

The critical incidents

[205] In non-technical terms, the relevant incidents involved:

<u>Incident 1 – 1 January 2008:</u>
Anti-vibration assembly retention bolts missing. During a post-maintenance, pre-flight inspection, a THL pilot discovered that an assembly that sits on top of the rotor blades was loose with six retaining bolts missing. Had the pilot not discovered this on the pre-flight check, potentially the blades could have detached from the aircraft although this would have been unlikely with the aircraft in an upright position in normal flight.
The experts agreed that, with this incident, Airwork had failed to meet CAA approved standards of maintenance.

Incident 2 – 26 January 2008:

After maintenance and during a pre-flight inspection, another THL pilot noticed one of three straps that was part of the main rotor head assembly was missing along with a nut to attach the strap to the bottom of a bolt. Another strap was loose, five remaining nuts were found to be loose. A part of the assembly was broken in two places and separating from the mast to which the blades were attached.

Experts agreed – standards default.

Incident 3 - 2 February 2008:

A similar part associated with the main rotor head was incorrectly installed. A THL pilot discovered this during a pre-flight inspection. This could have resulted in serious damage. It could also have resulted in the blades dropping lower which would have been a danger to anyone near the aircraft when it was on the ground and the blades were coming to a stop.

Experts agreed – standards default.

Incident 4 - 15 May 2008:

During a THL pilot's pre-flight inspection, a torque wrench was found sitting on the transmission deck of an aircraft. THL claims this had the potential to cause damage to vital parts of the aircraft's engine system such as engine oil lines, hydraulic oil lines and engine oil reservoirs, resulting in serious damage.

Experts agreed – standards default.

Incident 5 - 23 October 2009:

The complaint here was that engineers had failed to provide required paperwork to the pilot to ensure the pilot was aware of the maintenance work that had been carried out. There was no dispute that the paperwork should have been provided but the rules made the pilot responsible for obtaining this, just as the engineers had to provide it.

Heli Holdings' experts said this was not an instance of non-compliance but a request to improve a process. THL experts said they did not have sufficient information to express an opinion.

Incident 6 - 13 November 2009:

During a test flight after maintenance, immediately after the helicopter became airborne, the pilot found it was not possible to move the tail rotor pedals which felt like they were jammed. The pilot manoeuvred the aircraft clear of hazards and performed an emergency landing.

During maintenance an unapproved pin had been left in part of the tail rotor mechanism to prevent it moving. The pin was not flagged in the way normally required with such parts and had been left in the hole where it had been inserted. With the pin in place, the pilot would not be able to manoeuvre the helicopter in the normal way. Had the problem not been detected on a pre-flight check, there was potential for serious damage to the aircraft and the property or people nearby.

Experts agreed – standards default.

Incident 7 - 16 November 2009:

THL pilot discovered full tail rotor control was not available with an aircraft. This was because equipment associated with the tail rotor pedal had not been properly adjusted after maintenance. Full control is needed in certain circumstances when an aircraft is landing.

Experts agreed – standards default.

Incident 7(A) - 15 February 2010:

Pilot noticed an excessively high temperature indication on one engine. There had been some disintegration of internal engine components as a result of corrosion. An earlier engine on the aircraft had been replaced with an engine from near a saltwater environment in Auckland.

Experts agreed – compliance with standards. I note this opinion was on the basis of the documents they had seen. Mr Dave Matthews, the pilot who drew up a QIF as to the incident, said in evidence that the then senior base engineer at Queenstown, Mr Beale, had told him that an inspection would normally be carried out every 300 hours to identify if sulphidation was present, that such an examination had not been carried out and should have been. On that basis, there was a maintenance default.

Incident 8 - 28 February 2010:

After maintenance, a large rag was found lodged underneath the front of the main gearbox during a pre-flight check. The aircraft had been flown for three days before the rag was found. There was potential for the rag to be caught in a duct through which cooling air is drawn towards the main gearbox. The obstruction of the opening had potential to cause overheating and thus damage to the engine.

With this incident, and in 2012 when it was discovered that the hydraulic reservoir cap was found to be missing after the helicopter had been flown for five hours, the experts agreed not to express an opinion because it had not been "proven" that this resulted from an engineer's maintenance error rather than the action of someone else such as a pilot.

Incident 9 - 2 September 2010:

Upon take-off, an engineer's wrench had slid forward from underneath the pilot's seat. The wrench could have interfered with the operation of the tail rotor pedals and distracted the pilot.

Experts agreed – standards default.

Incident 10 - 3 September 2010:

This was another complaint raised by THL that appropriate documentation had not been handed to the THL pilot to inform him of maintenance work that had been completed.

This was similar to incident 5. Heli Holdings' experts emphasised THL's obligation in the process. THL experts said that standards were not met.

Incident 11 – 8 December 2010:

Airwork advised THL that a particular aircraft had been grounded because it had found that unapproved main rotor blades had been installed on the aircraft in a way that was strictly prohibited. Ex-military blades had been acquired from the USA and fitted to the aircraft. The installation of ex-military blades was regarded by the CAA as being particularly dangerous. The CAA had in 2008 publicised widely its warning that this must not happen. The fitting of ex-military blades had been identified as the cause of a major helicopter crash resulting in fatalities near Murchison in August 2005.

Experts agreed – standards default.

Incident 12 - 11 December 2010:

A rag and plastic cup were found on the main gearbox deck after maintenance. This had the potential to cause damage to the engine.

Experts agreed – standards default.

Incident 13 - 9 February 2011:

Mr Bisset reported an uncommanded torque split and subsequent over-heating of an engine on a plane he was flying with torque splitting having been experienced on the particular aircraft on 21 January 2011.

Incident 14 - 13 February 2011:

FCU problems generally.

Incident 15 - 16 March 2011:

The pilot, Mr Bisset, noticed a engine over-heating during a start-up procedure during a medical evacuation operation. Mr Bisset considered there was either an FCU fault or a battery fault or a combination of both.

These incidents and incident 17 related to an uncontrolled loss of power in one of the two engines through what ultimately turned out to be problems with the FCU for that engine. When these incidents occurred, it was also thought there could be problems with the power turbine governors (PTG). The problems had resulted in what has been described as "uncommanded torque splitting". This refers to a difference in power from each engine affecting the pilot's control of the aircraft. In their statement, the experts agreed that these incidents related to a failure of PTG/FCU; there had been compliance with Civil Aviation Rules. The experts considered these problems arose from a component failure for which Airwork was not responsible.

Incident 16 - 23 March 2011:

A THL pilot was undertaking a pre-flight inspection. Lights on the instrument panel indicated small metal fragments had been detected in an engine or gearbox. The presence of small metal fragments was an indication of impending failure of a bearing, gear or other component within an engine or gearbox. The Airwork

engineer had to drain the oil from the relevant engine. The pilot had to correct the engineer as she prepared to drain oil from the wrong engine.
The experts agreed – CAA standards had been met.

Incident 17 - 28 April 2011:

Another uncommanded torque split occurred in connection with a PTG failure. This occurred as a twin was on a climb from its hangar in the Fox Glacier township.

Incident 18 - 13 May 2011:

Safety or snap wires had not been installed on fuel shut-off levers after maintenance. Fuel shut-off levers may have to be used in an emergency to stop fuel going into the engine. The wires are attached to the levers to reduce the chances of the lever being pulled back inadvertently so as to result in an inadvertent engine shut-down during flight.
THL experts said minimum standards had not been met. Mr Earnshaw and Mr Peter Anderson said standards had not been met but said the pilot had been notified verbally of this. Mr Eric Scott said that fitting of the wires was not required in the maintenance manual.
In his response to the relevant QIF, Mr Wales, the engineer, accepted the snap wire should have been fitted. Mr Wales did acknowledge, when the matter was investigated, that he should have had spare wire with him in his inventory when he was working away from Queenstown and he should not have left it to another engineer to attend to this.

Incident 19 – 30 October 2011:

A pilot found that a spanner had been left on the transmission deck post-maintenance. The spanner was found by a pilot on a pre-flight inspection but had not been picked up during any earlier pre-flight inspection.
Experts agreed – standards default.

Incident 20 - 13 February 2012:

In-flight failure of the number two engine PTG resulting in another uncommanded torque split with associated power loss on the number two engine.

Heli Holdings' experts said this was another instance of component failure so standards had been met. THL experts said, on the basis the pilot had advised the engineer of a potential uncommanded torque split three days earlier, with no documented response from the engineer, there would have been a standards default.

Incident 21 - 21 August 2012:

After maintenance, a pilot noticed an imbalance in the main rotor blade. He landed and shut down the helicopter. It was discovered maintenance engineers had not matched blades with the correct sleeves into which they should have been inserted. Had the problem not been detected by the pilot, there would have been the potential for damage to the aircraft.

Experts agreed – standards default.

Incident 22 - 21 November 2012:

Hydraulic reservoir cap was found by pilot not to have been fitted some five flight hours after maintenance check. A leak of hydraulic fluid, depending on the extent of the loss of fluid, could have rendered the aircraft unserviceable.

As with incident 8, experts did not express an opinion on the basis there was no proof as to who was responsible.

Incident 23 - 3 January 2013:

The Gorilla Creek incident - A pilot parked the helicopter on a ledge on Mount Cook, left the engines running but locked the blades so they remained stationary through application of the cyclic friction mechanism or locking device. While the pilot was out of the helicopter, the locking device became free. The main rotor head components disintegrated. There was an associated starter generator bearing failure. Heli Holdings' expert said there was compliance with minimum standards. THL experts disagreed.

Mr Scott

[206] Mr Scott is a very experienced pilot with almost 50 years' involvement in the aviation industry. A focus of Mr Scott's evidence was on the ways in which pilots are required to carry out various checks after maintenance work on the helicopters or through normal pre-flight checks. With a number of the incidents, Mr Scott said the

maintenance problems that had arisen through the work done by Airwork were picked up by the THL pilot as they should have been. In some cases the defects were not picked up when he considered they should have been. From an overall safety point of view, he considered the travelling public and the CAA could be reassured because application of the overall safety rules for both maintenance and operation of the aircraft had led to identification of potential problems.

[207] However, I accept that, to an operator such as THL, the seriousness and significance of any maintenance defaults would not have been diminished just because the default and resulting defect was identified and remedied through the checks made by a pilot. As was explained by various experts, very serious incidents endangering human safety occur when there are a series of defaults at different levels or in different parts of the overall industry. They referred to this as the James Reason or "Swiss cheese" model. It is when those defaults align that there is the greatest potential for loss of life. I accept that, when THL was deciding whether or not the maintenance support it was receiving from Airwork was sufficient to ensure the safety of its pilots and passengers, its primary focus had to be on the nature and seriousness of the shortcomings in Airwork's operation rather than whether those shortcomings had been remedied, mitigated or aggravated by the work of its own pilots.

[208] Consistent with that view, Mr Scott acknowledged that, in assessing the quality of engineering support, the question of pre-flight inspection was largely irrelevant. Mr Earnshaw and Mr Anderson also agreed that provision for pre-flight checks could never relieve the maintenance provider of its obligation to be diligent in performing its functions.

[209] Mr Scott nevertheless impressed me. He appeared to be balanced and objective in the opinions he expressed. Mr Scott said, in his experience, with both the maintenance and operation of helicopters, it will be impossible to achieve perfection. He said that "the incidents I have reviewed are not out of the ordinary over the period of time involved".

[210] Despite that, in respect of incidents 1, 2, 3 and 22, Mr Scott made comments to the effect that he had never encountered or heard of such incidents in his 49 year involvement in the aviation industry. He would not expect pilots to notice such problems during pre-flight checks, as they would have relied on post-maintenance inspections by approved engineers.

[211] As to incidents 4, 8, 9 and 19 where tools or other items had been left behind on aircraft after maintenance, Mr Scott agreed this could potentially interfere with the operation of aircraft. He said such incidents were unusual.

[212] Incident 6 on 13 November 2009 involved the insertion of an unapproved, unflagged pin into the tail rotor mechanism. Mr Scott said this was "a totally inappropriate procedure".

[213] With regard to the installation of ex-military blades on 8 December 2010 (incident 11), Mr Scott said this should not have happened, "the error should have been picked up before fitment" and was not something he would expect a pilot to be able to detect. He lessened the seriousness of what had occurred by saying that what happened should not have affected the airworthiness of the aircraft short term.

[214] Mr Scott accepted that, with military blades having been installed on this aircraft, it was not airworthy in terms of Civil Aviation Rules.

[215] Mr Scott's opinion as to the seriousness of this incident depended on the military blades being exactly the same as the blades manufactured and designated for use on civilian helicopters. There was some uncertainty on all the evidence as to whether that assumption was correct. In any event, I accept that, from THL's point of view, the fact that military blades had been purchased and fitted would have been a major concern for THL given the recognised potential for the fitting of unauthorised parts to have a major impact on the safety of the aircraft, particularly so with the use of military blades because of the stresses to which these parts may have been exposed through the use of those helicopters in a military situation.

[216] Incident 21 involved the installation of blades into the incorrect sleeves on 21 August 2012. Mr Scott regarded what happened as "a serious breach on the part of the maintenance engineers". This incident occurred not too long before the Gorilla Creek incident.

[217] Mr Scott said that in 2013 he would have had confidence in the maintenance support that would have been available through Airwork in Queenstown. It was apparent from his evidence that whether or not there can be such confidence involves the exercise of judgement. Mr Scott said that after the incidents in 2008 he would have been inclined to think differently.

Mr Earnshaw

[218] Mr Earnshaw was another expert for the plaintiff. He had some 39 years' experience in the aviation industry with engineering qualifications.

[219] Mr Earnshaw assessed the overall seriousness of each event in applying what he said was "a normal risk matrix" identifying the risk or hazard that was involved with each event, the potential consequences of that event and then the likelihood of that event occurring. Applying the matrix, Mr Earnshaw considered that the overall risks for each event were generally low.

[220] Consistent with the statement produced by the experts after their conference, he stated that, with a number of the incidents, there had been a failure to follow published technical data in the maintenance manual which meant there was also a breach of Civil Aviation Rules.

[221] In relation to each incident, he considered there had been an appropriate investigation and follow up by Heli Holdings/Airwork. In respect of nearly all incidents where he was satisfied there had been such a breach of Civil Aviation Rules, he stated that, from his experience, similar occurrences had occurred in a number of well-respected aviation organisations. He said, however, the purchase and fitting of unapproved main rotor blades on a twin was a rare occurrence.

[222] In connection with incident 19 on 2 November 2011, when a spanner was left on the gearbox deck post-maintenance, he did refer to the fact that this was the fourth occurrence of a foreign object being found in an inappropriate place in 22 months. He did not say whether this made the recurrence of that sort of event any more significant but noted that corrective action had been taken in introducing a second check of all jobs prior to panel close up, which he considered was appropriate.

[223] As with other witnesses who were expressing an opinion on these issues, Mr Earnshaw noted a considerable amount of work had been done in the aviation industry in trying to identify the factors which could contribute to serious crashes.

[224] Mr Earnshaw referred to programmes or models, such as the "Swiss cheese" model mentioned above, which were "in use to help identify and eliminate such failures from happening or reoccurring". He identified "just culture" as "one of the fundamental requirements for any of these programmes or systems". It was his opinion that the open reporting he had seen at Heli Holdings/Airwork was indicative of a functioning reporting culture. He considered that Heli Holdings had examples of random failures in its system of maintenance but these were not indicative of a serious systemic failure.

[225] Mr Earnshaw said that he had attempted to make an assessment in June 2013 as to whether there was some systemic issue within Airwork which could lead to less than high quality maintenance standards. He was satisfied there were no concerns of this nature at an operational level. He did identify "conflict at a senior management level between Airwork and THL but these conflicts seem to revolve around legal issues and commercial factors". He further said "I have concentrated my enquiries at an operational level and as far as possible tried to get an insight into attitudes, practices, procedures and relationships at that operational level. It seems to me that once commercial and general management issues are removed from the equation, the operational aspects are as I would expect in any well run organisation both Airwork and THL".

[226] Mr Earnshaw was obviously sincere in the opinions he was expressing. Although he accepted an assessment as to whether maintenance services would provide sufficient assurance as to safety should be made on a holistic basis, his own approach was significantly narrower than that. He considered that, if some maintenance problem had resulted in the operator or maintenance provider generating a QIF and both the operator and the maintenance provider had agreed to the form being closed on the basis it had been dealt with appropriately, then that should be the end of that matter. He was firmly of the opinion that, once this had occurred, the event which had resulted in that QIF should not be taken into account at some future time in deciding whether or not the maintenance services being provided were of the required standard.

[227] That was in contrast with the approach which had been taken by THL when it made its assessment of the whole situation in July 2013. It was contrary to the approach taken by Mr Fogden when he gave his preliminary advice to THL in a brief report of 3 July 2013. It was contrary to the approach taken by Mr Fogden and Mr Murtagh in their detailed report of 15 July 2013 and to the opinions which they expressed in their evidence.

[228] I also noted the way Mr Earnshaw minimised the significance of the various breaches of Civil Aviation Rules through categorising them as the result of human error, rather than evidence of some underlying deficiency in the maintenance support which Airwork was providing. For example, the serious incidents 1, 2 and 3 had occurred with the same engineer. Mr Earnshaw considered that THL had addressed the particular problem these incidents had exposed by ultimately bringing this engineer's employment to an end. Airwork's investigation of the incident had, however, shown that associated with these incidents was a problem regarding the pressure staff were under in Queenstown through perceived shortcomings in the support available from Airwork in Auckland and an inadequate number of personnel in Queenstown.

[229] The purchase and fitting of unauthorised helicopter blades had occurred in a situation where Airwork did not have an audited list of approved suppliers and the people involved in its purchasing procedures were not sufficiently educated as to

what they needed to be looking out for. Although Airwork personnel involved in the purchasing process had been understandably misled by certain information associated with the items Airwork was purchasing, no notice had been taken of the fact that these blades were shown as at some stage being green which would and should have indicated that they were military blades and thus unauthorised for civilian use.

[230] In incidents 3, 9 and 19, tools had been left on a helicopter which would have been unlikely if Airwork had a system ensuring that at the end of the job it would have been easy for the engineer to see if a tool used on the job was back in its rightful place. In these incidents, and incidents 8 and 12 where other foreign objects were left in the engine area, the fact that these objects had been found on a helicopter after there should have been a second inspection must have indicated that there was a problem with the adequacy of the final checks being made, both by the engineer who had done the work and the second engineer who was signing off the second inspection.

[231] In incident 21 of 21 August 2012, when blades were reinstalled into the incorrect locations after maintenance work, Mr Earnshaw attached no significance to the fact that more than one employee had been involved in this event or that prior to the event occurring there was no system in place, for example through the use of coloured markings on the blades or sleeves, to minimise the potential for such a mismatch of parts to occur.

[232] Mr Wales' problem with the snap wire in incident 18 had occurred because he had been required to work at a base distant from Queenstown without taking with him all the items which he could foreseeably need in carrying out the work which was required of him.

[233] In assessing and reducing the seriousness of the events where there was an acknowledged breach of Civil Aviation Rules, I accept the logic of Mr Fogden's criticism of Mr Earnshaw's approach. The matrix Mr Earnshaw used did not appear to have been modified to allow for the fact that in considering the likelihood of a

damaging event occurring, in each of these situations, part of the event had in fact already occurred.

[234] Mr Earnshaw also expressed the opinion that the CAA had never had concerns about Heli Holdings' operation in Queenstown because it had never taken immediate action to ensure the safe continued operation of aircraft and there was nothing to indicate that CAA had ever detected "any evidence of a systematic failure during their regular scheduled audits." I do not consider that was an objectively accurate assessment. As pointed out by Mr Fogden, in 2008 the CAA was so concerned as to inadequacies in the operations of Airwork in Queenstown, that it had directed immediate action must be taken to employ more people in the South Island and had made the recertification of Airwork as a maintenance provider conditional on such steps being taken.

[235] While Mr Earnshaw's opinions were generally based on the information from the documents, there were instances where, without having disclosed this in his brief, he had relied on information or opinions conveyed to him by others, particularly Mr Cudby for Airwork. For example, in assessing the risk associated with inappropriate rotor blades being fitted to a twin in incident 11, he had assumed that the military blades were interchangeable with civilian blades because he had been told this by Mr Cudby.

[236] I was also concerned that, with the opinion he had reached as to the seriousness of the various events and lapses, he was not able to make an objective and impartial assessment of the evidence which was in front of him. There was an example of this when he was asked whether he accepted that THL had concerns as to whether the maintenance support it was receiving would ensure its helicopters were safe to fly after the Gorilla Creek incident. It was his view that, if THL had such concerns and they were genuine, then it would have grounded the fleet. He was not willing to accept that THL had demonstrated a real concern over the safety of its aircraft despite the evidence he had seen or heard during the trial that it had engaged Mr Marwick to provide an independent report, had issued an operations notice to its pilots putting them on alert for Airwork's maintained aircraft, had issued a breach

notice and had been involved in the high level 13 April 2013 meeting to discuss maintenance concerns leading to an agreed action plan.

[237] Generally, THL was justified in considering the breaches of Civil Aviation Rules and required maintenance procedures that Mr Earnshaw acknowledged were involved in 11 of the 23 incidents were actually or potentially more serious than Mr Earnshaw considered.

Mr Anderson

[238] Mr Anderson was called as an expert witness for Heli Holdings. He has been involved in the aviation industry for some 40 years. Mr Anderson considered the 24 incidents that had been highlighted by THL were "representative of the aviation industry as a whole". He considered Airwork "had a sound philosophy of reporting and investigation accidents, and overall had good quality management processes which were representative of comparable companies that operate and maintain similar aircraft types". He said the more serious incidents had occurred in the 2008-2010 years and there had been a significant improvement in Airwork's performance in the period after that until July 2013 when THL grounded the helicopters.

[239] Mr Anderson considered that, of the 24 incidents, there were seven that involved, in his words, a "genuine issue of non compliance, being a failure to comply with maintenance procedure including lack of adherence to Airwork policy (human factors errors)". Of the 24 incidents, he considered only 13 to genuinely relate to Airwork's maintenance. He considered that all events had been well reviewed and safety and quality systems instituted that subsequently reduced the number and severity of incidents to a level which he considered to be "more than favourable" with comparable companies' operations that he had audited. He did not consider any of the events were symptomatic of a systemic failure, which would have occurred only if a systems deficiency had contributed to repeated non-compliance.

[240] The assistance which I derived from the opinions Mr Anderson expressed was significantly diminished by certain aspects of his evidence which caused me concern.

[241] He said that his assessment of the seriousness of the incidents, where he acknowledged there had been non-compliance with Civil Aviation Rules, was consistent with the way the CAA had dealt with those incidents. On cross-examination, it became apparent that he had not seen or considered all the CAA communications with Airwork over the incidents.

[242] Mr Anderson was also reluctant to acknowledge that certain documents from the CAA were critical of aspects of Airwork's maintenance operation, when they plainly were.

[243] It was also apparent on occasions that his opinion diminishing the seriousness of an incident was based not on his own assessment of all relevant documents that he could have examined but on opinions that had been expressed to him by others, something which he had not explained initially in his brief of evidence.

[244] For instance, Mr Anderson acknowledged that Airwork's purchase and use of ex-military rotor blades for one of the twins was a significant breach of Civil Aviation Rules but summarised this as "a human factors error on the part of Airwork's ordering system". He said it had been established that the US supplier had misled Airwork about the blades, "which were manufactured for military and non-civilian use, although they are physically identical in all respects and had been repainted to portray them as a civilian part". Although he categorised the incident in this way, it became apparent that he had not closely considered the detailed Airwork report into how this had all happened and had not noticed for himself that even before the order had been made Airwork had been sent photographs of the blades which clearly showed them as having been painted green and thus military blades. When it was suggested that there was no documentation which established the blades were identical to those manufactured for civilian use, Mr Anderson said that, in making his comment about them being identical, he had relied on what he had been told by Mr Cudby, Airwork's helicopter fleet manager.

[245] Mr Anderson said his overall assessment of the seriousness of the incidents, and the way Airwork had generally complied with CAA and manufacturers' maintenance requirements, was consistent with THL's audit reports which he said

did not express a level of concern with the management of maintenance. At paragraph [31](f) of his brief, he said "this point was further supported by the review of the record of management review minutes… which shows consistently from 2002 that no customer complaints from THL, regarding any matter, were formally lodged until February 2013 when a notice of default was lodged".

[246] When it was suggested to him in cross-examination that there were references to complaints or criticisms of Airwork's maintenance work in records of THL meetings, he said he was not sure who had written this paragraph in his evidence.

[247] When asked to comment on communication from the CAA, plainly expressing serious concern at the state of the Timaru maintenance facility in November 2013, his initial response to Mr Weston was that the CAA was simply saying that the apparent state of the hangar was something that needed to be investigated and explained. An email from the CAA plainly said that the state of the hangar was unacceptable, something which Mr Anderson did ultimately acknowledge in response to a question from me.

[248] Mr Anderson also suggested a number of the incidents and failings on the part of Airwork were less serious because they resulted from human error and had been appropriately investigated and reported by Airwork's quality assurance department. He said that those inquiries had demonstrated that the safety system process, as a whole, was functioning as intended. As with Mr Earnshaw, Mr Anderson made no reference to the fact that, in Airwork's own inquiry into the incident of January 2008 when six retaining bolts were missing from the anti-vibration assembly, its quality assurance manager had associated the maintenance failings with the environment in which the particular engineer was working.

[249] Furthermore, it was apparent from all the evidence I heard, including evidence from Mr Cudby, that aircraft maintenance operations need to be carefully and rigorously systemised to accord with CAA requirements and to avoid the potential for human error to compromise the safety of anyone flying in an aircraft.

[250] While I am critical of many aspects of Mr Anderson's evidence, I do note his observation that there can be safety risks associated with an aviation business even when it is complying with all relevant rules and regulations. He also said that, in his experience, the level of success that could be achieved in maintaining and promoting a "just culture" was dependent on senior management and that it was the responsibility of the CEO to uphold the principles of a "just culture" and the way they are implemented by the quality and safety managers.

Mr Cudby

[251] Mr Cudby had been helicopter fleet operations manager at Heli Holdings since July 2012. I will deal with his involvement in events between July 2012 and 2 July 2013 later.

[252] Mr Cudby did not claim to be giving evidence as an independent expert. He presented what he considered was the full background to the 24 incidents that had been highlighted by THL and the way in which he considered Airwork had dealt with those systems.

[253] It was his view that the South Island operation "improved both in response to the lessons learnt from these incidents and due to broader organisational development and learning". He said Heli Holdings, Airwork and THL had taken steps to improve the systems in place. He noted that audits had been conducted over several years by THL and the CAA, checking the processes that Airwork followed in the South Island and confirming that those processes were in place and were correct. He noted the declining number of incidents which THL considered were of concern in the 2012 and 2013 years.

[254] Mr Cudby gave evidence as to how Airwork has investigated and analysed the incidents raised by THL. He described how THL had introduced several organisational and supervisory changes to deal with issues at the deeper level. He noted there were a total of 21 audits conducted by Airwork, THL and the CAA, making a total of 83 recommendations. He said that all these recommendations had been closed in the sense of either being implemented or not taken up.

[255] In providing a positive picture as to the remedial steps taken by Airwork as a result of the various incidents, Mr Cudby necessarily had to identify ways in which organisational, procedural or personnel deficiencies within the Airwork operation had been a factor in the various incidents.

Mr Fogden

[256] Mr Fogden gave evidence as an expert for the defendants. He provided THL with a tentative opinion as to the adequacy of Airwork's maintenance support for their fleet in a report of 3 July 2013, based on rather limited information. I will deal with that later. He provided a more extensive report based on further information and documents on 15 July 2013.

[257] Mr Fogden was well qualified to express opinions on the matters for which he was engaged, having accumulated 9,000 hours of helicopter flight time since 1977. Between 1997 and 2010, Mr Fogden was with the CAA from 2002 as manager of the general aviation rotary wing and agricultural operations unit. Mr Fogden left the CAA in 2010 to establish a business which provides safety, quality, audit and risk management services for individual aircraft operators.

[258] Mr Fogden impressed me as an expert witness. As with Mr Scott, he was careful to express opinions within the limits of his expertise. Because he did not have an engineering qualification, he engaged Mr Murtagh to assist him with his reviews. As one would expect with his experience, he displayed a detailed knowledge of the Civil Aviation Rules. Moreover, his opinion as to conclusions to be drawn from the CAA's involvement with Airwork, particularly Airwork in the South Island, over the relevant years was based on a detailed knowledge of the interaction that had occurred between the CAA and Airwork.

[259] Mr Fogden had also exhibited appropriate independence in refusing to initially give an opinion as to whether THL should ground the Heli Holdings fleet. It was his view that this was an issue of governance. He made it clear his initial opinion as to the risks involved in continuing to fly the aircraft was based on the limited information he had been given as to the previous incidents and what had occurred with the Gorilla Creek incident.

[260] Although the PTG and FCU related incidents had obviously been of major concern to THL, both Mr Fogden and Mr Murtagh accepted, through the experts' statement, that the failure of those components should not be regarded as reflecting maintenance defaults.

[261] When asked under cross-examination about THL issuing an ops notice in February 2013, putting all pilots on high alert as a result of the Gorilla Creek incident in relation to Airwork's maintained aircraft, he did not try and explain why it may have been reasonable for THL to do that without discussing the matter at the same time with Airwork's manager at Queenstown. He agreed that it would have been preferable for THL to have done so, consistent with the promotion of "just culture" between the two organisations.

[262] It was also apparent that Mr Fogden and Mr Murtagh had been given access to all documents that had been discovered in these proceedings and had been able to decide for themselves which documents were relevant to the issues they were considering and that their opinions were based on those documents. Both Mr Earnshaw and Mr Anderson said they had been provided with and had considered a much more limited number of documents. Perhaps as a result of this, both of them had acknowledged instances in which their opinions were not based on the documents they had considered but on information provided to them by others, including Mr Cudby.

