

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2011-485-391**

UNDER An application for review under Part 1 of  
the Judicature Amendment Act 1972

AND

UNDER Part 30 of the High Court Rules

IN THE MATTER OF Maritime Transport Act 1994

BETWEEN SURVEY NELSON LIMITED  
First Plaintiff

AND TERENCE MOWAT REYNOLDS  
Second Plaintiff

AND JEAN REYNOLDS  
Third Plaintiff

AND WILLIAM DIXON  
Fourth Plaintiff

AND THE DIRECTOR OF MARITIME NEW  
ZEALAND  
Defendant

Hearing: 16 and 18 March 2011

Counsel: H A Cull QC and P C Dawson for Plaintiffs  
M T Scholtens QC, S F Wellik and J L W Wass for Defendant

Judgment: 24 March 2011

I direct the Registrar to endorse this judgment with a delivery time of 11.30am on the  
24<sup>th</sup> day of March 2011.

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**RESERVED JUDGMENT OF MACKENZIE J**

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[1] This application for judicial review is a sequel to earlier proceedings by the first plaintiff. Survey Nelson Limited (SNL) held an approval from Maritime New Zealand (MNZ) authorising it to offer specified services as a safe ship management (SSM) company. As an adjunct of that approval, the directors and some staff of SNL held certificates of approval and an instrument of delegation of some of the defendant's powers, including the power to issue SSM certificates. Following a lengthy review of the approval, the Director advised SNL on 20 November 2009 of her decision to withdraw its approval and wrote to the owners of all vessels within its system advising of that decision. The associated delegations to the directors and staff were also withdrawn.

[2] SNL issued judicial review proceedings, and sought interim relief. Interim orders were granted by Miller J on 26 November 2009. Subsequently an urgent fixture for the substantive hearing of the application for judicial review was fixed. The judicial review was heard on 9 March 2010 by Simon France J.

[3] In his judgment delivered on 31 March 2010, Simon France J identified three principal questions for determination:<sup>1</sup>

- (a) Whether the Director followed the correct statutory process in cancelling the approval. The Director had followed the process applicable to cancellation of a ~~maritime document~~, and the essential question was whether the approval fell in the statutory definition of the term;
- (b) If the approval was not a maritime document, whether proper notice of the Director's intention to cancel had been given to SNL; and
- (c) Whether the decision to cancel was unreasonable in that it was a disproportionate response to problems in the shipping industry in general.

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<sup>1</sup> *Survey Nelson Ltd v Director of Maritime New Zealand* HC Wellington CIV-2009-485-2395, 31 March 2010.

[4] Simon France J answered the first two questions adversely to the Director. He rejected SNL's alternative claim that the Director's decision to cancel was unreasonable. Despite his finding in favour of the plaintiff on the first two questions, Simon France J declined to intervene and quash the Director's decision, because he was not satisfied the Director's errors led to a defect of process of a nature sufficient to justify that course and he was satisfied that the Director had proper grounds for withdrawing the approval regardless of the process defects.

[5] SNL appealed to the Court of Appeal, and the appeal was heard on 6 October 2010. In a judgment delivered on 21 December 2010,<sup>2</sup> the Court upheld Simon France J's decision on the first two substantive issues and found it unnecessary to consider the alternative claim of unreasonableness. On the question of relief, the Court of Appeal reversed the decision of Simon France J not to grant relief. It quashed the Director's decision to cancel the approval of SNL as a safe ship management company. The Court of Appeal also dealt with a related point, namely whether, because the Court had quashed the Director's decision, it should also quash her contemporaneous decision to revoke the delegations given to SNL's employees. On this aspect the Court said:

[63] SNL sought the specific remedy of a declaration that the Director's decision to cancel the approval was invalid and an order quashing or setting it aside. The company did not seek relief relating to revocation of the delegations or raise that issue in its statement of claim. Nor has it applied to amend. We cannot grant relief on this point. However, if SNL is correct that as a matter of law the Director's decision to cancel the approval and revoke the delegations are interlinked, then we assume that the Director will act accordingly.

[6] The Court also dealt with a related submission by the Director that it would be futile to grant relief because the approval, if it had not been revoked, would have expired in the meantime. On this issue the Court of Appeal said:

[64] The other issue is whether it would be futile to grant relief given that the approval may have expired by effluxion of law or time. The certificate of approval issued on 30 June 2008 was expressed to expire on 28 February 2010. However, Ms Cull argues that it still remains legally valid, given that r 21.12 does not prescribe a time limit for expiry; and that quashing the Director's decision will place

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<sup>2</sup> *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629.

