

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC No.250 of 2008

BETWEEN : **SUNFLOWER AVIATION LIMITED [FORMERLY KNOWN AS SUN AIR (PACIFIC) LIMITED]** a duly incorporated company having its registered office at Shop 1, Beddoes Plaza, Namaka, Nadi.

1ST PLAINTIFF

: **AIR FIJI LIMITED** a duly incorporated company having its registered office at Hangar Road, Nadi Airport.

2ND PLAINTIFF

AND : **CIVIL AVIATION AUTHORITY OF THE FIJI ISLANDS** a body corporate created under the Civil Aviation Authority Act 1979, having its registered office at Nadi International Airport, Nadi, Fiji Islands.

1ST DEFENDANT

AND : **AIRPORTS FIJI LIMITED** a duly incorporated company having its registered office at Nadi International Airport, Nadi, Fiji Islands.

2ND DEFENDANT

AND : **HOT SPRING HIRE SERVICE LIMITED** a company incorporated having its registered office at Estate of Umar Building, 11 Nanuku Street, Labasa.

3RD DEFENDANT

Solicitors : S.B. Patel for the Plaintiffs
: Patel & Sharma for the 1st Defendant

R U L I N G

INTRODUCTION

- [1]. The plaintiffs are seeking discovery of various documents from the 1st and 2nd defendants. The first defendant, Civil Aviation Authority of Fiji (“CAAF”) is resisting the application on the ground that the documents are privileged under **section 17B** of the Civil Aviation Authority of the Fiji Islands Act (Cap 174A) (“CAAFI Act”) and under **regulation 32** of the Civil Aviation Occurrence Reporting & Investigation Regulation 2009 (“CAORIR”). Indeed, the wording of section 17B and Regulation 32 are couched in anti-disclosure language.

GENERAL ISSUE

- [2]. If the documents are relevant to any matter in question in this case, are they discoverable under the regular rules of civil discovery in Order 24 Rule 7¹, notwithstanding the prohibitive effect of section 17B and regulation 32? Arguably, the discoverability of a document of which statute prohibits disclosure, but at the discretion of an administrative authority, is a public law matter. If, indeed, it is a public law matter, is it appropriate for this Court sitting in its general civil jurisdiction, in this private law claim, to make discovery orders?

BACKGROUND

- [3]. The documents in question all relate to three incidents or accidents that occurred at Savusavu Airport in April and August 2005 and in May 2006. The plaintiffs are suing the defendants for losses suffered as a result of the three accidents/incidents. The first of these happened on 21 April 2005 at about 9.05 a.m. when a twin otter spun out of control on the runway shortly after touchdown and veered off-course only to collide with a stationary Bandeirante (“**first Bandeirante**”) that was boarding passengers by the side. The second incident happened on 12 August 2005 at about 9.30 a.m. The same twin otter had been parked at a spot at the airport nearby a worksite where, allegedly, some renovation work to upgrade the Airport was in progress. It is alleged that the tail of the twin otter was struck, and damaged, by the bucket of an excavator machine that had swung out of control. The third incident happened on 24 May 2006 at about 3.50 p.m. when a certain other Bandeirante (“**second Bandeirante**”) veered slightly off-course upon touchdown to collide with some fencing and earth embankment along the side of the runway.
- [4]. All three incidents resulted in severe damage to the three aircrafts. The twin otter involved in the first and second incidents is owned by Sunflower Aviation Limited (“**Sunflower**”). The first Bandeirante, I gather, was owned by Air Fiji Limited (“**Air Fiji**”), but, with its hull and both engines being on lease from Pacific Turbine Brisbane Limited (“**Pacific Turbine**”) which I assume is an Australian company. The

¹ of High Court Rules 1988.

second Bandeirante was also owned by Air Fiji with its hull and one of two engines being on lease from Aeromil Australian Pty Limited (“**Aeromil**”) and from a Canadian company called Pratt & Whitney Canada Leasing (“**Pratt & Whitney**”). The losses alleged by the plaintiffs are set out in paragraphs 19 to 40 of the statement of claim².

- [5]. CAAF is the authority established under the Fiji Islands Civil Aviation Authority Act 1979 to regulate civil aviation in the Fiji Islands. Its core functions include the issuing of licenses to airport operators and developing, promoting and enforcing good aviation safety standards. CAAF had issued a license to AFL to operate Savusavu Airport. It is alleged that CAAF and AFL breached their duty of care to Sunflower and to Air Fiji in failing to ensure that the airport was safe for the Plaintiffs’ aircrafts. To summarise a rather long-winded statement of claim, the allegation is that the accidents happened because the Savusavu Airport was not built, managed or maintained in accordance with acceptable standards³.
- [6]. CAAF did carry out an investigation following the first incident pursuant to its statutory powers. Report 15/8/44 was produced pursuant to the Civil Aviation (Investigation of Accidents) Regulations which made some safety recommendations.
- [7]. The application for specific discoveries was filed by the plaintiffs pursuant to Order 24 Rule 7. The documents for which the plaintiffs seek discovery are set out in **Appendix 1** to this ruling. The plaintiffs also seek against AFL an Order to, within fourteen (14) days produce for inspection at AFL’s Solicitor’s Office the following:-
- (a) Copy of Civil Aviation and Airports Improvement Project.