[263] Mr Fogden was critical of the way Mr Earnshaw had referred to the maintenance issues that he had considered as being similar to what Mr Earnshaw had seen in a number of well-respected aviation organisations. Mr Fogden was of the opinion that, whatever failings Mr Earnshaw may have witnessed in other aviation organisations, it was "far from normal to observe such (sometimes repeated) failings all emanating from the one small helicopter maintenance facility (referring to the South Island operations of Airwork)".

[264] It was his opinion, having reviewed CAA audit reports of Airwork South Island line stations from 2007, 2008 and 2010, that the CAA's comments were "not

descriptive of an organisation providing a service to best industry standards". Rather, these reports were:

> … descriptive of an organisation failing to follow not only its own documented procedures (SPIs), but also failing to meet manufacturer's instructions for continued airworthiness and failure to meet minimum CAA Rule requirements.

[265] Further CAA audits of 2009 and 2011 were "indicative of an organisation struggling to maintain the minimum standard qualify assurance process required by Civilian Aviation rules". Both in his brief and in oral evidence, Mr Fogden referred to correspondence from the CAA to Airwork in 2008 which indicated the CAA had significant concerns as to inadequate staff resources with Airwork in the South Island and Airwork's inability to explain clearly how quality assurance function and accountability was being handled in the South Island. He said this had resulted in the CAA taking the unusual step of directing Airwork to employ more people in the South Island and making Airwork's recertification as a maintenance provider conditional on remedial steps being taken promptly.

[266] Mr Fogden was critical of Mr Earnshaw's low assessment of the risk factors associated with the various incidents. He considered that Mr Earnshaw's risk assessment methodology was inappropriate. He said the predictive tool used by Mr Earnshaw was to enable an organisation to quantify a potential risk so that measures could be put in place to prevent the event happening, to reduce the likelihood of it happening (or its severity, if it did happen) or to ensure an informed decision was made to accept the risk. He considered that to adopt this prospective/preventive methodology was pointless because the event had already occurred.

[267] In relation to 17 of the incidents, Mr Fogden said they established "a repeating pattern of inappropriate, ineffective or poor maintenance practice". He added that such unsatisfactory instances of maintenance "have had severe and tragic consequences in the past". He referred to a number of documented accidents to back up that opinion.

[268] Mr Fogden was critical of the way Mr Earnshaw and Mr Cudby had categorised various incidents as simply reflecting human factor errors. He

considered that, in relation to the incidents, there were repeated instances of Airwork South Island failing to adhere to SPIs (standard performance instructions), failing to adhere to manufacturer's instructions for continued airworthiness and failing to comply with Civil Aviation Rules. He referred to the four repeated occurrences of foreign objects being left in the helicopter after maintenance as being the result of a conscious choice to ignore or shortcut Airwork SPIs and CAA's return to service documentation and practice, designed to prevent just such occurrences.

[269] Mr Fogden did not consider that putting measures in place after an event to prevent reoccurrences could be termed "pro-active" as Mr Earnshaw had said in his evidence.

[270] Mr Fogden was critical of the way both Mr Earnshaw and Mr Scott had sought to minimise the potential seriousness and consequences of maintenance errors through referring to the way these should have been picked up by pilots on post maintenance or pre-flight checks. It was Mr Fogden's view that, while Civil Aviation Rules require pilots to "be satisfied that the aircraft is airworthy and in a condition for safe flight":

> Pilots are rightfully entitled to rely on the integrity of the Part 145 certificated organisation quality assurance process and documentation attesting to the fact the aircraft has been maintained to the manufacturers and CAA maintenance requirements including all required primary and duplicate inspection processes.

[271] Mr Fogden concluded that the evidence established recurrent examples of "at risk" behaviour (in contravention of "just culture") as well as:

> [a] repeated breaches of the CAA rules and manufacturers' requirements; and
>
> [b] numerous examples of Airwork not meeting best industry standard over the period 2008 – 2013.

[272] Mr Fogden did not consider there had to be a repeat of maintenance errors for there to be a systemic problem. He also said that in assessing the degree of risk associated with maintenance services, it was the cumulative effect of previous errors which could be important. He did not consider Mr Earnshaw's approach, in putting previous incidents on the shelf once QIFs had been closed off, was appropriate.

Mr Murtagh

[273] Mr Murtagh gave evidence for Heli Holdings as an expert from an engineering perspective. He had access to the same information and documents as Mr Fogden. They had worked in conjunction in providing reports to THL in July 2013 and November 2013 and with regard to evidence.

[274] Mr Murtagh had almost four decades of relevant experience and expertise both as a pilot and as a licensed helicopter engineer. Operating from a pilot and operations perspective, I consider his experience matched that of Mr Scott. In addition, Mr Murtagh had the additional licensed helicopter engineering qualifications, expertise and experience. He had been involved in the aviation industry for a period comparable to that of Mr Scott.

[275] Mr Murtagh was asked to provide an opinion as to whether, over the period 2002 to mid 2013 (with emphasis on the period 2008 to July 2013), the maintenance services provided by Airwork had been performed in accordance with "best industry standards". He considered that in 19 of the relevant incidents, there was "a pattern of repeating failures on behalf of Airwork". Contrary to the evidence of Messrs Anderson, Earnshaw and Scott, Mr Murtagh did not agree that the level of incidents identified was normal or acceptable. He said he did not consider the level of incidents to be reflective of an organisation providing maintenance services to best industry standard. He also considered the incidents demonstrated an unacceptable level of non-compliance with Civil Aviation Rules and manufacturers' requirements.

[276] I note that in his overall assessment he referred to PTG and FCU problems as examples of maintenance-related errors. He must have reassessed his opinion in that regard, having accepted through the experts agreed statement that these problems related to component failure for which Airwork could not be held responsible.

[277] Specifically, he regarded the installation of unapproved main rotor blades around 8 December 2010 as being particularly serious. He was critical of the fact the purchase of those items was approved by the CEO, Mr Jones. He was also critical of the Airwork safety report into this incident which he said failed to acknowledge the potential risk for catastrophic failure resulting from the installation of unapproved

blades. He said that, given that Airwork had documents which showed the blades were originally green military blades, it appeared the Airwork logistics supervisor who negotiated the purchase appeared to have little or no knowledge of the implications of these blades. He was very critical of Airwork for not having robust procedures in place which would have prevented it from dealing with Vaughan Helicopter Support who it appears had been fraudulent in selling these parts. He considered this incident represented "a total failing of Airwork's senior personnel, including CEO". The reference to the CEO had to be a reference to Mr Jones who had approved the purchase.

[278] He regarded the absence of the anti-vibration assembly retention bolts in an aircraft, as observed on 1 January 2008, as a serious error. He described how the main rotor anti-vibration assembly was a critical component of the main rotor head assembly. He had never seen an incident of this nature in his 42 years in aviation. He considered the potential consequences of the maintenance errors were major, with there being potential for the anti-vibration assembly to part company with the aircraft and damage the main tail rotor. He said this failure had the potential to result in the loss of control of the aircraft and loss of life. He considered the incident was not caused simply by lack of ability of the particular engineer. He considered it also showed a lack of on-site supervision from an approved certifying engineer and a willingness to certify outside the company's approved privileges. In this sense, it was his opinion that the incident reflected conscious decisions to ignore or shortcut known and documented safety barriers which could not be categorised simply as "human error".

[279] Through cross-examination, Mr Murtagh's opinions were challenged primarily on the basis that, although he had been so critical of the way Airwork had provided maintenance to THL, as a consultant to two helicopter operators in the Central Otago area, he had arranged for maintenance on their helicopters to be performed by Airwork at Queenstown. Mr Murtagh explained that it had been the owners of those businesses who had made a commercial decision to use Airwork and that choice had not been made as a result of his recommendation. He said the maintenance work required of Airwork in those instances had been limited. He had taken particular care to ensure that work was done to the required standard and he

had remained conscious of the shortcomings he had observed in the service it had provided to THL.

[280] I do not consider that his involvement with Airwork carrying out maintenance work for these other operators' calls into question the validity or justification for the opinions he expressed in relation to Airwork/THL maintenance.

[281] With regard to their overall assessment of the seriousness and significance of Heli Holdings' maintenance defects, I attach greater weight to the evidence given by Mr Fogden and Mr Murtagh than the opinions expressed by Mr Earnshaw and Mr Anderson. While I consider the overall seriousness of the established maintenance defaults to be greater than Mr Scott indicated, his evidence was nevertheless helpful to me in making my own assessment as to these matters.

Further review of the particular incidents

[282] The incidents of 2008, 2009 and 2010 involved significant failings with potentially serious consequences. Understandably, those events would have caused concern to THL and would have continued to affect THL's confidence in the maintenance support Heli Holdings was providing, even after the incidents had been dealt with.

[283] Airwork's quality safety manager's report as to the investigation into the incident of 2 February 2008 concluded:

> This is the third induced maintenance error in the last month of major issues from the Queenstown maintenance base and, while in isolation, it did not threaten the immediate flight safety of the helicopter, it fails to promote the necessary level of flight safety confidence.

[284] On 23 November 2009, after incidents 6 and 7, the then quality assurance coordinator of THL, Mr Evans, emailed the quality service manager of Airwork, Mr Derek McDonald, most concerned at the delay in having an explanation from Airwork as to what exactly had occurred. Mr Evans described THL's steadily decreasing confidence in Airwork as maintenance provider, and THL's fear that "the greatest risk our operation faces is a maintenance induced error that we cannot control".

[285] Mr McDonald responded to Mr Evans, referring to Airwork's report on the incident, and emphasising the need "to investigate further for systemic problems that, in my view, have come to the surface once again at Queenstown". Mr McDonald also stated:

> As previously stated, I share your concerns of a lack of confidence in the maintenance being performed at Queenstown and commit to implementing and promoting change to restore the required level of confidence for all stakeholders in this partnership.

[286] There was then a flurry of email communications within Airwork to Mr McDonald criticising the way in which he had expressed himself. Within Airwork, his comments were described by one person as "dangerous". Another person made the comment "I don't think he understands who pays his wages".

[287] Mr Kevin Johnson, of Airwork, emailed Mr McDonald, saying that he had read Mr Evans' email and accepted the justification for Mr Evans' concerns. However, with regard to Mr McDonald's comments as to potential systemic problems and shared concerns, Mr Johnson said:

> Such comments are serious enough if they are confined to company internal correspondence, but to make those statements to a customer under these circumstances is inexcusable and puts us in a difficult position with THL. There is no doubt that they will use your words against us in our upcoming commercial negotiations and that could result in a negative financial impact for the company. In future please think before making detrimental statements about Airwork to people outside of the company.

[288] In cross-examination and in submissions, much was made of this correspondence with the suggestion that it illustrated how Airwork was acting contrary to the "just culture" obligations which were of fundamental importance in the relationship between the parties.

[289] Having considered all the documented communications around what happened, I do not consider that senior managers or others within Airwork were consciously trying to limit the free, frank and honest exchange of information which "just culture" required. What they were trying to do was change the way in which such communication happened so they would not be at a disadvantage if disputes between Heli Holdings/Airwork and THL ultimately became the subject of Court

proceedings. Although it may not have been their intention, the defensive approach they took with regard to the way concerns might be documented could not help but have a negative impact on maintaining a "just culture" within the Heli Holdings/Airwork and THL relationship. This exchange of emails does illustrate how the conflict over commercial issues and at senior level within the two organisations could have an impact and create risks as far as overall safety of THL's operation was concerned.

[290] Mr Wales took up his position as Airwork's manager of the Queenstown base in March 2010. On 18 March 2010 he reported to superiors at Airwork. In doing so, he referred to "the poor or no file system" in the South Island manager's office and the state of the Airwork workshop in the hangar as "an embarrassment at the moment" and the necessity of presenting the hangar as a clean, tidy, quality set-up if it was to attract new customers.

[291] Consistent with this, on 16 April 2010, Mr Wales and Mr Roger Pullar, the Timaru based engineer for Airwork and maintenance controller for THL, were indicating they were having difficulty installing a new computer system into the South Island because of the pressure they were under just "keeping aircraft flying" and, as Mr Wales put it, "just putting out fires".

[292] In July and August 2010, Mr Wales was emailing others at Airwork indicating that he was having problems around engine performance, with one aircraft in particular (HKY), and describing the way this was affecting THL's confidence in maintenance.

[293] In their agreed statement, the experts would not comment on the incidents where a rag had been left on aircraft (incident 8) and where a hydraulic oil cap was found to be off (incident 22), because it had not been proved who was responsible for these incidents.

[294] In respect of incident 8, a QIF was issued by Mr Pullar. His report indicated the relevant Airwork maintenance provider had provided a statement indicating all associated handover forms and release check forms had been completed,

maintenance staff had been interviewed and all or certain items had been removed. Mr Pullar's report noted that the rag may have originated from the cleaning process at the scheduled inspection and therefore may have been overlooked by all parties at the handover process and subsequent pre-flight checks.

[295] Mr Pullar noted "It is unlikely a pilot would have used any rags for cleaning subsequent to RTS [return to service] after the scheduled inspection". Mr Pullar's report acknowledged the requirement for decks to be inspected for freedom from foreign objects before handover to the pilots. It concluded by saying that little more could be done other than to reinforce the need for persons signing the relevant release documents to do so after due diligence.

[296] In his brief of evidence, Mr Scott appeared willing to accept that the rag must have been left on the deck after maintenance. Given Mr Pullar's report, I consider this is more likely than not to have been the case. Through leaving the rag there, Airwork's maintenance providers were in breach of CAA requirements.

[297] Mr Dave Matthews was the quality assurance manager and senior pilot with THL at the time of incident 22. It was his evidence, which I accept, that there is little reason for a pilot to remove a hydraulic reservoir cap. He said the only reason would be to replenish hydraulic fluid. Hydraulic fluid levels generally remained stable from one scheduled inspection to another. He thought it very unlikely to have been removed by a pilot. Mr Dave Matthews had raised the QIF in relation to this incident. I note he did so in a non-confrontational way, asking Mr Wales and Mr Pullar to look into it. He suggested there was no reason for a pilot to have left the cap off but acknowledged that a few pilots had "pre-flighted" the aircraft before it was noticed. It was Mr Scott's evidence that the hydraulic fluid reservoir on a twin is difficult to access.

[298] Mr Pullar responded to Mr Wales referring to the fact the engineer at Glentanner, Mr Sebastian Bourke, was the last person to top-up the hydraulic reservoir after ground runs at the scheduled inspection. He said that Mr Bourke had been "pretty certain that he put the cap back on". Given three different pilots had carried out pre-flight inspections and not noticed the cap was off, Mr Pullar thought

the most likely scenario was that the cap had been fitted at the scheduled inspection after maintenance but not properly. He considered that, with time, the cap must have worked its way off. If the cap had been off for some time, there would have been more contamination around the opening which had not been the case.

[299] On the basis of that information and Mr Matthews' evidence, I find that probably the engineer, Mr Bourke, had been responsible for that cap either being not applied at all or having been improperly applied after maintenance. On that basis, it is more likely than not there was a breach of minimum maintenance standards.

[300] The experts agreed the incidents involving torque splitting, as a result of PTG or FCU problems, could not be attributed to poor maintenance. Those problems and those incidents were of some significance in assessing all that happened over the 1 July 2008 to 4 July 2013 period because of the problems they created for THL in having aircraft available for its operations and because of the issues raised as to the twins' suitability.

[301] Although the PTG/FCU problems were ultimately found not to have been caused by maintenance problems, they did understandably aggravate THL's concerns over the maintenance of the aircraft and their suitability for THL operations. I also find that, in certain instances, the way Heli Holdings/Airwork dealt with the problems associated with these components did not meet "best industry standards", the obligations of "just culture" or the good faith obligations Heli Holdings had under the contract to THL.

[302] Mr Scott reduced somewhat the seriousness of the torque splitting occurrences by saying they were not unusual and pilots were trained to deal with them. With a torque split, there is a loss of power to one of the two engines, resulting in an imbalance between the level of power being provided by both engines. The pilot has to be able to compensate for this in the way he operates the aircraft. Typically, this will also result in one or more engine parameter limitations being exceeded on the engine which is being relied upon. Mr Dave Matthews explained that, as helicopters fly higher, they require more power and at any mountainous landing site used by THL the health of both engines is critical. He said

experiencing power loss on one engine when close to terrain, such as when landing or taking off, is critical.

[303] Consistent with Mr Matthews' evidence, Mr Scott, in referring to the incident which occurred on 9 February 2011, said the pilot "experienced the torque split in the worst possible moment and was able to handle the situation appropriately and report the issue for further engineering to be carried out".

[304] Mr Bisset had landed an aircraft on Mount Cook at 7,800 feet. On lifting off, he was at about 60 feet when one engine lost power. The other engine was at maximum temperature. Mr Bisset decided that, to use the good engine to compensate would result in a catastrophic over-heating of that engine. He dealt with the situation by diving the aircraft over the edge. His report of the incident also indicated there had been an uncommanded power loss on the day preceding and the day following the incident when it was being hovered after the engine was checked.

[305] The associated problems with the PTG/FCU began in early 2011. In February 2011, Mr Wales conveyed a concern to Airwork that there had been engine problems with a particular aircraft (HMV) and that Heli Holdings had attempted to correct the problem with the installation of another turbine but this had turned out to be unsatisfactory. Mr Wales said that this was causing him frustration and not doing the THL/Airwork relationship any good. Mr Wales advised his superiors that he was telling THL of all that Airwork was doing to deal with the problem but that everything he was doing "would not be needed if we had a decent spare turbine".

[306] On 24 February 2011, Mr Wales emailed complaining of the lack of support from Auckland with the supply of spare parts. He asked for an assurance that the South Island would be supported, and noted that "[we] are doing damage to the relationship with THL and wasting a lot of manpower and time trying to recover". Mr Wales was roundly reprimanded by Mr Richard Pitt, Airwork's general manager, for raising support issues in an email.

[307] I consider the PTG/FCU issues did justifiably cause THL pilots and management to be concerned about the safety of their aircraft.

[308] After the 15 March 2011 incident, relating to an FCU problem, Mr Richard Desborough, senior standards pilot with THL in Queenstown, emailed people within THL expressing intense concern as to what he said was "an ongoing issue with the serviceability of the fuel control units" and "a failure rate will [sic] above what anyone would consider expectable". He said the factors he had referred to:

> … combined to place our pilots in an unacceptable position whereby they are flying aircraft that are not serviceable and should there be an incident or accident then the pilot will be held accountable.

[309] The focus of his concern was not the commercial impact of what was happening. He wrote and emphasised his opinion:

> Airwork does not have the right to place those life threatening decisions (relating as to how they react to the apparent power failure) on or [sic] pilot staff.

[310] There is also significant email communication between THL pilots where they referred to problems they were having with hot starts and battery issues and thought they were probably connected with FCU failures. Two of the twins were grounded as a result of such concerns.

[311] Following incident 15, Mr Dave Matthews and Mr Bisset described what they considered was the unprofessional approach from Mr Wales (Heli Holdings Queenstown) in not wanting to conduct a power assurance check as there was no engineering support to correct the problem should it fail. Mr Matthews had been present when Mr Bisset had made the request.

[312] On 18 March 2011, Mr Bisset referred to the fact a particular aircraft had been grounded for uncommanded torque splitting, again indicating FCU failure. He said it had been suggested this particular aircraft could be used on local flights. He said this was unacceptable because of the potential that they could have a crash to deal with.

[313] While personnel within THL were expressing these sorts of concerns, emails within Airwork indicated they were cynical as to the motivation behind these

expressed concerns and believed Mr Quickfall was trying to make it an Airwork issue to THL's advantage.

[314] Mr Wales provided Airwork with a South Island weekly report of 18 March 2011. Under the heading "current issues", there was this entry:

> Alison engines — Engine report reviewed, comments sent to Pieter and Dan. Note, THL senior pilots are concerned over the number of FCU, PTG problems they are experiencing. 18 March, post-IAV event, serious concern raised by THL over the torque split problems.

[315] There was a response from Mr Pieter van Wyk to another Airwork employee. Mr van Wyk stated:

> Viewing Rob's report, there seems to be many serious defects arising on SI [South Island] fleet that might indicate a potential accident.
>
> Not sure on cause of action, but might be worth our while to internally review our situation on SI related to aircraft serviceability. Especially post PTG failure on Friday (HPI).

[316] On 23 March 2011, Mr Quickfall emailed Mr Hanson of Airwork referring to a meeting scheduled for the next day "to review the performance of Airwork and the twins". The response from Mr Hart within Airwork was consistent with the level of distrust between the parties. In an email he said:

> Nick, this is a set up … I don't really want you to get this call alone and I am not available in the morning.
>
> We need to ensure they don't put words in your mouth.

[317] There was a telephone conference call on 24 March 2011. Following on from that, Mr Bisset sent Airwork a letter of 28 March 2011 including a list of 16 of the incidents which he said demonstrated maintenance failures raising safety concerns. He also summarised the issues they had to deal with as being:

1. the standard of maintenance and level of service associated with it;
2. aircraft reliability and serviceability; and
3. aircraft suitability for our operation.

[318] It was Mr Bisset's evidence, which I accept and which was consistent with the way he recorded what happened at the time, that Mr Wales visited THL and was very upset. He saw THL's concerns as unreasonable and unfounded and said they were driven by commercial reasons and personalities. Mr Wales said that THL was in year nine of a 20 year contract, THL had failed to pay for minimum hours owing and were trying to use "safety" as leverage for commercial gain. He told Mr Bisset that independent customers who paid their bills would receive priority and said Mr Bisset's letter had been "nit-picky", "emotional" and "pedantic".

[319] Mr Bisset was concerned that there was no acknowledgement from Airwork management that THL's concerns were valid. It was Mr Bisset's evidence, which I accept, that at the time he did not have knowledge of the agreement between THL and Heli Holdings or commercial implications which could eventuate from this and that his concerns were with regard to safety and maintenance arising out of concerns expressed by pilots connected with repeated failures.

[320] Mr Wales acknowledged in his evidence that he was not happy with the letter but he could not recall the "so called heated discussion". I am satisfied Mr Wales did react in the way Mr Bisset has described in his evidence and in the way Mr Bisset recorded in an email to Mr Quickfall of 28 March 2011. His reaction was significant in the context of the major issues in this case in that it indicated a reluctance on the part of Heli Holdings' South Island manager to treat issues Mr Bisset was raising as to maintenance and safety as genuine and needing attention. His views are also significant in that they reflected the views of Mr Jones and Mr Hart with regard to both the genuineness of the complaints and the motivation for them.

[321] On 1 April 2011, Mr Pullar, the senior base engineer from Timaru and THL's maintenance controller, advised other people within Airwork that Mr Quickfall had rung him expressing concerns about fuel and control system problems with the twins, that recent issues with one particular aircraft had served "as a catalyst to severely reduce confidence we may have previously regained, that it had become a safety issue in his mind". Mr Pullar expressed the concern that, unless THL's confidence could be restored, THL may ground the twin fleet. Mr Hart's response

within Airwork was that "Quickfall is putting words in people's mouths. We need to stick to the facts."

[322] Mr Bisset, the then operations manager for THL, was the pilot of an aircraft involved in incident 20 on 13 February 2012. He experienced a major torque split when he was returning to Queenstown with four passengers. In his evidence and in a report he prepared dated 13 February 2012, he described how, because the torque split indicated a problem with one of the engines, he performed a one-engine inoperative landing. He did this in accordance with the requirements of the Aircraft Flight Manual. It involved approaching a flat area at a decreasing speed and landing while still moving forward. At a weight below 2,150 kg the aircraft should be able to land at zero speed. It avoids the need to hover which requires more power. Mr Bisset said he was very concerned the major torque split had occurred because he had been told there was a risk of it and so had made a particular check of the governor arm.

[323] In his report, Mr Bisset referred to a concern that, prior to his flying the aircraft, the lead pilot at Queenstown, Pete Saxon, had told him there had been a low power torque splitting issue with the aircraft for a few days and that Airwork engineers had been advised but were not concerned.

[324] After the incident on 13 February 2012, Mr Bisset immediately advised people within THL and Airwork of what happened. Mr Pullar, of Airwork, emailed Mr Wales that day, stating that he had requested investigation and rectification of random torque splits on 8 February, and asking if that had been actioned.

[325] Mr Wales responded the next morning:

> Nothing was done with the torque splits other than discuss with pilots. They were not overly concerned and all manpower was focused on IAV [one of Heli Holdings' leased aircraft].

[326] Mr Wales' response indicates to me that, while he may have been influenced by the attitude of certain THL pilots, he had not followed up on an instruction from a superior at least partly because of a lack of resources, all manpower being focused on another aircraft.

[327] Mr Dave Matthews, with cooperation from Mr Wales and Mr Pullar, prepared the required QIF in relation to this incident and lodged it with the CAA. Airwork sent the PTG to Helicopter Engine Repair Overhaul Services (HEROS), an international company obviously regarded as having the expertise to deal with such a problem. HEROS provided a detailed report to Airwork as to its findings. It was also provided with information as to what the pilot had noticed and how he had dealt with the loss of power in the number two engine. HEROS reported that it could not find any problem with the PTG which would have caused or contributed to the loss of power in one of the engines. In the exchange of information that took place between Airwork and HEROS over the investigation HEROS was conducting, there was a comment from Mr Mike Broderick, the vice president of business development for HEROS, "… and I know I speak for all for when I congratulate your pilot on keeping his head during this emergency, he did a good job."

[328] The documentation around this time indicates Airwork was attempting to find out from Rolls Royce and Honeywell just what the problem was with PTG/FCU issues, that it had received advice that there was a global problem. Airwork produced a report of 13 April 2012 with the conclusion that it could not confirm any defect could have caused the engine problem that occurred. While HEROS had said it could not identify any defect in the PTG, Mr Wales had reported to THL at a team meeting of 23 March 2012 that Rolls Royce/Honeywell had accepted there was a global problem with PTG/FCU issues.

[329] In his evidence, Mr Earnshaw said he considered the PTG failure for the aircraft to have been caused by random or intermittent component failure.

[330] In December 2013, after THL had grounded the Heli Holdings aircraft and mediation had failed, there was email correspondence between Mr Cudby and Mr Bisset, in part over whether THL had grounded the aircraft for commercial reasons or because of genuine safety concerns. On 20 December 2013, Mr Jones responded personally to an email which Mr Bisset had sent to Mr Cudby on 19 December 2013. In the course of correspondence at that time, Mr Bisset referred to concerns he had as to the way the PTG issue was investigated. That led to emails between Mr Cudby and Mr Jones of 3 and 4 February. Mr Cudby sent Mr Jones an email in which he

gave a report by way of summary of what happened in this incident. That brief report referred to Mr Bisset having "hover taxied the aircraft with a full load of passengers and HEROS not having found any fault with the PTG." In his email to Mr Jones, Mr Cudby concluded:

> Based on the flight data recorded on this flight, the flight performance that Grant Bisset managed to achieve with a full load of passengers and the two reports, it is unlikely that this PTG had failed.

[331] Mr Jones' response was:

> With an engine failed and a full load of passengers, the AS355F1 will not hover and so cannot achieve a zero speed landing – it is not unlikely, it is impossible.

[332] Somewhat surprisingly, this proposition was put to Mr Bisset in cross-examination. It carried with it the implication that Mr Bisset had given a false account of how he identified a problem with one engine and how he dealt with it in making a zero speed run-on landing. Mr Bisset pointed out in his brief of evidence and in cross-examination that he had never said he had a full load of passengers. He had been carrying four small passengers. He had never said that he had hovered the helicopter on one engine, as had been suggested by Mr Cudby.

[333] The exchange of emails between Mr Cudby and Mr Jones occurred after the relationship between THL and Heli Holdings had completely broken down. Nevertheless, what occurred in 2014 is, to me, a good illustration of how a dysfunctional relationship, including the aggressive attitude of Mr Jones, has resulted in Airwork failing to acknowledge, contrary to the position adopted by all the experts in this case, that there was a problem with a component that could have a serious affect on the operation of that aircraft.

[334] Mr Bisset's justifiable concern was that Airwork's report had not identified or acknowledged what had caused the loss of power in one engine, requiring him to carry out an emergency-type landing when carrying passengers.

[335] Incident 21 of 21 August 2012 involved the blades being put in the wrong sleeves. Mr Scott said that reinstalling blades usually involved three people. He

regarded what happened as "a serious breach on the part of the maintenance engineers". Incident 22 of 21 November 2012 related to the hydraulic reservoir cap not being in place.

[336] Although there had been improvements since 2008 and 2009, when the worst incidents occurred, the nature and number of maintenance-related issues that had arisen since then were such that THL, at the end of 2012, was justifiably concerned as to whether it was receiving the maintenance support it was entitled to and which was essential to ensure it could operate aircraft safely. Neither the evidence of Heli Holdings' experts nor all the evidence I have considered was sufficient to persuade me that THL's concerns over maintenance were exaggerated, contrived or objectively unjustified.

[337] It was against that background the Gorilla Creek incident occurred.

The Gorilla Creek incident, Mr Marwick's report and the aftermath

[338] On 31 December 2012, a THL pilot approached Heli Holdings' Glentanner-based engineer about vibration through the cabin floor of a particular aircraft. It was the only single in the THL/Heli Holdings fleet, an AS350SD helicopter. The engineer and pilot carried out a test flight. The vibration was confirmed at certain speeds and was noticeable in the forward region of the cabin floor. Because of poor weather and no tracing gear being on hand, it was decided to check the track and balance at the next convenient time. The pilot also told the engineer the cyclic friction lock was defective. The cyclic friction lock is a part that can be used to hold the cyclic or joy-stick in place so that the rotor blades remain stationary while the engine is idling.

[339] The pilot told the Glentanner engineer that when the aircraft had landed on snow and he thought the lock had been correctly frictioned, it moved forward tilting the disc towards the pilot and the passengers. The pilot had re-centred and tightened the friction but later had trouble undoing it. The engineer later said he had dealt with it.

