

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CRI-2008-009-000731**

**CIVIL AVIATION AUTHORITY**  
Informant

v

**SCOTT GRIFFITHS**  
Defendant

Hearing: 10 June 2009

Appearances: Mr T McKenzie for the Informant  
Mr A Greig for the Defendant

Judgment: 18 June 2009

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**RESERVED JUDGMENT OF JUDGE N A WALSH**

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**The Charge**

[1] Scott Griffiths (Mr Griffiths) is charged that on or about 21 December 2006, he committed an offence against ss 46B(1)(a) and (2) of the Civil Aviation Act 1990, in that he made a fraudulent, misleading or intentionally false statement in the course of an application for a medical certificate, for the purpose of obtaining a medical certificate under Part 2A of the Civil Aviation Act 1990, in that he failed to disclose fully all alcohol open convictions as required.

## Introduction

[2] All of the informant's evidence from its four witnesses were read by consent and only the Civil Aviation Authority (CAA) investigator, Corey Price, was called for cross-examination.

[3] At the commencement of the case, Mr Greig for the defendant conceded there was no dispute that Mr Griffiths made an inaccurate statement in the course of his application for a medical certificate but it was Mr Griffiths' state of mind which was the issue, ie whether Mr Griffiths intended to be "fraudulent, misleading or intentionally false" in completing the application for a medical certificate.

[4] The charge against Mr Griffiths relates to an alleged offence which occurred two and a half years ago and the defended fixture has been adjourned on two previous occasions because of insufficient hearing time.

[5] Fortunately, counsel agreed on a timeline pursuant to s 9 of the Evidence Act 2006 which I now incorporate into this judgment:

DATE	EVENT
6 December 2005	Defendant applies to Dr Lee for Class 1 medical certificate. Discloses breach of liquor ban conviction only.
21 December 2005	Ministry of Justice receives request for defendants criminal history report from Kevin Walsh of Christchurch Helicopters.
31 January 2006	Ministry of Justice provides defendants criminal history report to Mr Walsh.
3 February 2006	Mr Walsh writes letter to CAA Licensing Department requesting an indication of defendants fit and proper person status on basis of criminal history report attached to that letter.
1 March 2006	Mr Tucker of CAA Licensing responds by letter to Mr Walsh's letter.
21 December 2006	Defendant applies to Dr Lee to renew his Class 1 medical certificate. Discloses one drink driving conviction.
30 January 2007	Defendant sits private pilot's licence flight test.
26 February 2007	CAA Medical Unit send letter to defendant advising discovery of irregularity re: conviction history disclosure in medical applications, requests a Ministry of Justice criminal history report.

### **Informant's opening**

[6] Mr McKenzie helpfully opened by explaining the background to the informant's case. Mr McKenzie stated that at the material times, Mr Griffiths was either in training, or contemplating training, for a commercial pilot licence for a helicopter.

[7] Mr McKenzie further explained that the first step in any aviation training, prior to the flight training itself, is for someone in Mr Griffiths' situation to make an application for a Class 1 medical certificate from an authorised Doctor, or Medical Examiner (ME). Once granted, the medical certificate for a commercial pilot must be renewed every 12 months, requiring a new application and repeat of the process.

[8] Mr McKenzie pointed out that *safety* is a dominant consideration in aviation and a thorough regime is in place to assess pilot safety through the medical examination system. Considerations are physical health, from eye sight to heart conditions, mental health, and alcohol and drug issues.

[9] Mr McKenzie explained that there is a standard CAA application form for a medical certificate that is downloadable off the internet, and this process occurred in Mr Griffiths' case. The application form seeks a variety of health related information for the ME. Applicants fill the form out either before or during the examination, the contents are discussed with the ME and the contents of the application are declared as true and is executed in front of the ME.

[10] Mr McKenzie submitted that the application form is the primary mechanism for identifying medical problems that may impact on a pilot's fitness to fly. If a pilot does not make full disclosure then the ME is not in a position to make an informed assessment.

## **Informant's evidence**

### ***Dr Kevin Lee***

[11] Dr Kevin Lee is a general practitioner working at the Ferry Road Medical Centre in Christchurch and has been an Aviation Medical Examiner since obtaining a Diploma in Aviation Medicine in 1993.

### ***First Assessment***

[12] On 21 December 2005, Dr Lee examined Mr Griffiths at the Ferry Road Medical Centre. This was the first time that he had met Mr Griffiths as he is not one of Dr Lee's regular patients.

[13] The purpose of the medical examination was to assess Mr Griffiths' standard of health and fitness to hold a Class 1 and Class 2 Aviation Medical Certificate which is the prerequisite for obtaining a New Zealand Pilot Licence.

[14] Mr Griffiths had downloaded a copy of the medical certificate application form and had brought it with him to the examination.