² In a nutshell, these are in the nature of the loss of the market value of the aircrafts, the damage and repair costs, and the costs involved in having to indemnify Pacific Turbine, Aeromil and Pratt & Whitney for the damage to the hulls/engines that were on lease from them. The plaintiffs also claim loss of profits for the duration of time when the aircrafts were grounded by reason of their lack of airworthiness resulting from the damage sustained as well as the costs of their preparation and investigation for this case.

³ The plaintiffs allege that CAAF breached of its duty of care to the plaintiffs under sections 14(3) and 17 of the Civil Aviation Authority of Fiji Act 1989 (Cap 174A), Regulations 132 and 134 of the Air Navigation Regulations 1981, sections 10(2) and 10(4) of the Civil Aviation Reform Act 1999 as well as under the Minimum Requirement Document 14 which CAAF developed. Airports Fiji Limited (“**AFL**”) is alleged to have breached its duty of care under Regulations 87(1) and 97(1) of the Air Navigation Regulations as well as under the Occupiers Liability Act 1968 or alternatively, under the common law.

ARE THE DOCUMENTS RELEVANT?

- [8]. Order 24 Rule 7⁴ confers a wide jurisdiction on discovery and inspection of documents. The philosophy is that the more discovery and inspection there is between litigants, the better disposed they and the court will be in thrashing out and in determining the real issues. This saves time and expenses. In Davies v Eli Lilly & Co [1987] 1 WLR 428, Sir John Donaldson MR said:

In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why", they ask, "should I be expected to provide my opponent with the means of defeating me?". The answer of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information,, it cannot achieve this object.

- [9]. From where I sit, the documents all appear to be relevant to this case. Ordinarily, in the usual application, this would be the point where the Court makes the Order for discoveries⁵. However, the defendants in this case argue that, even if the documents are relevant, they still cannot be disclosed because they either "relate to the affairs of" the CAAF and thereby be caught under the protective scheme of section 17B, and/or, they fall under the category of "records" of the sort which are protected under regulation 32(1)(a) to (e).

⁴ Order for discovery of particular documents (O.24, r.7)

7.-(1) ... the Court may ... on the application of any party .. make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not when he parted with it and what has become of it.

(2)

(3) An application ... must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

⁵ The onus initially is on the applicant to establish the following by way of affidavit evidence:

(i) identify clearly the particular document or documents or class of documents that he seeks to be discovered by the opposing party (see Order 24 Rule 7(1)).

(ii) show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7(1)).

(iii) establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see A.B Anand (Christchurch) Ltd -v- ANZ Banking Group Limited (1997) 43 FLR 22 30 January 1997).

(iv) whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page 34 s cited in Singh v Minjesk).

(v) show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7(3)).

THE STATUTORY PROTECTION

[10]. Section 17B of the CAAFI Act provides:

Confidentiality

17B.-(1) A person who is or has been a member, officer, employee or agent of the Authority or a member of a committee or who is or has been invited to a meeting of the Authority or of a committee must not disclose any information relating to the affairs of the Authority or of any other person which has been obtained by or in the performance of duties or the exercise of functions under this Act unless –

(a) the disclosure is necessary for the performance of those duties or the exercise of those functions;

(b) the disclosure is required under any written law; or

(c) the disclosure is necessary for the performance of the Authority's functions under this Act.

(2) A person who receives any information relating to the affairs of the Authority must not use the information for his, her, or any other person's financial gain.

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 2 years.

[11]. Regulation 32 of the CAORIR provides:

Non-disclosure

32.—(1) The following records shall not be made available for purposes other than accident or incident investigation, unless the Attorney General determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations —

(a) all statements taken from persons by the investigation authorities in the course of their investigation;

(b) all communications between persons having been involved in the operation of the aircraft;

(c) medical or private information regarding persons involved in the accident or incident;

(d) cockpit voice, flight data and relevant air traffic service recordings and transcripts from such recordings; and

(e) opinions expressed in the analysis of information, including any relevant recorder information.

(2) The relevant records in sub regulation (1)(a) to (e) shall only be included in the Final Report or its appendices when pertinent to the analysis of the accident or incident.

COMMENTS ON THE STATUTORY SCHEME

[12]. As is evident from a reading of section 17B, it is a criminal offence under the former provision for any person who is or has been a member, officer, employee or agent of CAAF to disclose "*any information relating to the affairs of*" CAAF or for any person who receives such information to his or her or any other person's financial gain. As for regulation 32(1), clearly the parliament of Fiji has vested the Attorney-General of Fiji with a discretion to allow disclosure of the protected documents if he determines that, to disclose would outweigh the adverse domestic and international impact that disclosure may have on that or any future investigation'.

- [13]. There are two competing interests involved in the balancing exercise. On the one hand, is the interest to be served by disclosure, and, on the other, the competing interest which founds the statutory premise that, to disclose has potential *“adverse domestic and international impact ...on that or any future investigation”*.
- [14]. To better understand the premise upon which the protective scheme in regulation 32 is founded, one must revisit the ICAO.