SNL in its former position as at 20 November 2010. On that basis, the approval was invalidly suspended three months before its actual expiry date, if it was in law due to expire on 28 February 2010.

[65] SNL expressly sought the further remedy of a declaration that its approval is to continue in force and is to be deemed to have continued in force from 20 November 2009. We are satisfied that an order of that nature should be made to ensure that SNL is put back in the position in which it should have been on 20 November. We add that we are aware SNL has made arrangements to protect its commercial position in the interim.

[66] However, fixing a reinstatement date of 20 November 2009 will not fully protect SNL. Ms Scholtens asserted that it is not open to this Court to reinstate what she termed the expired SSM approval given that SNL did not apply for a stay following the High Court judgment. We disagree; SNL should not be penalised for failing to follow that procedural route when the Director's originating error in withdrawing the approval wrongfully deprived the company of its lawful status. We are satisfied that the approval should be deemed to be in force as from the date of this judgment, in order to suspend the adverse effect of the withdrawal in the interim.

[7] The orders made by the Court were in the following terms:

[67] SNL's appeal is allowed. We make orders:

- (a) declaring that the decision of the Director dated 20 November 2009 withdrawing SNL's approval as a SSM company was invalid;
- (b) quashing the Director's decision; and
- (c) declaring that SNL's approval as a SSM company is reinstated and is deemed to resume effect according to its original terms from the date of this judgment.

[8] Following that decision, on 22 December 2010, SNL requested MNZ to:

- (a) Issue a certificate of approval under the SSM for a period of five years;
- (b) Notify all vessel owners serviced by SNL that SNL had been reinstated;
- (c) Take all steps required to restore the delegations to Mr and Mrs Reynolds; and

- (d) Advise vessel owners that the exemption granted by MNZ from the requirement to be part of a SSM organisation be withdrawn.

[9] MNZ replied that same day refusing to take the steps requested and indicating that an application for stay of the Court of Appeal decision was to be made. The application for stay was heard on a preliminary basis on 23 December 2010. The stay was refused and the application was adjourned to the week commencing 24 January. On 23 December, MNZ issued to SNL a certificate of approval with an expiry date of 31 March 2011. The Director responded to the request to reinstate the delegations that she considered she had a proper legal basis to revoke the delegations, and informed SNL that its request to reinstate the delegations would be treated as a request for new delegations. The Director also wrote on 23 December 2010 to owners and operators of vessels formerly entered in the SNL safe ship management system advising them that SNL had been issued with an approval for a period of three months only with effect from 21 December 2010, and indicating that she was considering the request for the re-issue of delegations and informed vessel owners that there were limits to what could be undertaken by SNL while the delegations were not in place.

[10] On 14 January 2011 MNZ applied for leave to withdraw its application for a stay of the Court of Appeal judgment and on 9 February 2011 applied for leave to appeal to the Supreme Court against that decision. These proceedings were issued on 3 March 2011, seeking judicial review of the Director's exercise of her statutory powers subsequent to the Court of Appeal decision. An application for interim relief was lodged, but the matter was instead listed for this substantive hearing before me.

[11] During the period when SNL's approval was withdrawn and under challenge in the previous proceedings, there was a relevant development which it is necessary to describe. In December 2009, MNZ wrote to all SSM companies, requiring them to submit an application for renewal of their SSM approvals and delegations. SNL's approval had been issued with an expiry date in February 2010. At that stage, SNL's status as a SSM company was governed by the interim orders made by Miller J on 26 November 2009. SNL advised MNZ that its position was protected by the interim orders, and that it would not be applying for renewal. MNZ confirmed that in those

circumstances the renewal process was not necessary for SNL. All of the other SSM companies that applied for certificates of approvals were re-issued certificates for periods to 2013.

[12] Subsequent to the judgment of Simon France J, holding that a certificate of approval as a SSM company was not a maritime document, and following a suggestion in the judgment, MNZ sought the Minister of Transport's consent to amend the relevant rule to make certificates of approval a maritime document. Consent was given and the amended rule came into effect on 1 December 2010. That amended rule provides that certificates of approval are now deemed to be maritime documents. There is a transitional provision which provides that the existing certificates of approval are to be valid up to the date of expiry shown on the certificates held at the time the amendment came into force.