[15] In effect Dr Lee was performing two roles. Firstly he was a Medical Examiner, which is a form aviation certification issued by the director under the Act. Performing the first role Mr Griffiths was examined by Dr Lee and Dr Lee discussed the completed application form with him. Dr Lee then referred Mr Griffiths to the acknowledgement at the end of the application, regarding Mr Griffiths' obligations to provide accurate information when seeking a medical certificate. Mr Griffiths then signed the form in Dr Lee's presence.

[16] The only information that Mr Griffiths disclosed regarding his previous alcohol or drug related convictions in the application was a breach of liquor ban in 1998, which Mr Griffiths explained related to having beer on the beach at Mount Maunganui.

[17] Dr Lee did not consider this conviction to be of significance to Mr Griffiths' application for a medical certificate given that this was his only alcohol related conviction and Mr Griffiths had only been 23 years old at the time of that offending. Therefore Dr Lee issued Mr Griffiths with a Class 1 and Class 2 medical certificate based on the information provided to him by Mr Griffiths on 22 December 2005.

#### *Second Assessment*

[18] On 21 December 2006, Mr Griffiths returned to Dr Lee to renew his medical certificate and he had completed the CAA application form for a medical certificate.

[19] Dr Lee's evidence was that he reviewed the information provided in Mr Griffiths' application form and asked Mr Griffiths to read and sign the consent and acknowledgement sections located on the last page of the application form. In this application form Mr Griffiths indicated that he had a drink-driving conviction in 1998.

[20] Dr Lee's opinion was that the disclosure of one drink-driving conviction was not alarming and as there was no other indication to suggest that Mr Griffiths may have an alcohol dependency he issued Mr Griffiths with a new Class 1 and Class 2 medical certificate.

[21] At the time of Mr Griffiths' second medical certificate application Dr Lee did not realise that Mr Griffiths has previously disclosed a different alcohol related conviction during his first medical application and examination in December 2005.

[22] Dr Lee said that the consumption of 20 units or more of alcohol per week, or having more than two alcohol related convictions would usually cause him to take a closer look at an individual to assess whether the applicant might have issues with alcohol dependency.

[23] Dr Lee said that if he suspected that an applicant may be suffering from alcohol dependency, he would have the applicant complete an additional and more detailed alcohol usage questionnaire and he would also require the individual to

undergo specific blood testing to check for signs of alcohol abuse before issuing the medical certificate.

[24] Dr Lee said that if he had been aware of the full extent of Mr Griffiths' previous alcohol related convictions at the time of the 2005 or 2006 medical examinations he would not have issued Mr Griffiths with a medical certificate.

[25] During Mr McKenzie's opening he explained that after the examination and execution of the application, Dr Lee moved into his second role, which is one of being a delegate of the Director of Civil Aviation to assess, on the basis of the medical examination, whether someone in Mr Griffiths' position is eligible for the subsequent issue of a medical certificate.

[26] When this assessment is completed by the Medical Examiner, if granted, a medical certificate is produced by the Medical Examiner then and there, simply by printing off a standard form (coloured to the applicant), signing it and sending it to them. The Medical Examiner in this role does not resort to the CAA and completes the task essentially within their own practice, in total reliance of the honesty of the statement provided by Mr Griffiths.

[27] Accordingly Dr Lee considered Mr Griffiths' application, and on the sole basis of the information provided to him by Mr Griffiths, issued the medical certificate the following day, namely 22 December 2006.

***Dr Dougal Watson***

[28] Dr Dougal Bruce Watson's evidence is that he is employed by the CAA as Principal Medical Officer.

[29] Dr Watson said that New Zealand is a signatory to the Convention of International Civil Aviation, also known as the Chicago Convention. The Convention, while recognising the sovereignty of each state, aims to promote co-operation between nations in respect of civil aviation so that civil air transportation is provided in a uniform and safe manner.

[30] Dr Watson emphasised the significance of the fact that the medical examination of an applicant in Mr Griffiths' position and the medical assessment of Mr Griffiths are two quite separate stages in the process of obtaining a CAA medical certificate.

[31] Dr Watson pointed out that the consent/acknowledgement/signature section on the last page of the application form for a medical certificate includes the following text:

30. Consent

I consent to the disclosure to the Director and, or his delegate, of any medical information relating to me, which is held by a registered medical practitioner, hospital or other organisation. I consent to the disclosure to the Director, of information about convictions for alcohol or substance abuse from the Land Transport Safety Authority or other organisation.

I hereby authorise the Director to use information obtained concerning me for any purpose authorised by law. I authorise such information to be disclosed by the Director to any person who requires such information to carry out any function authorised by law. I understand that the Director may provide relevant medical information to other international jurisdictions for the purpose of aviation medical certification, as and when required.