INTERNATIONAL CIVIL AVIATION ORGANISATION - ICAO

- [15]. Fiji became a fully-fledged member of the International Civil Aviation Organisation (**“ICAO”**) in 1973. The ICAO was formed by the Convention in Chicago in 1944. Article 44 of the Chicago Convention stipulates that the overall objective of ICAO is to:
- ...ensure the safe and orderly growth of international civil aviation throughout the world.
- [16]. Over the years, the ICAO has produced successive policies and practices in aviation safety, with periodical updates, to guide member nations. A key area of concern to the ICAO is the investigation of aviation accidents and incidents. In this regard, ICAO encourages member nations to enact laws premised on a policy of non-disclosure of aviation-accident reports. Member nations have responded accordingly by enacting laws to that effect. Fiji’s response is embodied in regulation 32.
- [17]. Regulation 4 of Fiji’s CAORIR states:
4. The Authority may, with the approval of the Minister, issue an occurrence reporting and investigation manual in accordance with the standards prescribed by ICAO.
- [18]. Regulation 2 defines **“Convention”**, **“ICAO”** and **“State of Occurrence”** respectively as follows:
- “Convention”** means the Convention on International Civil Aviation signed at Chicago in 1944.
“ICAO” means the International Civil Aviation Organization;
“State of Occurrence” means the State in the territory of which an accident or incident occurs
- [19]. Article 26 of the Chicago Convention imposes an obligation on the *State of Occurrence* ‘so far as its laws permit’, to institute an inquiry into the accident in accordance with ICAO procedures and highlights the cooperation between the

states involved. Annex 13 to the Convention⁶ provides detailed Standards and Recommended Practices (**SARPs**) for aircraft incident and accident inquiries. These SARPs complement Article 26 by setting out appropriate investigative procedures and protocols for Article 2 as well Annex 13 purposes.

[20]. Fiji's commitment to the ICAO is evident in various provisions in the Regulations (see for example regulations 5⁷, 10⁸, 19⁹, 28¹⁰, 30¹¹ and 38¹²).

⁶ first adopted by the Council on 11 April 1951 pursuant to Article 37 of the Convention.

⁷ Regulation 5 provides:

Language

5. The notification, preliminary and final reports and any safety recommendations shall be prepared in the English language or any other working languages of ICAO, taking into account the language of the recipient, whenever it is possible to do so without causing undue delay.

⁸ Regulation 10 provides:

Notification to other parties

10.—(1) The Authority shall notify the Minister of any accident as soon as practicable by the most expeditious means available and when such advice is given orally, then it shall be followed up with further information in writing, as soon as practicable.

(2) The Minister may delegate any further notification requirements to the Authority.

(3) The Minister shall forward notification of an accident and the Authority shall forward notification of a serious incident with a minimum of delay and by the most suitable and quickest means available to —

(a) the State of Registry;

(b) the State of the Operator;

(c) the State of Design;

(d) the State of Manufacture; and

(e) ICAO when the aircraft involved is of a maximum mass of over 2250 kg.

⁹ Regulation 19 provides in part:

Requirements for medical examination

19.—(1) When conducting an investigation into an accident, the Investigator-in-charge shall have the right, for the purpose of safety investigation, to require —

(a) a complete autopsy examination of fatally injured flight crew and, subject to the circumstances, of fatally injured passengers and other crew members, by a pathologist, preferably experienced in accident investigation, in accordance with guidelines as notified by the ICAO; and

¹⁰ Regulation 28 provides:

PART 5 — ACCIDENT REPORTING REQUIREMENTS

Preliminary, Accident and Incident Data Reports

28.—(1) When the aircraft involved in an accident is of a maximum mass of over 2250 kg, the Minister shall send the Preliminary Report to the following if they are not the State of Occurrence —

(a) the State of Registry;

(b) the State of the Operator;

(c) the State of Design;

(d) the State of Manufacture;

(e) any State that provided relevant information, significant facilities or experts; and

(f) the ICAO.

¹¹ Regulation 30 provides:

Final Report

30.—(1) The Final Report of the investigation of an accident shall be sent with a minimum of delay by the State conducting the investigation (the State of Occurrence) to the following states, where applicable —

(a) the State that instituted the investigation;

(b) the State of Registry;

(c) the State of the Operator;

(d) the State of Design;

(e) the State of Manufacture;

(f) any State having suffered fatalities or serious injuries to its citizens;

(g) any State that provided relevant information, significant facilities or experts; and

(h) the Civil Aviation Authority of the Fiji Islands.

(2) The Minister shall, in the interest of accident prevention, release the Final Report as soon as possible.

(3) When the Investigator-in-charge has conducted an investigation into an accident or serious incident involving an aircraft of a maximum mass of over 5700 kg, the Minister or the Authority shall send a copy of the Final Report to the ICAO.

¹² Section 38 provides:

- [21]. Mildred Trögeler Criminalisation of Air Accidents And The Creation of a Just Culture (<http://media.leidenuniv.nl/legacy/mildred-tr-366geler-eala-prize.doc>).pdf)

would describe the regulatory framework of the ICAO as follows:

The ICAO was created in 1947 to promote the safe and orderly development of international civil aviation throughout the world.

In view of the increasing criminalisation of aircraft accident investigation three aspects covered by Annex 13 are of considerable legal interest.

..... The sole purpose of an accident or incident investigation within the meaning of Annex 13 is the prevention of future accidents and incidents but not to apportion blame or liability. Secondly, Standard 5.12 of Annex 13 refers to the non-disclosure of certain types of records which are collected by safety investigation authorities. The main objective of this Standard is to prevent the misuse of the safety-related data by parties conducting concurrent investigations serving a purpose other than aviation safety. However, the protection offered is apparently not absolute. The disclosure of safety information may be allowed when ‘the appropriate authority for the administration of justice in that State determines that the disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation’.

.....

