

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2018-485-000002
[2019] NZHC 591**

IN THE MATTER OF the Declaratory Judgments Act 1908 and
Part 18 of the High Court Rules

IN THE MATTER OF Maritime Rules Part 90: Pilotage

BETWEEN NEW ZEALAND MARITIME PILOTS'
ASSOCIATION
Plaintiff

AND THE DIRECTOR OF MARITIME
NEW ZEALAND
Defendant

CIV-2018-485-000258

IN THE MATTER OF the Declaratory Judgments Act 1908 and
Part 18 of the High Court Rules

IN THE MATTER OF Maritime Rules Part 90: Pilotage

BETWEEN NEW ZEALAND MERCHANT SERVICE
GUILD IUOW INC
Plaintiff

AND THE DIRECTOR OF MARITIME
NEW ZEALAND
Defendant

Hearing: 6 March 2019

Counsel: B J Marten and E P P Maclaurin for New Zealand Maritime
Pilots' Association
G G Ballara for New Zealand Merchant Service Guild IUOW Inc
D R Ferrier and A Roberts for Defendant

Judgment: 26 March 2019

JUDGMENT OF COLLINS J

Introduction

[1] Rule 90.41(1)(b) of the Maritime Rules (the Rules) provides that an applicant for a maritime pilot licence must, amongst other criteria:¹

...

(b) either—

- (i) hold a certificate as Master issued in accordance with [the Rules]; or
- (ii) hold an equivalent certificate to that referred to in subparagraph (b)(i) recognised or accepted by the Director [of Maritime New Zealand] under the [Maritime Transport Act 1994]; or
- (iii) provide evidence of experience, qualifications and competencies equivalent to those required in subparagraphs (b)(i) or (b)(ii), or otherwise relevant to pilotage, that are acceptable to the Director; ...

...

[2] The person whose circumstances are the catalyst for this proceeding is an experienced dredge skipper working for Port Otago Ltd (Port Otago), who holds a qualification that ranks below that of Master and only allows him to operate vessels under 500 gross tonnes within domestic waters.

[3] As the dredge skipper does not hold a certificate as Master or its equivalent, the question this judgment answers is whether he nevertheless satisfies the requirements of r 90.41(1)(b)(iii), in particular the “or otherwise relevant to pilotage” portion of that rule, so as to enable him to be considered for obtaining a pilot licence.

[4] These proceedings have been commenced by the New Zealand Maritime Pilots’ Association (the Association) and the New Zealand Merchant Service Guild Industrial Union of Workers Inc (the Guild) against the Director of Maritime

¹ The full criteria in r 90.41 is set out at [20].

New Zealand (the Director). The declarations they have sought have required me to ascertain the meaning of r 90.41(1)(b)(iii). I have done so by reference to its text and in light of its purpose.² This approach has led to the conclusion that the correct meaning of the rule is close to that advocated for by the Association and the Guild and that the approach taken by the Director is too broad. I have accordingly issued a declaration similar to those sought by the Association and the Guild. The declaration I am issuing is set out at [64].

Background

[5] Piloting a vessel involves a licensed pilot taking control of navigation as a ship enters and leaves a harbour or other narrow passage such as a channel or strait. Pilots have expertise and local knowledge that allows them to safely navigate difficult waters that may be foreign to a ship's master. Pilots take control of ships of varying size and type, including large cruise ships.³ Pilotage requires a high degree of seafaring skill and experience. Usually, port authorities employ pilots and maintain pilot training programmes that are approved by the Director.

[6] The Maritime Transport Act 1994 (the Act) defines "pilot" in the following way:

2 Interpretation

(1) In this Act, unless the context otherwise requires,—

...

pilot, in relation to any ship, means any person not being the master or a member of the crew of the ship who has the conduct of the ship.

"Pilotage" is defined in a corresponding way by r 90.3 of the Rules.

² Interpretation Act 1999, s 5(1).

³ Although in practice there are several grades of pilot licence that limit the size of vessel that the pilot can operate. Pilots generally start at more junior grades and progress up until they can pilot any vessel.

[7] The phrase “has the conduct of the ship” is not defined in the Act or in the Rules. The term, however, is well established by cases dating back to the mid-19th century. For example, in *Hammond v Rogers, The “Christiana”*, it was explained:⁴

... the pilot has charge of the ship, ... his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, ... The pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is ... required; the direction, the course, the manoeuvres of the vessel, when sailing, belong to him; ...

[8] Maritime New Zealand has issued guidelines on the meaning of “having the conduct of the ship”. Those guidelines state:⁵

A pilot’s primary duty is to use their skill and knowledge to protect ships from collision or grounding by safely conducting their navigation and manoeuvring in pilotage waters. This means the function of a pilot is to have the conduct of the navigation of the ship.