31. Acknowledgement

I acknowledge and understand the following:

That I have obligations under the Civil Aviation Act 1990, in relation to –

1. the provision of information, for the purpose of obtaining a medical certificate. I understand that failing to comply with these obligations is an offence, and
2. advising a medical examiner or reporting to the Director if I become aware of, or suspect that there is any change in my medical condition or the existence of a previously undetected medical condition that may interfere with the safe exercise of the privileges to which my medical certificate relates, and
3. the making or causing to be made of any fraudulent, misleading, or intentionally false statement for the purpose of obtaining a medical certificate constitutes an offence under section 46B of the Civil Aviation Act 1990, and is subject, in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$10,000, and
4. the failure to notify the Director of any change in medical condition or the existence of a previously undetected condition constitutes an offence under section 46C of the Civil Aviation Act 1990, and is

subject, in the case of an individual, to imprisonment for a term not exceeding 12 months or a fine not exceeding \$5,000.

I have read this application form, familiarised myself with it and understand its contents, including the consent and acknowledgement in paragraphs 30 and 31. I confirm that all the information that I have entered onto this form is true and accurate in all respects.

[32] Dr Watson said that the medical questions in the application form include general questions that can relate to drug or alcohol usage, including questions about any history of substance dependence or abuse, use of legal or illegal recreational drugs or substances, and alcohol dependence or abuse.

[33] There are also specific questions asking about amounts of alcohol consumed and alcohol and drug related offences.

[34] Dr Watson said that a drink drive conviction or any other alcohol related conviction, is considered by the CAA as being an *alarm-bell* or *red-flag* for the presence of unsafe drinking practices.

[35] Furthermore, Dr Watson said that multiple alcohol related convictions are considered to be of greater concern than one. More recent alcohol related convictions are considered to be of greater concern than convictions in the distant past.

[36] Dr Watson said that whenever the CAA medical unit becomes aware of an alcohol related conviction additional information is sought to assist the CAA in deciding whether the applicant's alcohol usage patterns are likely to interfere with aviation safety.

[37] Of significance Dr Watson said that **the CAA medical system is highly dependent on the honesty and full disclosure of information by applicants and licence/certificate holders.** (emphasis added)

[38] Furthermore, Dr Watson said that without the complete and correct provision of all the information sought in the CAA medical certificate application form it is not



possible to fully and correctly assess an applicant for the issue of a medical certificate.

[39] Dr Watson said that an incorrect assessment represents a failure in the system of aviation safety that is provided for by the legislation. Dr Watson said:

The importance of honesty, and the accurate and full provision of medical information, is paramount for the safe function of the CAA's medical certification system.

[40] Dr Watson said that Mr Griffiths was a Commercial Pilot Licence (Helicopter) holder who was issued that licence on 11 June 2007.

[41] Dr Watson's review of Mr Griffiths' CAA medical file indicated a first civil aviation medical certificate application in late 2005.

[42] In response to question 24 on the medical certificate application form, "Have you ever been convicted of an alcohol or drug-related offence, or is any action pending for such an offence?", Mr Griffiths indicated "Yes" and expanded with "Breach of liquor ban 1998?" and "had a beer on the beach at Mount Maunganui either 1997 or 1998, received a fine of \$60".

[43] In response to question 28, "How much alcohol do you drink per week?", Mr Griffiths indicated "less than 1 [unit] p/w" and said that he drank alcohol only on the weekends.

[44] Mr Griffiths was examined by Dr Lee, further test results were obtained (eg. concerning Mr Griffiths' hearing, eyes, and heart), and on 22 December 2005 he was issued a CAA Class 1 and 2 CAA medical certificate. This Class 1 medical certificate was scheduled to expire on 21 December 2006.

[45] On 21 December 2006, Mr Griffiths again applied for the issue of a CAA Class 1 medical certificate and Mr Griffiths made application was made to Dr Lee.

[46] In response to question 22, "Have you every been convicted of an alcohol or drug-related offence, including a drink-driving offence, or is any action pending for

such an offence?”, Mr Griffiths indicated “Yes” and expanded with “Drink driving in 1998”.

[47] In response to question 26, “Do you drink alcohol? If yes, how much do you drink per week?”, Mr Griffiths indicated that he drank usually at the weekends, did not drink every weekend, and consumed six units of alcohol per week.

[48] Mr Griffiths was examined by Dr Lee and on 1 January 2007, Mr Griffiths was issued a CAA Class 1 and 2 CAA medical certificate. The Class 1 medical certificate was scheduled to expire on 31 December 2007.

[49] Dr Watson said that during a routine review of Mr Griffith’s medical certification CAA staff noted a possible inconsistency between Mr Griffiths’ medical certificate application responses to question 24 in 2005 and in question 22 in 2006.

[50] On 26 February 2007, CAA wrote to Mr Griffiths noting a “lack of clarity about the conviction history” and requested that Mr Griffiths provide a “Ministry of Justice report detailing all current/previous convictions”.

[51] Mr Griffiths’ Criminal Conviction Report of 31 January 2006, disclosed three drink-drive convictions, on 16 March 1993, 28 June 1996, and 28 April 1998.