[13] In giving effect to the Court of Appeal decision, MNZ issued a certificate of approval for a period of three months expiring on 31 March 2011. The Director's reason for choosing that expiry date was that this reflected the approximately three months that the approval had left to run when she originally cancelled it.

[14] SNL also asserts that, when the certificate of approval was withdrawn in November 2009, SNL's name was promptly deleted from the list of approved SSM companies on the MNZ website. The name was restored, at the request of SNL following the interim relief granted in November 2009, but again deleted following the judgment of Simon France J in March 2010. SNL's name has not been reinstated to the list of approved companies following the Court of Appeal's decision.

[15] In its amended statement of claim, the plaintiff seeks judicial review of a number of aspects of the Director's action, on the grounds of error of law, breach of legitimate expectation, bias, substantive unfairness, and unreasonableness. It seeks mandatory orders requiring the Director to:

- (a) Take all steps to restore the instruments of delegation to the second, third and fourth plaintiffs;

- (b) Issue SNL a certificate of approval to operate as a SSM company to 31 March 2013; and
- (c) To notify all vessel owners that SNL has been so reinstated.

[16] The plaintiffs also plead a cause of action alleging breaches of natural justice and of s 27 of the New Zealand Bill of Rights Act 1990 for which they seek a remedy by way of compensation.

[17] A preliminary question, at least so far as the relief sought in respect of the approval is concerned, is whether that issue should more appropriately have been the subject of an application to the Court of Appeal. An important aspect of the dispute on that issue, indeed the nub of the case on that aspect, is whether the issuing of an approval with an expiry date of 31 March 2011 complies with the Court of Appeal's order declaring that SNL's approval as a SSM company is reinstated and is deemed to resume effect according to its original terms from the date of the Court of Appeal's judgment. That is a question which, at least on the face of it, should more properly be determined by the Court of Appeal than by this Court. In response to a question from me, Ms Cull indicated that the choice had been made to issue proceedings in this Court, because of the possibility that the Court of Appeal was *functus officio*. The point was not pursued in submissions further than that. Without expressing a firm view on the point, it seems to me that the interpretation of the Court of Appeal's order should properly be a matter for that Court, and that the Court of Appeal would have jurisdiction to address the questions. In response to questions from me, counsel advised that no judgment had yet been sealed under r 51 of the Court of Appeal (Civil) Rules 2005. Notwithstanding the lodging of an application for leave to appeal to the Supreme Court, and the obligations imposed by r 52(3), an application for recall of the judgment would technically be possible. At first blush, and without giving any close consideration to the point, a question over the proper interpretation of the judgment, potentially giving rise to a need for clarification, would appear to fall within the third category of cases for recall described in *Horowhenua County v Nash (No. 2)*.<sup>3</sup>

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<sup>3</sup> *Horowhenua County v Nash (No. 2)* [1968] NZLR 632.

[18] However, whatever the correct position may be, I took the view, at the hearing, that it was not appropriate to pursue that issue further. The parties were then before this Court, and no point as to the jurisdiction of this Court had been taken. Second, the comments that I have made as to possible recourse to the Court of Appeal to clarify its decision relate only to the restoration of the approval of SNL as a SSM. The related question of the status of the delegations had not been in issue before the Court of Appeal, and any further relief in that regard is clearly a matter for this Court. The two issues are so closely linked that I took the view that the interests of justice in obtaining a speedy resolution of the issues would best be served by addressing all issues in this Court. That course necessarily requires me to form a view as to the proper interpretation of the Court of Appeal's order. Any challenge to the view which I take on that issue will be able to be considered by the Court of Appeal, which should rightly be the interpreter of its own order.

[19] I deal first with the question of the terms in which the Director has issued the approval following the Court of Appeal's order. The issue is whether the insertion of an expiry date of 31 March 2011 accords with that order. The Director's position is that in November 2009, when the approval was revoked, it had approximately three months to run. The Director has, after taking legal advice, interpreted the Court of Appeal's declaration that the approval is reinstated and is deemed to resume effect according to its original terms from the date of this judgment requires the issue of an approval only for the unexpired term of the approval applying when the approval was originally revoked.