[340] On 3 January 2013, the pilot landed this particular aircraft with a group of tourists at approximately 2.00 pm. The landing site, known as Gorilla Creek, was at 7,000 feet on Mount Cook on top of a 3,000 to 4,000 foot vertical bluff. The passengers got out of the helicopter to view the scene. The pilot left the engine running but was confident he had engaged the cyclic friction nut to hold the blades stationary. After some minutes out of the aircraft, he went back and checked the cyclic was still locked. He returned to his passengers. Some minutes later, he noted the aircraft was making a strange noise, rocking backwards and forwards, and shaking violently with parts coming off it. He shepherded the passengers further away. When the shaking subsided, he entered the aircraft and turned off the engine. The passengers were retrieved by another aircraft. The engineer from Glentanner was flown to the site.

[341] The engineer inspected the rotor head. Certain nuts had to be tightened. Certain other parts on the rotor head had been broken. Pieces of metal and other bits were found in the engine bay. The engineer could not find where these pieces had come from. It was decided to leave the aircraft where it was as the weather was closing in. The aircraft was tied down and staked to the snow.

[342] On 4 January 2013, Heli Holdings' Glentanner engineer was flown to the site by THL's lead pilot from the Glentanner base. Again, the engineer could not identify the source of the metal pieces found in the engine bay. The engineer carried out an inspection of the main rotor head area and then the engine was cranked over while the engineer watched and listened. With that, another piece of metal, similar to those found earlier, appeared. The engineer removed the starter generator for further inspection. Certain defects were noticed with the starter generator. There was also a rattle inside the generator, the source of which could not be determined.

[343] Against that background, they decided the starter generator should be refitted "as it was still starting". It was to be used to get the aircraft off-site and back to the Glentanner base. The lead pilot checked the cyclic friction. It was deemed to be operating satisfactorily. The aircraft was started up. They noted a vibration from the starter generator. After that, the aircraft was run up to the flight position and further monitoring carried out with no new issues discovered. A precautionary hover check

was carried out. A very noticeable surging issue was identified with the engine. The aircraft was landed and investigated further. A fuel pipe had broken. With that, the aircraft was tied down again and picketed to the snow. The engineer and pilot returned to Glentanner.

[344] On 5 January 2013, two engineers, including the engineer from Glentanner and Heli Holdings' Timaru senior base engineer and a THL pilot, went to the Gorilla Creek landing site with a replacement starter generator and new pipe. The cyclic friction was inspected again and was tested as best it could be and was found to be functioning satisfactorily. The replacement parts were fitted. Following further checks, the aircraft was flown back to the Glentanner base. Further checks were carried out on 6 January 2013. The aircraft was back available for operation at 12.30 pm that day.

[345] The Heli Holdings engineers prepared an incident report at that point. They noted that, after his landing at Gorilla Creek, the pilot had noticed a strange vibration noise similar to earlier vibration issues. The engineers were of the opinion that this noise was starter/generator related.

[346] On 7 January 2013, Mr Ken Matthews emailed Mr Hart of Heli Holdings and Airwork in relation to this event. He wrote:

> Mark Quickfall and I are Skyline representatives on the Board of The Helicopter Line and as such we are particularly mindful of our responsibilities, especially given the nature of that Company's activity's [sic].
>
> It was very concerning therefore to learn that the above aircraft was rendered inoperable last Thursday in circumstances where the causal factor for the incident appears to be that of mechanical failure. It appears that human life was not in any danger at the time of this incident although that seems to be a matter of simply good fortune!
>
> I understand that the aircraft has now been returned to Glentanner where an evaluation is currently underway and that Airwork is scheduled to provide their determination of such later this week.
>
> Should the results indicate that the cause cannot be clearly identified, or deemed 'inconclusive', then in view of previous and documented instance where a similar interpretation has been offered then I am left contemplating as to whether such 'inconclusiveness' be reason for cause for alarm in itself, or merely (at worst) a convenient response. Clearly I cannot be categoric in

> respect of either observation, however the matter of servicing competency is an issue that concerns us greatly especially when a comparison is made with other alternative service providers.
>
> If the evaluation determines the specific reason as to why the incident occurred (and as a result new or changed processes or similar are introduced) then there is clearly some comfort to be derived for all parties.
>
> Should that not be the case, then we do not like to have to contemplate any thought of any culpability arising for a former lessee, through our continuation of usage of aircraft which are apparently not being maintained to an appropriate standard. I make this comment in the context of the other serious maintenance issues that have occurred in the past.
>
> Your comments are awaited.

[347] In response to this, Mr Jones emailed Mr Hart and Airwork's in-house counsel, Mr Greg Steele the next day. His email stated:

> This letter is a real opportunity for us to make a statement. Matthews letter is ridiculous in the extreme but clearly has been crafted in an attempt to use later to discredit the maintenance of Airwork.
>
> Can you please let me know what the actual issue was; where it happened; and any relevant information.
>
> In due course I would like to reply personally to him, but not until you have replied.

[348] That evening, Mr Hart emailed Mr Ken Matthews with his email copied to Mr Quickfall, Mr Staniland and Mr Bisset of THL; Mr Jones, in-house counsel Mr Steele and Mr Christie of Airwork. The email provided his detailed summary of events. It began:

> We have investigated the failure and carried out all necessary maintenance and repairs in accordance with the manufacturers' and/or CAA requirements to return this aircraft to service.

[349] It referred to checks that had been made. The letter stated:

> The starter generator fault appears to have occurred at or about the time of landing at Gorilla Stream. Investigation on site revealed this to be the cause of the vibration noted by the pilot upon landing. There was no indication prior to the event occurring that there was any issue with the starter generator. The failure in this component was not a threat to safety of the aircraft, and indeed we note that the starter generator was still operating sufficiently to start the aircraft at Gorilla Stream on 4 January.

[350] Mr Hart stated the damage identified with parts of the rotor head resulted from the tilting which occurred after the landing. He then said they had investigated the cause of the tilt. They attributed this to the cyclic friction lock not being sufficiently tightened. He noted that the pilot had believed that he had tightened the friction lock before alighting from the aircraft and again some minutes later.

[351] His email went on:

> As there is no mechanical cause we have determined the cause to be that the lock was not tightened sufficiently to prevent the gusty wind from pushing the blades back and resulting in the disk tilt. From the pilot's report it suggests that he has not applied the tension required to prevent the cyclic and disk moving and/or being affected by the wind. The resolution for this in the future is for pilots to provide greater tension on the friction lock. We also question the appropriateness of pilots leaving machines running while aircraft are unattended at these locations. This latter point is clearly an operational issue for you to address. No doubt this will be taking place in line with the various operational, Safety Management and reporting requirements under Part 12 of the CAA regulations.
>
> The failure in the PR PTG to FCU pipe appears to have occurred during the incident at Gorilla Stream. This view is supported by the fact that the engine surging, arising from the break in the pipe, did not occur until after the incident.
>
> We have reviewed the engineering reports which break down the various events and actions taken and are comfortable with the decision of our licensed engineers to release this aircraft back to service. Notwithstanding this we have initiated an internal QA investigation into this event, which will include further inspection and/or testing of the failed components, and we will share these with you in due course.
>
> We do not accept your comment that there are any competency issues with Airwork's servicing, and we can assure you that our dispatch and reliability record compares favourably with that achieved by other service providers, particularly in light of the difficult operating conditions.

[352] That same evening, a short time after Mr Hart had emailed his response to Mr Staniland and the THL directors, Mr Bisset emailed the directors with a report as to what he had learnt from the pilots he had spoken to. His report referred to the vibration which had been noted by a pilot on 29 and 30 December 2012. The pilot who had landed the aircraft at Gorilla Creek had said he noted a vibration in the aircraft and also an unusual sound when he landed at Gorilla Creek on his last flight, the eighth flight of that day. The pilot could not find the source of the vibration or noise, which he said was short-lived. Mr Bisset noted that he had tested the aircraft

and if friction was not applied the cyclic consistently migrated out of an acceptable locked range within 15 seconds. He noted that, if Mr Hart's assertions were correct, THL had to accept:

> 1 A pilot with thousands of hours on type failed to adequately friction lock the cyclic, the only time in his career, coincidentally at the same moment in time as the bearing on the starter generator failed, however all parties accept that he did indeed lock it to some degree.
>
> 2 The failure of the Startergen bearing and the cyclic lock failure are two entirely separate and unrelated events.

[353] He said "this could be the case, however I suspect not". With regard to Mr Hart's comments as to there being no competency issues with Airwork's servicing and reputation with other major helicopter users, he wrote:

> I presume he will be happy therefore for us to get their QA people to analyse our maintenance related events and pass judgement on whether they think the occurrences to date are representative of sound maintenance practices.
>
> At the end of the day gentlemen, we need to be satisfied that we can look ourselves and each other in the eye and put our hands on our hearts and say that we are satisfied that after considering all perspectives of commercial, maintenance, and safety issues we are doing the best we can to provide our clients and staff with safe and reliable aircraft that are fit for purpose to operate in.

[354] Mr Jones drafted an email to Mr Ken Matthews on the morning of Wednesday 9 January 2013. The draft was sent to Mr Hart and Mr Steele. It does not appear to have been sent to Mr Matthews but it is relevant and significant in demonstrating the attitude which Mr Jones had towards what had occurred.

> Ken,
>
> I have received correspondence around the recent issues with AS350 ZK-HBR at Glentanner.
>
> Included in that correspondence is your email to Chris Hart which, without any basis or investigation, presumes that the issues were caused by mechanical/engineering failures.
>
> There was an issue (not a failure) with the starter generator, but that was not a safety concern.
>
> The concern is that the plane of the rotor system moved fully aft whilst the helicopter was running on the ground (and caused other damage).

> In 40 years of operating and flying helicopters, I know of only two reasons why this will happen:
>
> 1. The cyclic friction nut (which is common to most general aviation helicopters) has either not been tightened at all or insufficiently tightened.
>
> 2. The helicopter M/R head or mast comes into contact with something and pulls the drivetrain from the basic airframe.
>
> In this case it is clear that the cause is lack of tension on the cyclic friction nut, and to argue otherwise is nonsensical.
>
> The pilot's report actually raises more questions than answers and that in itself is of concern.
>
> Given your concerns that this incident could have had, and the fact that the helicopter may have been operating in contravention of the regulations, it is clear that further action is required.
>
> I believe the correct process is to advise NZCAA of this incident.

[355] On 18 January 2013, Mr Ken Matthews emailed Mr Hart. He advised him that, after considering respective reports of 3 January 2013, THL's Board had requested an aircraft engineer, who he said was totally independent of the parties, to conduct "a comprehensive review as to why this incident occurred". The email did not inform Mr Hart who the engineer was but said the appointment was "driven by the fact that there are contentions that the incident could have been prompted either by a mechanical failure, or by operator error". The email stated that the Board considered it important that they have clarity on this issue, that the effects of the incident might have had serious life-threatening consequences and that the Board's directors considered they had a significant responsibility in this regard, hence the action taken.

[356] Within Airwork, Mr Jones then emailed Mr Hart expressing the opinion:

> The reason for Matthews actions are clearly to find some way that could help them in the inevitable legal action and to try and cover his previous email – unfortunately as you say, he is digging himself a deeper hole.

[357] Mr Jones referred to the fact that, while in New Zealand, a pilot leaving a helicopter which is running is probably legal and an accepted practice, there might now be an issue with the CAA as to whether that is the case. He offered the opinion:

> Given Matthews comments about the threat to life etc, there is clearly now a dilemma for them whether they (THL) can allow this to continue. If they do not, then I imagine the downside for THL will be significant.

[358] The engineer THL engaged to provide an independent report was Mr Marwick. Mr Marwick was subpoenaed by THL to give evidence at the hearing. He had not provided a brief of his evidence. He did not participate as one of the experts in the conference of experts.

[359] Mr Marwick's CV establishes beyond any doubt that he was well qualified to conduct this review. Mr Murtagh said Mr Marwick was acknowledged within the New Zealand general aviation sector as one of the most experienced helicopter engineers in New Zealand.

[360] In the course of his evidence, Mr Marwick said that when he had been approached by Mr Bisset to see if he would do the report, his response had been that he would prefer not to because he was a practising engineer in the industry, he had a lot of respect for his industry peers and Mr Jones was one of them. He nevertheless accepted the engagement because his employer, Helicopters New Zealand (HNZ), asked him to do so. He said he understood that he was to provide a report as an independent expert.

[361] After Mr Marwick provided his report on the particular incident, Mr Staniland suggested to Mr Bisset that he invite Mr Marwick to make some general comments about the way Airwork investigated other incidents and that as being potentially evidence of "a systemic failure in Airwork's maintenance procedures". Mr Marwick's response was that he did not want to comment further without investigating other incidents and that he felt what was in his report sufficiently covered what he was asked to do which was specific to the Gorilla Creek aircraft (HBR) and the overall THL/Airwork relationship. In that way, he demonstrated his independence at the time he provided his report.

[362] On learning of this report, in an internal memo, Mr Jones recorded that he had spoken to someone at HNZ asking if Mr Marwick's report had been prepared on behalf of HNZ or Mr Marwick himself. His memo recorded that he was critical of

HNZ for not having allowed Airwork to vet the report. He had concluded by saying "litigation was inevitable and it was a pity that HNZ had allowed themselves to get caught up in what will be a no win situation for them".

[363] Mr Marwick's report was provided under the Helicopter New Zealand Limited banner. The report began by saying that he considered Mr Bisset's report of 30 January 2013 provided a fair representation of the facts around the incident. I read that as referring to the sequence of events. It recorded that he was met in Christchurch on 21 January by Mr Bisset but accompanied to Glentanner at Mount Cook by Mr Christie of Airwork and Heli Holdings. Mr Christie was then Heli Holdings' business development manager and general manager of Airwork NZ.

[364] Mr Marwick conducted a short interview with the engineer from Glentanner in the presence of Mr Bisset and two of the THL pilots. He made a test flight of the relevant aircraft with the Glentanner engineer and the pilots. While the helicopter was idle on the ground, the cyclic friction system seemed to be working. He then decided to inspect the cyclic friction system more closely. He said this was a simple procedure and tools were not required. He found "moderate wear" on three different parts. He alerted all parties to this finding. He also spoke to Airwork's engineering manager in Auckland who suggested more testing to confirm if his findings contributed to the incident.

[365] Mr Marwick and Mr Bisset met with Mr Staniland and THL directors on the morning of the next day, 22 January 2013. He and Mr Bisset then returned to Glentanner. They carried out further tests on the cyclic friction system and found that it was half the friction level as detected on another aircraft. The following day, Mr Marwick, Mr Bisset and Mr Christie met with Heli Holdings/Airwork's senior South Island engineer, Mr Pullar, at Timaru. There they carried out further tests on the cyclic friction of the aircraft involved in the Gorilla Creek incident. Mr Pullar and Mr Jeff O'Sullivan, the Airwork Auckland engineering manager, observed the checks. All agreed "the cyclic friction mechanism was faulty on an intermittent basis".

[366] In his report, Mr Marwick said the Glentanner engineer had confirmed that a fault had been detected in the starter generator at Gorilla Creek and that it had been decided to refit the starter to get the aircraft off the site as it was still starting the engine and generating. He noted the component was replaced after an engine fuel pipe was found broken, preventing aircraft flight. Mr Marwick's report stated:

> 3. Findings
>
> 3.1 The high frequency vibration reported on 31 December was not adequately investigated to find the cause and this clearly resulted in the eventual failure of the PG pipe.
>
> 3.2 The starter generator found faulty on 3 Jan should have been replaced before further flight was attempted.
>
> 3.3 The cause of the faulty cyclic friction system on HBR should have been investigated fully after the first incident and definitely after the 2nd incident which damaged the aircraft. An investigation was never carried by Airwork until 23 Jan, after Nick and Grant proved the point.[20] In the interim, the aircraft was released to service on 6 Jan following inspections and repair work to the main Rotor head. At no time was a detailed inspection to determine serviceability of the cyclic friction carried out, nor was Eurocopter consulted requesting wear limits and an inspection procedure other than an email from Mark Haywood 8 Jan requesting reasons for this event.
>
> 3.4 There are no inspection procedures in chap 5 of the Eurocopter MM for an event where the cyclic is allowed to move back to the aft stop. At no time had Eurocopter been consulted with regard to what inspection criteria should be followed.
>
> 4. Conclusions and Safety Recommendations
>
> 4.1 It is highly likely a collapsed starter generator rear bearing was the cause of the high-frequency vibration felt on the aircraft floor on 31 Dec.
>
> This eventually caused the engine FCU-GOV PG line to crack and fail, resulting in N1 surging. Earlier detection of the vibration source would have prevented this failure.
>
> 4.2 As there are [sic] is no specific inspection procedure in the maintenance manual, advice should have been requested from Eurocopter by Airwork at the time of the incident to ensure the cyclic friction device was serviceable.
>
> 4.3 Abnormal occurrence maintenance actions should have been requested from Eurocopter following the cyclic friction incident, which resulted in damage to main rotor head components.
>
> 4.4 It is my opinion that the aircraft, passengers and crew were exposed to an unacceptably high level of risk by this aircraft being operated carrying the defects it was.

---

[20] I have taken this to be a reference to an Airwork engineer Nick Banks and Grant Bisset.

[367] In evidence before me, Mr Marwick confirmed it was his view there was a problem with the starter generator bearing which caused the vibration that was felt on 31 December 2012 and again on 3 January 2013 and this caused the fuel line to fail. He was of the view that it was a coincidence the fuel line broke on the same day as the failure of the cyclic. He could not find any link between the two events. He said this breaking of the fuel line resulted in engine surging. He said, because the engine is controlled by air pressure, a crack in the PG line is a serious matter. In terms of the operation of the aircraft, it would lose power. He said that, if the aircraft had been flying at that point, the pilot would have to do an auto-rotation landing because he would not have the power available to remain in flight. Mr Marwick considered the starter generator should not have been put back in the helicopter because there was the potential for it to blow itself to bits on the way back to base. If the starter generator failed, it could result in a loss of power for the lights and radio. He said it was also common knowledge that the problem with the starter generator could cause fracturing of the PG pipe.

[368] Mr Marwick's evidence was that a high frequency vibration would normally be associated with a starter generator or a tail rotor or a shaft in the engine or something which was turning at a high RPM, rather than a low frequency vibration which is normally associated with the main rotor system which turns at much lesser RPM. He said high frequency vibrations in a helicopter are a red-flag because it means a part is turning very fast so it can fail very fast and there would be the potential for a catastrophic failure of the aircraft. Accepting his evidence in this regard, I can understand why Mr Bisset was so concerned that on 31 December 2012 an engineer had agreed to the aircraft being flown and operated after the pilot and engineer had confirmed that vibrations were occurring on that aircraft.

[369] For reasons which Mr Murtagh explained, he considered the decision on the mountain to refit the faulty starter generator and allow the aircraft to be flown with unidentified debris on the engine deck was a serious breach of Civil Aviation Rules. He considered this incident had the potential to be fatal. He considered a faulty generator had the potential to create high frequency vibration which could cause the rupture of key components such as fuel lines or control pipes leading to engine

failure or ruptured fuel lines. He considered this could lead to a potential loss of all power in the engine and thus effectively to the aircraft falling out of the sky.

[370] Heli Holdings' experts considered that this was unlikely given that, before the aircraft took off, there would be a hover test when such a potential problem would have been apparent so that the pilot could then have landed safely. This is what actually happened on Mount Cook. It was not, however, explained by any of Heli Holdings' experts why a failure of a component, such as a break in a fuel line resulting from a starter motor defect, had to happen only when and if the pilot conducted a hover test before taking off. On the information available to me, particularly from Mr Marwick, it would seem possible that with a faulty starter motor there was potential for significant damage to key components to take effect at some point after an initial hover test. With the relevant aircraft flying off Mount Cook, albeit on a flight of some seven minutes to the maintenance base at Glentanner, with a faulty starter motor and debris on the deck, there was a potential for that flight to have been disastrous for the aircraft and the engineer and pilot who were on board.

[371] Although Mr Marwick's final report was dated 30 January 2013, Airwork and THL had been made aware of the intermittent fault with the cyclic friction device through their involvement in the testing at Timaru on 23 January 2013. Mr Hart emailed key people within Airwork, including Mr Jones, and key people within THL. His email began:

> As you are likely now aware, Nick Marwick and our engineering team have concluded their inspection of the cyclic friction system on ZK-HBR. Notwithstanding a number of tests that indicated there was no issue with the system, an intermittent fault has now been identified.

[372] The email advised that Airwork engineers were continuing to review the system and that they considered the fault highly irregular. He said Airwork considered it prudent to review the status of other aircraft with the same friction modification status and, in the meantime, pilots should not exit the aircraft while they were running.

[373] Mr Bisset prepared a report dated 28 January 2013 expressing his concerns and recommendations following the investigation by Mr Marwick. He considered the sequence of events showed up the following failures:

> 1 Failure by Airwork to correctly assess aircraft defects when presented with them on Dec 31st.
>
> 2 Failure to take the correct action of replacing the starter gen when it was found to be damaged.
>
> 3 Failure to correctly investigate and identify the root cause of the rotor head damage despite assuring THL that they had.
>
> 4 Failure to appropriately assess the damage to the starter gen and subsequent releasing HBR to service for the return flight from Gorilla to Glentanner while the starter/gen was in a damaged state, that we believe would have resulted in an engine failure as evidenced by the damage to the PR line.
>
> 5 Failure of Roger Pullar in his duty of care as Maintenance Controller to THL by allowing the aircraft to be returned to service still carrying the defective cyclic lock.
>
> 6 Failure by Airwork to correctly follow up after the incident, this was left to THL.
>
> 7 An ill-conceived and inappropriate response to THL by Airwork on the causes of the incident.
>
> **Recommendation**
>
> In my professional opinion I consider that these matters are extremely serious. THL cannot have confidence in Airwork as a maintenance provider. There have been too many serious incidents that have been caused by poor maintenance performance by Airwork. We have found ourselves in the uncomfortable position of receiving conflicting advice from Airwork and Rolls Royce over the PTG issue. We now find that the advice and actions of Airwork regarding the HBR incident were incorrect and inadequate.
>
> Knowing that THL has been exceptionally lucky that none of these events have had catastrophic consequences, and knowing that there is a continuation of serious incidents it is reasonable for us to conclude that sooner or later we will have another serious event.
>
> For this reason I recommend that THL ceases to operate Airwork maintained aircraft as soon as practically possible.
>
> We have issued an ops notice putting pilots on high alert to maintenance issues with Airwork aircraft.

[374] Appendix A of Mr Bisset's report listed the 24 incidents which have been features in these proceedings and the QIFs and documentation lodged with the CAA

(if applicable) in respect of each incident. In relation to each incident, Mr Bisset had noted what he considered to be the potential outcome, in nearly each case portraying the incident as having potentially grave consequences.

[375] Mr Marwick's conclusions and safety recommendations ended with these statements:

> 4.5 I find the list of additional incidents in Appendix A of the THL Bisset report concerning. While I have not been asked to investigate these incidents specifically and therefore will not pass judgement on them individually, in my opinion on the face of it they are outside of what would normally be expected or accepted in a Pt 135 Operation, and represent a serious safety concern that should be investigated further.
>
> 4.6 It is essential that operations and maintenance providers have a sound, respectful and professional relationship that fosters safety, it appears that the relationship between THL and Airwork is dysfunctional, this represents a safety concern in itself.

[376] Mr Marwick said he came to that last conclusion based on conversations he had had with people when carrying out his investigation into the Gorilla Creek incident, namely Mr Bourke (the Glentanner engineer), Mr Pullar (the senior Heli Holdings engineer and THL maintenance controller based in Timaru), Mr Bisset of THL and Mr O'Sullivan, the Airwork Auckland engineering manager.

[377] In cross-examination, Mr Heaney suggested Mr Marwick's observations as to the dysfunctional relationship between THL and Airwork resulted from information he had been given as to THL's wish to replace the twins and reasonably significant contractual negotiations which were underway at the time about this. I am satisfied that, from Mr Marwick's answers, he did not have any specific information about this. Mr Marwick did acknowledge that Mr Bisset had spoken to him about problems in connection with the incidents referred to in appendix A of Mr Bisset's report. He accepted that he knew there was a level of dissatisfaction within THL over the various incidents that had occurred over the years. Mr Marwick said it was not as a result of the meeting with Mr Staniland and THL directors that he concluded there were relationship issues between THL and Heli Holdings.

[378] Mr Scott accepted that the decision to fly the aircraft with the unexplained condition of the starter generator was probably a breach of Civil Aviation Rules and the aircraft should not have been considered airworthy.

[379] Mr Fogden, the expert with the best knowledge of the application of Civil Aviation Rules to the situations the Court was dealing with, was adamant that, at that point, the aircraft could not fly without a one-off permit issued by the CAA for an unserviceable aircraft. He was also clear that it was the engineer's responsibility to obtain the permit.

[380] Mr Anderson said that the engineer had not acted wrongly in deciding to reinstall the starter motor and to allow the pilot to fly the aircraft back to the Glentanner base, because he had considered whether this was appropriate. It was his opinion that this was sufficient justification for the decision that he came to. It was another aspect of his evidence that caused me concern. The opinion he expressed was contrary to the conclusion of other experts and contrary to the conclusion which Airwork had come to in its own report into the incident.

[381] Mr Earnshaw said he could not be sure what had caused the pipe to break but, in all probability, vibrations associated with the starter motor would have exacerbated whatever problem there was with the pipe. He said that quite possibly, if no problem had emerged when the pilot did the hover check, the helicopter could have lifted off the mountainside, but then experienced serious problems in the operation of the aircraft.

[382] Mr Staniland said that, as the CAA-approved senior person for THL, he was the person primarily responsible for safety issues within THL. Mr Staniland said it was the Gorilla Creek incident that caused his organisation to really focus on safety issues, especially as concerned himself, Mr Ken Matthews and the Skyline Board who had become involved as a result of buying out the Quickfall interests in THL. Mr Staniland said he was concerned at the incident; it made THL aware of risks it was facing and that the way Mr Hart had blamed the pilot was part of its concern. He said THL had a concern that it was a "cultural thing" and that, because the default

position was that it was the pilot's fault, Heli Holdings was closing its mind to other potential causes.

[383] Mr Staniland provided the Bisset and Marwick reports to Airwork on 31 January 2013 recording that the directors were very concerned at the contents of the reports, advising they had sent copies of them to the CAA and that they had issued "an ops notice to our pilots to report any concerns as regards your fleet".

[384] On 25 January 2013, Mr Staniland instructed Mr Dave Matthews to issue an operations notice to all THL pilots. It required them:

> … to be on high alert for any maintenance issues with regard to Airwork-maintained aircraft. Any defect that has any potential to affect the airworthiness of an aircraft shall result in that aircraft being immediately grounded and the defect reported to engineering staff via the usual procedure …

[385] Mr Staniland said the issuing of the notice was, to him, a pragmatic response to what THL saw as a risk. Under cross-examination he accepted that, with the benefit of hindsight, it would have been helpful for the notice to have been discussed with Mr Wales before it was issued. Given THL's level of concern and Mr Earnshaw's suggestion that, if THL was genuinely concerned as to the safety of Airwork's aircraft, it should have grounded the whole fleet, I do not accept that there could be major criticism of the way Mr Staniland issued this notice. The fact that he did so without someone from THL discussing what he was doing with Mr Wales, and that this had the potential to impact on the way maintenance staff at Queenstown cooperated with pilots, illustrated how the conflict between THL and Heli Holdings/Airwork could have an impact on safety.

[386] Mr Dave Matthews gave evidence of the way Mr Wales had personally attacked him after Mr Matthews had issued this ops notice. I accept his evidence that Mr Wales said maintenance issues and commercial issues should be compartmentalised or separate and that Mr Wales told Mr Matthews he should be cautious of his reputation as he had signed the ops notice.

[387] In attacking Mr Matthews in this way, Mr Wales must have assumed the issuing of the ops notice was to assist THL in its commercial negotiations rather than

because of genuine concerns over safety. That assumption was consistent with the assumptions made by Mr Hart and Mr Jones.

[388] On 1 February 2013, Mr Hart circulated the reports amongst key personnel within Airwork with his email beginning:

> Please see attached reports sent last night. Whilst this is a disappointing approach, I can't say I am surprised. Clearly Skyline is trying to force an issue around safety as a way of breaking a commercial agreement they do not like.

[389] He said an initial read indicated there were a number of inaccuracies and omissions in the report.

[390] Mr Hart suggested to in-house counsel that they should think about an interim response, highlighting that Airwork had not approved Mr Marwick as an independent investigator and summarising factual inadequacies in the report. Mr Hart emailed THL on 2 February 2013 with detailed comments and criticisms in relation to the Marwick and Bisset reports.

[391] From then on, the record of communications indicated THL personnel were being especially vigilant over possible defects in maintenance and engineering support. Airwork and Heli Holdings' staff, including their Queenstown engineering manager, were being super-defensive.

[392] On 11 February 2013, THL gave notice of default to Heli Holdings. The letter referred to 14 of the incidents in the appendix to Mr Bisset's report and asserted "these incidents exemplify a systemic failure by Heli Holdings (through Airwork) to comply with its maintenance and service obligations under clause 6.2 of the agreement". The letter claimed the potential consequences of a number of the incidents were serious. It required Heli Holdings' non-compliance default and/or breach of the agreement to be remedied within 30 days of the receipt of this notice, failing which THL would be entitled to terminate the agreement by notice in writing.

[393] THL suggested that, while ultimately it was a matter for Heli Holdings, an option for Heli Holdings could be to replace its maintenance contractor Airwork with

a new contractor to provide maintenance services and engage constructively with THL as to its maintenance and service level expectations. THL proposed a meeting between the parties and their legal representatives to discuss these issues. Mr Staniland advised Mr Christie, of Heli Holdings, that THL was seeking "a desktop review of some of the historic maintenance issues to give us a clearer view on these".