[52] In response to the knowledge of Mr Griffiths having three drink-driving convictions the CAA medical unit:

- Asked Mr Griffiths’ CAA Medical Examiner Dr Lee, to arrange for an AUDIT questionnaire as well as some blood tests;
- Advised Mr Griffiths of this request to the Medical Examiner;
- Advised the CAA licensing unit and prosecutions investigation unit;
- Did not suspend, withdraw, disqualify, or revoke Mr Griffiths’ medical certificate.

[53] On 14 March 2007, a copy of Mr Griffiths’ AUDIT questionnaire was received. Mr Griffiths scored four points where “a score of eight or more is

associated with harmful or hazardous drinking, a score of 15 or more in men, is likely to indicate alcohol dependence.”

[54] On 30 March 2007, the CAA received the reports of the blood tests requested of Mr Griffiths. All parameters tested were within the normal range.

[55] Based on the AUDIT questionnaire and blood test results no further medical investigations were sought and no action was taken concerning Mr Griffiths’ CAA medical certificate.

***Michael Tucker***

[56] Michael Tucker is the Principal Aviation Examiner at the CAA, a position he has held for ten years. Mr Tucker’s principal roles include overseeing all licensing qualification, assessment and certification for pilots, flight training and aviation examining organisations.

[57] As part of Mr Tucker’s duties he responds to general inquiries or correspondence regarding personnel licensing. These inquiries can eventuate from members of the community, both before and after they embark on aviation training.

[58] On 10 February 2006, the CAA received a letter from Christchurch Helicopters, authored by Mr Kevin Walsh.

[59] Mr Walsh’s letter stated (inter alia):

Further to our conversation on 2 Feb, please find enclosed a copy of the Ministry of Justice Criminal Convictions Report for a Scott Griffiths. This report was requested by Christchurch Helicopters for us to ascertain his suitability for training as a commercial helicopter pilot.

I would request that CAA peruse this report and make a judgment as to whether or not a CTL licence would be issued in the future if Mr Griffiths completed his flight training with us. Having recently interviewed Scott, he does appear to have settled down since his earlier days with no convictions in the last six years. He also has a partner and young child and came across as reasonably responsible...

[60] Mr Tucker said that this type of inquiry is routine and on reading the letter, it was not immediately clear whether Mr Griffiths had already started flight training with Christchurch Helicopters. The letter simply advised that Christchurch Helicopters were trying to assess Mr Griffiths' suitability for training as a commercial helicopter pilot, and that Mr Griffiths had been recently interviewed.

[61] Mr Tucker said that a personnel licensing file is created for a pilot (or client) when they first apply for a pilot's licence. When this letter was received from Mr Walsh, Mr Griffiths had not yet applied for a pilot's licence. Therefore there was no personnel licensing file to refer to. Mr Griffiths may, however, have had a medical file if he had applied for or obtained a medical certificate at that time. In doing that, Mr Griffiths would have been assigned a CAA client number. Personnel Licensing staff do not have access to a client's medical file.

[62] Mr Tucker said that because Mr Walsh's inquiry was of a general nature and had been received at a time when Mr Griffiths did not have a personnel licensing file, the letter was filed into a general personnel licensing folder with other items of a miscellaneous nature and archived accordingly.

[63] Mr Tucker responded to Mr Walsh with a letter dated 1 March 2006. Mr Tucker said that given the general nature of Mr Walsh's inquiry, the response was a pro-forma letter used in these situations. He had tailored the letter to the specific instance and forwarded it to Mr Walsh.

[64] Mr Tucker's letter stated (inter alia):

As already mentioned, the CAA takes into account convictions relevant to the applicant's proposed involvement in the civil aviation system. **A conviction free period of at least five years prior to receipt of an application for a pilot licence is generally considered favourably in deciding whether an applicant is fit and proper to hold an aviation document.** (emphasis added)

[65] Mr Tucker emphasised that his letter provided no assurance as to whether Mr Griffiths would ultimately be considered a fit and proper person. Mr Tucker said that no such determination can be made until the person in question personally applies for a licence and the full circumstances can then be considered by the

Director of Civil Aviation or a delegate. For that reason, Mr Tucker said that the responses to an inquiry such as the letter of Mr Walsh are “somewhat generalised in nature”.

[66] Mr Tucker said that as Mr Griffiths did not have a personnel licensing file at that time, there was no file to put the letter in against Mr Griffiths’ name. He said that the CAA does not open a personnel file for every inquiry received.

[67] Mr Tucker said that a criminal history is relevant and considered as part of the fit and proper person test, when an application for a pilot’s licence is made. The applicant’s conviction history is considered in its entirety, with particular attention being given to the types of convictions, the length of time since the last conviction and any penalties imposed. Mr Tucker said the sole purpose of reviewing an applicant’s conviction history is to make an informed determination on whether the individual is an appropriate person to hold an aviation document.