[20] The restoration of the approval for such a limited period would not be the usual outcome where the revocation of a permit is set aside. The usual outcome of a decision on an application for judicial review quashing the withdrawal of a permit because of a defect in the revocation process is that the permit will be restored. If the relevant authority considers that the permit should be withdrawn, its proper course is to begin the revocation process anew. The onus of establishing that proper grounds for revocation exist, and of following proper process, will remain, as it was at the outset of the process, on the authority. On the defendant's interpretation of the order, SNL will be placed in the position where the onus will be on it to satisfy the defendant that it should be granted an approval, as if it were a new applicant.

[21] One of the grounds upon which the Director relies to support that reversal of the onus is her statutory responsibility for safety in the maritime sector. Safety considerations are important. However, they cannot justify a failure to comply with the Court of Appeal's orders. If the Director considered that compliance with the orders might raise safety concerns, the appropriate course would be to raise these concerns with the Court of Appeal, possibly by seeking a stay of the decision. The Director did make such an application, which was then withdrawn. Also, the Court of Appeal had noted that one of the grounds of withdrawing the approval was concerns for safety. It made its orders with that background.

[22] I find nothing in the Court of Appeal's judgment to suggest that the normal outcome described in [20] was not the intended effect of the Court of Appeal's order here. The Court was concerned with an appeal against a decision where the High Court had held that there was a deficiency in the revocation process, but had refused to grant relief. The Court of Appeal upheld the decision that there was a defect in process, but overturned the exercise of the Judge's discretion to decline relief. The Court of Appeal declared that the approval was to be reinstated and was to resume effect according to its terms. If the Court of Appeal had intended that the use of the words "according to its original terms" were to confine the effect of its relief to the issue of a permit for a three month period only, following which the renewal of the permit would be at the discretion of the Director, without any obligation on the Director to take steps for revocation, then one might have expected that the Court of Appeal would have made some specific reference to that consequence. There is none.

[23] Further, the Court of Appeal had specifically noted the issue of the expiry of the approval, in [64]. If the Court of Appeal had intended that its reference in [67](c) to the approval resuming effect "according to its original terms" was to include a reference to the expiry date, then clearly some modification to the original terms was required. The expiry date actually included in the approval had passed. The absence of any provision to prescribe what that modification should be suggests that the reference to "its original terms" was not intended to include the expiry date.

[24] I do not consider that the Court of Appeal is to be taken to have intended that the modification to the original terms which would be necessary if an expiry date was to be inserted should be achieved by the insertion of a three month period. As the Court had noted in the final sentence of [64], the issue of whether the expiry date of 28 February 2010 was valid was a live issue. If, as Simon France J and the Court of Appeal both held, the approval was not a maritime document, there was no requirement that the approval have a specified expiry date. It had been SNL's submission, both before Simon France J and before the Court of Appeal, that an expiry date could not properly be imposed. As the final sentence of [64] makes clear, the Court of Appeal did not resolve that issue. Had it intended that its order should have been given effect by issuing an approval with an expiry date three months after the Court's decision, it would have had to address that question. That clearly indicates to me that the COA did not intend that its order be interpreted in the way for which MNZ contends. That conclusion is reinforced by [66], where the conclusion is expressed that the approval is deemed to be in force as from the date of this judgment. No time limit is expressed.

[25] If the approval had been, as the Director contended, a maritime document, an expiry date would have been necessary. Under s 34(2) of the Maritime Transport Act 1994 the maximum period for which the approval could be issued would be as prescribed by maritime rules. The effect of the Court of Appeal's decision, confirming Simon France J's decision that the approval was not a maritime document, was that no expiry date was necessary. Rule 21.12 of the Maritime Rules, pursuant to which the approval was issued, does not require that the approval be issued for a defined period. The structure of r 21.12 suggests that an approval will continue, so long as the requirements of r 21.12(1) continue to be met, unless and until the approval is withdrawn under r 21.12(6).

[26] As I have earlier noted, MNZ, in accordance with a recommendation to that effect given by Simon France J, took steps to have approvals of a SSM system classified as maritime documents. An amendment to the Maritime Rules, to give effect to that suggestion, was promulgated by the Minister of Transport on 19 October 2010, about two weeks after the Court of Appeal hearing. The amendment came into force on 1 December 2010, about three weeks before the

Court of Appeal's judgment. At the time of the hearing before the Court of Appeal in October 2010, there had been no change to the status of an approval from that which had been considered by Simon France J. Thus, at that time, there would have been no need for the Court of Appeal to make any provision, in its grant of relief, for an expiry date.