[394] Mr Hart's opinion, expressed in communications within Airwork, was that there was little doubt to him that THL was trying to use a safety argument to further a commercial disagreement but that Airwork's focus had to remain on maintaining its professionalism and standards.

[395] The CAA communicated with Mr Staniland and Mr Hart on 27 February 2013 in response to communications it had received from both THL and Airwork over maintenance issues. The CAA encouraged a meeting of THL, Airwork and the CAA. In that email, the CAA's general manager, operations and airworthiness wrote:

> I advise that the CAA expects operators and maintenance providers to implement corrective and preventative action (without waiting for the regulator) to ensure aircraft airworthiness and to avoid significant defect occurrences. *Given that operators and maintenance providers are strongly linked through the maintenance control function, it is our view that this action will not be fully effective unless the parties involved are working cooperatively together*. [Emphasis added.]

[396] A meeting took place between Mr Staniland, Mr Ken Matthews and Mr Hart on 4 March 2013. Following that meeting, Mr Hart emailed Messrs Staniland and Matthews saying "we accept that THL are not taking steps to terminate the current contract".

[397] On 20 March 2013, Mr Quickfall emailed Mr Hart following a telephone discussion, referring to THL's concerns. The email stated:

> To recap on our telephone discussion here are the key points;
>
> 1/ Loss of confidence by THL in Airwork maintenance provision.
>
> 2/ Airwork counter claim THL pilots are not complying with set procedures.

3/ Twins need to be replaced, preferred replacement being Super D2's.

4/ A number of Twins are heavier than original resulting in reduced payload.

Following our discussion, the following is an option:

1/ Airwork provide 4 Super D2's to THL's specs. Treated as replacement of Twins.

2/ THL operate as per agreed rates.

3/ THL and Airwork agree on service standards for maintenance. As I mentioned THL has employed a new chief pilot. Norm is a qualified aircraft engineer so his brief is to ensure all pilots and helicopters meet high standards. He will be responsible for managing our fleet of helicopters.

4/ Airwork to address engineering management issues. Service Standards Agreement as already discussed.

5/ Proposed new agreement remains alive for ongoing discussion.

Mr Quickfall said these proposals would "provide both parties the opportunity to win back confidence".

[398] Airwork provided THL with a draft final report on the Gorilla Creek incident on 9 April 2013. In a summary, the report stated:

> The Airwork interim report… issued 25 January reflected the combined efforts of Airwork, THL and Mr Nick Marwick and concluded that the cyclic friction mechanism had failed to adequately restrain the cyclic control from moving from its friction position, which in turn allowed the rotor disc to become unstable.

[399] It said the root cause of the cyclic friction failure had not been determined, that operational and maintenance events over three days from 3 January 2013 involved multiple unusual defects and that "some Airwork and THL concerns regarding the initial reinstallation of the starter generator have been found to be valid". It referred to some "process deficiencies" having been highlighted.

[400] In light of all the information that was available at the time that report was prepared and which has subsequently become available through these proceedings, I consider it significant that, given the importance of "just culture", there is no reference in the report to the fact that Airwork initially attributed the failure of the

cyclic control to pilot error. The report was also somewhat misleading in the way it indicated that Airwork and THL had cooperated in arranging for the cyclic locking device to be investigated further, those initial investigations revealing the way it failed on an intermittent basis. In fact, that investigation was carried out only after THL unilaterally took the initiative to engage Mr Marwick to investigate the situation, his involvement being something that Mr Jones was clearly most unhappy about.

[401] In a similar way, the report did not provide information as to the way in which the breakdown in the relationship between THL and Airwork was creating problems in the way it said "the decision of the Glentanner base engineer to initially refit the starter generator has been raised by both THL and Airwork as a potential concern". Heli Holdings and Airwork did not raise this initially as a concern. The concern was raised initially by THL and particularly Mr Marwick.

[402] The Airwork report explained how the Glentanner-based engineer had decided it would be appropriate to refit the starter generator and to try and operate the aircraft using it. The report did acknowledge the engineer had sufficient information at the time to make a correct determination and "that determination should have been to identify the unit as unserviceable and not reinstall it". Given the seriousness of the risks for the aircraft and those flying in it, I consider the report did not adequately acknowledge the seriousness of what happened in its conclusion.

[403] The report referred to vibrations that came from the starter generator following reinstallation, the engineer and pilot nevertheless proceeding with a hover check potentially in anticipation of flying off the mountain and a subsequent engine surge which was found to have been caused by the broken fuel pipe. Given the likely connection between the vibrations and the broken fuel pipe, it is surprising there was no consideration in the report as to whether the Timaru engineer should have released the aircraft to service on 31 January after the pilot had reported experiencing vibrations. Consideration in the report, as to the significance of what happened then and whether the engineer's actions at that time were appropriate, appears inadequate given that, by the time Airwork prepared this report, it had a

report from Mr Bisset and a report from Mr Marwick very critical of what had happened on 31 January.

[404] Mr Bisset, I accept, was most concerned at the content of the report in the context of all that had occurred. It was his evidence that he was concerned that Airwork had released the aircraft back to service on 31 January with the defective cyclic lock. He considered that THL had been exposed by this and that aspect was not addressed in the report. He considered there were factual discrepancies in the report and it failed to address what he said were "the key failings and the corrective actions required to prevent this happening again". I accept that he genuinely held those views and those concerns and that they were justified.

[405] Mr Bisset said the Gorilla Creek or HBR incident:

> … was the straw that broke the camel's back. In particular, it was the attitude of Airwork which was immediately to blame THL and its pilots. But even more so was the fact that Airwork released the aircraft back into service when the origin of the debris found on the engine deck had not been established.

[406] Mr Bisset expressed the opinion then to Mr Quickfall, Mr Staniland and Mr Ken Matthews that "if this is the standard of response to an incident as serious as this, we are correct in our view not to have confidence in Airwork as a maintenance provider". Significantly, in the context of views held by Heli Holdings and allegations put to Mr Bisset that his concerns were motivated by THL's desire to change the commercial arrangements, he said to those directors that substituting singles for the twins would not adequately address his concerns. In response to the report, he suggested that THL should tell Airwork that it would not operate its aircraft until Airwork could restore THL's confidence in its maintenance service provision.

[407] On 10 April 2013, Mr Bisset emailed Mr Staniland, Mr Ken Matthews, Mr Quickfall, THL's newly appointed chief pilot Mr Kensington, and Mr Dave Matthews, quality assurance manager. He said the key issues were:

> 1. We have lost faith and confidence in Airwork as a maintenance provider;

2. The final HBR report alerts us to very serious failings in Airwork's investigation and rectification process;

3. If we have a fatal incident as a result of Airwork's poor maintenance, and we have knowingly chosen to continue to operate with the history that we have, I think we will be very exposed to a claim of negligence as an operator;

4. I am not prepared to hold the responsibility of continuing to operate aircraft activity, neither is Norm [Kensington, THL's then Chief Pilot].

Mr Bisset

[408] At the time of the hearing, Mr Bisset was the operations manager for THL and general manager, aviation, operations and tourism for Totally Tourism Limited. He completed his flying training in 1984. He completed his helicopter training in 2002 and has been flying helicopters since then. He started flying for THL in 2005 as a casual pilot based in Glentanner and subsequently moved to a permanent position as lead pilot based in Queenstown. He became the operations manager in October 2010.

[409] The evidence of Mr Bisset was important, both as to the Gorilla Creek incident but also the other maintenance-related incidents which I was required to consider. More than anyone, he brought concerns over maintenance/engineering to the attention of Mr Quickfall and later Mr Staniland. I consider his concerns were driven by his anxieties over safety. This was evident in his communications around the time of the particular incidents he dealt with. It was also evident in his responses under cross-examination. I find that he was content to leave the negotiation of contractual issues to others.

[410] I do consider Mr Bisset was intensely aware of the worst possible outcome where there had been a maintenance issue. In reporting on the worst possible outcome of a particular event, he did not readily discount the risk by acknowledging the potential for the defect to be identified and remedied following a further inspection or check by the pilot. For example, Mr Bisset considered the insertion of the rotor blades into the wrong sleeves could have resulted in the aircraft shaking or vibrating to pieces through ground resonance without readily acknowledging this risk was likely to be significantly reduced through the pilot carrying out a hover

check and identifying the vibration in time to shut the aircraft down so the problem could be fixed.

[411] I also consider that, after Mr Bisset had become aware of the various maintenance-related incidents that occurred with the aircraft before he became the operations manager in October 2010, he was particularly vigilant over potential maintenance failings on the part of Airwork and not inclined to take a tolerant approach to apparent failings. An example of this occurred with his reaction to the way Airwork dealt with the FCU which was involved in the torque splitting incident connected with his emergency landing of an aircraft in February 2012. On inspection, blue grease was found on that component, an indication of a defect with it. Airwork sent the component to the overseas experts, HEROS, for further examination. HEROS noted that, on their inspection, the blue grease was no longer apparent but appeared to have been removed with a cleaner. The presence of the blue grease would have been of assistance to HEROS in identifying the defect with the FCU. Mr Bisset regarded the removal of the blue grease as a deliberate tampering with evidence. In this regard, I consider his suspicion over this and the way he mentioned it at a subsequent meeting of pilots, was an over-reaction, given Airwork had told HEROS of the earlier presence of blue grease when they sent the FCU to HEROS for examination.

[412] I nevertheless consider that Mr Bisset could not properly be criticised for the way in which he dealt with maintenance issues. THL was flying these aircraft often in a challenging and dangerous environment. The safety of passengers and pilots had to be all-important. Mr Bisset's standards and intensely cautionary approach were entirely consistent with THL's business and operational requirements and also with Heli Holdings' contractual obligation to provide maintenance support to "best industry standards".

[413] It was understandable that Mr Bisset was particularly vigilant and intolerant of continuing maintenance issues given the seriousness of the pre-2011 incidents, the further incidents that did occur and the frustrations and safety issues associated with the PTG/FCU problems.

[414] Mr Bisset was not so negative about the Heli Holdings/Airwork maintenance that he could not recognise positive aspects of the support they provided. In mid-March 2011, he was passing on information from Airwork to THL's pilots and noting the apparent "light at the end of the tunnel" in terms of resolving FCU and PTG issues.

[415] I also consider that before the Gorilla Creek incident, as operations manager, Mr Bisset had been open to the possibility that there could be an improvement in the Heli Holdings/Airwork maintenance operation which would allay his concerns. He had been positive that improvements could follow the appointment of Mr Christie as business development manager for Heli Holdings in 2011. He was also optimistic about prospects for an improvement after the appointment of Mr Cudby as fleet operations manager in 2012. I accept his confidence in Heli Holdings' maintenance had begun to increase during the latter part of 2012 but it was severely damaged as a result of the Gorilla Creek incident and its aftermath.

[416] I accept Mr Bisset's concerns were all about ensuring the aircraft were maintained in a way that would ensure the safety of all people flying in them.

The meeting of 15 April 2013

[417] On 15 April 2013, senior representatives from THL and Heli Holdings/Airwork met to discuss maintenance issues.

[418] As a result of that meeting, at the beginning of June 2013, THL and Airwork personnel were generally attempting to work together to restore THL's confidence in the maintenance and engineering support which Heli Holdings/Airwork was providing. Alongside that, Mr Quickfall and Mr Staniland were negotiating with Mr Hart over various aspects of the contractual arrangements.

[419] There is a dispute as to some of the detail of what was acknowledged and agreed to by the Heli Holdings/Airwork representatives at the April meeting.

[420] On the evidence, I accept that:

(a) THL representatives made it clear the meeting was to deal with maintenance issues, rather than commercial arrangements;

(b) THL representatives made it clear they had fundamentally lost confidence in Airwork and wanted an assurance that there were going to be positive changes;

(c) Airwork representatives acknowledged THL concerns; and

(d) the parties agreed on action items to address these concerns.

[421] THL representatives considered real progress had been made at the meeting with regard to addressing their maintenance concerns.

[422] It was Mr Bisset's evidence that, at this meeting, he challenged Mr Hart's assertions that Airwork had been proactive in the way it had investigated the Gorilla Creek incident. Mr Bisset questioned how that could be so when Mr Jones had phoned both Mr Marwick and his employer (HNZ) threatening them about Mr Marwick's involvement with the investigation. Mr Bisset asked how THL could trust Airwork with that sort of response. It was his evidence, which I accept, that Mr Hart said Mr Jones had intervened to discourage HNZ and Mr Marwick's involvement because of Airwork's concern the incident might be used as a commercial lever.

[423] It was Mr Bisset's evidence that one of THL's maintenance concerns raised at the meeting related to what it considered to be problems in shortcomings with management, specifically from Mr Wales in Queenstown. At the meeting, I am satisfied the THL representatives, particularly Mr Bisset, said they had an issue with regard to Mr Wales' position as the South Island manager. Mr Bisset, in particular, referred to the way he had responded to Mr Dave Matthews notifying the CAA of the incident where blades had been put into the incorrect sleeves on a particular aircraft after maintenance. I am also satisfied that the Heli Holdings representative agreed to

review his position and deal with the South Island management structure. Consistent with the cooperative approach, which both parties indicated they would adopt at that meeting, it was also agreed that, recognising the sensitivity of employment issues, there was ultimately no reference to this particular matter in the action plan that was circulated.

[424] Consistent with a recognition of there being a problem with Mr Wales, one of the items agreed to in the action plan was that maintenance-related issues would be addressed by communication between Mr Kensington for THL and Mr Cudby for Airwork. Neither Mr Cudby nor Mr Hart contradicted Mr Bisset's evidence in this regard.

[425] Consistent with this concern too, although Mr Wales was the South Island engineering manager, Heli Holdings did not have him at the meeting. Mr Christie had earlier referred to the attitude of Mr Wales being a serious problem in the Heli Holdings/THL relationship in an email within Airwork.

[426] There was no evidence that Heli Holdings had done anything specific to address the acknowledged concerns over Mr Wales' position in the period between 15 April 2013 and 4 July 2013.

[427] THL's minutes of the meeting referred to Mr Bisset talking about lacking confidence in the provision of services from Airwork, a reference to certain specific incidents and to Mr Hart agreeing:

> … that THL would not have a defensible position, given historic maintenance deficiencies, should the HBR (Gorilla Creek) incident have been … fatal and that they are here to agree demonstrable changes to current circumstances and service quality provision.

[428] In their evidence, Mr Hart and Mr Cudby said their recollection was that Mr Hart had said that basically both parties had issues to work on and that, if nothing changed and something went wrong, both parties would be in a difficult situation.

[429] As was referred to in THL's minutes and as was accepted by Mr Cudby who attended, at that meeting both THL and Heli Holdings expressed a "willingness to

get relationship and service provision to a required level". There was general agreement that THL and Airwork would work together to provide maintenance service. Mr Cudby agreed it was definitely an operating meeting about improving the operation and getting THL's confidence back up again. Mr Cudby accepted that THL had confidence issues. He accepted them as genuine and was very concerned about them.

[430] Later, in the brief statements Mr Jones made about maintenance issues in the 2 July conference call, and in their evidence, Mr Hart and Mr Cudby disputed the accuracy of the THL minutes insofar as they referred to Heli Holdings representatives acknowledging shortcomings in maintenance provision. Nevertheless, there was no dispute that at this meeting THL raised concerns about maintenance issues. There was no dispute that, in a general way, Heli Holdings/Airwork's representatives acknowledged those concerns and their genuineness and committed to addressing them by improving the relationship and maintenance support.

[431] Mr Cudby's notes of the meeting indicated Heli Holdings offered to put a particular engineer into Queenstown. His notes also recorded Mr Bisset as saying Mr Wales' attitude reflected a cultural "them and us" division and in the context of a discussion about Mr Wales, Mr Hart saying "contract issues are not easy to deal with". Mr Cudby's notes also indicate that Mr Hart had identified a challenge with availability being the only key performance indicator (KPI) as to the standard of maintenance required.

[432] Having considered the evidence, I am satisfied that at that meeting Heli Holdings representatives, in accepting the genuineness of THL's concerns, recognised that shortcomings in the provision of engineering services in the past had left THL "exposed".

[433] Both Mr Staniland and Mr Quickfall proceeded on the basis that immediate maintenance issues were being addressed through the acknowledgements which Heli Holdings had made at that meeting and its commitment to the action plan which had emerged from that meeting.

[434] While Mr Bisset saw the outcome of the meeting as positive, he was obviously unenthusiastic about continuing to rely on Airwork for maintenance support. In an email of 18 April 2013, he suggested, in light of all the evidence, the directors could consider choosing not to deal with Airwork any further but acknowledged it was a decision for the directors. On 25 April 2013, he suggested it would be prudent and responsible to ground the Airwork aircraft until they had been independently verified as airworthy. The aircraft were not grounded.

[435] On 30 May 2013, there was a meeting of THL lead pilots at which Mr Quickfall said the Board requirement for Airwork aircraft to be flown was discussed. The meeting was also attended by Mr Staniland but he was not there for the whole meeting. It was Mr Bisset's evidence that the pilots expressed their concern at having to continue flying the Airwork aircraft. Mr Bisset emailed Mr Staniland and the directors after the meeting advising them that the lead pilots did not think it fair or reasonable for them to fly the Airwork aircraft given a lack of demonstrable change from Airwork.

[436] It was suggested to Mr Bisset in cross-examination that this was not a fair reflection of the pilots' views. I have considered Mr Bisset's responses to those suggestions, the evidence of Mr Staniland who was also present at part of the meeting, the evidence of THL's quality assurance manager Mr Dave Matthews who was at the meeting, and communications from pilots around that time. I accept that pilots did express a concern over the adequacy of maintenance and the aircraft, although to differing degrees and for different reasons. Of significance, those concerns were conveyed to the Board of THL and became part of the context in which it had to make decisions over the relationship with Heli Holdings and Airwork. There was no basis in the evidence or in the documentary record to indicate this meeting took place for an ulterior commercial motive, or that the pilots were encouraged or led into expressing this view in order to assist the directors in their negotiations over the commercial arrangements between THL and Airwork.

[437] Mr Bisset confirmed that, as contemplated by the action plan, meetings had taken place between Mr Cudby and Mr Kensington. Mr Bisset continued to be concerned about risks associated with operating the Heli Holdings aircraft but noted

the Board, while having discussed the concerns raised by the lead pilots, had decided to continue operating the machines. At the same time, the Board decided there should be an audit of the machines. It had been suggested Eurocopter should carry out this audit. It had declined. THL went back to Airwork requesting it to agree to an alternative.

[438] On 1 July 2013, Mr Kensington sent an email to pilots advising them that, following a meeting that morning, the Board had asked the pilots to "make every effort to use the Airwork aircraft". He acknowledged that the audit of the machines had not been carried out but advised them that their safety concerns around the aircraft and Airwork, as discussed at the meeting of 30 May, had been noted and recorded. He asked the lead pilots to brief their pilots to be vigilant in pre-flight and after-flight checks and to advise him of any concerns about the aircraft being fit for purpose.

[439] In marked contrast to the attitude of Mr Bisset and THL pilots, it is clear from the evidence that Mr Jones considered THL's concerns over maintenance/safety issues, at least after about 2011, were a fabrication. Mr Hart's view was that THL's concerns were over-stated, not genuinely about safety but motivated by commercial considerations.

Conclusions over maintenance issues – 1 July 2008 to 30 June 2013

[440] In relation to the allegations which THL has made as to Heli Holdings' failure to meet its contractual maintenance obligations, my conclusions are these:

(a) In the period 1 July 2008 to February 2013, there were a number of occasions when Heli Holdings/Airwork failed in significant ways to meet their contractual obligations. While Airwork raised QIFs and responded to them generally, in accordance with CAA regulations, on some occasions, for example with its initial investigation of and response to the Gorilla Creek incident, its response was not consistent with "best industry standards".

(b) While the potential seriousness of Heli Holdings' defaults varied, some could potentially have had the most serious of consequences, both with regard to the safety of pilots and passengers in the helicopter and also for THL's reputation and business.

(c) The number, nature and recurrence of certain failings justifiably gave THL cause to be concerned that Heli Holdings/Airwork were not doing enough to ensure they had the personnel, resources and procedures in place to eliminate the potential for such problems to occur.

(d) The torque split issues, caused by FCU/PTG defects, did not result from poor maintenance or breach of CAA or maintenance requirements but they did result in significant issues over the availability and suitability of the aircraft for THL's operations and caused THL to be justifiably concerned about the safety of aircraft. In connection with some of these incidents, there was a problem in Heli Holdings not having available replacement parts or the personnel needed to deal with the issues. There were also occasions when engineers allowed aircraft to remain in service, despite being told by pilots they had experienced actual or potential power splits which meant the aircraft may not have been airworthy and, at the very least, further investigation was required. In connection with these incidents, there were also occasions when Heli Holdings' personnel, including Mr Wales, did not respond to them in a way consistent with Heli Holdings' obligations under the contract.

(e) Mr Quickfall used the history of maintenance-related issues and his complaints as to the suitability of the twins for THL's continuing operations to argue there should be a significant change in the contractual arrangements, a change in the aircraft and a significant discount or waiver of any claim for shortfall hours. Despite that, I find that THL's concerns over the maintenance incidents and their potential impact on safety were genuine.

(f) The ability of Heli Holdings/Airwork to provide maintenance and engineering support, in particular, to deal with issues in accordance with "just culture" obligations and to be proactive in avoiding the potential for future incidents, was significantly undermined by the belief at senior management level that, when THL raised concerns over maintenance or engineering issues, this was being done to gain a commercial advantage rather than because it genuinely wanted its concerns addressed.

(g) THL's concerns over maintenance/engineering support and safety, arising out of the Gorilla Creek incident, were genuine, significant and justified. The way Heli Holdings dealt with the issues that arose out of this incident, particularly with the initial detailed response from Mr Hart, was the antithesis of what should have happened in accordance with "just culture" obligations. I also find that this happened because of the influence and direction exerted by Mr Jones.

(h) Risks over safety should not be considered simply by determining whether aircraft were considered by THL, Heli Holdings and the CAA to be airworthy and Airwork/CAA-compliant. In many of the 24 incidents, including the Gorilla Creek incident, aircraft were made available to pilots to fly with significant defects despite Airwork being CAA-approved and the aircraft thought to be airworthy. It was clear from much of the evidence I heard from all the experts that the safety of an aircraft operation, such as THL's, was dependent on much more than just ensuring the aircraft and the maintenance operation were CAA-approved. Maintenance and engineering support had to be provided in a way that eliminated the risk of aircraft being flown with significant defects.

(i) There were shortcomings in Heli Holdings/Airwork's maintenance support. These had been exposed through the various incidents culminating in the Gorilla Creek incident. THL was justified in taking that history into account when it had to make a decision in 2013 as to

whether there was then an unacceptable risk in continuing to rely on Airwork for continued maintenance and engineering support.

(j) The expert evidence and other evidence called by Heli Holdings fell far short of persuading me that THL's issues or concerns over maintenance provision and the safety of the aircraft were a fabrication used simply to justify THL ceasing to use the Heli Holdings aircraft.

[441] I am also satisfied that, between 3 January 2013 and 30 June 2013, THL was not pursuing concerns arising out of the Gorilla Creek incident simply to try and terminate its contractual arrangements with Heli Holdings or to gain some commercial advantage. I say this because:

(a) THL did genuinely seek further advice and information from an independent expert, Mr Marwick, to find out whether potential concerns it might have arising out of the incident were justified.

(b) Although Mr Bisset thought pilot error was an unlikely explanation, his communications at the time indicated he was open to this as a possibility.

(c) Even after Mr Marwick's report was available and Mr Bisset was firmly of the opinion that THL should be using another maintenance/engineer provider, his view was not accepted without reservation by the THL directors. Instead, they sought a further report and opinion from a reputable expert, Mr Fogden.

(d) After the meeting between Mr Staniland, Mr Ken Matthews and Mr Hart on 4 March 2013, Mr Hart had accepted that THL was not taking steps to terminate the current contract.

(e) Rather than using what had happened over Gorilla Creek as a basis for seeking to terminate the contractual relationship with Heli Holdings, THL genuinely gave Heli Holdings/Airwork the opportunity to address

its concerns through the meeting which took place on 15 April 2013. THL also then acknowledged the progress that had been made through that meeting and what it saw as a commitment from Heli Holdings/Airwork representatives to address its concerns and provide engineering and maintenance support of a standard consistent with Heli Holdings' contractual obligations.

THL's liability for shortfall hours for the period 1 July 2008 to 30 June 2013

Heli Holdings' breaches of contract

[442] THL's defence to the claim for shortfall hours over the 2008 to 2013 period is that Heli Holdings' breaches of contract preclude its recovery of the claimed shortfall payments.

[443] I have found that, over the period 1 July 2008 to 30 June 2013, there were significant failings in the standard of maintenance and engineering support provided by Heli Holdings. These involved a departure from the minimum requirements of the CAA, the aircraft manufacturers' and the "best industry standards" which it had to meet under its contract with THL. Heli Holdings was in breach of its contractual obligations in not meeting "just culture" obligations, particularly with regard to the way it dealt with the Gorilla Creek incident, but also issues arising out of the PTG/FCUs.

[444] I have found Heli Holdings was in breach of an implied term of the contract in allowing the weight of the twins to increase over this period but THL has not established that any loss resulted from this.

[445] Heli Holdings departed from the agreed procedure and timeframe with regard to its obligation to negotiate in good faith over the refurbishment and/or replacement of aircraft and the formula for establishing and paying for shortfall hours. With regard to these departures, however, THL continued to negotiate with Heli Holdings over these issues knowing that, in the way these discussions were proceeding, both parties were pursuing those discussions in a manner different than had been

anticipated and agreed to with the 2007 and 2008 agreements. THL agreed to a variation of the contractual obligations in this regard.

[446] In submissions for THL, Mr Weston said it should be accepted that THL had not been able to fly the twins to the extent it would otherwise have done because of proved breaches. He said, in pursuing this claim, Heli Holdings cannot ignore its own role leading to the shortfall, and asserted that payment of the shortfall in the circumstances in this case would result in a "windfall" for Heli Holdings. He referred to a statement from the Supreme Court that:[21]

> A party who is in breach of an essential term of a contract is not entitled to enforce its rights under the contract (assuming the other party has not affirmed the contract despite the breach).

[447] This statement from the Supreme Court was however made in the context of the Court having to consider whether Station Properties Ltd could legally require the appellants to settle the purchase of a property when Station Properties Ltd was seriously in breach of a contract. The Supreme Court was not dealing with a dispute between parties as to what might be owing under a contract that had already run its course. In these latter circumstances, I am satisfied a first party cannot avoid its contractual obligations simply by asserting that during the relevant period the other party has been in breach of contract. What the first party would have to prove is that, by reason of such a breach, the first party has suffered a loss which extinguishes or reduces the extent of its liability to the other party or that it has not obtained the benefit it was contractually entitled to.

[448] In August 2013 the parties went to mediation in Queenstown over the matters in dispute. That did not resolve the conflict between the parties.

THL's abandoned counter-claim/set-off

[449] On 24 September, Heli Holdings issued summary judgment proceedings against THL and Totally Tourism Limited. On 3 April 2014, Associate Judge

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[21] *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [94] (citations omitted).

Osborne gave judgment dismissing the plaintiff's opposed application for summary judgment.[22]

[450] In the summary judgment proceedings, in its notice of opposition and supporting affidavits, THL provided detailed evidence as to:

- the problems that had occurred over the relevant years with maintenance of its fleet;

- the way in which the twins were no longer suitable for THL's business and the difficulties it had faced in trying to arrange for the replacement of such aircraft;

- the problems that had arisen as a result of aircraft weight increases;

- the concerns that had arisen as a result of this with regard to the ongoing safety of the aircraft THL was leasing; and

- Heli Holdings' refusal to review arrangements between them and to engage with THL constructively in ways required by the contract.

[451] THL claimed that, as a result of these alleged breaches, it would have a counter-claim or set off for $5,079,578 excluding GST on account of:

- a credit claimed to be due to THL in respect of an over-payment for the 2006 year;

- costs it claimed to have incurred as a result of the unreliability of the twins and the lack of adequate maintenance (covering management time of directors, management of pilots, cost of extra fuel burn with having to use twins, pilot costs associated with training, maintenance flights and loss of yield due to weight issues and unsuitability of the twins); and

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22 *Heli Holdings Ltd v The Helicopter Line Ltd* [2014] NZHC 664.

- cost of grounding helicopters and hours lost for work otherwise available because the twins were not suitable.

[452] When the proceedings were heard before me, THL indicated it was not pursuing any counterclaim or set-off on the above basis because of the cost and difficulty it would have faced in detailing and proving the loss as originally claimed. THL is thus in the position of asserting that Heli Holdings was significantly in breach of contract over the relevant years without having proved it has suffered any financial loss as a result of such breaches.

Conclusion as to liability

[453] To the extent that Heli Holdings has been in breach of contract in the ways I have summarised, THL has been aware of those breaches but has nevertheless continued to operate the Heli Holdings aircraft. It was able to do this in accordance with the contract. Until and unless the contract was varied by agreement, cancelled or repudiated/breached by Heli Holdings to such an extent it was not entitled to benefit from it, THL was required to meet its obligations under that contract.

[454] On that basis, Heli Holdings is entitled to payment for shortfall hours in accordance with the contract for the years from 1 July 2008 to 30 June 2013.

Quantum of Heli Holdings' shortfall hours' entitlement – 1 July 2008 to 30 June 2013

[455] In the period 1 July 2008 to 30 June 2013 THL had to fly the aircraft for a minimum of 3,500 hours per annum, subject to an adjustment if the helicopters were unavailable for use by THL on the basis set out in clause 7.2 of the 2008 agreement. The amount payable for shortfall hours was to be 75 per cent of the agreed price per hour. It was payable no later than 31 July for the previous year to 30 June.