Due to the fact that aviation is a rapidly developing area, Annex 13 has been amended eleven times since 1951. The latest revision to Annex 13, Amendment 11, emphasized the need to develop appropriate legal guidance that will assist States to enact national rules to protect information from safety related data collection and processing systems (SDCPS), while allowing for the proper administration of justice in the State. The protection of this safety information from inappropriate use should contribute to the enhancement of aviation safety. ...

- [22]. The ICAO’s policy of non-disclosure is premised on the philosophy that, freedom and independence of reporting begets good aviation policies and practices which, in turn, begets *“the safe and orderly growth of international civil aviation throughout the world”*¹³.

- [23]. Trögeler (supra) is insightful in setting out the underlying rationale.

In air transportation the most crucial issue is safety..... Accidents are the result of an undesirable chain of events. To prevent the repetition of such events, the investigation process requires an effective safety occurrence reporting system, which means that all relevant accidents and incidents are reported and comprehensively documented by aviation professionals.

In the aviation community there is an increasing concern over a perceived trend of authorities to initiate criminal prosecutions against aviation professionals. The fact that incident reports and material submitted in the course of safety investigations often find their way into separate judicial investigations has led to an increased fear amongst aviation professionals that routine operational decisions could now become the basis for criminal prosecutions. This is detrimental to aviation safety as it could, in turn, lead to a reduced willingness of occurrence reporting by

Cost Recovery

38.—(1) Whilst the Republic of the Fiji Islands will initiate any accident investigation and require the Authority to provide technical and other support, whether or not blame is attributable for the accident, the provisions of the ICAO policy on charges (Doc 9082 ICAO’s Policies on Charges for Airport and Air Navigation Services — Appendix 2) will apply.

¹³ to borrow the phraseology of Article 44 of the ICAO.

those involved in such incidents or accidents. The chilling effect which potential prosecution has on openness and the flow of safety information following an aircraft accident or incident has an adverse effect on aviation safety and prevents lessons from being learned. This dilemma has impeded the effectiveness of safety investigations for decades.

.....

The key is to strike the right balance between the need to improve aviation safety and the recognition of the judicial system's legitimacy to investigate and prosecute the committed crimes.

WHERE TO STRIKE THE BALANCE?

- [24]. The right balance between the policy of non-disclosure in regulation 34 on the one hand, and, on the other, the courts' legitimate business of encouraging open pre-trial discoveries, is at the heart of the issue.

US Approach

- [25]. In the US Supreme Court case of **United States v. Weber Aircraft Corp.**, 104 S. Ct. 1488 (1984),¹⁴ the engine of an Air Force aircraft failed in flight and when that happened, the pilot ejected from the plane and, in the process, was severely injured. He sued Weber Aircraft Corp which had designed and manufactured the aircraft's ejection equipment. Weber sought pretrial discovery of confidential unsworn statements of the pilot and the airman made during the investigation of the Air Force. There was some precedent in the Supreme Court¹⁵ on the position that confidential statements made to air crash safety investigators are privileged with respect to pretrial discovery. Faced with this obstacle, Weber requested the statements directly from the Air Force under the FOI Act. The Air Force refused. Weber then commenced an action in Federal District Court which held that the statements were protected from disclosure by an exemption of the FOIA¹⁶. On appeal, the Court of Appeal reversed the FDC's ruling. On further appeal, the Supreme Court unanimously reversed the Court of Appeal's ruling and held that such confidential witness statements are exempted from discovery under the FOIA

¹⁴ reported and summarized in an official US Department of Justice website <http://www.justice.gov/oip/blog/foia-update-supreme-court-update>.

¹⁵ **Machin v. Zukert**, 114 U.S. App.D.C. 335, 316 F.2d 336, cert. denied, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124.

¹⁶ Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".

as well as in the civil discovery context. Justice John Paul Stevens dwelled on the fact that Weber was seeking to use the FOIA to circumvent and in effect nullify traditional civil discovery restrictions. He declared that such an approach, if permitted in this case:

"would create an anomaly in that the FOIA could be used to supplement civil discovery."

And:

"We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."

- [26]. The Australian Administrative Appeals Tribunal in Vasta and Anor and Civil Aviation Safety Authority [2010] AATA 499 (6 July 2010) reviewed another US case of Administrator, Federal Aviation Administration v Robertson [1975] USSC 130; (1975) 422 US 255.
- [27]. In Robertson, a public interest law group which had been looking into the operation and maintenance performance of commercial airlines, had sought access to a report titled "Systems Worthiness Analysis Program Reports". That report had been prepared by the Federal Aviation Administration ("FAA") which is responsible for air safety under the US Federal Aviation Act. In due course, FAA refused disclosure under the US FOIA on the ground that "the effectiveness of its operations required ongoing airline cooperation and candour", and that these "would be compromised if its reports were amenable to disclosure under the FOI legislation".
- [28]. The FAA had relied on an exemption under the FoI Act (Exemption 3) which excluded from disclosure documents "*specifically exempted from disclosure by statute*" and then argued that there was a specific statutory provision namely section 1104 of the US Federal Aviation Act which exempted from disclosure the report in question and which permitted the Administrator to withhold information he considered "*would adversely affect the interests of the objecting party and is not required to be disclosed in the interest of the public*".

[29]. The Court held that section 1104 constituted an exemption under the FOIA, even if it operated only by reference to the contingency that the Administrator had formed the requisite opinion¹⁷.