[27] The question arises as to the status of the approval required to be reinstated by the Court of Appeal's judgment. Is it not a maritime document, as the original approval was not a maritime document? Or is it a maritime document, as a new approval issued after 1 December 2010 would now be? The judgment of the Court of Appeal provides no direct assistance. It is clear that there was some communication from counsel to the Court of Appeal after the hearing. That is recorded by the Court of Appeal in these terms:<sup>4</sup>

[3] We add that after the appeal was heard both counsel submitted a series of memoranda. Originally they were directed to the issue of whether SNL's appeal was moot. But they have expanded into wider issues of relief which were plainly live and should have been the subject of consideration and submission before the appeal was heard. We will deal with counsel's supplementary arguments to the limited extent permissible in the course of this judgment.

[28] I have considered that it would not be helpful to refer to counsel's submissions or other memoranda in interpreting the Court of Appeal's ruling. I consider that it is preferable to confine my consideration to the terms of the judgment itself. What the Court of Appeal intended must be determined within the four corners of its judgment. Approaching the matter in that way, I do not discern an intention on the part of the Court of Appeal that an expiry date would apply to the approval which it has declared to be reinstated. The only potentially relevant expiry date is that within the certificate itself, namely 28 February 2010. The Court of Appeal plainly did not intend that that expiry date would be effective. The Court of Appeal made no provision for the expiry of the approval which it had declared to be reinstated.

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<sup>4</sup> *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629.

[29] There is a transitional provision in the amendment to the Maritime Rules which deals with approvals in force at the time of the amendment. The relevant transitional provision reads:

**21.11A Transitional provisions and savings provision**

- (1) An approval that—
  - (a) was validly issued in accordance with section 2 of Part 21 before 1 December 2010; and
  - (b) was in force immediately before 1 December 2010;is deemed to be a Certificate of Approval issued in accordance with this Part.
- (2) A Certificate of Approval deemed to be issued in accordance with this Part under subrule (1) is valid until the expiry date noted on the approval.

At the same time, a definition of the term “certificate of approval” was inserted in r 21.11. That definition reads:

**Certificate of Approval** means the maritime document issued under section 41 of the Act that is—

- (a) deemed by rule 21.11A(1) to be issued in accordance with this Part;  
or
- (b) issued under rule 21.12(1):

[30] I entertain considerable doubts as to whether the certificate of approval reinstated and deemed to resume effect as a result of the Court of Appeal judgment can be said to be deemed by r 21.11A(1) to be issued under the Maritime Rules. The approval was not in force immediately before 1 December 2010. As the Court of Appeal noted at [66], SNL had not applied for a stay following the High Court judgment. The Court of Appeal order deemed it to resume effect only from the date of the judgment. I consider that the approval reinstated and deemed to resume effect is properly to be treated as issued under r 21.12(1). That rule makes no provision for an expiry date, and, as I have held, the Court of Appeal order has not, as I interpret it, prescribed an expiry date. Because the amendment contemplates that all existing approvals will be subject to the transitional provision in r 21.11A, there is no provision for the insertion of a deemed expiry date in this certificate of approval.

However, if the reinstated approval is now a maritime document, an expiry date will be required.

[31] Those provisions, applied to the unique circumstances of this case, create a rather unsatisfactory situation. I consider it clear that the intention of the legislation and the rules is that every approval as a SSM company will, at least from 1 December 2010, have an expiry date. However, for the reasons I have given I do not consider that that intention has been achieved in respect of this certificate. I do not consider that this deficiency can be remedied by the grant of relief by this Court on this application for judicial review. Any imposition of an expiry date by the Court could be achieved only by an amendment of the grant of relief by the Court of Appeal. That is beyond the power of this Court.

[32] The next issue is the delegations. It is common ground that, for a SSM company to operate as intended by the grant of an approval of the operator's SSM system, officers of the SSM company will have power to exercise, as delegates of the Director, certain powers which are conferred by the Act on the Director. Thus, before SNL's approval was revoked in November 2009, the second third and fourth plaintiffs held delegations granted pursuant to s 444 of the Act. When the approval was revoked, the delegations were also revoked. The Director's letter of 20 November 2009 to SNL advising of the decision to withdraw the approval granted to SNL under Maritime Rule 21.12 with the immediate effect was addressed to Mr and Mrs Reynolds as directors of SNL. The letter went on to say:

**Consequences**

In view of this decision and in light of the views expressed in my letter of 20 October 2009 addressed to your solicitor, the consequence is that SNL no longer has approval to operate as an SSM Company under Part 21 of the rules. The delegation that was issued to you pursuant to the Part 21 approval is also revoked and the instrument of revocation is attached to this letter.