[456] In accordance with those terms, Heli Holdings claims the amounts due to it for shortfall hours to 30 June 2013 were as follows:

Year to 30 June	Invoice date	Shortfall hours	GST exclusive	Total charge
2009	1/2/13	423.35	222,259.77	255,598.74
2010	1/2/13	543.44	285,308.00	328,104.20
2011	1/2/13	715.11	383,655.00	441,203.25
2012	31/8/12	701.01	376,093.00	432,506.95
2013	15/7/13	1,410.45	756,706.00	870,211.90
TOTAL CHARGE				**$2,327,625.04**

[457] It has been submitted for THL that, even if there is a liability to pay for shortfall hours for this period, Heli Holdings has not adequately proved the quantum of its claim. Mr Weston acknowledged that Heli Holdings had referred to its calculations as to the amounts due, the basis on which those amounts had been calculated and also the analysis that had been made by THL but he said there was no evidence that either of the calculations was actually correct. In particular, he argued that none of the four operational documents, which comprised the log and provide the base information which is to be used in calculating what would be due in terms of the contract, have been produced to the Court.

[458] Given that payment for shortfall hours was required within a month of the end of each financial year, Heli Holdings should have provided details as to the basis of its calculation and the allowance for any credit that was due promptly after the end of each year. The 2008 agreement, clause 7.8, required the parties to deal with any dispute in relation to such credit "immediately" in accordance with the lines of communication which had been put in place under that agreement. Neither party dealt with shortfall hours in accordance with such requirements.

[459] There were detailed discussions between Mr Hart and Mr Staniland over a potential settlement for shortfall hours during 2012. The only invoice issued around that time for this period was an invoice of 31 August 2012 for the year to 30 June 2012. Invoices for earlier years were issued on 1 February 2013. An invoice for the year to 30 June 2013 was not issued until 15 July 2013.

[460] In preparation for the mediation in August 2013, Mr Staniland arranged for an accountant with THL, Keri Jackson, to calculate what Heli Holdings' claims for shortfall hours should be, based on THL's records. In her summary, she provided details of the adjustments which THL claimed had to be made in accordance with the contract.

[461] THL's calculation of the shortfall hour amount owing to Heli Holdings for the same period was $2,015,724.72 (including GST).

[462] Ms Jackson was not available to give evidence at the hearing. I did not receive evidence justifying the higher figures for which THL had been invoiced. On the summary judgment application which Heli Holdings pursued after matters were not resolved at mediation, Heli Holdings sought summary judgment on the basis of Ms Jackson's calculations. On that application it claimed that with her calculations there was an acknowledgement of liability for shortfall hours in that sum. THL strongly denied that any admission of liability was involved but did accept that the calculations showed what would be due if THL was liable for shortfall hours in accordance with the formula provided for in the contract.

[463] In the context of that evidence, the amount due for shortfall hours for the 2009 to 30 June 2013 years, in accordance with the formula and rates set out in the contract, was $2,015,724.72 (including GST).

[464] For Heli Holdings, Mr Heaney argued that no evidence had been produced by THL to prove that it had properly disputed the amounts claimed for shortfall hours, as it was required to do under clause 4.9 of the 2002 agreement. He submitted, on that basis, the Court could find that Heli Holdings had proven the amounts due for shortfall hours were as claimed by Heli Holdings.

[465] Pursuant to clause 4.8 of the 2002 agreement, the liability for shortfall hours resulted from THL not flying the aircraft for the minimum flying hours "within any year of the term". The liability, and thus the amount due, could only be established at the end of the year. Clause 4.8 provided the amount then due would be payable by

THL "as soon as is practicable and in any event no later than 31 July for the period 1 July - 30 June of the preceding year".

[466] Clause 4.9 stated that, in calculating shortfall hours, no account was to be taken of flying hours when the aircraft were not available to THL because of non-scheduled maintenance or for any other non-agreed maintenance subject to a proviso. Clause 4.9 then stated:

> The parties are to agree such hours, if any, on a monthly basis and (if necessary) in June of each year shall deduct such total hours in the calculation of the shortfall hours.

[467] Given their agreement in 2008 that the parties would renegotiate the formula for calculating shortfall hours, the fact that Heli Holdings did not issue invoices for claimed shortfall hours at the end of each relevant year and had decided to defer its claim for shortfall hours or to deal with them in the context of discussions over the total commercial arrangements, Heli Holdings cannot rely on any non-compliance with clause 4.9 of the 2002 agreement to establish that THL must pay the amounts it claims for shortfall hours. Given THL's denial of the quantum of Heli Holdings' claim for this period, Heli Holdings did have to prove the amount that was due to it, not simply by giving evidence as to how the claim had been calculated but by showing that the information relied on for those calculations was correct. It has not done this.

[468] On the other hand, the calculations and information provided by Kerry Jackson for the summary judgment proceedings are evidence that THL had checked the amounts being claimed against the base information and, on that basis, acknowledged the amounts as calculated by Ms Jackson were due if there was otherwise a liability to pay for those shortfall hours. On that basis, I find Heli Holdings has proved that the amount due to it for shortfall hours for the period from 1 July 2008 to 30 June 2013 is $2,015,724.72 (including GST).

Judicature Act interest

[469] Heli Holdings has also claimed interest on the amount due for each year as from 31 July following the end of the preceding year. Interest is claimed on the basis

that clause 4.8 required payment to be made by that time. Invoices were not issued consistent with this. There is no provision in any of the agreements for interest to be paid where there has been default. A claim for interest thus has to be made under the Judicature Act.

[470] Heli Holdings is entitled to interest under the Judicature Act rate of five per cent as from the time it filed proceedings in the High Court (26 September 2013) until judgment.

By 4 July 2013, had Heli Holdings repudiated or breached the contract to the extent that THL was entitled to cancel?

The position as at 30 June 2015

[471] As at 21 June 2013, the parties were negotiating over proposals to deal with hourly rates and minimum hours going forward. Without prejudice and subject to full Airwork Board approval, Mr Hart had proposed that, if they could not agree on how to settle issues over shortfall hours while they concentrated on having operational issues sorted, they would go to arbitration over that part of their dispute but with an agreement that THL's liability for shortfall hours would be limited to between $250,000 and $600,000, depending on when a new agreement was implemented. THL had proposed payment of $125,000.

[472] Maintenance and engineering support issues were being addressed at operational level through the implementation of the action plan agreed to on 15 April 2013. THL had not been told what was happening over Mr Wales' position as manager of the Queenstown facility but did not appear to be making an issue of this at that stage. The THL minutes of the 15 April 2013 meeting had been sent to Heli Holdings/Airwork without apparent rejection or request for variation. Those minutes recorded Heli Holdings/Airwork's acceptance and recognition of THL's concerns and of the need to restore THL's confidence in the engineering support it should receive.

[473] In draft agreements sent to Heli Holdings, THL had attempted to provide for the parties to agree on what was meant by "best industry standards" and to provide a

means of determining any dispute over whether those standards had been met and potential sanctions or outcomes if THL's confidence was not restored. Heli Holdings' representatives had, in draft documents, acknowledged the need for a maintenance service agreement between the parties. The need for some objective measure of maintenance performance had been discussed at the meeting on 15 April 2013.

[474] Weight issues with the aircraft were being addressed at operational level. There appeared to be agreement, at least between Mr Hart and THL, that four twins would be replaced with singles. Although THL did not know this at the time, Heli Holdings had already purchased three singles with the intention they would become part of the Heli Holdings fleet.

[475] Proposals and counter-proposals had been made with regard to hourly rates that would be paid for the new replacement aircraft and for existing aircraft that THL would continue to use, and over the minimum hours that THL would have to pay for. Mr Hart and THL appeared to be close to agreement over minimum hours and hourly rates for replacement aircraft. There was some uncertainty over whether Heli Holdings would require minimum hours for existing aircraft or a commitment for THL to use them on a best endeavours basis. Mr Staniland and Mr Hart had both been discussing an hourly rate for the replacement aircraft of NZ$1,350 plus GST. In the draft agreement which Mr Quickfall forwarded on 21 June 2013, he had allowed for an hourly rate for the replacement aircraft of $1,400 plus GST. The difference over the hourly rate for the existing aircraft appeared to be between Mr Hart's proposed figure of $1,250 and $1,073 plus GST.

[476] I have seen the communications between Mr Christie and Mr Hart from Heli Holdings and from Mr Staniland and Mr Quickfall for THL. I have also had regard to the evidence of these people and also Mr Ken Matthews, a director of THL and the chairman of directors for Skyline. These people had shown a commitment to a continuing relationship and an acknowledgement of the need for a change in the commercial arrangements to ensure the relationship could continue for the benefit of both parties. The contract contemplated this could be necessary.

[477] Had these people been left to continue with their negotiations, it may well have been possible for them to resolve the issues they had to address in terms of the contract. With Mr Jones assuming responsibility for the relationship, the prospects for such an outcome were significantly reduced.

[478] On 24 June 2013, Mr Hart advised Mr Quickfall that Heli Holdings' position remained "as per the current agreement between our parties" and that management of the THL relationship was being assigned to Mr Jones. This led to the conference call of Mr Jones with THL representatives on 2 July 2013.

The 2 July 2013 conference call

[479] It was plain from the preceding email correspondence and from all the evidence that Mr Jones' intention was to talk only about Heli Holdings' claim for shortfall hours. Mr Quickfall's wish was to talk about broader issues, including THL's loss of confidence in Airwork's maintenance support, weight issues and the fitness for purpose of the twins and their suitability for THL's business, and how those matters might impact the dispute over shortfall hours.

[480] Mr Jones said the purpose of the phone call on 2 July 2013 was to advise THL that it must pay its accounts or face legal action. He said this was in line with his email correspondence with THL in the lead up to the phone call. Mr Jones also said "I basically told THL there was nothing wrong with the maintenance services provided under the contract". He acknowledged there was some discussion about THL's record of the 15 April 2013 meeting and that he said words in the minutes attributed to Mr Hart were not correct. He also said that, at the time of the conference, he was not aware of the details of the agreed action items but that he never indicated during the conference that Heli Holdings/Airwork would not be adopting and completing the action items agreed to at the meeting.

[481] In response to evidence from THL people as to what he had said about maintenance during the call, Mr Jones said he "had no interest in discussing maintenance or safety issues". To him, "the agenda of the call was about Heli Holdings being paid outstanding shortfall hour amounts owed by THL."

[482] It was Mr Quickfall's evidence that, when the conference started, he suggested it would be in the interests of both parties to discuss the proposed variations as a way of avoiding termination or heading to Court. He said Mr Jones' response was that he had no interest in discussing the variations; too much time had passed and THL owed Airwork money so it should pay up.

[483] Mr Quickfall said there was a general discussion around the action plan and the THL minutes. He said that Mr Jones questioned the accuracy of the minutes and both Mr Jones and Mr Steele rejected THL's concerns over maintenance. Mr Quickfall said Mr Jones' attitude was "Airwork meets the regulations so that was that". He said Mr Jones was not interested in discussing issues over suitability and weight and said that Heli Holdings was providing helicopters as per the agreement. Mr Quickfall said that Mr Staniland had reinforced THL's safety concerns and had said pilots were not wanting to operate the twins. Mr Quickfall agreed that Mr Jones had not said Heli Holdings/Airwork would not be implementing the action plan. He said that it was clear from Mr Jones' response that Mr Jones "was no longer interested in any of THL's issues which included progressing the items in the action plan". He said the clear message from Mr Jones' responses at the meeting was that THL should "pay up" and "fly the twins, there was nothing wrong with Airwork's maintenance services". He said the attitude displayed by Mr Jones was consistent with a view that:

> THL is a captive client tied into a long time contract with maintenance services to be provided by Heli Holdings (through Airwork) and accordingly it did not have to address THL concerns in any substantive way.

[484] Mr Quickfall said that both he and Mr Ken Matthews told Mr Jones that his attitude left them no option but to take more drastic action to resolve the safety issues and that this would ultimately be to the cost of both parties as opposed to what they might be able to achieve through an agreed variation. Mr Quickfall said "THL could not afford to continue on the current path as THL was not prepared to be in conflict and exposed to risk going forward".

[485] Mr Quickfall said that the attitude of Mr Jones during the call was concerning because it suggested the whole response by Heli Holdings/Airwork to the

implementation of the action plan and the default notice was "window dressing" to keep THL from taking steps to cancel the contract.

[486] Mr Ken Matthews has been chairman of Skyline. Following Skyline's purchase of THL, he became a director of THL on 31 August 2011. Mr Matthews gave evidence as to his view of the course of negotiations from late 2011 to late December 2012. He said, by late December, "the relationship as between the parties was frustrating for THL but it was not fractious". He said, at that time, the key issues for THL were the timely replacement of the twins and the resolution of concerns over aircraft maintenance. He referred to the way matters had come to a head as a result of the Gorilla Creek incident. He said that the issues over shortfall hours had been relatively secondary and were not thought to be of such magnitude that they would have precluded settlement of an agreement, provided matters of servicing and aircraft replacement were addressed.

[487] Mr Matthews said that he had told Mr Jones in a telephone conversation that the Gorilla Creek incident had raised considerable concerns for THL and shaken its confidence insofar as both service and maintenance standards were concerned, especially with regard to the initial response from Airwork and the way he considered it had been more interested in blaming the pilot rather than examining possible causes of the incident. Mr Matthews said Mr Jones' response had been that:

> Gorilla Creek was a "one off" freakish incident;
>
> Eurocopter still maintained that it was technically not possible for the cyclic to move;
>
> He was "bemused" by the fact THL had engaged with the CAA when the investigation into the incident was not completed; and
>
> THL had opened a can of worms for itself insofar as allowing the pilot to exit a stationary aircraft while the engine was still functioning.

[488] Mr Matthews' evidence, as to the conference call of 2 July 2013, was that "the comments from Mr Jones were acrimonious in the extreme". Mr Matthews stated (amongst other things) that Mr Jones said:

> … you have an agreement for the use of 8 helicopters, we are CAA compliant, get on and fly them.
>
> … that is not our record of the minutes of the April meeting.
>
> … not interested at all in any variation agreement, you have a contract.
>
> … pay me my money (for the shortfall hours).

[489] Mr Matthews said the attitude of Mr Jones was "one of belligerence" and that Mr Jones was not interested in any issues around the maintenance services and rejected the notion there was anything wrong with those services. He said that Mr Jones could not answer Mr Bisset when asked why his staff would agree to an action plan to correct something Mr Jones had said was not a problem.

[490] Mr Staniland, the CEO of THL and Skyline, and Mr Bisset gave evidence of the telephone conference and Mr Jones' position. Their evidence was consistent with the evidence of Mr Quickfall and Mr Ken Matthews.

[491] I accept the evidence of the THL witnesses with regard to what Mr Jones said in that conference call. I also accept that, to the extent they drew inferences as to his refusal to recognise that they had valid and genuine concerns over safety and maintenance issues, it was reasonable for them to draw those inferences. The THL witnesses' accounts of what Mr Jones said in the meeting were consistent with records that were made as to the meeting at the time. They were consistent with the steps which THL took after the meeting. The attitude which they said Mr Jones had displayed and the positions which they said he adopted were consistent with the attitude he displayed and the positions he adopted when giving evidence. They were also consistent with the action Heli Holdings took in September 2013 when making an application for summary judgment against THL in respect of shortfall hours for the 2008-2013 period.

[492] Mr Quickfall said it was the THL Board's view that, following this phone call, there was no longer a commitment from Heli Holdings/Aircraft to the action

plan or recognition of its concerns and this caused the Board to re-evaluate the hope and confidence that had been engendered by the 15 April 2013 meeting, the acceptance by Heli Holdings/Airwork personnel that THL's concerns had to be recognised and the engagement of Mr Cudby.

THL's actions after the conference call

[493] After the meeting, THL decided it needed expert advice. Mr Bisset contacted Mr Fogden on 2 July 2013. Mr Bisset told him of THL's concerns. He sent him the Marwick report into the Gorilla Creek incident, Mr Bisset's own report, the incident list and the minutes of 15 April 2013. Mr Bisset appears to have followed that up with a brief email of 4 July 2013. Mr Bisset referred to THL's concerns around the quality of maintenance provided by Airwork South Island, THL's belief that this was the result of "systemic" failures within the Airwork structure, THL's belief that this exposed crews and customers to an unacceptable level of risk and that it wanted an independent party to address these matters and advise THL as to whether it should continue to operate these aircraft or not.

[494] Mr Ken Matthews explained in his evidence that he personally contacted Mr Fogden at the time he was engaged to stress how important it was that he have an independent assessment and that he wanted to be careful that objectively there was justification for the concerns and criticisms made of Heli Holdings/Airwork by the aircraft operators.

[495] Mr Fogden responded on 3 July 2013 and, given THL's desire for a prompt response, he stressed that he had carried out "just a cursory review" of the material provided. Nevertheless, he stated:

> On the face off [sic] it however, I believe that THL have valid reasons for the concerns you allude to.
>
> I have reviewed the table of occurrences (2008 to present) you provided and against my operational experience (which I am happy to provide details of) observe as follows:
>
> - The number of incidents documented there is probably within the bounds of what might be expected within a Part 135 operation the scale of THL operations over that period of time.

- Inevitably, the level of reporting culture and safety awareness will dictate how long a list such as this might be for any given organisation.

- What is of concern to me is the individual (or in some cases, repetitive) nature of the occurrences.

- My other immediate impression is the apparent inconsistency in the responses you have received from the maintenance provider.

  - I do not believe there is any maintenance service provider in NZ that would deliberately set out to jeopardise the safety of aviation, particularly with respect to aircraft they are directly responsible for. But the inconsistent or conflicting responses you appear to have received from various office holders within the Airwork Group must give THL cause for concern for the functioning of the organisation currently given the responsibility for ensuring the safe and transparent management of a number of the helicopters you operate.

- These concerns would seem to be borne out in the report drafted by your initial independent and highly experienced observer Nick Marwick.

- On the basis of what I have read in my cursory review of the documentation, I can see no evidence that would negate or cast doubt on the conclusions arrived at and documented by Nick.

[496] In a follow up email of 4 July 2013, Mr Bisset said:

> Our senior management are unanimous in the view that continuing to operate the Airwork aircraft with no significant demonstrable change in maintenance provision to address the cause of the events to date represents an unacceptable level of risk to our crews, passengers and company. Do you think this is a reasonable point of view given the evidence you have available?

[497] Mr Fogden's brief response was that he considered this was a reasonable point of view.

[498] Mr Ken Matthews' evidence was that, as a consequence of Mr Jones' "commentary and unyielding statements", it had become clear THL could have "absolutely no confidence in being party to any agreement with Heli Holdings". He said the consequence was that the Board of THL, taking account of the personal safety of its pilots and passengers, could no longer continue to fly Heli Holdings aircraft – irrespective of any ramifications that may arise under the agreement. The

Board made a decision that THL should cease flying the aircraft on 4 July 2013. Formal notification of this decision was given to Heli Holdings on 5 July 2013.

[499] It was Mr Quickfall's evidence that the decision made by the Board to ground the aircraft was driven primarily by safety concerns and that "to continue to operate helicopters provided by an organisation refusing to acknowledge the safety concerns would put passengers and safety at risk".

[500] Mr Staniland said in evidence that THL's decision to ground the helicopters was a consequence of serious safety concerns associated with the maintenance support provided by Heli Holdings in association with Airwork. He had said this was the reason for the grounding in his letter of 5 July 2013 to Mr Jones.

[501] I accept that THL's decision to ground the aircraft on 4 July 2013 was motivated by genuine concerns about the future safety of operations involving the THL aircraft. I say this because:

(a) I accept that Mr Staniland, Mr Quickfall and Mr Ken Matthews were honest in the evidence they gave in this regard (just as I accept Mr Jones was frank and honest about his attitude);

(b) Mr Quickfall and Mr Matthews accepted at the time that there could be negative financial ramifications as a result of what they were doing. I accept that they appreciated that their decision to ground the aircraft, and inevitably not to make further lease payments, would be subject to legal challenge and that THL could end up with a significant liability as a result. The fact they were willing to assume that risk indicates that it was for reasons of safety;

(c) prior to the 2 July 2013 conference call, over the objections of senior pilots, the directors had insisted the pilots continue to fly the Heli Holdings' aircraft and were willing to proceed on the basis their concerns over maintenance and safety had been addressed through the 13 April meeting; and

(d) prior to making their decision to ground the aircraft, the directors went to the trouble of obtaining an opinion from Mr Fogden as to whether their concerns over safety were justified. They did not ground the aircraft until they had received that opinion.

Mr Jones' conciliatory letter

[502] On 4 July 2013, under the letterhead of Airwork and Heli Holdings, Mr Jones, as chairman, sent a letter to Mr Quickfall intended as a summary of the content and outcome of the call on 2 July 2013. The letter is different in tone and content from the way I accept Mr Jones communicated during the conference call. The letter, however, acknowledged that THL had raised issues as to "alleged deficiencies" with Airwork's maintenance in the South Island and fitness for purpose of the aircraft in connection with the claim for shortfall hours. The letter again referred to the way Heli Holdings considered THL's minutes as to the meeting of 15 April 2013 were not correct but acknowledged that Mr Hart's proposed corrections to the minutes had not been communicated to THL. In the letter, Mr Jones stated that he believed THL was "misrepresenting" the purported acknowledgements of "historic maintenance deficiencies" and their potential effect. He said that, with regard to past incidents, "while there have been incidents from time to time, these have been addressed". The letter included the statement:

> Airwork will continue to work with THL to ensure that appropriate action is taken by both parties to ensure the on-going safe operations of the aircraft in accordance with the requirements of the Civil Aviation Authority and/or the aircraft manufacturer.

[503] Mr Quickfall and Mr Matthews both considered this letter was written in an attempt to repair the damage that had been done in the 2 July 2013 conference. The letter did not allay the concerns that had become intense after the conference call.

[504] I consider the letter could not and did not change the meaning and impact of the views which Mr Jones had conveyed in the conference call. With regard to the meeting of 15 April 2013, there was still a reiteration of Mr Jones' view that Mr Hart and Airwork personnel had not acknowledged that THL had genuine concerns and a reasonable cause for concern arising out of historic incidents and the Gorilla Creek

incident. There was still a clear indication that Mr Jones and Heli Holdings considered all they had to do was meet the requirements of the CAA and/or the aircraft manufacturer.

[505] I accept that THL had to make decisions in early July 2013 in the context of the attitude that had been displayed by Heli Holdings/Airwork's chairman, Mr Jones.

[506] In reliance on Mr Fogden opinion that it was reasonable to consider that continued operation of the aircraft would represent an unacceptable level of risk, THL grounded the Heli Holdings fleet on 4 July 2013.

[507] Since then, THL has refused to fly the aircraft. It has thus not had to pay anything as required by the lease for the hours it actually flew the aircraft. THL has paid nothing for shortfall hours as the contract would require if it had continued to have a liability in terms of the contract.

The relationship after 4 July 2013

[508] From that point on, the relationship between THL and Heli Holdings/Airwork had irrevocably broken down. On 5 July 2013, Mr Staniland emailed a letter to Mr Jones summarising THL's maintenance concerns, referring to the meeting of 15 April 2013 and what he said was Mr Jones' position in the conference call of 2 July 2013. It referred to the report obtained from Mr Fogden and advised that, given the alleged failure of Heli Holdings to address THL's safety concerns relating to maintenance, THL had immediately ceased using Heli Holdings' aircraft.

[509] Mr Jones' response within Airwork in an email to Mr Steele and Mr Hart was that this letter had inadvertently gone into his junk mail system which was where it belonged.

[510] In a response of 8 July 2013 to THL, Mr Jones stated Heli Holdings disputed that there were valid reasons why THL should be released from its minimum hour obligations under the agreement. For the record, he stated that, in the event of a shortfall in operating hours in the 2013/2014 year, no allowance would be made for that period.

[511] Both parties were in correspondence with the CAA. In an email of 9 July 2013 to the CAA, Mr Jones said, with regard to THL's allegations that Airwork was not committed to making improvements:

> Our position is that we are fully certified by CAA – THL have approached CAA twice and their response is that they need examples of failures and none have been forthcoming.

[512] The parties went to mediation in Auckland on 20 and 21 August 2013. That did not result in any agreement.

The summary judgment proceedings

[513] On 26 September 2013, Heli Holdings filed an application for summary judgment. It sought judgment for $2,015,724.72. This was the amount claimed for shortfall hours for 2008 to 2013. The application was supported by an affidavit from Mr Hart. In it, he said the amount claimed was in accordance with THL's reconciliation of shortfall hours provided by email to Heli Holdings on 14 August 2013. Mr Hart said that he understood the difference between the THL reconciliation figure and the amounts originally invoiced by Heli Holdings arose out of issues as to the availability of helicopters and thus credits due to THL. He did acknowledge in his affidavit that THL had previously raised issues as to whether the aircraft were fit for purpose. He claimed there was no requirement that the helicopters be fit for purpose under the 2002 agreement and 2007 agreement so he did not believe THL had a genuine defence to the claim on this ground.

[514] Mr Hart acknowledged THL had previously raised issues about availability. He said there was a formula in the contract to deal with unavailability. He claimed unavailability had been taken into account by THL before it submitted its reconciliation figure so he did not believe THL had a genuine defence to the claim on that ground.

[515] Mr Hart referred to THL having raised issues over whether the helicopters had been adequately maintained at all material times. In relation to that, he rejected any suggestion that Heli Holdings has ever failed to provide adequate maintenance and said "our company is certified by the Civil Aviation Authority and has an

exemplary record". Because of this, he did not believe THL had a genuine defence to the claim on that ground.

[516] THL filed a notice of opposition and affidavits from Messrs Quickfall, Staniland, Fogden, Kensington and Bisset, in opposition to the application for summary judgment.

[517] In his affidavit, Mr Staniland said that, after the Gorilla Creek incident, THL considered there had been a systematic failure of the maintenance provisions under the 2002 agreement and claimed the evidence pointed to both "procedural issues and culture issues". He said the culture issues had been demonstrated by:

> [a] A lack of constructive engagement between THL and Airwork;
>
> [b] A tendency to default to the view that it is THL pilot error as the likely cause of the problem;
>
> [c] Repeated denial that there is a problem;
>
> [d] Once a problem has been proven beyond doubt, the change of position to one where Airwork says that they did in fact identify the problem and fix it.

[518] Mr Staniland produced various documents relating to or recording issues which had arisen in that regard. In his affidavit, he produced a full report from Mr Fogden. He referred to the dispute over suitability of the twins, including their reliability and serviceability and the losses THL had suffered as a result. He asserted that, as a result of these issues, THL had a claim against Heli Holdings which he believed would be for an amount equal to or greater than the amount Heli Holdings was claiming for shortfall hours.

[519] Mr Quickfall's affidavit in opposition raised the same issues and referred to the record as to these issues over the preceding years. Both Mr Staniland and Mr Quickfall roundly rejected the contention that THL and Ms Jackson's reconciliation as to the calculation of shortfall hours carried with it an admission of liability for shortfall hours to the extent her figures indicated.

[520] Mr Bisset's affidavit in opposition summarised the basis on which THL claimed to have a right to set-off or counterclaim for $5,079,578.62. Annexed to his

affidavit was his list of 24 incidents that had been attached to his and Mr Marwick's reports in relation to the Gorilla Creek incident.

[521] Mr Hart responded to these affidavits. He referred to the way Airwork had met CAA requirements and the way he said he had negotiated in good faith over potential changes to the contract, remaining open to discussing a mutually acceptable plan with THL. With regard to maintenance issues, he said Heli Holdings had made it clear that it had no faith in Mr Fogden's report.

[522] Mr Hart referred to and annexed a letter from solicitors for Heli Holdings to the then solicitors for THL dated 22 July 2013. That letter asserted that Heli Holdings' obligations regarding maintenance were spelt out in clause 6.2 of the 2002 agreement, such that:

> All aircraft have been maintained by Airwork on behalf of (Heli Holdings) so as to meet the applicable standard required by either the manufacturer or the CAA. All of the aircraft are in good working order and condition and state of repair. They are all airworthy and appropriate certified.

On that basis, the solicitors had asserted THL had absolutely no grounds upon which to cancel the agreement.

[523] Heli Holdings also filed a reply affidavit from Mr Earnshaw. Consistent with the evidence he was to give later, to which I have already referred, he said he had been engaged to undertake an independent review of the maintenance operations carried out by Airwork. He expressed the opinion that Heli Holdings was providing maintenance services under its contract with THL to the standard required by the CAA and the manufacturer of the helicopters, Eurocopter, and in accordance with "best industry standards". Mr Earnshaw said that in recent years there had been a focus on basic concepts of human factors and issues relating to judgment and decision making. He said that human factor failures were evident in some of the reported incidents and identified in Heli Holdings/Airwork's reports.

[524] Mr Jones also swore an affidavit in reply, in which he referred to THL's "totally unfounded" allegations and "utterly rejected" any submission of Heli Holdings/Airwork's breach of their obligations. He suggested that, "if there were in

fact any issues over safety or reliability there is no doubt the CAA would have intervened by now".

[525] Mr Jones said the relationship had broken down in late 2012 when Airwork refused to accept THL's offer of settlement and the terms of a new contract supplying single engine helicopters, that would fundamentally allow THL to terminate on day one. (That view was consistent with his later unawareness of the detail of subsequent negotiations between the parties and their attempts to deal with maintenance issues in the 15 April 2013 meeting.)

[526] Mr Jones said:

> In aviation it is generally recognised that where you have machinery, people and parts involved there are always risks and incidents do occur. The important factor is how an organisation mitigates and manages the risk and *if* an incident happens how they respond to ensure issues do not reoccur. As Managing Director I am comfortable that Heli Holdings and Airwork are extremely safe and effective as operators.