Canadian Approach

[30]. In Ken Rubin v The Minister of Transport 154 DLR (4th) 414; 1997 CanLII 6385, the document in question was a safety review report relating to the airline disaster in Jeddah, Saudi Arabia. The report reviewed the organisation, operations, maintenance and management of the airline operator. A request for disclosure was made to the Minister of Transport who, relying on the Canadian Access to Information Act, declined it, arguing that disclosure would be “*injurious to ... the conduct of lawful investigations.*” The Court of Appeal ordered disclosure and reasoned that:

- (i) the relevant provision only excluded information that could prejudice “something specific about the development or progress of a particular investigation”
- (ii) but did not “refer to the general investigative process”.

¹⁷ The AAT in Vasta went on to observe:

The US Supreme Court noted in Robertson that the Congressional intention, in providing for the various FOI exemptions (of which Exemption 3 was one) had apparently been to “preserve, for air transport regulation, a broad degree of discretion on what information is to be protected in the public interest in order to insure continuing access to the sources of sensitive information necessary to the regulation of air transport”. The Court concluded that vesting the exercise of the discretion conclusively with the Administrator reflected the Congressional conclusion “that the public interest was better served by guaranteeing confidentiality”. The Court rejected the proposition that it was appropriate to interpret the FOI legislation as if its enactment conveyed a legislative indication that “all information in all agencies and in all circumstances is to be open to public inspection”.

It remains the case that FOI exemption claims in the United States fall to be considered under Exemption 3. But there is an additional specific disclosure limitation that applies to voluntarily provided airline safety information. It is found at 49 USC 40123 and reads:

40123 Protection of voluntarily submitted information

(a) In General. - Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator

finds *that:*

(1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and

(2) withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.

The reference to voluntarily provided information, in the USA context, is probably best understood by reference to two formal programs the FAA has established. These, the Aviation Safety Action Program (“ASAP”) and the Flight Operational Quality Assurance program (“FOQA”) provide a measure of both conditional and comparative immunity from enforcement sanctions and immunity from employer imposed sanctions, where defects are promptly reported and do not involve deliberate misconduct. They appear to have a broad, but far from precise, parallel in the voluntary reporting scheme under Part 13 of the Civil Aviation Safety Regulations 1998.

In Working Paper A35-WP/92 to the 35th session of the International Civil Aviation Organisation Assembly Technical Commission the United States said this:

These supplementary programs share a common goal of establishing a proactive approach to accident prevention by individual air operators. In sum, operators accept responsibility for identifying adverse safety trends and making appropriate interventions before they lead to accidents, and further, can do so by utilizing tools provided by the FAA. The incentives provided by the FAA for sharing information in the context of these programs with the FAA are (1) protection from release of information to the public, and (2) protection from legal enforcement action by the FAA.

- (iii) the restriction might justify the nondisclosure of information relevant to an imminent future investigation.

[31]. McDonald JA in Ken Rubin (in whose judgment the other members of the court agreed) said the following:

... I am not unaware of the important role safety review reports play in the overall framework of ensuring safety for the public in the aeronautics industry. However, if, and as [the Minister] suggests, there is a negative impact on the willingness of individuals to participate in these reviews due to public disclosure, then there is nothing to preclude Parliament from changing the Aeronautics Act to provide for wide-scale confidentiality protection, or, from adding these reviews to the section 24 category of broad exemptions in the Access to Information Act. It is also open to the Minister to protect certain aspects of the report under other exemptions ...

Having stated the important role that post-accident safety reviews play in the overall safety of the aeronautics industry, I think it is also important not to underestimate the public's interest in disclosure and the positive impact disclosure may have on the regulation of the aeronautics industry...

The main ground advanced by those asserting that a privilege should be attached to all statements obtained by the investigators in the course of their investigations is that witnesses would refuse to provide information to accident investigators if these statements could become admissible in legal proceedings. Those who advanced this position opined that this would happen. These opinions were equally matched with the opinions of others that no such result would follow. It has not been the experience of the National Transportation Safety Board in the United States, where witnesses' statements enjoy no privilege that their sources of information have dried up. Conversely, there is a danger that witnesses who are assured that their information will not be challenged, nor come under public scrutiny may take liberties with the facts. This may impair public confidence in the reliability of accident reports.

An Australian Approach

[32]. In analyzing Ken Rubin, the AAT in Vasta observed that:

The actual decision in Rubin turned on the particular wording of the Canadian legislation. It was significantly different from the ground of exemption provided for in FOI Act s 43(c)(ii) - which does permit nondisclosure of information that "could reasonably be expected to prejudice the future supply of information" for the purpose of Commonwealth administration. However, the Canadian legislation did impose an onus on the entity resisting disclosure (similar to FOI Act s 61). It also contained a declaration of purpose similar to that contained in FOI Act s 3. A further similarity was the absence of any more specific legislative provision evidencing either a policy or a requirement inhibiting the disclosure of air safety related information. Against this background it is informative to recognise the way in which the Federal Court of Appeal dealt with the Minister of Transport's argument about the possibility that disclosure would have an adverse impact on Transport Canada's capacity to undertake effective future air safety investigations.