[33] On the same day the Director wrote to Mr Reynolds concerning his related recognition to operate as a surveyor. She said:

Our records show that you currently hold a recognition to operate as a surveyor, which is conditional on your employment with SNL, being an approved SSM Company.

I have withdrawn SNL's approval to operate as an SSM Company effective from 20 November 2009. Consequently, I have revoked all delegations and withdrawn all approvals associated with the company's operation as an SSM Company.

A letter to similar effect was apparently also sent to the fourth plaintiff, Mr Dixon.

[34] The ability of SNL to operate as a SSM company under the terms of its approval was dependent upon the delegations held by Mr and Mrs Reynolds, and Mr Dixon. Despite the fact that both the revocation of the approval and the withdrawal of the delegations were crucial impediments to the operation of the company's business, the original judicial review proceedings related only to the revocation of the approval. There was no application for judicial review of the withdrawal of the delegations. The original statement of claim in these proceedings did not include an application for judicial review of the revocation of the delegations. Nor did it seek any relief in respect of the allegations. Ms Cull advised that, at the beginning of the hearing in the High Court, an amended statement of claim was filed in which an order was sought ~~that~~ the extant delegations referred to in the Director's notice of 20 November 2009 continue currently with the plaintiff's approval as a SSM company." There was still no application for judicial review of the revocation of the delegations as an independent matter.

[35] Simon France J commented on the delegations issue in these terms:

[129] A topic which hangs over this case, without ever really gaining prominence, is the issue of delegations. One cannot operate as a safe ship management company unless one is also the recipient of a number of accompanying delegations. For the people on the ground, the delegations are primarily to powers of audit, inspection and survey. For the directors such as Mr and Mrs Reynolds, the delegations also involve powers to suspend maritime documents, or impose conditions.

[130] Sections 433–434 of the Act authorise these delegations. Concerning delegations to persons outside the maritime authority, s 444(8) provides:

(8) Every delegation under this section shall be given for a specified period but in any event shall be revocable at will.

[131] The question arises whether this capacity to revoke the delegations at will makes the rest of the case largely irrelevant. If the Director

can simply withdraw the delegations, then whether or not Survey Nelson still has an approval does not matter. And if they are withdrawn, Survey Nelson cannot operate effectively as a safe ship company.

[132] In this case, with one exception, the Director did not purport to act on the delegations other than as a consequence of cancelling the approval. The one exception was the status of Mr Reynolds and another as surveyors – the Director gave specific directions in that regard.

[133] I was not directed to any authority on the issue of the extent to which this capacity to revoke at will can be fettered by attaching the delegations to an overall system which itself attracts both natural justice considerations, and a statutory scheme. Instinctively I would consider that the delegations would take on some of the procedural obligations arising from the scheme, but this cannot be overstated. For example, the delegations of surveyors attached to Survey Nelson were consequently revoked because Survey Nelson ceased to be approved. The surveyors delegations for other companies would be unaffected. It has not been suggested that the surveyors have independent process rights that would accord them natural justice rights as regards the issue of cancelling Survey Nelson's approval.

[134] I conclude that the Director could not cancel the delegations only because she wanted to cancel the approval and wished to avoid due process obligations attaching to the approval. This seems contrary to the clear statutory scheme. Imagine, for example, that there was no breach of r 21.12(6)(d). It would seem surprising that despite there being no power to cancel the approval, the Director could achieve the same thing simply by revoking the essential accompanying delegations. Once the delegations are linked to the approval system, some fetter must arise. I stress, however, that if independently there are other reasons to cancel a person's delegation then that is a different matter unaffected by this.

[36] In the light of his decision to refuse relief in respect of the revocation of the approval, it was unnecessary for the Judge to take the issue of the delegations any further.