[527] Mr Jones said Mr Quickfall, with very limited aviation knowledge or experience, "has decided that he is in a position to make comments based on some one-sided investigations by Messrs Fogden and Marwick". Mr Jones said:

> The supposed safety concerns that THL have are clearly to try and achieve a better economic outcome for themselves and this is confirmed throughout Mr Quickfall's affidavit.

[528] He accepted that what Mr Quickfall had said was Mr Jones' view as conveyed in discussions in July 2013 was fundamentally correct. Namely, Mr Jones' view had been that Heli Holdings was providing helicopters as per the 2002 agreement and THL should just get on and fly them. Mr Jones said "Heli Holdings is contracted to provide eight helicopters and continues to meet its contractual obligations, and has done so since the contract started". He accepted that he had basically told THL, in the conference of 2 July 2013, "there was nothing wrong with the maintenance services provided under the contract". He did not accept statements that THL pilots had lost confidence. He firmly asserted the twins were not overweight. In response to statements made by Mr Staniland about safety concerns, he said:

> As a result of Gorilla Falls and some other unidentified incidents, THL concluded that there was a "systemic failure by Airwork". Given the fact that there has for 10 years been no major incident or any acts caused by a failure of Airwork's maintenance with THL and that there has been a significant number of operational (serious) accidents and incidents caused by THL, the fact that THL is not taking steps to rectify its own obvious shortcomings, says more about the commercial considerations than safety issues.

[529] He referred to an understanding that Mr Marwick had made changes to his "draft report after meeting with senior management of THL". He was highly critical of Mr Fogden's qualifications or knowledge with regard to the opinions Mr Fogden had expressed in his report.

[530] In response to Mr Bisset's affidavit and evidence that he had witnessed and experienced a continuing series of incidents involving sub-standard maintenance, Mr Jones questioned the genuineness of this statement on the basis:

> … it was only very recently that THL began raising these issues … in the context of wider commercial discussions and the fact THL was supposedly operating at a reduced profit margin.

[531] With regard to Mr Bisset's stated concern that this had compromised safety of passengers and crew, he said "as operations manager, Mr Bisset must take a high level of responsibility for those "operational failures"."

[532] In response to Mr Bisset's concern as to the potential serious outcomes of maintenance failings, Mr Jones said the potential outcome of any issue is an accident causing death and stressed that "every occurrence in aviation has a potentially serious outcome". In that context, he then referred to a recent collision of two THL helicopters where people had been injured and there had been a risk of fatalities.

[533] Mr Jones' affidavit aggressively rejected the notion that THL had genuine concerns about maintenance that required acceptance and action by Heli Holdings. This entailed an aggressive rejection of the stance taken by senior THL management, particularly Messrs Quickfall, Staniland and Bisset. He also roundly criticised the adequacy of the investigations conducted by Messrs Marwick and Fogden and made it clear that he had no regard for the opinions they had expressed as to the safety risks associated with the state of the THL/Heli Holdings/Airwork relationship.

[534] The application for summary judgment was heard on 20 February 2014. Associate Judge Osborne was critical of the way Heli Holdings had begun the summary judgment proceedings without acknowledging the extent to which THL had made "claims of non-performance against Heli Holdings and identified a need for redress".[23] He noted that the report authored by Mr Fogden and Mr Murtagh of July 2013 had been provided to THL on 15 July 2013, some two months before the commencement of the summary judgment proceedings. The Bisset report concerning the Gorilla Creek incident of 3 January 2013 had been provided on 31 January, some eight months before the proceeding was commenced. In his judgment, Associate Judge Osborne said that:[24]

> To the extent that the lessor had been appraised of these defendants arguments before the commencement of the proceeding, it had not only the opportunity but the obligation to depose as to its grounds for rejecting those defences when commencing the proceeding. It did not do so.

[535] At the hearing, then counsel for Heli Holdings, Mr D J Goddard, abandoned the proposition that there could not arguably be a dispute as to THL's breach of its maintenance obligations. He said the issue for determination was whether THL had an arguable case as to the loss flowing from the breaches which were recoverable under the lease. Mr Goddard relied on a particular clause in the contract as barring THL from bringing a counterclaim or claiming set-off.

[536] Associate Judge Osborne held it would be unjust and oppressive to deny THL the opportunity to fully explore at trial the interpretation and application of the claimed exclusion clause. THL's application for summary judgment failed.

[537] Associate Judge Osborne noted that no evidence had been presented for Heli Holdings to contradict the evidence given by Mr Bisset as to potential losses that THL had suffered by reason of alleged breaches of contract. Associate Judge Osborne considered the evidence presented by THL with regard to a potential counterclaim or set-off was "a reasonable response on the part of the defendants in the context of a summary judgment application".[25]

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23 *Heli Holdings Ltd v The Helicopter Line Ltd*, above n 22, at [34].
24 At [40].
25 At [78].

Continuation of proceedings and formal cancellation

[538] After delivery of that judgment, the parties continued to deal with the substantive proceedings according to timetabling orders of Associate Judge Osborne. There were various changes to the timetable which were accepted as being necessary. Following the appointment of their previous senior counsel to the High Court, Mr Weston became involved as senior counsel for the defendants. Following his involvement, on 20 February 2015 THL formally gave notice that it was cancelling the contract.

[539] In that notice, Mr Staniland referred to THL's decision of 4 July 2013 to cease flying the helicopters after the telephone discussion of 2 July 2013. He asserted that THL's actions constituted cancellation by conduct in terms of s 8(2) of the Contractual Remedies Act but, if that was not correct, THL was cancelling the contract on the basis Heli Holdings' conduct as at July 2013 and continuing after that, amounted to repudiation and/or Heli Holdings had broken the terms in the contract which it had been expressly or impliedly agreed were essential to THL and the effect of the breaches had been substantially to reduce the benefit of the contract to THL.

[540] After a telephone conference with counsel on 18 March 2015, I noted that Mr Heaney for Heli Holdings had signalled that Heli Holdings may well cancel its contractual arrangements with THL on the basis of THL's repudiation of the contract through the formal cancellation notice it had issued. The parties and I accepted that, if this eventuated, there could be a further change to the pleadings with Heli Holdings making a claim for future losses suffered as a result of THL's alleged unlawful repudiation of the contract. Heli Holdings did in fact cancel the contract through notice given to THL on 24 March 2015.

[541] Amended statements of claim and defence were filed following Heli Holdings' cancellation of the contract. To the credit of counsel and those working within the organisations to prepare evidence, this did not result in any postponement of the hearing. The length of the hearing was, however, altered. There was an unavoidable delay to the start of the hearing but submissions were made for both

Heli Holdings and THL over 6-7 May 2015. Evidence was presented in Queenstown over the weeks between 13 May 2015 and 29 May 2015. Further evidence, mainly from the experts, was given in Christchurch. Closing submissions were presented on 7 July 2015.

Mr Jones

[542] Mr Jones gave evidence over two and a half days. He was cross-examined extensively in relation to the 24 incidents and how Airwork and THL had dealt with them. He was also cross-examined over the Gorilla Creek incident and its aftermath, the negotiations that occurred over the commercial arrangements and his involvement in the conference of 2 July 2013.

[543] There is no doubt Mr Jones has been a very successful businessman and has gained the respect of many in the aviation world. When he acquired Airwork, the business employed 18 people. It now employs around 400 people. It is doing business with major international helicopters flying helicopters and other aircraft overseas. For a time, he was on the Board of the CAA. I accept that Mr Jones has considerable experience in the aviation engineering support industries. It was apparent from his evidence and the way he gave it that he has confidence in his own judgment and ability. He was also readily dismissive of those who had views contrary to his own and of those who made complaints which, on his judgment, were not warranted or necessary.

[544] The views Mr Jones expressed in giving evidence were consistent with those he had demonstrated in summary form in the conference of 2 July 2013 and in the affidavit he filed in support of the summary judgment application. It was apparent from his evidence that he considered THL's expressed concerns about maintenance did not have to be taken seriously because he was confident Airwork's maintenance performance was of a high standard, had achieved excellent rates of availability of the machines and had resulted in there having been no serious accident with the leased helicopters over all the years since 2002 and the extensive hours of operation.

[545] Mr Jones had difficulty in accepting or acknowledging that THL could have been genuinely concerned or have lost confidence in the support it was receiving

from Airwork as a result of various incidents. Mr Jones acknowledged that, in his call of 2 July 2013, he "basically told THL there was nothing wrong with the maintenance services provided under the contract". He acknowledged that in that call there was some discussion about the meeting between Airwork and THL on 15 April 2013. He also said that, at the time of that conference call, he was not aware of the details of the agreed action items.

[546] Mr Jones said THL had pursued complaints about maintenance with more vigour since 2005. It was his view that this vigour corresponded with what he perceived "as THL's increased desire to change from using the AS355 machines to single engine machines". Mr Jones accepted that his evidence was to the effect that THL had fabricated its maintenance concerns for the purpose of extracting commercial advantage. To me, Mr Jones said he considered the fabrication of complaints began about the time Mr Bisset became chief pilot.

[547] As to incidents which the experts agreed involved a serious breach of CAA and manufacturers' requirements, Mr Jones invariably downplayed the significance of them and/or said that pilots were also to blame.

[548] With the installation of military blades, Mr Jones acknowledged that Airwork people had failed to identify the part numbers and failed to note the photos showed the blades as green and thus ex-military. He accepted the CAA had publicised the dangers associated with the installation of ex-military blades but considered THL had exaggerated the risk associated with this incident. He also accepted that he had personally approved the purchase where the cost of it was 43 per cent of the new price with blades that apparently had 80 per cent life left in them.

[549] Significantly, in the context of cross-examination as to whether the installation of the military blades could affect airworthiness and safety, Mr Jones explained how, many years previous, he had bought a set of repossessed main rotor blades from a finance company. He found he could buy the blades at a very good deal and ended up buying the helicopter from the finance company for $25,000, spent $5,000 on getting it functioning, leased it to a company for six years and recovered the purchase price every three months. He said it was what he had done

through his life and there were lots of opportunities like that. While he used this as an illustration to justify his lack of concern at what was being suggested as a significantly discounted price for the blades, to me it was significant that, in the context of a cross-examination which was all about safety, he emphasised not the safety of using discounted price parts but the profit he had made from them.

[550] It was Mr Jones' view that THL should not have been too concerned about what had happened because, in his view, the parts were pretty much interchangeable.

[551] Mr Jones was cross-examined as to the problems that had arisen over the PTG/FCU and THL's concerns as to the way these problems were affecting operations, safety and how Airwork was dealing with the problems. Mr Jones' response was that Airwork had done everything it could do.

[552] In relation to the Gorilla Creek incident, Mr Jones acknowledged that, with a problem in a starter generator, there can be a vibration problem which could cause a pressure pipe to split. He also accepted that it would be pretty risky to try and fly the helicopter, even for seven minutes, with a potential starter generator problem. Mr Jones also accepted that Airwork's own report into the incident indicated that two important staff members in the South Island operations had concerns about what had happened. Despite this, when asked to accept that THL had not fabricated concerns relating to the incident, he said he was very much on the outside so could not actually comment.

[553] In being asked whether he accepted that Mr Ken Matthews' concerns as to safety arising out of this incident were reasonable, Mr Jones said that it appeared human life was not in any danger at the time of the incident although that seemed "to be a matter of simply good fortune". It was in response to Mr Matthews' letter that Mr Jones had emailed Mr Hart telling him this was an opportunity to make a statement. That had been followed by Mr Hart sending off to THL an email attributing what happened to pilot error. It was suggested to Mr Jones that it was not a good look for Mr Hart to have sent the letter, attributing what happened to pilot error, before the investigation into the event had been completed. Mr Jones' initial response was that Airwork had to defend itself in some of these matters. Mr Weston

then referred Mr Jones to the concept of "just culture". Mr Jones' response was to question what that had to do with what happened.

[554] Mr Jones found it difficult to reconcile a claimed lack of confidence in Airwork with an apparent acceptance of the airworthiness of the helicopters. Mr Jones acknowledged that his view was that, if the aircraft are airworthy, then they should be flown. He went on to say that, as far as confidence as between the maintenance provider and an operator was concerned, it all came down to whether the aircraft were airworthy or not.

[555] Mr Jones was questioned as to whether it was he or the Board who would have to approve settlement proposals that Mr Hart was involved with. He said the Board of Airwork would ultimately have to ratify or reject the proposals. He thought there were two other people on the Board at the time but said that it was very likely that, if he was available and he thought the settlement was a good idea or agreed to it, the Board was "very likely" to go along with his view.

[556] Mr Jones' knowledge of what was in the action plan and in the minutes of the meeting of 15 April 2013 to discuss THL concerns over maintenance and engineering support was vague. That was consistent with his lack of acceptance that THL's concerns over maintenance and engineering support were genuine and his own belief that there was nothing wrong with the maintenance support Airwork provided to THL.

[557] Mr Weston asked Mr Jones whether he accepted Heli Holdings/Airwork had been in breach of contract in respect of 15 of the 24 incidents in which Mr Earnshaw considered there had been a breach of the standards imposed by the manufacturer and the CAA. Mr Jones' view was that there may have been "some technical breaches" but he did not believe that would have put them in breach of the contract.

What impact did Mr Jones' statements and conduct have on continuing contractual obligations? Repudiation? Breach?

[558] THL claims that, by reason of Heli Holdings' breach and anticipated breach of the contract, THL was entitled to cancel the contract after 2 July 2013 and did so

by conduct. Alternatively, THL says that, with Heli Holdings being in breach of the contract, THL was justified in refusing to fly the aircraft, that it was thus not obtaining the benefits it had contracted for under the contract and should not have to pay for any shortfall hours from that point on.

[559] The right to cancel for breach or repudiation is dealt with in the Contractual Remedies Act. Pursuant to s 7(2), a party has the right to cancel a contract where the other party repudiates it. Section 7(2) provides:

> Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

[560] The case for THL is that, with Mr Jones' communication to THL on 2 July 2013, Heli Holdings was in breach of contract in ways that justified THL cancelling the contract and/or not making the payments to Heli Holdings that would otherwise have been due under the contract. THL had reached the point where, as a result of accumulated events (associated substantially with the 24 incidents highlighted in its notice of default but particularly the Gorilla Creek incident and its aftermath), it had lost the trust and confidence which it needed to have in Heli Holdings/Airwork as the maintenance provider for the aircraft it was flying. THL says its trust and confidence was destroyed by the attitude which Mr Jones displayed in the conference call of 2 July 2013 and this led to THL grounding the aircraft.

[561] Sections 7(3) and (4) deal with a party's right to cancel a contract for misrepresentation or breach (including anticipated breach), as follows:

> (3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if –
>
> (a) he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
>
> (b) a term in the contract is broken by another party to that contract; or
>
> (c) it is clear that a term in the contract will be broken by another party to that contract.
>
> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) applies, a party may exercise the right to cancel if, and only if, -

(a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or

(b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be, -

(i) substantially to reduce the benefit of the contract to the cancelling party; or

(ii) substantially to increase the burden of the cancelling party under the contract; or

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[562] The Supreme Court, in *Kumar*, stated:[26]

> A conclusion that a party has repudiated a contract will not be reached lightly – repudiation is a "drastic conclusion". The evidence must show an unequivocal intention not to perform the contract.

[563] I exercise the same caution in considering whether a breach is of such a nature as to justify cancellation or to relieve the other party of any continuing obligations under the contract.

[564] The Supreme Court noted that, by contrast with repudiation, breach does not require intention – the fact of breach is sufficient. In considering whether a breach of contract is of such a nature as to provide grounds for cancellation, the Supreme Court said:[27]

> In principle, if an objective analysis shows that a particular combination of terms was essential to the cancelling party, effect should be given to that even if a particular term, viewed in isolation, might not be regarded as essential. Any other approach would, in our view, be artificial. We see nothing in s 7(4)(a) to preclude such an outcome.

[565] I conclude that, in his telephone communication with THL directors and others on 2 July 2013, Mr Jones made it clear that, insofar as providing maintenance and engineering support to THL was concerned, Heli Holdings/Airwork would meet only the minimum requirements of the CAA and the manufacturer. He made it clear that he would not recognise the validity of THL's concerns over the quality of

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[26] *Kumar v Station Properties Ltd (in rec and in liq)*, above n 21, at [58] (citations omitted).
[27] At [93].

maintenance and engineering support which it had received. He made it clear he did not consider Heli Holdings/Airwork had an obligation to deal with THL according to the principles of a "just culture" as between engineers and operators. Mr Jones made it clear that he did not accept that the obligation to provide maintenance and engineering support in accordance with "best industry standards" required Heli Holdings/Airwork to do more than simply ensure their maintenance industry was CAA-approved and the aircraft airworthy. I also find that Mr Jones made it clear that he did not consider Heli Holdings was under an obligation to deal with THL's maintenance concerns honestly, fairly, cooperatively and with integrity, consistent with good faith obligations. I find that Mr Jones made it clear that he did not accept Heli Holdings had to take THL's maintenance concerns seriously or that Heli Holdings had to demonstrate it was ready and willing to respond to such concerns proactively with a view to taking any remedial action that might be required, consistent with good faith obligations, the requirements of "just culture" principles and "best industry standards", as required by the contract.

[566] Mr Jones did not say or indicate that Heli Holdings/Airwork would not meet any of its obligations under the contract, far from it. Heli Holdings was still going to provide the aircraft. It was still going to provide maintenance and engineering support from its South Island bases. There was no indication in Mr Jones' communications of 2 July 2013 that Heli Holdings would not be implementing the action plan agreed to at the 15 April 2013 meeting.

[567] For Mr Jones' communications to amount to a breach justifying cancellation or relief of THL from its obligations under the contract, THL had to establish that the terms of the contract that were going to be broken were terms that the parties had expressly or impliedly agreed were essential to THL or that the breaches or anticipated breaches would substantially reduce the benefit of the contract for THL, substantially increase the burden on THL or make the benefit or burden for THL of the contract substantially different from that contracted for.[28]

[568] I am satisfied that, at the time the 2002 agreement was entered into, both parties would have recognised that it was essential to all parties that Heli Holdings

[28] Contractual Remedies Act 1979, s 7(4).

provide maintenance and engineering support to "best industry standards" and that it deal with THL in good faith. THL had made its position clear by including express terms in the 2002 agreement to that effect. I am also satisfied that, in agreeing to and expressly requiring Heli Holdings to provide maintenance and engineering support for the aircraft to "best industry standards", both parties would have understood that this required the parties to deal with each other consistent with the principles of "just culture". I thus find that the performance of the terms of the contract which Mr Jones had indicated Heli Holdings would not be meeting (because he did not recognise it had to) were terms of the contract which it had been agreed were essential to THL.

[569] I also find that Mr Jones' statements as to how Heli Holdings considered it had to meet its obligations substantially altered the burden or benefit of the contractual arrangements to THL. I reach that conclusion because I accept that Mr Jones' attitude, his view of Heli Holdings' maintenance/engineering support obligations and his attitude towards THL put the safety of THL pilots and passengers and thus the reputation of their business at risk. Having carefully considered all the evidence, including the evidence of the experts, I consider Mr Jones' interpretation of the contract and his views as to THL fabricating concerns over safety increased the potential for a significant error and failings in the way Heli Holdings provided the maintenance and engineering support required of it under the contract.

[570] The potential for that to be the case was recognised by the CAA in its email of 27 February 2013 where it said it expected operators and maintenance providers to implement both corrective and preventative action to ensure Airwork airworthiness and to avoid significant occurrences. The CAA also said this action would not be effective unless the parties were working cooperatively together.

[571] After his independent review of the Gorilla Creek incident, Mr Marwick stated that the conflict at senior level between THL and Heli Holdings/Airwork had resulted in significant safety issues for THL as far as its flying of Heli Holdings' aircraft was concerned. I accept the evidence of Mr Marwick that he reached that view on the basis of what he had learnt, not from speaking to the directors of THL but from the discussions he had with both THL and Airwork personnel when meeting

with them at Glentanner and Timaru. Those people were Mr Bourke (the Glentanner engineer), Mr Pullar (the senior Heli Holdings engineer based in Timaru), Mr Bisset of THL, Mr O'Sullivan (the Airwork engineering manager from Auckland) and Mr Christie (general manager, Heli Holdings/Airwork business development).

[572] Chapman Tripp, then solicitors for THL, sent a letter of 15 July 2013 to Heli Holdings. With the letter was a report from Mr Fogden, to which Mr Murtagh had made a significant contribution with regard to technical aspects of aircraft maintenance, aircraft maintenance practices and statutory requirements as well as matters of general aircraft airworthiness.

[573] In that report, Mr Fogden stated:

> Modern global efforts in professional aviation safety (that is, development of industry best practice) are driven by initiatives such as 'Just Culture' and the 'Reason model' for accident causation (colloquially referred to as the 'Swiss Cheese' model). Both of these initiatives are premised on the understanding and acceptance the humans will always make mistakes.
>
> The fundamental nature of these models for risk management is that the aviation (or any other) industry must adopt an open and transparent system for reporting incidents and occurrences in order that we can learn from them and prevent them from reoccurring. Action should be proactive and preventative, not reactive once something has gone wrong. This philosophy is embedded in Safety Management Systems (SMS).
>
> The denial or rejection of the existence of internal failings or concerns is counter to any safety focussed organisation. Moreover, rejecting safety concerns does not negate them. The fact that statements rejecting safety concerns came from the key leadership figure in Airwork SI appears to undermine the development of a positive safety culture. Nor is it consistent with an organisation required to operate a fully documented Quality Management System under its CAANZ or EASA Part 145 Certification. CAA quality management systems are only effective when all parts of the certified processes are functioning. CAA certification is but one safety defence mechanism. It does not and cannot stand alone in ensuring safety (see for example the James Reason model of accident causation).

[574] In a summary at the end of that report, statements made by Mr Fogden included:

> **Does the standard of maintenance service provided by Airwork SI meet industry best practice?**

49 From my experience in the aviation industry, I do not consider that the standard of maintenance provided by Airwork SI meets industry best practice. This is because of factors including:

49.1 Historical and serious maintenance incidents, in particular including the January 2013 HBR incident.

49.2 An apparent lack of systemic oversight to help ensure incidents do not recur.

49.3 The lack of a proactive, preventative approach to maintenance. Instead, Airwork SI's response appears to be reactive once something has gone wrong and is lacking in accountability and acceptance of responsibility.

49.4 THL's observation of a lack of meaningful engagement by Airwork SI with THL's safety and maintenance related concerns.

…

Would THL be carrying an unacceptable safety risk by operating helicopters maintained by Airwork SI?

51 In my view, THL's current risk exposure is very high when the situation is assessed against conventional aviation safety modelling as part of a risk assessment. THL owes responsibilities to the travelling public, to the Director of Civil Aviation, to its staff as an employer, and to its shareholders.

52 In the event of an accident or incident, it appears that THL would have limited defences available. Its liability under the Health and Safety in Employment Act 1992, for example, could extend from its Directors and Senior Persons to those operating the helicopters. THL has been put on notice of maintenance concerns, and of my findings as now recorded. This increases their responsibility to take urgent action for the dual purposes of helping prevent further occurrences and of ensuring they meet their legal responsibilities to help prevent prosecution and liability in the event of a serious accident.

53 It is a governance matter for THL's Board of Directors as to whether operating the aircraft in this environment presents an "acceptable" safety risk.

54 There is always an opportunity for robust corrective actions via which Airwork SI may improve its maintenance to best practice and THL may thereby lower its current risk. However, I note that in the past, THL considers that robust corrective actions have not occurred. This is for reasons including:

54.1 THL has sought repeatedly to engage with Airwork SI about its safety and maintenance related concerns but to date does not consider that it has received satisfactory responses.

54.2 Airwork SI's response has been lacking in accountability or responsibility.

54.3 Airwork SI's staff reporting lines and responsibilities are unclear.

54.4 The relationship between THL and HHL/Airwork SI does not appear to function well.

54.5 THL Senior Persons have expressed a lack of confidence in Airwork SI.

[575] The experts' opinions as to whether in 2013 THL could reasonably have had concerns over the way in which Heli Holdings/Airwork had provided maintenance support since 2008, having regard to the 24 highlighted incidents, were based on the documentary record in relation to those incidents, communications with the CAA and communications within the separate companies. Mr Marwick and Mr Fogden both acknowledged their initial general assessments of risk were based on limited investigations and without discussing the issues with Heli Holdings/Airwork personnel.

[576] I have had to carefully consider not only the volumes of documentary material but also the extensive oral evidence given by the witnesses called for both sides. On my overall assessment of the evidence, the opinion initially expressed by Mr Marwick and by Mr Fogden has turned out to be objectively valid and justified. I have thus concluded that, by reason of Mr Jones' approach, the burden and benefits of the contract with Heli Holdings for THL were substantially altered. This was as a result of Mr Jones' indication on 2 July 2013 as to the basis on which Heli Holdings would be performing under the contract.

[577] The evidence has satisfied me that, after 2 July 2013, the directors were justified in deciding there was too great a risk for THL's pilots, passengers and the business to continue operating Heli Holdings' aircraft and that they had genuinely lost the confidence and trust in Heli Holdings/Airwork which they needed to continue flying Heli Holdings' aircraft. THL could not be discharged from its liabilities under the contract on the basis of just a subjective loss of trust and confidence. It had to prove that loss of confidence resulted from substantial breaches of contract or anticipated breaches of contract. I am satisfied there had been such breaches and they were going to continue because of the attitude which Mr Jones had towards THL, the statements he made, the way he had acted in relation

to THL's concerns over safety and the approach which he indicated Heli Holdings would continue to take with regard to his view of its obligations under the contract.

[578] Mr Hart accepted that, in the meeting of 15 April 2013, he had acknowledged that the parties would have had a lot to answer for if the Gorilla Creek incident had more disastrous consequences. Mr Jones had said that it was a matter of luck there were no such consequences. I am satisfied the directors of THL did not want to put their business or people at risk in a similar way in the future. I was satisfied, on all the evidence, that, by reason of Heli Holdings' failure to meet contractual obligations and the likelihood of its continuing failure to do so, that risk would have continued in a way which the directors would have had to answer for had they not taken the action which they did.

[579] Given the caution which I am required to exercise, I have considered whether the directors of THL attached too much significance to what Mr Jones said in what must have been a relatively brief telephone discussion on 2 July 2013 which he wanted to be about just his demand that THL pay approximately $2 million for shortfall hours.

[580] I do not consider the response of THL can be criticised in this way. Mr Quickfall obviously had extensive dealings with Mr Jones, both before 2002 and afterwards. There had been significant disputes between the parties, two extensive mediations leading to the 2007 and 2008 agreements. Through discovery, through the evidence I heard and particularly through the evidence presented by Mr Jones and the cross-examination of him, it has been established that the view THL formed as to how he was going to respond to its safety concerns was justified. The views which he expressed in the telephone conference call were repeated in intense and direct fashion in his affidavit filed in support of the summary judgment application.

[581] Despite its concerns over safety issues, which I accept were genuine, THL was nevertheless somewhat cautious as to whether it should ground the Heli Holdings aircraft as a result of Mr Jones' communication. Consistent with that caution, Mr Ken Matthews spoke to Mr Fogden and THL obtained a preliminary opinion from him. Mr Fogden's opinion supported the position it was

contemplating. THL did reach a judgment about what it should do and grounded the aircraft. All the evidence I heard and saw has been sufficient to persuade me that the decision it reached was objectively justified.

[582] Mr Earnshaw said in his evidence that his assessment as to the adequacy of the maintenance and engineering support provided by Heli Holdings/Airwork had been based primarily on a consideration of how Airwork had carried out its business at operational level, rather than with regard to what was happening at the most senior level of management. It was the attitude of those at the most senior level which, in my view, led to an unacceptable level of risk for THL's operations.

[583] In the context of the issues which I had to consider, I did have regard to the evidence given by Mr Anderson that cultural factors, quite independent of whether or not an airline was meeting CAA regulatory or manufacturers' requirements, could increase risks over safety.

[584] I have also considered whether THL attached too much significance to Mr Jones' view of Heli Holdings' contractual obligations and what was required of Heli Holdings given he was involved at executive director/chairman of directors and ownership level rather than at the intervening management and subordinate operational levels.

[585] Objectively, should THL have taken the view that what Mr Jones was saying did not matter because others would, in reality, be responsible for the way in which Heli Holdings delivered on its contractual maintenance obligations?

[586] I accept that, in growing Airwork's business as successfully as he has, Mr Jones must have been able to employ engineers and managers with the experience and expertise sufficient to gain the respect of the significant number of people working for Airwork, mainly in Auckland, and also the respect of other aircraft operators and businesses, both in New Zealand and overseas.

[587] The significance of Mr Jones' approach to Heli Holdings' contractual obligations cannot be minimised on that basis. Mr Jones involved himself as the

effective owner of Heli Holdings. On 24 June 2013, Mr Hart advised THL that Mr Jones was to be responsible for the relationship between Heli Holdings and THL. On 2 July 2013, Mr Jones' demand of THL was to the effect "pay me my money". At crucial times, Mr Jones involved himself in the way Heli Holdings/Airwork dealt with maintenance issues at an operational level. The way he told Mr Hart, CEO of both Airwork and Heli Holdings, to "make a statement" to THL over the Gorilla Creek incident, was evidence of that. That led to Heli Holdings sending THL a detailed letter before the inquiry was complete, attributing what was undoubtedly a dangerous situation to pilot error, wrongly as it turned out.

[588] There was also an example of how he could be involved in influencing Airwork's assessment of a particular maintenance situation through his communication with Mr Cudby in 2014 and their implicit rejection of Mr Bisset's account as to how he had needed to make an emergency landing of an aircraft as a result of a torque split.

[589] Having seen and heard the way in which Mr Jones expressed himself when giving evidence and having read the way he expressed himself in his affidavit in support of the summary judgment application, I have no doubt that his view as to Heli Holdings' obligations under the contract and his view as to THL fabricating concerns about maintenance would have been put forcibly to the managers who were responsible to him and could not have helped but have had an impact on the thinking of people like Mr Wales.