In a compulsory pilotage area the pilot’s role is to exercise conduct of the ship, other than in very limited circumstances, such as where the [m]aster has clearly taken conduct away from the pilot. This should only occur in exceptional circumstances. Examples of when it may be appropriate for the [m]aster to take conduct include:

- When the master forms the view that the pilot may be endangering the ship; or
- When it is considered safer for the master to berth the ship.

[9] Before a person can assume the responsibilities of a pilot, they must have a licence as a pilot issued by the Director under s 41 of the Act. The Director may issue a licence if the candidate meets the requirements set out in r 90.41 of the Rules, which are subordinate legislation promulgated by the Minister of Transport (the Minister) under s 36 of the Act. When issuing the Rules, the Minister must bear in mind his or her functions under the Act, which include promoting safety in maritime transport and protecting the marine environment.⁶

[10] A “master” is defined in the Act as “any person (except a pilot) having command or charge of any ship”.⁷ A “Master” (formerly Master Foreign Going,

⁴ *Hammond v Rogers, The “Christiana”* (1850) 7 Moo PCC 160, 13 ER 841 at 845–846.

⁵ “Having the conduct of the ship” Maritime New Zealand Position Statement (April 2018).

⁶ Maritime Transport Act 1994, s 5A(a) and (b).

⁷ Section 2, definition of “master”.

Master (Unlimited), or Master Class 1) is the highest New Zealand seafaring qualification and it enables those who hold that certificate to be the master of any ship of any tonnage or length and in any operating area.⁸ Each jurisdiction has its own technical requirements governing the acquisition of a qualification as Master, although the essential elements are reflected in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (the Convention), which has been ratified by most countries, including New Zealand.⁹ Prior to 2014, the Rules referred to a “certificate of competency as Master of a foreign-going ship”. The Rules were amended in 2014 to bring the terminology in the Rules into line with that in the Convention so that now the Rules simply refer to a “certificate as Master”.

[11] There are currently 18 categories of certificates issued by Maritime New Zealand relating to masters and deck officers. Those classifications include seven categories of Master, including Master (the qualification referred to in r 90.41), Master on ships less than 3,000 gross tonnes, Master on ships less than 500 gross tonnes (in near-coastal areas or unlimited) and three categories of yacht Master. There are five categories of “Mate” and four categories of “Skipper”. The dredge skipper has a certificate under the former regime that is deemed to be a “Master on ships less than 500 gross tonnes in near-coastal waters”.¹⁰ Finally, the Rules provide for two categories of Watchkeeper.

[12] Pilots are required to navigate vessels over 500 gross tonnes within the pilotage area of Otago Harbour. The dredge skipper, however, has a pilotage exemption certificate for his dredge, which allows him to command the dredge himself within Otago Harbour.

[13] On 22 August 2017, Port Otago sought clarification from the Director as to whether the dredge skipper could be considered for pilot licensing, explaining that although he did not hold a certificate as Master, he “does more harbour transits per

⁸ I have used the capitalised “Master” throughout this judgment to refer to this qualification and the lower-case “master” to refer to a person with command of a ship. This approach is consistent with the Act and Rules.

⁹ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1361 UNTS 2 (signed 7 July 1978, entered into force 28 April 1984), substantially amended from 1 February 1997.

¹⁰ Maritime Rules, r 32.205(1), Table 44, NZOM STCW 95.

annum than our Pilots do”. On 4 September 2017, the Director confirmed that he was satisfied that the dredge skipper “meets the experience, qualifications and competency requirements to be appointed as a pilot on successful completion of the approved training programme”.

[14] Both the Association and the Guild became concerned that the Director’s interpretation of r 90.41 would have the effect of lowering the standards for becoming a pilot in New Zealand.

[15] The Association is an incorporated society that represents and advocates for the interests of maritime pilots. It has 95 members, 65 of whom hold a pilot licence. One of the objectives of the Association is to “promote and maintain safe and effective standards of performance of pilotage and associated matters of navigation and management”.

[16] The Guild is a registered union that advocates for the interests of ship officers, deck officers and associated maritime personnel. The Guild’s members include pilots, prospective pilots and masters, who are required to utilise the services of pilots. One of the objectives of the Guild is to “watch over and help to promote the best interests and welfare of all members in regard to conditions of employment”.

[17] Declaratory relief is sought both in relation to the meaning of r 90.41(1)(b)(iii) and its application to the dredge skipper. The prayer for relief in the statement of claim filed by the Association seeks:

- (1) A declaration as to the proper interpretation of [r] 90.41(1)(b)(iii);
- (2) A declaration that an applicant who holds the [dredge skipper’s qualification] does not have the required seafarer competencies, under [r] 90.41(1)(b), to be eligible for a pilot’s licence under [r] 90.41 ...