[68] Mr Tucker also said that this is an entirely different reason for considering an applicant’s conviction history than the CAA medical unit would have for reviewing an individual’s conviction. It is Mr Tucker’s understanding that the CAA medical unit takes into consideration the alcohol, drug related convictions an applicant may have when determining if an applicant is sufficiently healthy to be a pilot.

### ***Corey Price***

[69] Corey Price is an Investigating Officer with the CAA Law Enforcement Unit.

[70] On 13 April 2007, Mr Price acting on information received commenced an investigation to determine whether Mr Griffiths had provided false information in an application for a medical certificate.

[71] On 16 April 2007, Mr Price met Mr Griffiths at Christchurch Helicopters where Mr Griffiths was undergoing flight training to obtain his commercial helicopter licence.

[72] Mr Price said that Mr Griffiths agreed to participate in a formal interview which he recorded using a digital recorder.

[73] Mr Price produced into evidence the interview and I listened to the audio and read the transcript.

[74] Under cross-examination by Mr Greig, Mr Price conceded that at the time that he interviewed Mr Griffiths, he possessed a copy of Mr Griffiths' previous criminal history but Mr Price was unaware that CAA had already seen the list.

[75] Mr Price, under cross-examination, also said that at the conclusion of his investigations he was of the belief that Mr Griffiths had deliberately misled Dr Lee. Therefore, Mr Price made a recommendation to the Director of CAA's Law Enforcement Unit that Mr Griffiths be prosecuted. He also said that even if he had been made aware that CAA had already seen Mr Griffiths' criminal history as a result of Mr Walsh's enquiries his recommendation would not have been any different.

[76] Under re-examination Mr Price confirmed that Dr Lee in his dual roles is completely reliant on Mr Griffiths' full and honest disclosure of relevant information during the interview and, of course, Dr Lee did not have access to Mr Griffiths' criminal history.

## **The Defence**

[77] Scott Griffiths' evidence was that between 2003-2004 he was employed by Scenic Circle Hotels in the IT area. Mr Griffiths became interested in flying as he thought that this might provide him with a different career path when he was about 16 years of age he was briefly involved in fixed wing flying for a period of time.

[78] Mr Griffiths made enquiries with Christchurch Helicopters and enrolled in helicopter pilot training in March 2006 and was told that it was going to cost him about \$90,000.

[79] Mr Griffiths said that when he discussed matters with Kevin Walsh he was aware from accessing the Christchurch Helicopters school's website that the drink-driving conviction had to be disclosed. Therefore he asked Mr Walsh if the convictions for drink-driving were going to be an issue.

[80] Mr Griffiths said that about the beginning of November 2005 he applied to the Justice Department to get his criminal convictions history. In February 2006, Mr Walsh wrote to CAA to ascertain if the convictions were going to be an issue in obtaining a private pilot's licence.

[81] Mr Griffiths said (inter alia):

... I had to take a lot of things into account. I was obviously in a full time job. I had family. I was going to go back to full time study. I didn't want to jump into it and later find out there was going to be an issue with it so I was always up front with Christchurch Helicopters. I said, "This is what I have, is there going to be a problem" and they couldn't make a judgement call obviously. They don't do the licensing so they had to apply to the CAA and write the letters.

[82] Mr Griffiths said that when he completed the form in December 2005, he disclosed that he had issues with his eyes as he had undertaken eye laser treatment in the United Kingdom for short sightedness and the issue was corrected.

[83] In any event, Mr Griffiths completed the questionnaire form and having been made aware that Dr Lee was the preferred medical examiner for prospective pilots in Canterbury he made an appointment.

[84] Mr Griffiths confirmed that Dr Lee knew absolutely nothing about his background and he further confirmed that Dr Lee examined the form that he completed.

[85] With respect to questions 24 and 31 he accepted that the information he provided to question 34 was not accurate and that he had drink-drive convictions in 1996 and 1997.

[86] Mr Griffiths' explanation was that he knew that he had to draw attention to any convictions concerning alcohol related matters. Mr Griffiths said that as he had

not received his criminal history from the Ministry of Justice he decided to put a question mark at the end of question 24 as “I was always going to give the CAA my criminal history report and they would have, you know, all my information anyway so that’s why I ...”.

[87] Mr Griffiths said that he applied to the Ministry of Justice in early November 2005 for a copy of his criminal history. By early December 2006 Mr Griffiths had still not received the criminal history and he was not going “to get it until the new year. Christmas was coming up and everything and I, I had to sort of move forward with it so I just put a question mark because I didn’t know what dates were. I put the thing that was most relevant and the fact was I way always going to give the CAA my criminal history report and they would have, you know, all my information anyway so that’s why I ...”. In short Mr Griffiths claimed that it was always his intention to supply CAA with a copy of his criminal history.

[88] With respect to the second application for a medical certificate completed on 21 December 2006, Mr Griffiths confirmed that he ticked the “yes” box in answer to question number 22 (ie. Have you ever been convicted of an alcohol or drug related offence, including a drink-driving offence, or was any action pending for such an offence?).