[590] Mr Jones also demonstrated the way in which he could be personally involved in the way incidents of concern to THL were investigated. There was evidence, which I accept, of the way he communicated directly with Mr Marwick and Mr Fogden when they were both engaged by THL. I have had regard to the way he referred to his contact with those people in emails and other documents referring to that contact. I am quite sure he made it very clear that he was most displeased at their willingness to involve themselves as they did.

[591] There was nothing in Mr Jones' evidence to indicate that he had any awareness or insight into how his attitude might be having a negative impact on how

Heli Holdings and THL could deal with each other over maintenance issues which might have made it necessary for him to step right back from any involvement with such issues. There had been an opportunity to improve the situation in this regard with the 15 April 2013 meeting to address THL concerns. I consider it likely that Heli Holdings' representatives did genuinely acknowledge the need for Heli Holdings to address THL's concerns so as to restore THL's confidence in Heli Holdings' maintenance and support. I consider it likely that Mr Jones' attitude and a likely concern as to how the concessions and acknowledgements of Heli Holdings' representatives might make it more difficult to obtain payment of "his money for shortfall hours" led to the belated criticism of the THL minutes from that meeting and Mr Hart's unwillingness to accept the full extent of the acknowledgements he made at that meeting.

[592] Heli Holdings did confirm, on a number of occasions after 4 July 2013, that it was committed to implementation of the action plan and that various people, other than Mr Jones, would be responsible for different parts of the plan. Despite this, Mr Jones continued to involve himself at an operational level in ways that impacted on the Heli Holdings/THL relationship.

[593] In November/December 2013, there was an exchange of emails between Mr Wales of Heli Holdings Queenstown, THL's chief pilot Mr Kensington and Mr Bisset. The emails went over old ground as to why the aircraft had been grounded and whether that was justified. Mr Bisset reiterated the THL position, mentioned concerns arising out of the Gorilla Creek incident and the hope for progress after the 15 April 2013 meeting. He referred to the position taken by Mr Jones in the 2 July 2013 conference call and to THL having decided that the risk of operating the aircraft was too high, leading to the grounding of the aircraft.

[594] Mr Jones responded to that email on 20 December 2013. Consistent with the tone of previous correspondence and the evidence he gave subsequently, Mr Jones' email contained personally disparaging remarks about Mr Bisset, said he had seen QIFs resulting from the maintenance work of Heli Support for Airwork and questioned why Mr Bisset did not have concerns about Heli Support's maintenance. He also suggested that THL should look at its own performance with regard to safety

and referred to three serious incidents he said its aircraft had been involved in recently. That response was indicative of a complete breakdown in the relationship between THL and Heli Holdings/Airwork. It was also an example of Mr Jones being involved at an operational level and his attitude and opinions inevitably having an impact on THL's concerns.

Conclusion as to breach of contract

[595] The conclusion I have reached is that by 2 July 2013 Mr Jones had a particular view as to what was required of Heli Holdings with regard to the provision of maintenance and engineering support and a particular view as to THL's concerns over maintenance which led him in July 2013 to indicate clearly to THL that Heli Holdings would not be addressing THL's concerns in the manner the contract required.

[596] Accordingly, I find that Heli Holdings, after 2 July 2013, was in breach of contract and was going to continue to be in breach of contract in a way that would have justified THL cancelling the contract and which, independently of cancellation, meant it did not have to continue paying for shortfall hours.

Did THL cancel the contract by conduct on or after 4 July 2013?

The parties' pleadings

[597] THL has pleaded that it cancelled the contract by conduct in the following ways:

> [a] First defendant advised its pilots on or about 4 July 2013 to cease flying the plaintiff's helicopters;
>
> [b] First defendant advised the plaintiff verbally on or about 4 July that it had ceased flying the plaintiff's helicopters, and wrote to the plaintiff on 5 July 2013 confirming it had ceased operating the plaintiffs helicopters;
>
> [c] First defendant hired in and/or purchased replacement helicopters;
>
> [d] First defendant took steps to remove the plaintiff's helicopters from the first defendant's operational specifications ("Ops Specs") by filing an application with the CAA on or about 12 July 2013;

[e] First defendant removed its operational equipment from the plaintiffs helicopters on or about 12 July 2013 including but not limited to survival bags, toolboxes, headsets, the downsets, cleaning equipment, fuel cards, rain covers and snow shovels;

[f] First defendant updated the first defendant's exposition to reflect that it was no longer operating the plaintiff's helicopters;

[g] First defendant took no further steps under the 2002 agreement or 2007 variation.

[598] THL also pleads that Heli Holdings recognised the cancellation as follows:

[h] The plaintiff took possession and control of its helicopters including relocating some to Timaru and removing the rotor blades of all helicopters;

[i] The plaintiff closed its maintenance base at Glentanner;

[j] The plaintiff failed to maintain the helicopters in a state such they were ready and available to fly by the first defendant at any time.

[599] In a statement of defence to THL's amended defence and counterclaim, Heli Holdings denied the assertions of fact THL relied on as amounting to cancellation by conduct except to admit that THL had ceased to fly the aircraft on 4 July 2013. Heli Holdings pleaded that THL had taken the following steps consistent with the agreement being operative after 4 July 2013:

(1) it maintained possession of the aircraft on the New Zealand CAA register of Aircraft through payment of the annual subscription for each aircraft;

(2) it continued to invoice and receive payment for the leases of hangars at Queenstown and Timaru;

(3) it conducted pilot maintenance on a [sic] least one of the aircraft in that a pilot removed a radio and GPS from the aircraft which is only authorised if the aircraft is in a pilot/operator's possession;

(4) it continued to exercise a right to free access to the aircraft and written records of the aircraft under the agreement;

(5) By letter dated 15 July 2013 from its then solicitors, Chapman Tripp, it noted "*THL considers that it has valid grounds to cancel the Agreement… The purpose in providing you with a copy of the report is to give you a period of 7 days from 16 July 2013 to comment before our client makes its final decision as to whether to cancel the contract*".

Discussion of THL's conduct

[600] I am satisfied that THL did take all the steps it has referred to in the pleadings as amounting to cancellation by conduct. The issue is whether or not, in all the circumstances, these steps were sufficient to constitute cancellation by conduct.

[601] In an email to Mr Jones and others of 5 July 2013, Mr Staniland referred briefly to the background to the teleconference of 2 July 2013, THL's concerns about safety, the apparent acknowledgement of them by Heli Holdings and Airwork on 15 April 2013 but then Mr Jones' statement on 2 July 2013 that there were no shortcomings in the provision of maintenance services, that Airwork was fully accredited and CAA-compliant and no remedial action would be forthcoming. Mr Staniland stated that THL considered Mr Jones' position was completely contrary to the prior discussions which had occurred between the parties. He advised of the preliminary advice received from Mr Fogden and THL's decision as a result to immediately cease the use of Heli Holdings' aircraft until further notice, pending the expert's full report.

[602] The letter stated that THL considered Heli Holdings was in breach and/or default of its maintenance service and repair obligations under the agreement and required "a timely resolution of this matter". As a minimum, it required Heli Holdings to address the agreed remedial action items identified in the minutes of the 2013 meeting. It also suggested that the most effective way to resolve THL's concerns would be by replacing Airwork as the maintenance provider. It was this letter which Mr Jones referred to within Airwork as being "junk". Mr Jones, however, responded more carefully in a letter stating that Airwork remained committed to completing the action items agreed to at the meeting on 15 April 2013. The letter said that Heli Holdings was not in breach or default of its obligations under the contract.

[603] On 15 July 2013, Chapman Tripp, as then solicitors for THL, emailed Mr Jones. In that email, Chapman Tripp stated:

> 3 This letter constitutes written notice to HHL that THL considers that it has valid grounds to cancel the Agreement pursuant to section 7 of the Contractual Remedies Act 1979 (Act).

Cancellation

4 THL is entitled to cancel the Agreement pursuant to s 7(3)(b) of the Act which provides that a party to a contract may cancel it if a term in the contract is broken by another party to the contract. The performance of the term must be essential to THL.

5 THL considers that HHL's provision of maintenance breaches the following clauses in the Agreement:

5.1 Clause 10.1(b): HHL will perform its duties under the Agreement diligently and in good faith and in accordance with best industry standards.

5.2 Clause 6: HHL shall maintain, service, repair, modify and overhaul the aircraft in accordance with listed specifications.

6 The performance of clauses 10.1(b) and 6 are essential to THL, concerning as they do the maintenance of aircraft and safety of passengers and operators. In addition, the effect of the breaches will substantially lessen the benefit of the contract because THL cannot safely fly the aircraft. THL has directed its operational staff to stop flying HHL helicopters due to serious safety concerns arising from the provision of maintenance services by HHL's maintenance provider Airwork (NZ) Limited (Airwork).

7 THL, and its officers/staff, face liability under statutes including the Health and Safety in Employment Act 1992. Liability potentially extends from Directors to operational and support staff.

8 This liability is of real concern given THL has been put on notice of serious issues regarding the maintenance of HHL aircraft. THL cannot and will not carry this risk.

Expert report

9 As you are aware THL has commissioned an expert report from John Fogden of Total Aviation Quality Ltd, Mr Fogden was asked for his opinion on whether the maintenance provided by Airwork SI meets industry best practice and whether THL would be carrying an unacceptable safety risk by operating helicopters as maintained by Airwork SI.

10 Mr Fogden relevantly concludes that he does not consider that the maintenance provided by Airwork meets industry best practice. He is of the view that this presents a "very high" level of risk.

11 Our client, being in possession of such advice from an expert, is in the position where on the information available to it, it must take steps consistent with the various obligations and duties it owes parties including passengers and operational staff.

12 Mr Fogden's report is attached. The purpose in providing you with a copy of the report is to give you a period of 7 days from 16 July 2013 to

> comment before our client makes its final decision as to whether it will cancel the contract.

[604] Heli Holdings referred to the Chapman Tripp letter as an express indication that THL was not cancelling the contract. Mr Weston accepted that the letter did result in there being a lack of clarity over the position THL was taking.

[605] Heaney and Partners responded to the Chapman Tripp letter in a detailed letter of 22 July 2013, firmly denying THL had any right to cancellation. The letter was consistent with Mr Jones' position and stated that the aircraft were maintained by Airwork on behalf of Heli Holdings so as to meet the applicable standards required by either the manufacturer or the CAA, they were in good working order, condition and state of repair, they were airworthy and appropriately certified. With the letter was Heli Holdings/Airwork's response to the Fogden report. They attacked Mr Fogden's independence, what they considered must have been his inadequate consideration of relevant information, his failure to have sought comment from Heli Holdings or Airwork in respect of his report and, in summary, suggested that Mr Fogden's review was simply a restatement of the views expressed by Skyline's directors and senior managers within THL.

[606] On 29 July 2013, Chapman Tripp responded to Heaney and Partners suggesting the parties urgently proceed to mediation.

[607] On 29 July 2013, the CAA issued an Air Operator Certificate for THL. It detailed the New Zealand registered aircraft authorised for use by THL. None of the Heli Holdings aircraft were included in the certificate. Airwork had a copy of that on 30 July 2013 and noted THL was not authorised to use Heli Holdings' aircraft. At the same time, THL confirmed to Heli Holdings that Kelly Buick had been formally approved by the CAA as maintenance controller for THL, in place of Heli Holdings' Mr Pullar.

[608] On 26 September 2013, Heli Holdings filed its proceedings in the High Court seeking judgment for the amounts due for shortfall hours for the years 30 June 2008 to 30 June 2013, the application for summary judgment and the supporting affidavits. On 15 November 2013, THL filed a notice of opposition to the application for

summary judgment, supported by detailed affidavits from Mr Staniland and Mr Quickfall. That then led to the parties filing extensive affidavits in which, amongst other things, witnesses for THL claimed they had genuine safety concerns over the maintenance and engineering support provided by Heli Holdings. Heli Holdings' witnesses, particularly Mr Jones, rejected that those concerns were genuine or that there was any reasonable basis for them.

[609] On 16 April 2014, THL filed a statement of defence and counterclaim. It referred to:

- Heli Holdings' alleged failure to review the whole system for charging of shortfall hours;

- Heli Holdings' alleged failure to meet its maintenance obligations under the contract based on the 24 incidents and the statements made by Mr Jones in the conference call of 2 July 2013;

- the failure of Heli Holdings to take THL's concerns about maintenance seriously;

- alleged repudiation of the action plan agreed to on 13 April 2013 and the subsequent further rejection of THL's concerns as being insincere and commercially motivated, evincing an intention by Heli Holdings not to comply with its obligations in providing maintenance services that meet "best industry standards" and comply with all its obligations under the contract;

- an alleged failure by Heli Holdings to engage in a meaningful way over the replacement of aircraft;

- an alleged default in allowing the weight of the aircraft to increase over the term of the contract; and

- as a result of the claimed breaches of contract, THL ceasing to fly Heli Holdings' aircraft in July 2013 and having incurred costs in obtaining replacement aircraft.

It sought judgment for substantial damages and a declaration that it was entitled to cancel the 2002 agreement. THL did not claim it had already cancelled the contract.

[610] In June 2014, Airwork (Mr Christie) wrote to THL (Mr Bisset). The letter asserted that Heli Holdings had continued to maintain the eight helicopters, subject to the lease so they were "in a contractually compliant condition" and remained available exclusively for THL. The letter also stated that, since 4 July 2013, THL had chosen not to fly the helicopters, had allowed them to lapse from THL's operational specifications and that Airwork understood "from subsequent correspondence that THL has no intention to use the helicopters in the foreseeable future … and had obtained alternative helicopters to replace them". Airwork sought permission from THL to relocate three helicopters from Queenstown to Timaru.

[611] Mr Bisset responded on 26 June 2014. In that response, he rejected Mr Christie's contention that the helicopters had been maintained subject to the lease. He referred to the proceedings in the High Court in which THL had sought a declaration that Heli Holdings had repudiated the lease. He said it was for Airwork to proceed as it saw fit with regard to the relocation. He said THL neither consented to nor opposed the request.

[612] On 16 July 2014, Airwork sent THL an invoice for shortfall hours for the 2013/2014 year. Mr Hart also suggested to Mr Staniland that they meet to discuss various issues with regard to "the ongoing contractual relationship" between the two companies.

[613] In a response of 29 July 2014, Mr Staniland accepted that THL had not cancelled the 2002 agreement but claimed Heli Holdings had repudiated the agreement giving THL the right to cancel the agreement. He referred to the fact that, in proceedings in the High Court, THL was seeking a declaration to that effect and it was THL's position that Heli Holdings' repudiation had relieved THL from having to

comply with its obligations under the 2002 agreement. On that basis, he said THL had no intention of paying the invoices which had been received. Mr Staniland referred to Mr Jones and Mr Hart's affidavits in reply in the summary judgment proceedings in which they had reiterated their complete rejection of any maintenance issues of serious concern. Mr Staniland said THL had no confidence that Heli Holdings was genuinely motivated to resolve THL's concerns.

[614] On 20 February 2015, THL served written notice on Heli Holdings advising it was cancelling the contract by reason of Heli Holdings' repudiation.

[615] On 23 February 2015, THL filed an amended statement of defence and counterclaim. In that document, it claimed it had cancelled the contract by conduct after 4 July 2013 but if not, then by notice on 20 February 2015. In those pleadings, amongst other relief, it sought a declaration that if the contract had not been cancelled by conduct on or after 4 July 2013, it was entitled to a declaration that the contract had come to an end by this date through the irrevocable breakdown in the relationship between the parties through breaching obligations of good faith so as to destroy THL's trust and confidence in Heli Holdings.

[616] In his evidence, Mr Quickfall accepted THL had not cancelled the contract until the written notice of 20 February 2015 although he thought it should have.

[617] It was in response to THL's notice of cancellation of 20 February 2015 that Heli Holdings then asserted THL had repudiated its contractual obligations justifying Heli Holdings' cancellation by notice dated 24 March 2015.

Conclusion as to cancellation

[618] Having carefully considered the evidence as to the communications between THL and Heli Holdings on and after 4 July 2013, I conclude that the evidence is insufficient to prove that THL cancelled the contract before serving written notice of cancellation on 20 February 2015. THL's conduct and its communications indicated clearly to Heli Holdings that THL considered Heli Holdings was seriously in breach of essential terms of the contract so as to provide sufficient grounds for THL to cancel the contract. THL also clearly conveyed to Heli Holdings its view that Heli

Holdings' breach of the contract was sufficiently serious as to relieve THL from its obligations under the contract. THL, however, gave Heli Holdings the opportunity to remedy those asserted breaches until it served the notice of cancellation on 20 February 2015.

[619] THL was thus not discharged from its obligations under the contract by reason of the cancellation of the contract between 4 July 2013 and 20 February 2015.

Was Heli Holdings entitled to payment for shortfall hours from 1 July 2013 to 20 February 2015?

Continuing breach of contract

[620] However, Heli Holdings' breach of the contract breach or anticipated breach of the contract, for the reasons that I found to have been established as at 2 July 2013, continued right through until 20 February 2015. Mr Jones continued to hold and express his view of Heli Holdings' limited obligations under the contract. He refused to acknowledge that Heli Holdings/Airwork had to provide maintenance and engineering support for THL consistent with obligations of good faith and in accordance with "best industry standards". He refused to acknowledge an obligation to recognise the responsibility on all parties to implement the principles of "just culture" in their dealings with each other. He continued to deny that THL had genuine and justified cause for concern over the way in which Heli Holdings/Airwork was providing maintenance and engineering support. This stance resulted in Heli Holdings continuing to be significantly in breach of its obligations under the contract.

[621] In the period July 2013 to February 2015, there was no indication from Mr Jones that he was going to change his attitude to the whole situation or his view of what Heli Holdings had to do to meet its contractual obligations.

[622] Throughout that intervening period, THL continued to have valid reasons for believing that the benefit of the contract to it had been significantly altered and there would be significant risks for it in operating the Heli Holdings aircraft. At no time during that intervening period did THL indicate that it would permit the contract to

continue and accept the obligations which it had under it while Heli Holdings was in breach of contract and/or repudiating the contract in this way.

[623] In *Kumar*, only one of the appellant purchasers in the development, which was the subject of that litigation in those proceedings, purported to cancel his purchase agreement in response to the breaches complained of against the vendor company. It was in that context that the Supreme Court said:[29]

> … But even if the appellants did not formally cancel their agreements at this point, they were not obliged to perform when Station called for settlement. A party who is in breach of an essential term of a contract is not entitled to enforce its rights under the contract (assuming the other party has not affirmed the contract despite the breach). This is particularly so where the obligations of the parties are mutually dependent and concurrent, as in contracts for the sale of land… Station had made it clear that it would not be able to meet its essential contractual obligations... In those circumstances, it was not entitled to call for settlement on the basis that it was ready, willing and able to complete. On the face of it, the appellants were entitled to refuse to perform, subject to what we have to say below.

[624] Heli Holdings' continuing breach of the contract was of such a nature and so fundamental to the contract as to relieve THL of the obligation to use Heli Holdings aircraft or to pay for the shortfall hours if they were not used, unless THL had affirmed the contract.[30]

Had THL affirmed the contract?

[625] Section 7(5) of the Contractual Remedies Act states a "party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract".

[626] To establish THL affirmed the contract despite the continuing breach, Heli Holdings must show THL unequivocally made a firm choice to continue with the contract despite the breach, i.e. that it was going to "put up" with the breach. The evidence of this must be clear given the consequences of affirmation.[31]

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29 Kumar v Station Properties Ltd, above n 21, at [94] (citations omitted).

30 At [94].

31 See Burrows, Finn and Todd, above n 6, at [18.3.2]; *Jansen v Whangamata Homes Limited* [2006] 2 NZLR 300 (CA).

[627] Whether an election has been effectively exercised to proceed with the contract is fact dependent. In the circumstances of this case, I am satisfied THL did not affirm the contract between 4 July 2013 and 20 February 2015.

[628] In its first statement of defence and counterclaim dated 16 April 2014, THL sought a declaration that it was entitled to cancel the contract. Following its formal cancellation on 20 February 2015, it filed an amended statement of defence and counterclaim dated 23 February 2015 in which it claimed to have cancelled by conduct and, alternatively, by its notice of 20 February 2015.

[629] Heli Holdings was directed to file an amended statement of defence to the counterclaim by 30 March and did so on 26 March 2015. That statement of defence asserted THL had not cancelled the contract by conduct and gave particulars in support of that defence. That amended statement of defence did not allege that THL had affirmed the contract. The particulars did not include matters that were included in Heli Holdings' subsequent statement of defence.

[630] I directed Heli Holdings to file an amended statement of claim by 27 March 2015 permitting it to make a claim for future losses suffered by reason of THL's wrongful formal cancellation of the contract on 20 February 2015. During the hearing, I gave Heli Holdings leave to amend that claim to significantly reduce the claim in respect of future losses, given its recognition that there had been a significant error in the way it had calculated those losses. I did not give leave to file an amended statement of defence to THL's counterclaim.

[631] In a second amended statement of defence dated 23 June 2015, Heli Holdings pleaded that THL affirmed the contract in that:

(1) THL purported to issue a breach notice under the contract on 11 February 2013, and failed to cancel the contract after 30 days in reliance upon that breach notice;

(2) THL attended a meeting 15 April 2013 and agreed on an action plan;

(3) despite Heli Holdings' alleged breaches of the contract and THL characterising the January 2013 Gorilla Creek incident as the decisive incident, THL continued to fly the subject helicopters up until July 2013 and otherwise met its obligations under the contract;

(4) THL attended a mediation in August 2013 in accordance with the contract between the parties;

(5) THL did not take any steps to transfer possession of the aircraft in accordance with Civil Aviation Rules, r 47.57. THL continued to be registered with the CAA as holding possession of the aircraft and continued to pay the annual registration fees until possession was handed back to Heli Holdings in March 2015. Rule 47.57 requires that the holder of the certificate of registration (THL) is required to transfer that certificate if possession passes to another party for a period of 28 days or longer;

(6) in September 2013 Mr Kensington directed that one aircraft be moved from the West Coast base and directed that the aircraft in Queenstown could not be moved;

(7) THL continued to hangar the aircraft in accordance with the 2002 contract and subsequent variations;

(8) THL's lawyers, Chapman Tripp, confirmed the contract was still on foot in writing on 15 July 2013, in that THL required resolution and suggested remedial actions;

(9) invoicing and receiving payment for the lease of hangars at Queenstown and Timaru to Heli Holdings;

(10) conducting pilot maintenance on at least one of the aircraft in that a pilot removed a radio and GPS from the aircraft; and

(11) continuing to exercise a right to free access to the aircraft and written records of the aircraft under the agreement.

[632] Mr Weston submitted that, in these pleadings, there were particulars that had not been included in the statement of defence that was before the Court when the trial commenced and that, while leave had been granted to file an amended claim to allow Heli Holdings to claim for a loss arising out of its cancellation of the contract in response to THL's cancellation, leave had not been granted to file an amended statement of defence to THL's counterclaim. Mr Weston submitted THL would be prejudiced if I had regard to the amended statement of defence and certain particulars as to claimed affirmation in that it had been denied a reasonable opportunity to present evidence dealing with those particulars.

[633] In the circumstances of this case, it is appropriate and necessary for me to have regard to Heli Holdings' contentions over affirmation in order to deal with the dispute between the parties on the merits. With my ultimate conclusions in this regard, THL will not be prejudiced. In any event, the issues as to how THL conducted itself with regard to the continuation of the contract were squarely before the Court before the trial began through the dispute over whether THL had cancelled the contract by conduct.

[634] I have already held that THL cannot rely on any breaches of the contract that occurred before 30 June 2013 to avoid liabilities that it had under the contract before that time. With regard to the dispute over liability for the period after 30 June 2013, Heli Holdings cannot rely on any affirmation of the contract that occurred before then in relation to breaches of the contract that occurred after 30 June 2013.

[635] THL's failure to cancel after the 11 February 2013 breach notice, attendance at the 15 April 2013 meeting and flying of helicopters pursuant to the contract up to 4 July, could thus not amount to affirmation of the breach that occurred on 2 July 2013 and afterwards.

[636] Participating in a mediation, in acknowledgement that there is a significant dispute between the parties, does not demonstrate that a party is going to continue

with the contract whatever the outcome of the mediation in relation to what is in dispute.[32]

[637] There was communication between THL and Heli Holdings/Airwork in which THL made it clear it was not exercising any rights of ownership or control over the aircraft.

[638] THL's removal of the Heli Holdings aircraft from the CAA Air Operator Certificate on 29 July 2013 was the clearest of indications that it was not intending to exercise control over those aircraft in its CAA-approved operation.

[639] THL did not require Heli Holdings to continue maintaining the aircraft in accordance with the contract. This was acknowledged by Heli Holdings in its advising the CAA that maintenance had to meet the requirements of the manufacturer rather than THL.

[640] The aircraft were not maintained in a manner that meant they could be immediately available for use by THL as would have been required if THL had indicated it was continuing with the contract.

[641] Some maintenance was done on the aircraft, for instance with their engines being run from time-to-time, but this was not with the expectation that they had to be immediately available for THL to operate if required. Mr Cudby said that Heli Holdings genuinely intended to have the aircraft ready to go back to operations if they needed to but also, because whether the contract "worked out or not", the aircraft still had to be available for operations. Whatever Heli Holdings did in the way of maintenance was thus not done with the expectation that THL was necessarily continuing with the contract.

[642] On 30 July 2013, the Heli Holdings/Airwork business development manager, Mr Christie, emailed Mr Hart and Mr Steele stating that there was only one aircraft that THL could fly without engineering work and sign-off. He sought and obtained their agreement to putting the other seven on ground-risk insurance.

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[32] Burrows, Finn and Todd, above n 6, with reference to *Wilson v Hines* (1994) 6 TCLR 163 (HC).

[643] I have considered the communications between Mr Cudby and Mr Kensington over the removal of a Heli Holdings aircraft from a THL hangar at Franz Josef. The fact he asked Heli Holdings to remove the aircraft was consistent with THL not having control of that particular aircraft. Mr Kensington asked for the aircraft to be moved because THL was about to demolish the hangar.

[644] In the context of all the correspondence and circumstances, an email advising the THL Board did not agree to aircraft being moved from Queenstown to Glentanner did not indicate that THL asserted it had control over the aircraft and they must remain in Queenstown. The email was consistent with THL advising that it would not agree to the aircraft being stored by Heli Holdings in the THL hangar at Glentanner.

[645] There was evidence that THL had continued to register the Heli Holdings aircraft with the CAA and to pay annual registration fees as required by the CAA for those aircraft. In the context of all that was happening between July 2013 and February 2015, I do not consider that, in doing this, THL was indicating intent to exercise control over the aircraft. It had transferred actual control and possession of the aircraft to Heli Holdings.

[646] Rule 47.57 of the Civil Aviation Rules requires a transport operator having possession of aircraft for more than 28 days to register it with the CAA. Registration does not however create rights to possession or ownership.

[647] There was no evidence from THL as to why the aircraft had been registered in this way. The aircraft continued to be registered with the CAA, presumably along with numerous other aircraft that THL owned or operated, even after THL had formally cancelled the Heli Holdings lease in February 2015. They were only removed from THL's list of registered aircraft after Heli Holdings had also cancelled the contract and asked THL to deal with registration. I do not accept that, in THL continuing to register those aircraft in accordance with r 47.57, THL was indicating to Heli Holdings that it wanted the contract to continue, that it was willing to put up with the breaches which had occurred or that it was asserting a right to control or possession of the aircraft over the intervening period.

[648] There was no evidence as to whether, what or how THL had charged Heli Holdings for use of the hangars.

[649] Mr Heaney referred me to a letter from Mr Hart to Mr Staniland of 16 July 2014. In the letter, Mr Hart said that, under clause 4.5(c) of the 2002 agreement, THL was required at its expense to provide hangar facilities for each of the Heli Holdings aircraft. He said aircraft were currently being stored in facilities in Glentanner, Timaru and Queenstown, the Timaru and Queenstown facilities being hangars leased and operated by Airwork (NZ) Limited. Mr Hart said Airwork was looking to reduce congestion in the Queenstown hangar and looking to find alternate storage locations. In what would appear to have been an attempt to apply some commercial pressure to have THL make available cheaper or different storage for the aircraft, Mr Hart enclosed with the letter "invoices for the costs of storage for the aircraft at those locations, together with supporting invoices from Airwork (NZ) Limited". The invoices were not part of the bundle but this letter suggests that new arrangements were made between the parties as to how they would deal with Heli Holdings' use of the hangars after 4 July 2015, inconsistent with a continuation of the contract.

[650] The evidence did not establish that THL considered it had a free right of access to the aircraft and written records. THL had sought permission to remove its property from the aircraft. It is hard to see how the removal of a radio and GPS from an aircraft could amount to maintenance. Even if that had occurred with one aircraft, it would not have demonstrated that THL was unequivocally committing itself to a continuation of contract.

[651] In late 2013, Mr Bisset went to Airwork's engineering base in Timaru and obtained some operational records relating to the aircraft. Mr Bisset's evidence was that he took photographs of the records of one aircraft and sighted records from others. In doing that, he was not demonstrating that he considered THL had a right to possession of any aircraft. There was no evidence he had removed any records.

[652] The correspondence from Chapman Tripp to Heli Holdings of 5 August 2013 did not indicate that THL was prepared to "put up" with Heli Holdings' breaches of

contract. The correspondence was clearly to the contrary. While it was giving Heli Holdings the opportunity to remedy those breaches of contract, the inference Heli Holdings should have drawn from that correspondence was that, if it failed to do so, THL would cancel the contract, would not consider itself bound by it and would choose to walk away from any benefits it was entitled to under the contract.

[653] Heli Holdings refused to acknowledge or remedy the continuing breaches of contract. THL did not use or seek to use the aircraft again. Through its opposition to the application for summary judgment, THL made it clear it was not accepting Heli Holdings' breaches of contract or affirming the contract.