The prayer for relief in the statement of claim filed by the Guild is slightly different. The Guild seeks:

- (1) A declaration that the decision or intended decision of licensing a person in the circumstances [of the dredge skipper] is contrary to [r] 90.41; and

- (2) A declaration as to the proper extent of [r] 90.41 as regards qualification for licensing a pilot ...

[18] Port Otago has placed the training of the dredge skipper on hold pending the conclusion of this proceeding. The dredge skipper and Port Otago were served with the proceeding but elected not to take part in the litigation. The parties agree that the High Court should exercise its discretion to issue a declaration under the Declaratory Judgments Act 1908 because Port Otago may resume its application on behalf of the dredge skipper if I upheld the Director's interpretation of r 90.41(1)(b)(iii) and, in any case, other ports have expressed interest in following a similar course to that contemplated by Port Otago.

Maritime Rules

[19] Rule 90.1 sets out the purposes of Part 90 of the Rules, which governs pilots:

90.1 Purpose

The objective of this Part is to—

- (a) maintain the contribution of pilotage to the safety of navigation, the protection of the marine environment and the efficiency of seaborne commerce;
- (b) set minimum national standards while enabling port-specific risks to be addressed;
- (c) provide a licensing regime for pilots and pilotage-exempt masters within the maritime document provisions of the Maritime Transport Act 1994;
- (d) recognise and support industry best practice; and
- (e) ensure that the provision of pilotage services is sustainable and responsive to future demands, changes in technology and best practice.

[20] Rule 90.41 provides:¹¹

90.41 Application for pilot licence

- (1) An applicant for the issue of a pilot licence must make an application in accordance with section 35 of the Act, and

¹¹ Footnotes omitted.

- (a) include the information requested on the form required by the Director; and
 - (b) either—
 - (i) hold a certificate as Master issued in accordance with rule 32.106 of Part 32; or
 - (ii) hold an equivalent certificate to that referred to in subparagraph (b)(i) recognised or accepted by the Director under the Act; or
 - (iii) provide evidence of experience, qualifications and competencies equivalent to those required in subparagraphs (b)(i) or (b)(ii), or otherwise relevant to pilotage, that are acceptable to the Director; and
 - (c) hold a current certificate of medical fitness of category A or B issued under Part 34; and
 - (d) provide evidence, satisfactory to the Director, of having successfully completed a structured training programme, approved by the Director, for the issue of a pilot licence for the pilotage area for which the licence is sought.
- (2) Every application must be submitted to the Director, with payment of the fee prescribed by regulations made under the Act.

[21] There is a footnote at the end of r 90.41(1)(b)(iii), which states:

This provision permits the Director to consider candidates who have completed an alternative training scheme and obtained the necessary experience, qualifications and competence to train as a pilot in New Zealand. This will include consideration of candidates holding pilot qualifications issued by another administration. The Director will assess candidates against an accepted standard for competency of trainee marine pilots.

[22] Rule 90.42 provides:¹²

90.42 Issue of pilot licence

- (1) Subject to subrules (2) and (3), the Director must issue a pilot licence if satisfied that the applicant meets the requirements of section 41 of the Act.
- (2) The Director may issue a pilot licence for a period of no more than five years.
- (3) The Director must endorse a pilot licence issued in accordance with this rule or rule 90.48, or renewed in accordance with rule 90.49, with—

¹² Footnotes omitted.

- (a) the pilotage area in which the holder may exercise the privileges of the licence;
 - (b) the grade of licence, or size and type or category of ship as specified by the Director, in respect of which the holder may exercise the privileges of the licence;
 - (c) the recent experience requirements for the licence determined by the Director in accordance with rule 90.81; and
 - (d) any other conditions the Director considers appropriate in the interests of maritime safety.
- (4) In determining appropriate conditions in accordance with subrule (3)(d), the Director must have regard to any recommendations of the examination panel conducting the examination.

[23] Rule 90.106(2) sets out the minimum requirements for a structured training programme referred to in r 90.41(1)(d). A structured training programme is required to provide detailed instructions on matters, such as:

- (1) the location of lights, buoys, fog signals and radio beacons in the area where the applicant intends to be a pilot;
- (2) names and characteristics of the channels, shoals, headlands and points in that area;
- (3) tides, depths and prevailing weather in that area;
- (4) port infrastructure and anchorages in that area;
- (5) ship handling for piloting, anchoring, berthing and unberthing, manoeuvring with and without tugs, and emergency situations;
- (6) use and limitation of various types of tugs; and
- (7) master/pilot relationship and operational procedures.