[33]. The AAT continued thus:

*... it is important to acknowledge material differences between the two jurisdictions relating to the regulation of air safety and the disclosure of air safety information. For example, the Australian *Transport Safety Investigation Act 2003* contains specific provisions limiting the disclosure of "restricted information" (which includes information obtained for the purposes of an investigation under the Act irrespective of whether it has been compulsorily acquired, obtained as a result of an inspection permitted by the Act, or has been voluntarily provided) and*

“on board recording information”. Information within these two categories is prohibited from disclosure except (i) for the purposes of the Act, (ii) certain types of criminal proceedings, and (iii) in civil proceedings where the court determines that “any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice”: see ss 53 and 60. (Each of these provisions is prescribed as a secrecy provision for the purposes of s 38 of the Australian FOI Act.) The conditional disclosure limitations contained in the *Transport Safety Investigation Act 2003* involve a statutory recognition of Australia’s obligations as a signatory to the 1944 Convention on Civil Aviation (the “Chicago Convention”): see *Cooke v Pacific Hawker Pty Ltd* [2000] NSWSC 1238 at

United Kingdom

- [34]. In the UK Information Tribunal’s decision in *Civil Aviation Authority v Malcolm Kirkaldie* [2010] UK ITEA 2009-0033¹⁸, an initial request for disclosure for an airline safety audit report was made to the Civil Aviation Authority. CAA opposed disclosure relying on some UK FOI provisions, arguing that to disclose “would adversely affect the administration of the Civil Aviation Act 1982 (UK)”.
- [35]. In explaining its position, CAA did emphasize:
- [1]. the significance to *“maintaining trust and openness with the organisations regulated and their apprehensions about the potential impact disclosure would have on their future dealings with the CAA”*.
 - [2]. that any assessment of the likelihood of prejudice must consider both the arguably low degree of probability of any adverse effect and the potential seriousness of the consequences of any such prejudice.
 - [3]. that the statutory exemption ground was sufficiently made out if there was a real risk of prejudice to its ability to discharge its functions under the legislation. A wholly speculative risk of prejudice would not suffice to attract the exception.
 - [4]. that its functions were not limited merely to establishing compliance with regulatory requirements.

“[e]vidence of compliance might not in itself be evidence of competence”.
 - [5]. that, in all its audit investigations, it is concerned to obtain the maximum possible amount of information potentially relevant to assessing the actual competence and safety of particular organisations.
 - [6]. its ability to make an assessment was enhanced by the willingness of organisations to share information with it voluntarily, rather than to provide only what was specifically requested.
 - [7]. its concern about the risk of material information being withheld by organisations because of anxiety about the risk of their subsequent unrestricted disclosure.

¹⁸ was also reviewed by the AAT in *Vasta*.

- [36]. Having set out the above policy arguments, the CAA then took the position that disclosure was prohibited under section 23 of the Civil Aviation Act 1982, and that prohibition exempted the document from the policy of open disclosure under s 44 of the UK FOIA. The Information Tribunal determined that the statutory prohibition applied, as a consequence of the CAA's determination not to disclose information, unless that determination was unreasonable in the *Wednesbury* sense.

OBSERVATIONS

- [37]. There are two competing public interests involved whenever and wherever the disclosure or otherwise of aviation accident records is raised. On the one hand, is the public interest of freedom of information and free and open discoveries in civil litigation. On the other, is the "public interest" that, in the name of aviation safety, documents relating to aviation investigations are to be protected from disclosure¹⁹.
- [38]. To reiterate, the records for which the plaintiffs seek discovery in this case all appear to fall under the purview of regulation 32(1)(a) to (e) and are protected from disclosure. The Attorney-General of Fiji is vested with a discretion to allow their disclosure if he determines that, to disclose would outweigh the adverse domestic and international impact that disclosure may have on that or any future investigation'.
- [39]. From all the cases reported above, the process of seeking disclosure of aviation records has begun with an initial application to the public authority responsible. In no case, has the applicant applied directly to court or to any tribunal. It is only when the public authority responsible refuses to disclose, that an application is then made to the appropriate tribunal concerned for disclosure under the applicable FOIA. Hence, the argument at tribunal level is, invariably, whether or not the documents or records concerned are exempted under the applicable FOIA regime.
- [40]. This, in itself is telling of the attitude that the disclosure of statutorily protected records is a matter of public law and not a private law matter. As such, it would be

¹⁹ to preserve the integrity of the investigation process, and encourage candid and voluntary provision of information to investigators.

totally inappropriate for this court to deal with the issue in the current private law proceedings.

- [41]. Fiji does not yet have a Freedom of Information Act. Section 25 of Fiji's 2013 constitution however makes provision for a general right to information held by any public office²⁰. Part B of the Constitution also provides at section 150 that:

Part B—FREEDOM OF INFORMATION

Freedom of information

150. A written law shall make provision for the exercise by a member of the public of the right to access official information and documents held by the Government and its agencies.

- [42]. In my view, the correct approach that the plaintiffs should have taken in this case is to, first, apply to the Office of the Attorney-General for disclosure. If the Attorney-General then exercises his discretion against disclosure, then, in the absence of an FOIA in Fiji, the plaintiffs may consider whether to challenge the exercise of that discretion in Court.

- [43]. Lord Greene M.R in the oft cited House of Lords decision in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** (1947) 2 ALL E.R. 680 said at p.682:

'The exercise of such a discretion must be a real exercise of the discretion. If in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.'