[37] The Court of Appeal dealt with the issue of the delegations in [63]. The statement that the company did not seek relief relating to the revocation of delegations in its statement of claim nor had it applied to amend is apparently inconsistent with the amendment to the prayer for relief to which I have referred. Ms Cull explained the reason for that apparent inconsistency. She said that, when the case on appeal was prepared, the original statement of claim was, in error, included in the case on appeal instead of the amended statement of claim.

[38] It is clear from its remarks at [63] that the Court of Appeal took the view that if the decision to revoke the delegations was interlinked with the decision to cancel the approval that the Director would arrange for new delegations to be put in place. The Director's position on this aspect is essentially as follows:

- (a) She does not accept that the decisions are interlinked;
- (b) Even if they were, she regards any reissue of delegations as requiring that she be satisfied, having regard to her statutory responsibilities, that the issue of a new delegation is appropriate.

[39] In this proceeding, the plaintiff initially sought to deal with the delegations issue by seeking mandatory orders requiring the Director to reinstate the delegations. In the course of argument, it seemed to me that there were conceptual difficulties with the plaintiff's approach. First, it seeks mandatory relief to reverse the effect of a decision, the validity of which, on administrative law grounds, has not been directly challenged. Second, it seeks a mandatory direction from the Court as to how the Director should exercise her powers, in circumstances where the exercise of those powers is a matter within the scope of her discretion, and is subject to the constraints attaching to the exercise of her statutory functions. Third, the issue of a delegation by the Director is subject to the consent of the Minister of Transport. No direction could be given by the Court, in these proceedings, to the Minister as to how he should approach any request by the Director for such consent.

[40] For these reasons, I suggested during the course of argument that the better course might be to amend the claim to seek judicial review of the decision to revoke the delegations. That would leave open to the Court a potential remedy by way of the setting aside of that revocation, which would have the effect of restoring the original delegations. During the hearing, following that suggestion from me, Ms Cull sought leave to amend the statement of claim in respect of the delegations, to seek judicial review of the original decision to revoke the delegations, and to seek

the setting aside of that decision, as an alternative to the relief described in [15](a). I granted leave for reasons recorded in my ruling at trial.<sup>5</sup>

[41] To approach the matter in that way goes beyond what would ordinarily be appropriate, and Ms Scholtens objected to the plaintiffs' claim being reframed in that way at this stage. However, for the reasons I gave at the time, I considered that it was appropriate to grant leave to amend the statement of claim to allow the matter to be addressed in that way. The essence of the claim for judicial review is that the decision to revoke the delegations was consequential on the decision to withdraw the approval, and that if the decision to withdraw the approval is invalid then the decision to revoke the delegations must be so tainted by that invalidity as to be itself invalid. I regard the situation as closely analogous to that considered in *Rowling v Takaro Properties Limited*.<sup>6</sup> In that case, Takaro required two consents for the actions which it wished to take; one from the Minister of Finance and one from the Reserve Bank of New Zealand. The Minister refused consent. The Reserve Bank then also refused consent, because, as the relevant bank official explained in evidence, it was thought necessary to achieve a result that would be uniform in terms of the Minister's decision. The Court of Appeal upheld Wild CJ's finding that the Minister's decision was invalid because it was motivated by an irrelevant consideration. The Court dealt with the bank's position in these terms:<sup>7</sup>

The position of the bank is rather different and can be dealt with quite briefly. On its behalf the argument was advanced that whatever be the conclusion upon the validity of the Minister's decision the bank's refusal of consent cannot be regarded as founded upon an irrelevant consideration. It was said that the bank was obliged to act in conformity with what counsel described as a direction given it by the Minister (although clearly no direction in terms of s 8 of the Reserve Bank of New Zealand Act 1964 or otherwise was given); that it took into account and was influenced by his decision because it could do no less; and that an incongruous situation would develop if the bank had taken a position different from that of the Minister. But that is a circular argument that not only assumes that the bank was entitled to avoid making a real decision for itself upon the merits of the application: in addition it is an argument based upon the uncertain premise that the Minister had acted correctly. Because if it can be shown that the Minister's decision was actuated by an unauthorised purpose then the

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<sup>5</sup> *Survey Nelson Ltd v The Director of Maritime New Zealand* HC Wellington CIV-2011-485-391, 18 March 2011.

<sup>6</sup> *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62.

<sup>7</sup> At 66–67.

consequential decision made by the bank is left without any basis and automatically that decision should be regarded as invalid.