[24] I was informed that common practice has involved port companies designing their own general structured training programmes, which the Director has approved.

However, the rule also provides for a structured training programme to be amended, taking into account the circumstances of an individual trainee pilot.¹³

History to r 90.41

[25] Rule 90.41 can be traced to reg 59 of the General Harbour (Nautical and Miscellaneous) Regulations 1968 that were made pursuant to the now repealed Harbours Act 1950. That legislation delegated the licensing of pilots to local authorities. Relevantly, reg 59(1)(c) stated that a candidate for appointment as a pilot was required to “[h]old a foreign-going certificate of competency not lower than that of [M]aster”. In 2003, this criterion was replicated in r 90.7 of the Rules. At the same time, r 90.9 of the Rules vested in the Director the power to issue pilot licences.

[26] In 2007, Maritime New Zealand commenced a process of consultation with interested parties about the contents of the Rules then in force. Draft Rules were issued for consideration in 2007 that included the following proposed rule:

The Director may, subject to any condition he or she considers necessary, accept any certificate or qualification he or she considers equivalent to any certificate or qualification required as a prerequisite for the issue of a pilot’s licence or master’s exemption certificate under this Part.

[27] The commentary that accompanied the 2007 Draft Rules explained that the proposed amendment set out at [26] would “[widen] the qualification requirements and scope of individuals who can be assessed for a pilot’s licence”. The 2007 Draft Rules were commented upon by interested organisations, including the Association, the Guild and a number of port companies. Most who commented expressed concern that the Draft Rules risked lowering the standards for qualification as a pilot in New Zealand.

[28] Following consultation, a further draft set of rules was issued in 2009. The relevant part of the 2009 Draft Rules provided that an applicant for a pilot’s licence must:

¹³ Maritime Rules, r 90.106(1)(f).

...

- (b) (i) hold a Master (Unlimited) Certificate, (Master Mariner), or
- (ii) hold an equivalent certificate to (i) recognised by the Director pursuant to section 41 of the Act; or
- (iii) hold a pilot licence issued by the relevant Authority of a Flag State that is a party to [the Convention], with relevant pilotage experience acceptable to the Director; or
- (iv) provide evidence of experience, qualifications and competencies equivalent to those required in (i), (ii) or (iii), that are acceptable to the Director;

...

[29] The reference in para (b)(iii) of the 2009 Draft Rules to an applicant holding a pilot licence issued by a “relevant Authority” was a response to suggestions that Australia was considering training pilots who did not have a certificate as Master or its equivalent. While the evidence on the point was opaque, I was informed that the proposal was not implemented nationwide, although Captain Bolt, the General Manager, Marine and Infrastructure at Port Otago, gave evidence that the State of Western Australia, where he has worked in a senior pilotage role, does not require its pilots to have a certificate as Master or its equivalent. In some other jurisdictions, such as Singapore and Canada, pilots may also be trained, and certified, without acquiring a certificate as Master or its equivalent.

[30] The draft criteria for applications for a pilot licence contained in the 2009 Draft Rules were, however, not adopted. Instead, the Minister issued r 90.41 in its current form. It is to be noted, however, that the reference to candidates holding pilot qualifications issued by another Authority can be found in the footnote to r 90.41(1)(b)(iii).

Evidence

[31] Most of the evidence was filed to assist in understanding the purpose of r 90.41(1)(b)(iii).

[32] Ms McAra, the General Secretary of the Guild, explains that the historical rationale for r 90.41(1)(b) is that, as a pilot has the conduct of the ship, he or she

“should have the qualifications and experience to actually be in command of that ship”. Ms McAra also explains that the Otago Harbour poses a variety of challenges for pilots. For these reasons, the Guild became concerned when it discovered that the Director considered that the dredge skipper could meet the requirements of r 90.41(1)(b)(iii).

[33] Captain Oliver, a retired pilot with over 30 years’ experience at the ports of Lyttelton and Timaru, explains that historically all New Zealand pilots have obtained a certificate as Master or, in rare cases, had equivalent qualifications, such as extensive command of a naval vessel. Captain Oliver explains that the structured progression required for a seafarer to obtain a certificate as Master ensures they have extensive seafaring experience. He explains that to be certified as a Master on ships of less than 500 gross tonnes involves far less training than to be certified a Master and that, accordingly, those who train on smaller vessels lack the experience to competently handle vessels that may be 50 to 60 times larger by volume than the vessels they have skippered. Captain Oliver also explains the nature of the master/pilot relationship and the reasons why the master of a ship must have utmost confidence in a pilot.