[89] At question 29 Mr Griffiths elaborated on question 22 by stating “Drink-driving in 1998”.

[90] Mr Griffiths said:

A. Um, I knew the CAA already had my criminal convictions report. Yeah, you know, you’re under a bit of stress when you’re doing these medical exams, you know, your eyes and your ears and everything and I, I just put that ‘cos it was the most recent and most relevant one and I was kind of thinking about the seven year, if you hadn’t had any convictions and it was getting close to that and I wasn’t sure if I had to declare any but I did anyway.

Q. When you talk about seven years, are you talking about the clean slate legislation, is that what you have in mind there.

A. Yeah. That’s another reason why I applied for another medical now due to the fact that, you know, it has kicked in for me and if I apply for a new medical it’s going to be different to those previous two medicals



so, you know, I might get into trouble again. That's another reason I haven't re-applied for a medical.

Q. Is it now your understanding that since you have been conviction free for seven years that you are entitled to answer these forms, "I have no convictions".

A. I believe so.

[91] Therefore, Mr Griffiths said that as he had been conviction free for seven years it was his belief that he did not have to disclose all of the previous convictions and he had taken on board Mr Tucker's advice in his letter to Mr Walsh.

[92] Mr Griffiths claimed that he thought that CAA "would have a file for me".

[93] Under cross-examination Mr Griffiths was shown a copy of a letter from the Ministry of Justice dated January 2006 to Mr Walsh of Christchurch Helicopters Limited stating that he had requested his criminal conviction history. However Mr Griffiths pointed out that the letter also disclosed that his request was "received on 21 December 2005" and that he his request "could have been in a pile".

[94] Under cross-examination Mr Griffiths agreed that he read the final page of the application form before filling it out and when it was put to him if it was a case of him not wanting Dr Lee to know about his drink-driving convictions he said "No, not really".

[95] Furthermore, under cross-examination Mr Griffiths insisted that this was not a case of trying to pull the wool over Dr Lee's eyes as it was a "big commitment – on my part, you know, family, money-wise, financially, time-wise and everything so for me to, you know, try and pull the wool over CAA's eyes would have just been ridiculous."

**The offence: Fraudulent, misleading, or intentionally false statements to obtain medical certificate**

[96] An offence under s 46B(1)(a) of the Civil Aviation Act 1990 ("CAA" or "the Act") requires a person to make or cause to be made:

- (a) any fraudulent, misleading, or intentionally false statement for the purpose of obtaining a medical certificate under Part 2A

Essentially, for there to be an offence under this provision, a statement made, or caused to be made, must be

- fraudulent; or
- misleading; or
- intentionally false.

[97] Mr McKenzie also helpfully referred me to the decisions in *The Director of Civil Aviation v West* (DC Auckland, CRI-2008-004-007838, 2 December 2008, Sinclair J), *CAA v Madden* (DC Auckland, CRN 3004631789, 21 February 2005, Doogue J) and *E v CAA* (HC Auckland, CRI-2006-404-000332, 28 June 2007, Venning J).

[98] In the case of *West*, the defendant pleaded guilty to a charge under s 46B(1)(a) (ie misleading statement) and Judge Sinclair's decision concerned an application for a discharge without conviction under s 106 of the Sentencing Act 2004.

[99] In *Madden* the defendant appears to have elected not to have given evidence and the primary objective of the defence was to challenge the admissibility of prosecution evidence. In *Madden* the key issue was whether or not Mr Madden had used illicit drugs for other than medical purposes or was drug dependant when he filled out the application form representing that he had not used the above. Judge Doogue held that Mr Madden was substance dependent prior to completing the questionnaire in that he was using legal or illegal recreation drugs. The Judge found that Mr Madden knew that the information he provided was going to be relayed to the Director of Civil Aviation, the statement was misleading and Mr Madden knew that it was.

[100] *E v CAA* was an appeal against conviction and sentence and the appellant who was a captain on Boeing 747s had been diagnosed with a stroke prior to completed a questionnaire. Venning J dismissed the appeal.

## Fraudulent statement

[101] “Fraud” is defined in *Butterworths New Zealand Law Dictionary* as “something said, done, or omitted by a person with the design of perpetrating what he or she must have known to be a positive fraud. In *Hilton International Ltd v Hilton* [1989] 1 NZLR 442, at 466 it was said that:

The concept of fraud involves actual dishonesty. What must be shown is fraudulent, ie. dishonest, intent. In the present context that means a deliberate and dishonest intent to cheat either the company or its creditors.

[102] Obviously, depending on the context of the particular case, what will amount to fraudulent conduct will vary accordingly. However, in *Broom v Police* [1994] 1 NZLR 680 at 685 it was said that at the simplest level, fraudulent means dishonest.

[103] A “fraudulent misrepresentation” is defined in *Butterworths New Zealand Law Dictionary* as “a false statement of fact, made by a person who does not believe the truth of the statement or is recklessly indifferent to whether it is true or not, to another, with the intention that the other person will rely on it.”