[654] In its statement of defence and counterclaim, THL had plainly asserted that there was a continuing significant breach of the contract, that this was not accepted and THL thus had a right to cancel the contract.

[655] I have had regard to the judgments from the Supreme Court that an innocent party, faced with repudiation or breach of an essential term, must make an election between affirmation or cancellation and cannot defer its contractual obligations on an indefinite basis.[33]

[656] Those judgments related to contracts for the sale of land. Consistent with the principle articulated by the Supreme Court, the contract between THL and Heli Holdings remained on foot until the cancellation of 20 February 2015. Cancellation of a contract does not abrogate rights and liabilities which have accrued prior to cancellation.[34] On that basis, under the contract, THL had an obligation to pay for shortfall hours but Heli Holdings also had an obligation to provide maintenance support in the manner required by the contract. If, during the intervening period, Heli Holdings remained in breach and had not been willing to acknowledge that breach and remedy it, THL could avoid its obligations under the contract.

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33 *Property Ventures Investments Ltd v Regalwood Holdings* [2010] NZSC 47, [2010] 3 NZLR 231 at [72] per Blanchard J and at [96] per Tipping J; *Kumar v Station Properties Ltd (in rec and liq)*, above n 21, at [101].

34 *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173; *Garratt v Ikeda* [2002] 1 NZLR 577.

[657] In *Property Ventures Investments Ltd*, Blanchard J adopted and approved the statement of Brennan J in *Foran v Wight* in the High Court of Australia: [35]

> Where the respective obligations of parties to a contract are mutually dependent and concurrent, the primary rule is that neither party who fails to perform his obligation when the time for performance arrives can rescind for the other party's failure at that time to perform his obligation. Each party's obligation is conditional on performance by the other; neither can complain of non-performance by the other when the condition governing the other's obligation goes unfulfilled.

While that statement refers to the exercise of a party's right to rescind or cancel, it must also apply to a party's right to sue for performance or damages for non-performance of a contract.

[658] Consistent with that analysis, in *Kumar* the Supreme Court did not require a purchaser to settle where the vendor was in breach. In *Property Ventures Investments v Regalwood Holdings*, the Supreme Court held a vendor could not cancel a contract of sale because of the purchaser's failure to comply with a settlement notice, where that notice required the purchaser to pay the vendor the full contract purchase price without acknowledging the purchaser's right to have that price abated.

THL's liability and entitlement to cancel as at 20 February 2015

[659] I thus conclude that, by reason of Heli Holdings' actual and anticipated breach of contract resulting from the 2 July 2013 conference call and Heli Holdings' continuing conduct with regard to the contract after that time, THL was not liable to pay for shortfall hours from 1 July 2013 to 20 February 2015 (Heli Holdings' claim was for $3,732,041.64 for the period from 1 July 2013 to 24 March 2015). THL was entitled to cancel the contract for breach on 20 February 2015. It did so. This relieved THL from any further obligations under the contract.

[660] That being my judgment, there is no need for me to consider what damages Heli Holdings might have been entitled to for loss of expected profits and additional

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[35] *Property Ventures Investments Ltd v Regalwood Holdings*, above n 33, at [82], citing *Foran v Wight* [1989] HCA 51, (1989) 168 CLR 385 at 417.

expenses for the period from 24 March 2015 to 22 August 2022 (THL's claim was for a total of $10,147,097).

Alternative defences to claim for period after 1 July 2013

[661] Although it is not essential to my judgment, for completeness, I will refer to the further grounds on which THL sought to avoid liability for the payment of shortfall hours for the period after 1 July 2013.

Failure to properly review mix of aircraft, the unavailability allowance and the system for charging for shortfall hours

[662] Heli Holdings did have obligations under the contract to review the mix of aircraft with due regard to market conditions. It had agreed to review the formula for dealing with the unavailability allowance and the system for shortfall hours. I have held that Heli Holdings met its obligations in that regard for the period from 2008 to June 2013 through the way Heli Holdings, through Mr Hart, negotiated over these issues. There is an issue as to whether Heli Holdings continued to meet its contractual obligations in this regard once Mr Jones assumed responsibility for the THL/Heli Holdings relationship in late June 2013.

[663] In its pleadings, THL relied on Heli Holdings' alleged breaches of contract in this regard in seeking to avoid liability. It was not THL's reason for grounding the helicopters or referred to specifically as justification for cancelling the contract.

[664] Mr Staniland said that Mr Jones' demand for payment of $2 million during the 2 July 2013 call was surprising and unhelpful in terms of the negotiations, given that they had been negotiating since 2012 over shortfall hours, the replacement of helicopters and maintenance but said the "impact of that meeting was all around the maintenance".

[665] Nevertheless, if a party seeks to cancel a contract on the basis of an alleged breach which is not established but there is evidence which establishes that they would have been entitled to cancel on another ground, they are entitled to rely on

that other ground to avoid any liability that might have arisen out of what would otherwise have been a repudiation of the contract.[36]

[666] It is not for the Court to impose its view as to what would have been a reasonable basis on which these issues should have been resolved between THL and Heli Holdings. At a certain point, Heli Holdings was entitled to take the view that these issues could not be resolved on a basis which was acceptable to it, to then refuse to discuss them any further and to then leave it to THL to take whatever steps might have been available to it, having due regard to the contract.

[667] The good faith obligations on Heli Holdings did however require Heli Holdings to act reasonably with regard to the obligations it had in this regard. Mr Jones accepted the arrangements entered into between the parties in 2002 recognised there would be a need for some flexibility, that there would be a right to negotiate for replacement aircraft and both parties should have expected they would act reasonably to endeavour to reach an agreement.

[668] Under cross-examination, Mr Jones said it was commercially unacceptable for Heli Holdings to have an agreement whereby THL could potentially terminate the maintenance contract but he seemed unaware of the extent to which that sort of provision had been proposed in earlier draft agreements along with a provision for any dispute over that to be determined by someone independent. Mr Jones also referred to a change from the 350 minimum hours to 300 but was unaware that figure had been included in a proposal presented by Mr Quickfall earlier and commented on by Mr Hart as being something he could consider but with other protections.

[669] As at 2 July 2013, Mr Jones had indicated that Heli Holdings was ready to proceed to mediation as required by the contract. Despite this, I consider that Mr Jones' refusal to discuss in any way the objections which Heli Holdings had to the agreement put forward by Mr Quickfall on 21 June 2013 was unreasonable. I consider that, in the context of all the issues that had arisen between these parties in the period between 2008 and 2013, and the indication from Mr Hart, apparently

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[36] *Thompson v Vincent* [2001] 3 NZLR 355 (CA); affirmed in *Kumar v Station Properties Ltd*, above n 21, at [64]-[66].

made in good faith, that Heli Holdings would accept a payment of no more than $650,000 to settle outstanding claims for shortfall hours, for Mr Jones on 2 July 2013 to have insisted, in such absolute terms as he did, that THL must pay more than $2 million, did involve a denial of Heli Holdings' obligations under the contract and meant it was not willing to negotiate in good faith over variations to the contract in a way it had agreed to do. In giving his reasons for terminating the negotiations as he did, Mr Jones showed he had not endeavoured to properly understand the detail of THL's proposals, the reasons for them or the way THL did recognise Heli Holdings' interest in the contract and a continuing relationship.

[670] Heli Holdings had an obligation to review the mix of aircraft, the formula to deal with unavailability and the basis on which shortfall hours were charged. Mr Jones' stance, that THL must simply fly the aircraft because the operation was CAA-approved and that it must pay what was due, was inconsistent with Heli Holdings' contractual obligations and the obligation to honour those obligations on a good faith basis.

[671] The terms of the contract made it clear to Heli Holdings that the honouring of such obligations was essential to THL. Non-performance of those obligations had the potential to substantially alter the benefit of the contract to THL. Mr Jones' refusal to honour those obligations in the way he dealt with THL in the conference call of 2 July, would have justified THL in cancelling the contract on that basis.

[672] On all the evidence, THL could justifiably conclude that Mr Jones' attitude over these obligations would not have changed between July 2013 and 20 February 2015 when THL cancelled the contract. The proposals which Heli Holdings had made for changes in the contract before 21 June 2013 were always made subject to Board approval. On the evidence, this meant subject to Mr Jones' approval. Despite the effort which Mr Hart put into the negotiations, it emerged from Mr Jones' evidence that Mr Jones had only a vague interest in the progress that had been made through negotiations. There was no indication in his evidence in support of the application for summary judgment or in relation to the trial that he was willing to be more flexible, reasonable or open to negotiation than had been apparent from the way he spoke during the conference call.

[673] I do not find there was a breach of good faith and contractual obligations because Mr Jones, in the strongest of terms, decided to end the negotiations and insist that THL meet what he considered were its obligations under the contract. I find there was a breach of good faith obligations because of his refusal to explain to Mr Quickfall the reasons for rejecting the latest proposals and his adoption of a final position without proper regard to the discussions that had taken place up to that point.

[674] I do recognise that, in his affidavit in support of the application for summary judgment, Mr Hart had said Heli Holdings was open to further discussion with regard to the contractual arrangements. THL was entitled to attach little weight to those comments, given the way Mr Jones had assumed responsibility for the THL/Heli Holdings relationship and had scant regard to the communications which had taken place between Mr Hart and THL or the agreements which had been reached over maintenance at the 15 April 2013 meeting.

[675] I refer to *Wellington City Council v Body Corporate 51702*. I recognise the Court of Appeal has held that an agreement to negotiate in good faith the sale of certain leased properties to lessees was unenforceable for uncertainty because there was "no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of good faith obligations".[37] Does that judgment require me to find that, in the particular context of these parties and their contract, good faith obligations should be treated as being of no effect?

[676] The Court of Appeal recognised that acceptance of good faith obligations in employment contracts and utmost good faith obligations in insurance contracts could be justified and explained on the basis that the relationship itself between the parties provided a degree of contextual objectivity.[38] In such a relationship setting, the good faith obligations could be regarded as having sufficient general certainty. As the Court of Appeal said, what effect that would have in a particular case would be for the Courts to assess on a case-by-case basis.

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37 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at [31].
38 At [37].

[677] In *Wellington City Council*, in relation to the matters in the dispute, the parties were not already in a contractual relationship through which they were under any obligation to negotiate over the potential sale and purchase of the council's leasehold interest in land. The council had written to lessees offering to negotiate in good faith the sale of that leasehold interest to existing lessees. The lessees entered into negotiations on that basis. The issue for the Court was whether or not any enforceable contract had come into existence. That situation is to be contrasted with the situation here where the parties were in a continuing contractual relationship which required them to meet all their obligations under the contract in good faith.

[678] It is consistent with the reasoning of the Court of Appeal in *Wellington City Council* that the Court should give effect to the expressly agreed mutual good faith obligation which both parties accepted with regard to all their obligations under the contract.

[679] Heli Holdings' breach of contract and the good faith obligations in this regard would have enabled THL to avoid a continuing liability under the contract for shortfall hours if it had not succeeded with its defence to the claim on the grounds which were the main focus of submissions and evidence at trial.

Weight of the aircraft

[680] For reasons which I have already discussed, I do not find that, during the period after 30 June 2013, Heli Holdings was in breach of contract with regard to the weight of the aircraft. To the extent there may have been a problem with the weight of those aircraft, Heli Holdings had been dealing with that issue in a way that had been acceptable to THL. The expectation was this would continue. What Mr Jones said in the conference call of 2 July 2013 did not suggest otherwise.

Failure to mitigate

[681] THL alleged that Heli Holdings failed to mitigate by continuing to be in breach of contract. If that happened, it could not constitute a failure to mitigate a loss suffered as a result of THL's alleged breach of contract. THL also alleged that, if it had been held liable for payment of the shortfall hours after 4 July 2013, Heli

Holdings should have mitigated its loss by finding other uses for the aircraft given THL was not using them. I do not accept there would have been a failure to mitigate in this way. THL did not cancel the contract until 20 February 2015. If I had held THL liable for the shortfall hours after 1 July 2013, it would have been inconsistent with such a conclusion to find that during that time THL should have been trying to lease the aircraft to another party.

Exclusion clause

[682] Clause 7.5 of the 2002 agreement provides:

> Subject to clause 12.5, The Helicopter Line shall not be liable for any consequential, indirect or special loss, damage or injury of any kind suffered by Heli Holdings or any other party arising directly or indirectly from any breach of any of The Helicopter Line's obligations under or in connection with this Agreement or from any cancellation of this Agreement.

[683] I agree with Mr Heaney's submission that Heli Holdings' claim for shortfall hours is for its direct contractual entitlement. Heli Holdings' claim for loss of profit after 24 March 2015 was also a claim for its loss of a direct contractual entitlement. The exclusion clause could not have afforded a defence to THL if it was otherwise liable to pay for shortfall hours after 4 July 2013 and was not entitled to cancel the contract as at 20 February 2015.

First subsidiary issue – Heli Holdings' claim for over-temperature incident

[684] On 12 May 2008, a THL pilot had been flying an aircraft (ZK-HPZ) at Franz Josef. When passengers were about to unload and the engines were idling, one of the engines was briefly at a temperature which could and did damage the engine. Smoke and flames were seen coming from the exhaust. The issue is whether THL is liable for the cost of repairing and servicing the engine.

[685] Heli Holdings incurred costs of $151,762.74 in testing and servicing ZK-HPZ. The work was done by Airwork and invoiced to Heli Holdings on 14 January 2009. Heli Holdings invoiced THL for those costs on 30 June 2010.

[686] Heli Holdings says that these costs were incurred because of the negligence of the pilot. Pursuant to clause 7.1 of the 2002 agreement, Heli Holdings says THL are liable for those costs.

> 7.1 Heli Holdings shall not be responsible for any damage or costs relating to or caused by the matters set out in clause 7.1 (a) - (c) below. Such costs, including (if applicable) any payments for the excess on any insurance policy, are to be met exclusively by The Helicopter Line except to the extent that Heli Holdings will share such costs equally with The Helicopter Line provided that Heli Holding's liability shall be no more than $75,000.00 plus GST in any year from 1 July to 30 June (such liability to apportioned pro-rata for any partial year during the Term) with respect to:
>
> (a) foreign object damage to engines and any components thereof including without limitation damage resulting from hot starts and operating the Aircraft in an erosive environment; and
>
> (b) the misuse of the Aircraft by, or the negligence of, The Helicopter Line or any of its officers, employees or contractors (including but without limitation the pilots who operate the Aircraft), such misuse or negligence to be identified and determined in accordance with the Altair monitoring systems installed in the Aircraft which Heli Holdings, or any representative of Heli Holdings, can inspect at any time. For the avoidance of doubt, misuse or negligence includes operating the Aircraft in any manner which is not in accordance with Civil Aviation Authority rules and regulations, or any limitations imposed by the Manufacturer in the flight manual; and
>
> (c) any Minor Maintenance Work in consultation with Heli Holdings.

[687] In statements of defence, THL denied liability but said that maximum liability had to allow for betterment and a 50 per cent contribution from Heli Holdings as required by clause 7.1 so as to be:

Original invoice	$134,900.21
Less Betterment	$38,155.85
Balance	$96,744.36
Less 50 per cent per clause 7.1	$48,372.18
Balance	$48,372.18
Plus GST at 12.5 per cent	6,046.52
Total	**$54,418.70**

[688] To support the claimed discount for betterment, THL relied on an email from Mr Hanson, Heli Holdings' business manager, to Mr Quickfall of 5 August 2010 in which he acknowledged there was an element of betterment so that the costs which Heli Holdings was seeking from THL were:

Original invoice	$134,900.21
Betterment	$38,155.85
Balance	**$96,744.36**

[689] There was further evidence of Airwork accepting there was betterment and having paid $38,155 of the costs on account of this in Mr Hanson's notes of a meeting which took place between he and Mr Quickfall on 15 September 2010.

[690] Those notes also referred to Heli Holdings claiming that, because Heli Holdings had paid the excess on an insurance policy claim for damage to a different helicopter caused "via storm", the contribution which Heli Holdings should have made to the costs could only be $75,000 minus $66,348, or $8,652 at most.

[691] Although THL claimed its liability (if any) for the over-temperature damage should be calculated as described, in Mr Hart's initial brief of evidence prepared for the trial he simply referred to the costs of $151,762.74 and the associated invoice. It was only on being cross-examined over an adjustment for betterment that Mr Hart referred to Heli Holdings having paid out $66,348 on an insurance claim arising out of damage done to a different helicopter in a storm. He said he believed this happened in the same year as the over-temperature incident. He did not refer to any invoice or other document relating to that insurance claim. He did refer to Mr Hanson's record of a meeting with Mr Quickfall on 15 September 2010.

[692] The evidence in relation to when Heli Holdings paid the excess on the insurance policy and, if so, just when that liability was incurred, is unsatisfactory.

[693] Clause 7.1 requires THL to pay the costs of certain damage but with those costs to be shared equally with Heli Holdings, only in connection with costs with regard to:

(a) foreign object damage to engines and components (clause 7.1(a));

(b) misuse of the aircraft or the negligence of THL (clause 7.1(c)); or

(c) minor maintenance work (clause 7.1(c)).

[694] Heli Holdings' liability to share equally and the limiting of its liability to $75,000 plus GST relates only to the costs that result from the matters referred to.

[695] Damage to an aircraft as the result of a storm would not appear to be in any of those categories. There is no evidence that the storm damage resulted from THL's operation of the aircraft. On the face of it, the damage to the other aircraft, in respect of which Heli Holdings had to pay an insurance excess, was for damage which it suffered as an owner. It was not a cost to which either the equal sharing provision or the $75,000 limit in clause 7.1 applied. The cost of the insurance excess could thus not be on account of its liability to contribute up to $75,000 for half of the costs for which THL might be liable under clause 7.1.

[696] On the evidence, THL's liability in respect of this claim would have been for a maximum of $54,418.70 as it pleaded in its statement of defence.

[697] The THL pilot completed a report as to what happened on the same day, 12 May 2008. He made five trips in the aircraft. He described how, after landing the aircraft at the Franz Josef helipad, he applied the friction lock and took the other required procedural steps to bring the aircraft back to ground idle. He said that, after having both engines at ground idle, he made eye contact with the loader to signal that the passengers could unload. On looking back into the cabin, he noticed an auto-reignition light for the number two engine was illuminated. He said this was out of the ordinary as an auto-reignition light only illuminates if self-activated in flight or during engine shut-down post flight. He scanned instruments for the number two engine which were reading as if that engine was shut down. He then observed a temperature reading for the number two engine which indicated it was at around 1,000 degrees centigrade. He then closed the fuel control to idle cut-off meaning that it was fully closed but motored the engine until the temperature was

shown as being 150. He then shut down the aircraft and grounded it because of a possible over-temperature of the number two turbine.

[698] Heli Holdings' engineering expert, Mr Scott, considered the pilot's report and temperature graphs for the engine. He speculated that, instead of pulling the fuel control lever back to the position appropriate for ground idling, the pilot could have pulled it back too far, past the notch appropriate for idling, towards the point for shutting off the engine. He then thought that, to compensate for the accidental cutting off of fuel to the number two engine, the pilot could have sought to reintroduce fuel by suddenly opening the fuel control lever back towards the position appropriate for ground idle. He said the high temperatures on the graph for the engine could have occurred because the pilot was trying to operate the starter process to bring more air back into the engine in an attempt to cool the system. Mr Scott said it would have been an error for him to proceed in this way.

[699] Mr Scott said the temperature on the engine should not have exceeded 927 degrees centigrade. The graphs recording temperature readings for the engine showed this maximum was exceeded for more than 20 seconds and that was sufficient time to cause considerable damage to the engine components. Mr Scott acknowledged that his scenario was at odds with the pilot's report.

[700] Neither the pilot nor any engineer who examined the FCU was called to give evidence.

[701] Mr Scott said that, if the pilot was to be believed, there would have to be some engineering issue with the FCU itself. The FCU was examined and tested by Standard Aero (Australia) Pty Limited. Its report said no relevant defect in the FCU had been observed.

[702] The incident was investigated by THL. Mr Desborough, the then Chief standards pilot for THL, prepared a report. Mr Evans, THL's quality assurance manager, advised the CAA of what had occurred in an occurrence report. Neither of these people were called as witnesses. Both reports referred to the pilot's account of what happened. The reports were prepared when THL had been advised by Airwork

that the FCU had been tested and been found to be operating correctly and within allowable limits. Mr Desborough said that, in addition to reading the reports, he had spoken to the pilot who stood by his account of what happened.

[703] Mr Desborough said it was clear the engine flamed-out when the fuel control lever was retarded to the ground idle position but he could not determine whether the pilot retarded the lever back beyond the 30 degree notch ground idle position, causing the engine to flame-out or whether it flamed-out at the ground idle position. Mr Scott's opinion was the same.

[704] Mr Desborough accepted that, once the engine had flamed-out and the combustion process ended, the fuel control lever should not be moved forward in an attempt to restart the engine as this would allow fuel to be reintroduced. The pilot said he did not do this.

[705] Mr Desborough said he could not accurately state what caused the flame from the number two engine. Mr Desborough concluded that, given reports that the FCU had been tested and found to be operating correctly but the pilot reporting that he had brought the fuel control lever only back to the ground idle position and at that point the engine flamed-out and combustion ceased, he could not "determine beyond doubt" whether the over-temperature incident was a spurious mechanical problem or human error.

[706] On cross-examination, Mr Scott accepted the temperature graphs for the engine did not demonstrate why the incident happened, just that it did happen. He could not draw a positive conclusion as to what happened from the graphs. Mr Scott was saying that it was more probable that what happened was due to pilot error than a fuel control problem. Mr Scott accepted that it was possible the FCU had failed but Standard Aero had not been able to verify this.

[707] At the conclusion of Mr Scott's evidence, I asked him a number of questions to ensure I understood what he was saying as to how the incident could have occurred. In response to those questions, he said it was his view that it was more likely the pilot had made an error because he was "a brand new pilot in a twin engine

environment". THL's reports showed the pilot had total flying time experience of 2,880 hours but 28.15 hours on a twin. The report indicated he had some 1,300 turbine hours when beginning employment with THL and had 10 hours' training on a twin including five hours under supervision where it was considered he had performed well.

[708] It would be entirely speculative to proceed on the basis that the pilot would have been more likely to have made a mistake because of a lack of experience on the twin. He was an experienced pilot. He had significant training on the twin. His relative inexperience on the twin could have been reason for him to have been more careful in the steps he took. Mr Scott had not referred to the pilot's experience as a factor to be considered when expressing an opinion as to this in his brief of evidence.

[709] In response to questions from me, Mr Scott said the only evidence that he could point to which would make it more likely that the over-temperature was caused by pilot error was the fact the FCU had been looked at and the report came back that it was not faulty.

[710] For me to accept that Heli Holdings has proved this over-temperature incident was caused by pilot error, I have to accept that the pilot's account of what he did on landing the aircraft and when he observed the engine was at 1,000 degrees centigrade was misleading. The difference between the pilot's account of what he did and Mr Scott's explanation as to how the pilot could have been in error is so marked that, if I accept Mr Scott's scenario, I must be satisfied the pilot's report as to what occurred was deliberately misleading.

[711] In connection with other problems with FCUs, albeit some three years later, there was evidence that there had been malfunctions with these units without the defects in the units ever being identified. In the Gorilla Creek incident, Mr Marwick established the cyclic lock failed on an intermittent basis. Heli Holdings says that the actual defect with the lock had not been identified by Eurocopter.

[712] In relation to this incident and this claim, the burden of proof is on Heli Holdings. On the evidence, I am not satisfied that, more probably than not, the over-temperature incident and the damage done to the engine was the result of pilot error.

Second subsidiary issue – THL's counterclaim for over-payment for hours flown

Intention of the parties

[713] In the 2008 agreement, THL agreed to pay Heli Holdings the sum of $383,437.42 by 13 June. Clause 3.1 of the agreement stated:

> The Helicopter Line will pay Heli Holdings Limited the sum of $383,437.42 by 5pm 13 June 2008. This payment is without prejudice to The Helicopter Line's right to dispute its liability to make that payment and without prejudice to Heli Holdings Limited's claim to interest on that amount. The payment is without prejudice to The Helicopter Line's claim that clause 8.3 of the variation of agreement entitles it to claim a discount across all hours. (The meaning and effect of clause 8.3 remains at large). The parties agree to work together to resolve the interpretation and if unsuccessful then after 150 days subject the dispute to mediation and failing mediation, litigation.

[714] The clause referred to was in the 2007 agreement. Clause 8 of that agreement required THL to pay $1,000 per hour plus GST for the twins. Payment had to be made for a minimum of 3,500 hours subject to adjustment according to the agreed formula for unavailability. Clause 8.3 stated:

> In the event that The Helicopter Line achieves productive hours in excess of the minimum hour requirements agreed to under this agreement Heli Holdings agrees to reduce the prices referred to in clause 8.1 and 8.2 by 12% per hour.

[715] Mr Quickfall explained that, in the 2006/2007 year, THL flew 3,450.15 hours and, after adjustments, THL considered that it was entitled to a 12 per cent discount on the price per hour charged for all hours flown, resulting in the claimed credit of $383,437.42. After the mediation, THL agreed to pay the full amount claimed by Heli Holdings but only on the basis THL was not waiving its claim to credit in respect of this payment. The payment was without prejudice to THL's ability to dispute its liability to make the payment and to claim that it was entitled to a discount across all hours. THL seeks to off-set that claimed credit against the claims which Heli Holdings made for shortfall hours.

[716] Heli Holdings denied THL's pleaded entitlement to a credit and said further that the credit did not accrue within six years of these proceedings and so was barred by the Limitation Act 1950.

[717] THL's claim can be determined through the way clause 8.3 is to be interpreted in line with what I find to have been the intention of the parties having regard primarily to the wording of clause 8.3 and relevant surrounding circumstances.

[718] I agree with the submission of Mr Heaney that the interpretation which Mr Quickfall argues for does not make commercial sense. If accepted, it would mean, if THL flew 3,500 productive hours, it would have to pay $3.5 million but, if it flew 3,501 productive hours, it would have to pay only $3,080,880. The total payable for all hours would then be less than the amount payable for fewer hours, even though the wear and tear on the aircraft would be greater.

[719] I agree with Mr Heaney's submission that it is not surprising that, after the mediation involving the 2006/2007 hours, THL actually paid over the amount it had been withholding.

[720] The interpretation which Heli Holdings argues for is also consistent with the proposals that were made in late 2012 and 2013 by both Heli Holdings and THL for both minimum hours and hourly rates for the replacement aircraft which the parties were contemplating would be introduced into the Heli Holdings fleet. In Mr Quickfall's draft agreement sent to Heli Holdings on 21 June 2013, he proposed:

> Each super D2 aircraft will be provided at an hourly rate of NZ$1,400 (plus GST) for the first 300 hours per aircraft per annum; this rate will be charged up to 350 hours. Hours above 350 will be charged at a rate of NZ$900 (plus GST) per hour.

[721] THL's counterclaim with regard to a credit for $383,437.42 must be dismissed on this basis.

Limitation Act 1950

[722] Heli Holdings also submitted it had a limitation defence to this claim. Mr Heaney's submission was that THL's cause of action in relation to this would have accrued on 31 July 2007, being the date on which it had to pay for the shortfall hour amounts for the 2006/2007 contract year. He submitted that any contract claim would thus have had to have been made by 31 July 2013 but it was first made in THL's counterclaim of 16 April 2014. I note that, if THL had any claim, it did not relate to any amount due for shortfall hours. On this particular year, THL had flown aircraft for more than the minimum. The cause of action probably did arise at such time as the parties could determine whether THL had flown the aircraft for more than 3,500 productive hours.

[723] Mr Weston submits that THL's cause of action should be deemed to have accrued at the time the claim was acknowledged in the 2008 settlement agreement dated 11 June 2008, meaning the claim was brought in time. He relied on s 25(4) of the Limitation Act 1950.

[724] I have not determined when the cause of action would have accrued independently of the 2008 agreement. I do not however accept that, pursuant to section 25(4), the cause of action would have accrued on the date of the 2008 agreement.

[725] Section 25(4) states:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

[726] The meaning of acknowledgement of claim referred to in s 25(4) must be determined having regard to the context in which those words are used. The words are used alongside the reference to a part payment of the debt. Such a part payment demonstrates an acceptance of liability for the debt. The extension of the limitation period, in the circumstances provided for in s 25(1), (2) and (3), also results from

some act or acknowledgement which inherently involves an admission of liability.[39] Clause 3.1 of the 2008 agreement preserved THL's right to bring a claim which was disputed. It did not involve an acknowledgement of the claim in the sense with which those words are used in s 25(4).

Result

[727] The plaintiff is entitled to judgment against the first and second defendants on a joint and several basis in the sum of $2,070,143.42 together with interest under the Judicature Act as from 26 September 2013.

[728] The defendants are entitled to a declaration that neither of them has any liability to the plaintiff on the plaintiff's claim for shortfall hours or for loss of profits for any period after 2 July 2013.

Costs

[729] Whether and what order might be made as to costs will require a consideration of what was at issue in the proceedings, the scope of the evidence and the success which each party had.

[730] If any party decides to apply for costs and the claim cannot be resolved by agreement, then the claim should be made by way of a memorandum from counsel. The first memorandum is to be filed within 30 days. The other party must file any memorandum in response within 14 days of receiving the first memorandum. A memorandum in reply is to be filed within a further 14 days. The memoranda are to be no longer than eight pages.

Solicitors:
Heaney & Partners, Auckland
MacAlister Todd Phillips, Queenstown.

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[39] Burrows, Finn and Todd, above n 6, at [21.6.2(e)]; *Anchorage Management Ltd v Oldham* (1997) 11 PRNZ 110 (HC) at 116; *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 (HL) at [21] per Lord Hope of Craighead; *Fog v Frimley Estate Ltd* [2015] NZHC 3301 at [38].