[34] Captain Banks obtained his certificate as Master in 1984 and became a pilot at the port of Wellington in 2000. He explains the relationship between the training of masters and pilots is complimentary:

... part of the training given to Master ... candidates involves learning to rely on the assistance of a pilot with local expertise to reduce the risk inherent with every arrival or departure. Most [m]asters of a large cargo vessel will never berth their ship without the aid of a pilot during their whole career at sea. The pilot’s background as a [m]aster ... means the pilot knows what the experience of visiting a foreign port is like, and is able to understand the visiting [m]aster’s needs and assistance.

[35] Captain Banks explains the importance of masters having confidence in a pilot to ensure large vessels are satisfactorily manoeuvred in ports and the importance of masters and pilots having a “mutual understanding of seamanship and vessel handling”.

[36] Captain Banks also explains his understanding of the training regimes for pilots in other jurisdictions. He refers to an Australian port that explored training pilots

without a certificate as Master or its equivalent. He says in his affidavit that the port concerned spent considerable time and effort in sending the applicant to a nautical college to undertake the same training as for a certificate as Master and that this was followed by an equally long period of practical training. Captain Banks said this process took several years compared to the less than a year of pilot training that is normally required when an applicant has a certificate as Master or an equivalent qualification.

[37] Captain Bolt has extensive experience as a harbour master and chief pilot in Australia. He explains that Singapore, which is the world's busiest port, does not require a certificate as Master or its equivalent as a pre-requisite for training as a pilot. Canada has a similar pilot training regime to Singapore. Captain Bolt knows the dredge skipper and has observed him demonstrate "extremely sound seamanship". Captain Bolt also explains:

... almost all trainee pilots, even those with a Master's certificate essentially start pilot training "from scratch". In any event, I regard each individual trainee as having specific training needs. Experience counts for a great deal. At the end of the day, each candidate has to meet a certain level of proficiency and if they don't meet that level, they are not going to be progressed in their training. The decision as to who should be trained should be a matter for the port, as employer.

[38] Mr Manch, the Director, explains that in his view:

... the Rules deliberately provide for some discretion on the part of the Director. One of the areas in which that discretion is provided is in relation to the qualifications required for the issuing of a pilot licence. I consider that the Rules allow the Director to consider an application for a pilot licence from an individual holding a qualification other than a Master's certificate, as long as the individual's experience, qualifications and competencies "relevant to pilotage" are acceptable to the Director. That is established, I believe, by the inclusion in Rule 90.41(b)(iii) of the words "or otherwise relevant to pilotage, that are acceptable to the Director".

[39] Mr Manch emphasises that, in his view, the rule as he has interpreted it does not involve a lowering of standards but simply provides a different pathway from obtaining a certificate as Master to allow individuals to be considered for a pilot licence.

[40] Ms Forsyth, the General Manager of Maritime Standards at Maritime New Zealand, has explained her understanding of the Rules relating to pilotage and the training and certification process for pilots. Ms Forsyth states:

Currently, all approved Structured Training Programmes are written with the prerequisite that the trainee holds a Master certificate. Where an individual did [not] meet the prerequisite, I would expect the pilotage provider to assess the individual's experience, qualifications and competencies and establish any additional training requirements that might arise that might otherwise have been met by holding a Master certificate. I would then expect to see a Structured Training Programme, tailored for that individual, with specific training to ensure that the trainee achieves the same level of competency as any other applicant who does hold a Master certificate. I do not think this lowers the ultimate standard of certified pilots – it is just a different starting place for the training activity.

Approach to interpretation

[41] In explaining the meaning of r 90.41(1)(b)(iii), I shall examine its text and then its purpose. In doing so, I acknowledge that the meaning of the rule is to be ascertained from its text and in the light of its purpose. Thus, text and purpose have equal importance.

Text

Parties' submissions

[42] Mr Marten, senior counsel for the Association, submitted that the correct interpretation of r 90.41(1)(b)(iii) rests upon the adjective “equivalent”, which he said means a candidate must have experience, qualifications and competencies equal to that required for a certificate as Master either in New Zealand or in another jurisdiction. Mr Ballara, counsel for the Guild, submitted that, in essence, the text of r 90.41(1)(b)(iii) only engages candidates who have qualified as a pilot in another jurisdiction.

[43] Mr Ferrier, senior counsel for the Director, submitted that the words “or otherwise relevant to pilotage” in r 90.41(1)(b)(iii) mean the Director has the discretion to grant a pilot licence to a suitable candidate who does not hold a certificate as Master or its equivalent. He said the words “acceptable to the Director” are

important as they recognise the Director's broad discretion to determine who satisfies the requirements for being a pilot in New Zealand.