[104] What all of these definitions have in common is the requirement that there be dishonesty coupled with either intention or recklessness. Therefore, for a statement to be made fraudulently, the statement must be dishonest, in the sense that it is false or not true, and the person making the statement must either intend the statement to be made or be reckless as to the making of the statement. Weight is given to this conclusion by commentary in *The Laws of New Zealand* regarding mens rea:

Mens rea generally consists of intention and recklessness. Statutes express these concepts in many different ways. For example, the following expressions have been used: “intentionally”, or “corruptly”, “knowingly”, “means to”, “reckless”, “with reckless regard”, “known to the offender to be likely”, “wilfully”, “knew would probably cause it”, and “fraudulently” [emphasis added]....These concepts reflect the proposition that a person is not criminally liable for a serious crime unless he or she intends to cause, foresees that he or she will probably cause, or in the least, foresees that he or she may cause the elements which constitute the crime.

## Misleading statement

[105] The *Concise Oxford Dictionary* defines “mislead” as to “lead astray, cause to go wrong, in conduct or belief”. A “misleading statement” is defined in *Butterworths New Zealand Law Dictionary* as “an assertion that, because of the context in which it is made or because of what it contains or omits, is capable of being misunderstood by a person to whom it is made”.

[106] The case of *YPB IP Ltd v Yellow Book.com.au Pty Ltd* (HC Auckland, CIV 2007-004-2839, 13 July 2007, Allan J) concerns a breach of s 9 of the Fair Trading Act 1986. Although “mislead” is viewed in a civil context in this case, it may be helpful to note that in paras [112] to [118], the concept of to “mislead” was explained by use of the words “deception” and “confusion”. The definition of “deceive” in the *Concise Oxford Dictionary* is to “persuade of what is false, *mislead* purposely” [emphasis added is mine]. Therefore, the terms mislead and deceive could be said to have a corresponding meaning.

[107] I have not received any specific guidance as to the meaning of “mislead” but it is helpful to look to provisions in other Statutes which may be used by analogy to give meaning to s 46B. Section 240 of the Crimes Act provides for the offence of “Obtaining by deception or causing loss by deception”. This section provides:

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of rights,—
  - (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - (b) in incurring any debt or liability, obtains credit; or
  - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - (d) causes loss to any other person.
- (2) In this section, **deception** means—
  - (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—

- (i) knows that it is false in a material particular; or
- (ii) is reckless as to whether it is false in a material particular; or
- (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
- (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

[108] Therefore, if one equates “mislead” with “deceive” this section is useful in the sense that it indicates the necessary mens rea that may, by analogy, be involved in an offence under s 46B of the CAA when one makes a misleading statement. Where a statement has been misleading due to its falsity, the mens rea required is:

- an intention to deceive; and
- knowledge that material is false; or
- recklessness as to whether material is false; OR

Where a statement has been misleading due to an omission of a material particular where there existed a duty to disclose the mens rea required is:

- an intention to deceive.

[109] Commentary to s 240 Crimes Act<sup>1</sup> states that when a positive representation is accompanied by silence as to other matters which could qualify or alter the impression of that positive representation, the two together could be seen to be a misrepresentation, as per *Oakes v Turquand and Harding* (1867) LR 2 HL 325. Further, if a person omits to disclose something that is material in the circumstances and there existed a duty to disclose that “material particular”, non-disclosure of that matter of fact or element of information will amount to a deception, thus will be misleading.

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<sup>1</sup> *Adams on Criminal Law* CA240.13

## **Intentionally false statement**

[110] Section 242 of the Crimes Act 1961 provides for the offence of “false statement by promoter, etc”. For the purpose of this section, “false statement” is said to mean (as per subs (2)), any statement in respect of which the person making or publishing the statement either **knows** the statement is false in a material particular or is **reckless** as to whether the statement is false in a material particular. A “material particular” is something important or something that matters, as per *R v Mallett* [1987] 1 WLR 820.

[111] Again, using similar Crimes Act provisions by way of analogy to the CAA, for there to be an offence under s 46B due to an intentionally false statement being made, the mens rea that may be required would be:

- knowledge that the statement is false OR reckless as to falsity of the statement; and
- an intention to make or cause such statement to be made.

[112] Knowledge will be present when an accused is said to “know” something when he or she has ascertained, by physical or mental perception, a state of facts or circumstances which creates in his or her mind a certainty that the point of the accused’s inquiry is free from doubt, as per *R v Crooks* [1981] 2 NZLR 53 (CA) at 56.

## **What is required for there to be intention or recklessness?**

[113] As can be seen, all three alternative forms of statement that will lead to an offence under s 46B will require either intention or recklessness. These two mens rea elements are discussed as follows:

### *Intention*

[114] For an accused to have “intention”, he or she must intend to bring about the elements of the offence, thus it must be his or her aim or purpose to bring about the constituent elements of the offence (*R v Moloney* [1985] 1 All ER 1025). However, it was held in *R v Nedrick* [1986] 3 All ER 1 at 2 that this is different from having a desire to bring about those elements. It was also said in *Nedrick* that intention can be inferred if the accused could foresee with virtual certainty that the offence would result from his or her act or omission.