- [44]. In my view, if in the event the Attorney-General were to refuse disclosure, the course open to the plaintiffs, in the absence of an FOIA in Fiji or a specialist tribunal to hear FOI-related grievances, proper avenue to challenge the exercise of that exercise of is through the Judicial Review procedures in Order 53 of the High Court Rules 1988 (i.e. to consider whether the refusal to disclose is unreasonable in the

²⁰ Section 25 provides:

Access to information

25.—(1) Every person has the right of access to—

(a) information held by any public office; and

(b) information held by another person and required for the exercise or protection of any legal right.

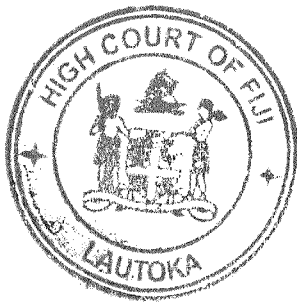
(2) Every person has the right to the correction or deletion of false or misleading information that affects that person.

(3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in subsection (1), and may regulate the procedure under which information held by a public office may be made available.

Wednesbury sense) rather than through the Constitutional Redress provision in section 44 of the Constitution²¹.

CONCLUSION

[45]. In the premise, I dismiss the application for specific discoveries. Costs in the cause. This case is adjourned to **Monday 27 April 2015** for mention at 10.30 a.m. for further directions



.....
Anare Tuilevuka
JUDGE
High Court of Lautoka

20 April 2015.

²¹ Section 44 of the Constitution provides that if a person considers that any provision of Chapter 2 of the Constitution has been violated or is likely to be contravened in relation to him, he may apply to the High Court for redress.

Enforcement

44.—(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

Appendix 1

1. Bundle of Documents in the Civil Aviation Authority of the Fiji Islands ('CAAFI') file 15/8/44 regarding Accident on 21 April 2005: Sun Air DQ-FIE, Air Fiji DQ-AFP.
2. Bundle of Documents in the Civil Aviation Authority of the Fiji Islands ('CAAFI') file 15/8/49 regarding Accident on 24 May 2006: Air Fiji DQ-AFQ.

Licensing Correspondence

3. 31 March 2005, email from AFL to CAAFI regarding Renewal of Airport licences.
4. 1 April 2005, CAAFI letter to AFL regarding Airport Licences.
5. 29 April 2005, CAAFI internal letter regarding Renewal of Airport Licences – AFL Managed Aerodromes.
6. 20 May 2005, CAAFI letter to AFL regarding Domestic Airport Licences.
7. 21 September 2005, CAAFI email to AFL regarding Savusavu Aerodrome.

Inspections, Assessments and related correspondence regarding Savusavu Airport on and around the time of the incidents.

8. 9 January 2004, Report on: Savusavu Airport.
9. 20 September 2004, CAAFI email to AFL regarding Savusavu Airport- Displaced THR.
10. 16-17 March 2005, Aerodrome Inspection Report – Savusavu.
11. 22 April 2005, AFL letter to CAAFI regarding Airport Manuals.
12. 27 April 2005, CAAFI email to AFL regarding Airport Lic-Domestic and attached defect summary updated 1 April, 2005.
13. 27 to 28 April 2005, emails (2 of 3 page string – less 3rd page containing disclaimer) between CAAFI and AFL regarding AFL Dom Ads-Defect Summary (April 2005).
14. 29 April 2005, two CAAFI internal emails regarding Restricted Aerodrome Operations due limited aircraft parking area.
15. 31 May 2005, CAAFI letter to AFL regarding Operation into Savusavu Airport.
16. 27 September 2005, Savusavu Aerodrome-Inspection Checklist & Report;
17. 31 October 2005, Progress Report on Savusavu Airport.
18. 18 November to 21 November 2005, emails (1-2 page string) between AFL and CAAFI regarding Savusavu anemometer Plans;
19. 30 November 2005, CAAFI internal email regarding Airport Licence Renewals.
20. 28 December 2005, Summary of Defects;
21. 28 December 2005, Summary of Defects (with further information);
22. 28 February 2006, Summary of Defects;
23. 28 February 2006 to 2007 (newest listed first), Summary of Defects (Savusavu listed on 3rd page with a date of 28 February 2006);
24. 19 April to 25 April 2006, email string between AFL and CAAFI regarding Savusavu Airport;
25. 26 May 2006, CAAFI facsimile to Ministry of Tourism and Transport regarding Savusavu Airport Findings.
26. 20 to 21 June 2006, Aerodrome Inspection Checklist & Report;
27. 21 June 2006, CAAFI email to AFL regarding Savusavu Aircraft Parking Apron;
28. 22 September 2006, Defect Summary – AFL Operated Aerodromes;
29. 13 October 2006, AFL Domestic Airports – Summary of Defects as at (13th Oct 06);
30. (undated) Savusavu Flight Service Station, relating to RWY 14 (Land);
31. (undated) Documentation – NFNS, NFNM, NFNL, relating to Documentation report for the outer stations. (Excluding Rotuma);

Embraer EMB-110 Bandeirante Approval Documents

32. 14 October 2002, AFL letter to CAAFI regarding Variation to AOC (Subject Operations to Savusavu);
33. 20 November 2002, CAAFI internal memorandum regarding Air Fiji AOC Variation;
34. 20 November 2002, Air Operator's Certificate of Competency – Airports – Schedule One-authorized Airports and Limitations (third page of copy document only);
35. (undated) Savusavu Operations document, outlining the special conditions for Savusavu Airport;

Airport Manuals

36. April 2001, AFL, Airport Manual-Savusavu Airport;
37. March 2006, AFL, Airport Manual-Savusavu Airport;

Consultant's Report

38. July 2006, Erasito Beca Consultants Limited, Report – Nausori, Labasa, Savusavu and Matei Airport Pavement Classification Number (PCN) Assessment.