[44] Mr Ferrier submitted that "or" in the phrase "or otherwise relevant to pilotage" is disjunctive and must therefore refer to experience, qualifications and competencies that are not equivalent to a certificate as Master.

Analysis

[45] In my view, the proper interpretation of r 90.41(1)(b)(iii) must account for the following features of the drafting:

- (1) Subparagraph (iii) is a single category, not two distinct categories, as the immediate context of the list suggests all aspects of subparagraph (iii) were deliberately placed under one subparagraph.
- (2) The phrase "or otherwise relevant to pilotage" must have a meaning different to "experience, qualifications and competencies equivalent to those required in subparagraphs (b)(i) or (b)(ii)", otherwise it would be rendered redundant.
- (3) All three subparagraphs in r 90.41(1)(b) are based, at least in part, on the standard of a certificate as Master as the threshold.

[46] The only way that all three of those features can be accounted for is to read the phrase "or otherwise relevant to pilotage" as a second limb of a single category that provides the Director with the ability to recognise experience, qualifications and competences of an equivalent calibre to those held by a person with a certificate as Master. In effect, that requires reading subparagraph (iii) so as to require an applicant to either:

- (1) provide evidence of experience, qualifications and competencies equivalent to those required in subparagraphs (b)(i) or (b)(ii) that are acceptable to the Director; or

- (2) provide evidence of experience, qualifications and competencies otherwise relevant to pilotage [in a manner equivalent to those required in subparagraphs (b)(i) or (b)(ii)] that are acceptable to the Director.

[47] The first limb deals with experience, qualification and competencies that are equivalent to a certificate as Master. This would include, for example, a senior naval officer, who might not have a certificate as Master, but who has the same skills and experience as a person with a certificate as Master, along with a naval qualification analogous to a certificate as Master. The focus of this limb is on equivalence to an experienced seafarer with a certificate as Master.

[48] The second limb deals with experience, qualifications and competencies that are relevant to pilotage. This would include a qualified pilot from a jurisdiction that does not require pilots to first obtain a certificate as Master. Such a person would not fit within the first limb because they would not have a qualification in the nature of a certificate as Master, or in other words, a qualification that would allow them to command a wide variety of vessels in general circumstances. However, such a person would necessarily have a pilot's qualification, and the skills and experience of being a pilot. Presumably, if those skills were sufficient for them to obtain a pilot licence in the other jurisdiction, then they would be of an equivalent aptitude to a person with a certificate as Master. The focus of this limb is on equivalence to the seafaring aptitude of a qualified pilot.

[49] That subparagraph (iii) comprises two limbs is supported by the fact that "or otherwise relevant to pilotage" is encapsulated by commas on either side. This supports Mr Ferrier's submission that the "or" is to be read disjunctively. The commas suggest that one of the disjuncts involves reading the sentence with the phrase "or otherwise relevant to pilotage" omitted, as follows:

provide evidence of experience, qualifications and competencies equivalent to those required in subparagraphs (b)(i) or (b)(ii) ... that are acceptable to the Director ...

[50] The other disjunct involves reading the sentence with the phrase "otherwise relevant to pilotage" included, while excluding the phrase "equivalent to those required in subparagraphs (b)(i) or (b)(ii)", as follows:

provide evidence of experience, qualifications and competencies ... otherwise relevant to pilotage, that are acceptable to the Director ...

[51] However, the word “relevant” is ambiguous as to the degree to which the experience, qualifications and competencies must be related to pilotage. The word “relevant” must be coloured by the words around it, in particular by the phrase “equivalent to those required in subparagraphs (b)(i) or (b)(ii)”, which suggests there must be some sort of equivalence with a certificate as Master. The level of relevance therefore must be high. It cannot be enough that the experience, qualifications and competencies are minimally connected with pilotage. The emphasis on a certificate as Master throughout paragraph (b) strongly suggests that the appropriate level of relevance is at the same level of aptitude as is required for a certificate as Master.

Purpose

Parties’ submissions

[52] A large portion of the parties’ submissions were directed to the purpose of r 90.41(1)(b)(iii).

[53] Mr Marten’s submissions concerning the purpose of the rule can be distilled to six points. Mr Ballara’s submissions substantially reflected those advanced by Mr Marten:

- (1) The primary objective of the rule is to promote maritime safety. Adopting an interpretation that reduces the qualifications required to be a pilot risks compromising the safety objectives of the rule.
- (2) Maritime qualifications in New Zealand and internationally are highly prescriptive. Conferring a broad discretion upon the Director to determine who meets the criteria in r 90.41(1)(b)(iii) would be contrary to the highly regulated nature of the rules governing maritime qualifications.
- (3) Relying on the evidence of Captains Oliver and Banks, Mr Marten submitted that pilots should hold a certificate as Master to maintain the

trust and confidence of masters and their crew when the pilot has the conduct of their ship. Mr Marten submitted that allowing persons with qualifications such as those held by the dredge skipper risks undermining the trust and confidence that masters and their crew have in a pilot.