### *Recklessness*

[115] In New Zealand, recklessness is generally given a subjective definition, equating to conscious and unjustified risk taking. In *R v Harney* [1987] 2 NZLR 576 at 579, the Court of Appeal said that in New Zealand recklessness is usually understood as meaning that the accused had “foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of the risk”.

### **Determinations**

[116] Clearly, Mr Griffiths in 2005 and 2006 omitted to provide Dr Lee, the Medical Examiner with all “material particulars” in relation to the question “Have you ever been convicted of an alcohol or drug related offence, or is any action pending for such an offence?”. Mr Griffiths therefore misrepresented the nature of his history of drug and alcohol related convictions, and, to use the term loosely, entered “misleading” information on his application form.

[117] However, Mr Griffiths’ case is that it was not his objective to make a fraudulent, misleading or intentionally false statement. When questioned by Mr Price as to why he did not disclose all relevant previous convictions, Mr Griffiths’ explanation was that he thought it would be sufficient to provide the most recent conviction. Mr Griffiths did, however, accept that he had been told by Dr Lee that he was required to full disclose **all** alcohol related convictions (emphasis added). In

the interim between the two medical examinations in 2005 and 2006, Mr Griffiths was completely aware that he had three previous alcohol related convictions. The issue for the Court is whether there is sufficient evidence to infer an element of intention.

[118] I have also turned my mind to the test for subjective recklessness. If it can be said that Mr Griffiths knew there was a *risk* that an offence may result from his conduct but chose to take that risk when it would be unreasonable to do so having regard to the nature of that risk, then Mr Griffiths will have been reckless. Is it enough therefore that being fully aware that he was required to disclose **all** previous convictions (emphasis added) but chose to list only one, that he has contravened s 46B(1)(a)?

[119] After having the benefit of seeing and hearing Mr Griffiths' evidence and reflecting on the interview between Mr Griffiths and Mr Price which occurred on 16 April 2007, I find that Mr Griffiths was sloppy and inexact in his responses to the questions in the forms. In my opinion the interview between Mr Price and Mr Griffiths revealed that Mr Griffiths was not trying to be deliberately deceptive in his responses. I find, however, that Mr Griffiths was sketchy and casual. For example, Mr Price asked:

- Q. Right. You accept in hindsight now looking at it that you could have answered that question better than what you have or given an indi, if you didn't know the specifics given in an indi an indication to the best of your knowledge that you could have later confirmed with ah once you'd received your conviction history?
- A. Imm, yeah, naf, nah totally agree mate I could have filled it in better had had I had the information yeah in I would of.
- Q. Sure okay. Um.
- A. I didn't realise there was anyway of updating that information because it had already been sent but.

And further into the interview there were the following responses:

- Q. Sure, did you feel uncomfortable at the time that um that what you'd disclosed in terms of your alcohol related convictions um may have been at best misleading?
- A. Nah.



Q. Didn't, didn't cross your mind that (inaudible)...

A. ...nah I didn't intentionally do anything that was misleading no.

And towards the end of the interview Mr Griffiths was asked:

Q. Look that's ah, really all the questions I sort of have for you, I'd just really like to open this up to you now to get your comments on on the situation and and um hear what you have to say about it.

A. Yeah. Well well I don't know what to say. You you've got the paperwork there and it speaks for itself obviously. Didn't intentionally think I was doing anything incorrect at the time ya know. Best of my ability I I've, aw to the best of my knowledge I thought I was putting the correct information on there. Um yeah, sorry about that, sorry to waste your time obviously ya know.

[120] I infer that the interview on 26 April 2007 occurred well before Mr Griffiths sought any legal advice.

[121] I do not place a lot of weight on Mr Walsh's letter to CAA because at the time CAA received the letter, Mr Griffiths had not applied for a pilot's licence and the inquiry was of a general nature. However, I cannot ignore what was Mr Griffiths' mindset when he filled in the questionnaires. In my view, Mr Griffiths was a credible but somewhat naïve witness. Although Mr Griffiths was inexact in his responses I do not find that Mr Griffiths' actions have reached the criminal threshold for recklessness.

[122] I accept that the Act sets out very clear obligations on Mr Griffiths directed at promoting aviation safety. After weighing all matters I find that Mr Griffiths was lackadaisical about the manner in which he completed the questionnaire but I am not satisfied beyond reasonable doubt that Mr Griffiths intended to be fraudulent, misleading or intentionally false in completing the application for a medical certificate. It is the effect of all the evidence taken together, not the evidence on any single point which compels that conclusion.

[123] Accordingly the information is dismissed.

N A Walsh  
District Court Judge