Other Incidents at Savusavu

39. 14 January 2006, CAAFI, Incident Summary – Occurrence ID 2006/009, Running short of runway at Savusavu.
40. 15 January 2006, CAAFI, Incident Summary – Occurrence ID 2006/008, Diversion due to failure of gear to retract.
41. 18 January 2006, CAAFI, Incident Summary – Occurrence ID 2006/020, Conflicting Operations.
42. 31 March 2006, CAAFI, Incident Summary – Occurrence ID 2006/068, Fuel Spill.
43. 24 May 2006, CAAFI, Incident Summary – Occurrence ID 2006/106, Aircraft Accident at Savusavu.
44. 5 June 2006, CAAFI, Incident Summary – Occurrence ID 2006/092, Restricted space at refueling bay.

AOC Documentation and Audits

Air Fiji

45. 20/21 March 2001, CAAFI, Flight Safety Oversight Inspecting Staff Manual, Extracts.
46. 2002, CAAFI, Summary of Findings (AOC Audit 16-18 April 2002).
47. 2003, CAAFI, Flight Operations AOC Renewal Inspection Report – (AOC Audit 9-11 April 2004).
48. 2004, CAAFI, Flight Operations AOC Renewal Inspection Report – (AOC Audit 19-21 April 2004).
49. 25 October 2004, CAAFI, Air Operator's Certificate of Competency for AFL, expiring 31 May 2005.
50. 2005, CAAFI, Flight Operations AOC Renewal Inspection Report, (AOC Audit 9-12 May 2005).
51. 31 May 2005, CAAFI, Air Operator's Certificate of Competency for AFL, expiring 31 May 2006.
52. 2006, CAAFI, Flight Operations AOC Renewal Inspection Report, (AOC Audit 11-21 April 2006).
53. 22 June 2006, AFL letter to CAAFI regarding Flight Inspection Audit – Bandeirante EMB110.
54. 21 August 2006, CAAFI internal memo from N Walding regarding Air Fiji AOC Amendments.
55. 2007, CAAFI, Flight Operations AOC renewal Inspection Report, (AOC Audit 26 April – 7 May 2007).

Sun Air

56. 2001, CAAFI, Sun Air Summary of Findings 31 May – 5 June 2001;
57. 13 June 2001, CAAFI letter to Sun Air (Pacific) Ltd, regarding AOC Renewal Audit.
58. 2002, CAAFI, Sun Air Summary of Findings (from CAAFI Audit of 13 to 14 May 2002).
59. 2003, CAAFI, Sun Air (Pacific) Ltd: Summary of Findings (from CAAFI Audit of 10 to 11 March 2003).
60. 29 March 2004, CAAFI letter to Sun Air (Pacific) Ltd regarding AOC Renewal Audit.
61. 2004, CAAFI, Flight Operations AOC Renewal Inspection Report, Sun Air (Pacific) LTD: Summary of Findings (from CAAFI Audit of 23 to 25 March 2003).
62. 30 June 2004, CAAFI, Air Operator's Certificate of Competency for Sun Air (Pacific) Limited, 1 July to 30 April 2005.
63. 2005, CAAFI, Flight Operations AOC Renewal Inspection Report (from Audit of 9 to 18 March 2005).
64. 26 April 2006, CAAFI letter to Sun Air (Pacific) Ltd, regarding AOC Renewal Audit.

Additional Pilot Documentation

Licenses

36. 23 December 2002, CAAFI, Commercial Pilot's Licence of A. Konrote, Certificate of Validity and Instrument Rating (Aeroplanes Only) Certificate of Test.

Other

37. 23 August 2001, letter from Navneet Sharma to CAAFI, regarding One Engine Turn Around.
38. 18 July 2005, CAAFI, Briefing Paper on reinstatement of Sun Air Pilots.
65. 26 July 2005, CAAFI letter to Captain Nasova regarding Reinstatement of Commercial Pilots licence No. 200283A.

Miscellaneous

66. 29 April 2004, CAAFI letter to AFL Renewal of AFL Outstation Airport Licences.
67. 28 May 2004, CAAFI letter to AFL regarding Renewal of AFL Outstation Airport Licences.
68. 21 June 2006, two emails between CAAFI (Wally Scott) and GAB Robins Aviation (Mike Ellis), regarding Air Fiji – Plane Pictures Savusavu.
69. Undated, 3 pages (copies of 6 black and white photographs), with notation Walter – FYI are 3 pages of the ntse undercarriage damage on DQ-AFQ for the files (accident).
70. 8 December 2006, CAAFI letter to AFL regarding Licence Renewal for Savusavu.
71. 14 December 2006, AFL letter to CAAFI regarding Licence Renewal for Savusavu Airport.
72. 28 [20] February 2008, CAAFI letter to AFL regarding Savusavu Airport Licence.
73. 25 February 2008, AFL letter to CAAFI regarding Meeting of CAAFI Board with AFL Board on Compliance Issues.
74. 11 March 2008, CAAFI email to N Waqa regarding Savusavu, enclosing Situation Report – AFL Mitigation of Savusavu deficiencies, dated 4 March 2008.