- (4) Training for a person who satisfies the requirements of r 90.41(1)(b) focuses upon addressing their knowledge of local conditions and not upon expanding their seafaring skills. Mr Marten pointed out that the key features of r 90.106(2) are directed towards training that examines an applicant's knowledge of local conditions. He submitted r 90.41(1)(b)(iii) therefore assumes a candidate for a pilot licence in New Zealand will already have the highest levels of seafaring experience, qualifications and competence before commencing training as a pilot.
- (5) The history to r 90.41(1)(b) shows that the proposals to expand the qualifications for admission as a pilot in New Zealand were met with broad resistance. Mr Marten submitted that the opposition to the proposed r 90.41(1)(b) caused the Minister to adopt a narrow and more prescriptive list of criteria in the rule.
- (6) The footnote to r 90.41(1)(b)(iii) shows that the drafters of that rule envisaged the Director should be able to consider applicants who were already qualified as a pilot in another jurisdiction. Mr Marten submitted that this route to obtaining a pilot licence should not be confused with treating persons, such as the dredge skipper, as satisfying the requirements of r 90.41(1)(b)(iii).

[54] Mr Ferrier's submissions concerning the purpose of r 90.41(1)(b)(iii) may be reduced to the following four points:

- (1) The Act and the Rules vest in the Director substantial discretionary powers and ultimate responsibility for maritime safety.¹⁴ The purpose of r 90.41(1)(b)(iii) must therefore be ascertained by bearing in mind that the Director has broad discretion to determine who may qualify as a pilot in New Zealand.
- (2) The history of the rule demonstrates that the Minister rejected the highly prescriptive criteria set out in the 2009 draft of the Rules in favour of the less prescriptive terminology in the rule as it currently stands. Mr Ferrier submitted this change in approach reflected a deliberate intention to expand the criteria for obtaining a pilot licence.
- (3) The suggestion the Director's interpretation lowers the standards for pilots in New Zealand is misconceived. Mr Ferrier pointed to the evidence of Ms Forsyth, who explained that the Director's approach expands the pool of applicants for a pilot licence without lowering the standards of pilots.
- (4) Referring to the evidence of Captain Bolt, Mr Ferrier said that linking the qualifications of a master with a pilot because of a perceived need for masters and their crew to trust and respect a pilot was also misconceived. Captain Bolt's evidence was that countries such as Singapore and Canada do not require pilots to have a certificate as Master or its equivalent and that there is no suggestion of a breakdown of trust and confidence in Singapore and Canada between masters and pilots.

Analysis

[55] In ascertaining the purpose of r 90.41(1)(b)(iii), I start with the Minister's statutory functions, which include promoting safety in marine transport. This function must be afforded primacy by the Minister when promulgating the Rules. It is also significant that the purposes of the part of the Rules that concerns pilots include

¹⁴ See *Survey Nelson Ltd v Director of Maritime New Zealand* [2010] NZCA 629 at [37].

promoting safe navigation, protecting the marine environment and maintaining the efficiency of seaborne commerce. The rules relating to pilots also aim to “recognise and support industry best practice”.¹⁵

[56] There is therefore merit to the concerns about safety raised by the Association and the Guild. Those concerns are borne from the fact that pilots may be required to have the conduct of large ships, including cruise liners with thousands of passengers. If Maritime New Zealand and masters are going to trust the ability of a pilot to have the conduct of a cruise liner solely on the basis of a pilot training programme, then that outcome should be developed through clearly thought through policies rather than advanced through the courts as an issue of interpretation. This is particularly important given the stringent requirements for obtaining a certificate as Master, which include substantial minimum periods of approved seagoing service.

[57] While the Act and the Rules confer discretion upon the Director and provide a framework for holding him or her accountable, there are limits to how much flexibility the Director has when assessing the suitability of an applicant for a pilot licence. Those limits are governed not only by the text of the Rules but also by the purposes that underpin the Act and the Rules, including those referred to at [55].