[42] Accordingly, I regard the essential issue on this aspect of the claim as being that foreshadowed by the Court of Appeal in this case, namely whether the Director's decision to cancel the approval and revoke the delegations are interlinked as a matter of law. The amendments which I allowed change the legal form, but not the substance, of the issue.

[43] As Ms Scholtens points out, the Director's power of delegation rests on a substantially different basis from the Director's power to grant approval as a SSM company. There is a much wider discretion conferred on the Director, both in the granting of a delegation and in its revocation. Different considerations may well be relevant, and the Minister has a statutory role in the delegation process. However, as Simon France J pointed out in the passage set out above, there are constraints on the ability to achieve the objective of a cancellation of the approval as a SSM company by the mechanism of the withdrawal of the delegations. In this case, no independent grounds for the withdrawal of the delegations were advanced by the Director, separate from the grounds advanced for the withdrawal of the approval. No separate procedural steps were undertaken before withdrawing the delegations. Some of the grounds relied on for the withdrawal of the approval related to issues which would also have been relevant to a withdrawal of the delegation, considered separately. But that is not the way that the matter was approached. The correspondence, which I have quoted above, makes it clear that the focus of the Director's consideration was on the withdrawal of the approval, and that the only ground advanced for the revocation of the delegations was that the revocation was consequential on the withdrawal of the approval. For these reasons, I consider that the conclusion in *Takaro v Rowling*, as to the validity of the Reserve Bank's decision, is directly on point. I consider that on the facts of this case, the two decisions were so closely interlinked that the invalidity of the decision to withdraw the approval must necessarily lead to the invalidity of the decision to revoke the delegations.

[44] It is clear from the Court of Appeal's decision here that, if that were the case, the Court expected the Director to reinstate the delegations. I do not consider it sufficient, when the issue is directly before me, to rely on that expectation. For the

reasons I have given, I consider that the appropriate way of ensuring that the expectation is met is to grant relief by setting aside the decision of 29 November 2009 to revoke the delegations to Mr and Mrs Reynolds, and to Mr Dixon, and to restore those original delegations.

[45] Those findings make it unnecessary for me to address the extensive argument which was addressed to me on issues of breach of legitimate expectation, bias, substantive unfairness and unreasonableness. In the circumstances I consider it preferable that I do not address those aspects.

[46] There is also a cause of action seeking compensation for breaches of the New Zealand Bill of Rights Act 1990. This case was set down, for an urgent hearing, so it was inappropriate to hear argument on that cause of action. Ms Cull asks that it be reserved for further consideration. Ms Scholtens opposes that course. She asks, in effect, that this cause of action be dismissed. I consider that it would be premature to address this cause of action now. The final position of the parties is far from clear. The decision of the Court of Appeal is the subject of an application for leave to appeal. What the final outcome may be is unknown. I have reservations as to whether the plaintiffs' claim on this cause of action should properly be the subject of this proceeding. If the claim is to be pursued, then that might be better done on the basis of fresh pleadings once the final outcome of the administrative law issues between the parties is known. If I were to adjudicate finally on the claim at this point, that may give rise to an issue estoppel which, in the circumstances, would not be appropriate. For these reasons I consider that the better course is to leave that claim alive, but to stay further proceedings on it for an indefinite period. Either party may apply to remove that stay on 14 days notice.

[47] For the foregoing reasons, I make the following orders:

- (a) I direct that, in the approval issued to SNL by the defendant pursuant to the judgment of the Court of Appeal, the expiry date of 31 March 2011 is to be deleted.

- (b) I direct that the defendant add SNL's name to the list of approved SSM companies on the MNZ website.
- (c) I make an order quashing the Director's decision of 20 November 2009 revoking the delegations of the second and third plaintiffs dated 4 July 2008 and of the fourth plaintiff dated 8 September 2008, and I direct that those delegations be reinstated.
- (d) I make an order staying the plaintiffs' cause of action alleging breaches of natural justice and of s 27 New Zealand Bill of Rights Act 1990 until further order of this Court. Leave is reserved to all parties to apply for removal of that stay on 14 days notice.

[48] Costs are reserved. The parties may submit memoranda.

**“A D MacKenzie J”**

Solicitors: Dawson & Associates, Nelson for Plaintiffs  
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Crown Law Office, Wellington for Defendant  
(Counsel Instructed: Mary Scholtens QC)