[58] There are two features to the scheme for licensing pilots that are particularly pertinent:

- (1) The Director does not have a true discretion in relation to subparagraphs (i) and (ii), or the first limb of subparagraph (iii). An equivalent certificate under subparagraph (ii) must be “recognised or accepted by the Director” and the equivalent experience, qualifications and competencies under the first limb of subparagraph (iii) must be “acceptable to the Director”, but there are standards provided for those assessments that the Director must have reference to, namely the concept of equivalence. It would therefore be unusual if the second limb of subparagraph (iii) allowed the Director a much broader discretion to accept whatever he or she considered appropriate as a

¹⁵ Maritime Rules, r 90.1(d).

suitable qualification. This would be especially so given the exact same phrase in subparagraph (iii) would be creating different levels of discretion in relation to each limb.

- (2) There is a clear separation between the qualifications required in r 90.41(1)(b) and the training required in r 90.41(1)(d). It appears that paragraph (b) is aimed at ensuring candidates have the requisite seafaring skills to become a pilot, while paragraph (d) is aimed at ensuring candidates have the particular skills and local knowledge to become a pilot in the relevant pilotage area. This supports the interpretation that the experience, qualifications and competencies otherwise relevant to pilotage must be sufficient in themselves to ensure the candidate has the requisite seafaring skills.

[59] Three points emerge from the history to r 90.41(1)(b):

- (1) First, the rule has evolved from the highly prescriptive requirement that a pilot hold a certificate as Master to a recognition that persons with qualifications equivalent to that of Master may be eligible to become a pilot.
- (2) Second, the changes to r 90.41(1)(b) that were mooted in 2007 to 2009 were driven by an expectation that pilots trained in some jurisdictions should be eligible for consideration to become a pilot in New Zealand, even though they may never have held a certificate as Master or its equivalent. This change was driven by an assumption that Australia was likely to follow a similar model for the training of pilots as Singapore and Canada. It transpired, however, that with the possible exception of Western Australia, Australia did not follow that course.
- (3) Third, while the 2009 draft of what is now r 90.41(1)(b) was more prescriptive than the current law, the changes between the draft and the final version of the rule probably reflects drafting style rather than substantive policy changes. This conclusion is reinforced when regard

is had to the opposition that was voiced to making any significant changes to the qualifications required for becoming a pilot in this country.

[60] It is also significant that the rules that prescribe the training for a pilot primarily focus upon ensuring the applicant is well versed in the maritime features of the area in which they intend to become a pilot. The expert evidence confirms that pilot training programmes in New Zealand predominantly focus on the skills and local knowledge peculiar to pilotage in the relevant pilotage area and assume competence in general seafaring abilities. The few seafaring skills included relate specifically to pilotage. The fact that the requirements in the Rules for training a pilot are limited to ensuring they are familiar with local conditions somewhat undermines Ms Forsyth's expectation that tailored pilot training programmes could ensure that trainees achieve the same level of seafaring competency as an applicant who holds a certificate as Master.

[61] It also appears that the foreign jurisdictions that licence pilots without a certificate as Master have made a deliberate choice to rely on pilot training programmes to ensure that pilots have sufficient seafaring ability rather than relying on the holding of a certificate as Master. It is evident, both from the scheme of r 90.41 and the nature of the present pilot training programmes in this country, that New Zealand has not made such a deliberate choice. In those circumstances, it would be perverse to read a discretion into the Rules that would enable such a method to take place in an unplanned manner. While Mr Ferrier is correct to observe that pilot training programmes can be tailored to the needs of individual candidates, those programmes have thus far not extended to teaching general seafaring skills. A change of that nature would be significant given the history in this country of relying on general seafaring qualifications, namely the certificate as Master or equivalent, to ensure that pilots have the requisite seafaring skills.

Conclusion

[62] The analysis of the text and purpose of r 90.41(1)(b)(iii) set out at [45] to [51] and [55] to [61] leads to the conclusion that the interpretation advocated by the Director is incorrect.

[63] In my assessment, r 90.41(1)(b)(iii) is to be interpreted in a way that gives primacy to the requirement to hold a certificate as Master or its equivalent. Consideration may be given under r 90.41(1)(b)(iii) to naval officers with extensive experience of commanding naval vessels and to persons who have obtained a pilot's qualification in a jurisdiction that trains pilots without a certificate as Master or its equivalent. Rule 90.41(1)(b)(iii) cannot be extended to apply to persons such as the dredge skipper.

[64] I therefore issue the following declaration:

Rule 90.41(1)(b)(iii) of the Maritime Rules allows the Director when receiving an application for a pilot licence to accept either:

evidence of qualifications, experience and competencies that are equivalent to a certificate as Master; or

evidence of pilot-related qualifications, experience and competencies that demonstrate the candidate's seafaring skills are of an equal calibre to a person holding a certificate as Master.

[65] The plaintiffs are entitled to costs on a scale 2B basis. There will be an order for one set of costs to be split between the plaintiffs unless they reach a different arrangement.

D B Collins J

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