Tonga

Cauchi v Air Fiji and Another

[2005] TOSC 8

Supreme Court

Ford J

22–23 November, 10 December 2004, 1 February 2005

(1) Practice and procedure – Interlocutory application – Striking out – Carriage by air – Successive carriers – International Convention – Accident causing death of passenger – Deceased's husband claiming damages against first carrier on basis of express agreement to assume liability – Convention providing for action against carrier performing carriage unless first carrier liable for whole journey under express agreement – No particulars of such agreement provided – Defendants denying such agreement – Onus on plaintiff to prove assumption of liability – Whether first carrier to be struck out – Warsaw Convention 1929, art 30(2).

(2) Evidence – Admissibility – Public document – Hearsay – Accident investigation report – Whether constituting a 'public document' – Statutory definition of 'public document' – Common law definition – Whether report admissible as exception to rule of inadmissibility of hearsay evidence – Evidence Act (Cap 15), ss 89, 91 – Civil Evidence Act 2002 (Fiji), s 3(1).

(3) International law – Carriage by air – International Convention – Accident – Damages – Currency of award – Convention limiting damages payable – Mandatory direction for conversion of prescribed damages into national currency – Date of such conversion – Domestic order prescribing rate of conversion – Defendant seeking interlocutory order to enforce conversion rate – Whether such order to be granted – Whether relevant to liability – Whether order having retrospective effect – Whether compliant with mandatory direction – Constitution of Tonga 1875, amended 1990, cl 20 – Warsaw Convention 1929, art 22 – Currency Equivalent Order 2003.

(4) International law – Carriage by air – International Convention – Accident causing death of passenger – Convention providing for action for death of passenger – Deceased's husband claiming damages for his own nervous shock – Whether such action available – Whether Convention constituting comprehensive code – Whether other domestic remedies available to plaintiffs – Warsaw Convention 1929, art 17.

In 1999 the plaintiff's wife died in a plane crash. The journey she was making at the time of her death involved using both the first defendant, Air Fiji, and the second defendant, Air Pacific. At the time of the air crash she was travelling on board a plane of the first defendant. The plaintiff commenced legal proceedings for damages. The plaintiff's claim was based on two alleged causes of action, first, a next-of-kin claim under the Warsaw Convention 1929

and, second, a common law cause of action for damages resulting from nervous shock. It was common ground that the deceased was travelling on an international carriage by air which was to be performed by successive carriers. As such, the plaintiff's claim for damages was governed by the provisions of the Warsaw Convention 1929, as amended by The Hague Protocol 1955. Both the Convention and the Protocol were incorporated into the domestic law of Tonga by virtue of the provisions of the Carriage by Air Act 1991. Where there were successive carriers then, in terms of art 30(2) of the Warsaw Convention, a plaintiff could bring his action only against the carrier who performed the carriage during which the accident occurred. However, the plaintiff alleged that the second defendant (as the first carrier) had, by express agreement, assumed liability for the whole journey. The plaintiff's allegation was one of agency, that Air Fiji was the interline carrier for Air Pacific. Those allegations were denied by the defendants and representatives from both had sworn affidavits that no such agreement existed. No particulars were provided by the plaintiff in support of the pleading that the second defendant had expressly assumed liability for the whole journey. An accident investigation report released by the Government of Fiji was sought by the plaintiff to be admitted into evidence on the ground that it was a public document under Pt V of the Evidence Act or alternatively on the ground that it fell within one or more of the exceptions to the hearsay rule set out in s 89, in particular sub-s(f), of the Evidence Act. The defendants sought an order striking out those parts of the statement of claim which were in excess of the limits payable under the Currency Equivalent Order 2003 or, alternatively, that damages should be limited in accordance with the order. Article 17 of the Convention created a presumed liability on the part of a carrier for damages sustained in the event of the death of a passenger but art 22(1) then limited the carrier's liability. The order specified the equivalent ro the sums expressed in art 22 of the Convention limiting the amount of damages able to be claimed for death due to recklessness. The plaintiff claimed that the order was not in force when his wife died and could not be given retrospective effect. Article 29(2) of the Convention stated that questions of procedure should be governed by the law of the court seized of the case. It had previously been agreed that the trial would be dealt with in two parts, dealing first with liability and then, if necessary, quantum. Both parties raised interlocutory matters upon which they sought the court's rulings prior to trial. The issues raised were: (i) the defendants' application to strike out the second defendant; (ii) the defendants' application for a ruling that the accident investigation report was inadmissible; (iii) applications by both parties for orders in relation to the Currency Equivalent Order 2003 and (iv) the defendants' application for an order striking out the nervous shock cause of action.

HELD: Defendants' application upheld. Plaintiff's second cause of action dismissed.

(1) The authorities made it clear that in the case of international carriage by air which was to be performed by successive carriers the onus was on the plaintiff to prove the assumption of liability by the second defendant as the first carrier. Under art 30(2) of the Convention a passenger or representative

could only take action against the first carrier, who had not performed the carriage under which the accident had occurred, if by express agreement the first carrier had assumed liability for the whole journey. If the second defendant could make out a prima facie case that the claim as pleaded could not possibly succeed and the plaintiff was unable to rebut that prima facie case then the defendant was entitled to have a striking-out order; he did not have to wait until trial. The plaintiff had already had over five years in which to sort out his case. The plaintiff had no prospects of proving his contention that the second defendant entered into an express agreement to assume liability for the whole journey. The cause of action against the second defendant could not possibly succeed and the second defendant was, accordingly, struck out as a party (see pp 77, 79–81, below). Shawcross and Beaumont *Air Law* Issue 97, September 2004 approved. *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] LRC (Comm) 91 and *Nugent v Michael Goss Aviation Ltd* [2000] 2 Lloyd's Rep 222 applied.

(2) Public documents were generally admissible as to the truth of their contents. Whilst the definition of a public document in s 91 largely codified the common law position it did not fully embrace the common law definition. In the instant case, the accident investigation report was brought into being for the stated purpose of air safety. The fact that it was now in the public arena was an incidental result rather than a purpose. In general, the definition of 'public documents' in s 91 related to documents such as birth/death certificates, registers of marriage, business records, court orders, legislation and the like. The definition was not broad enough to encompass a document such as the investigation report in the instant case. Even if the report could be classified as a public document, however, there was an even more fundamental objection to its admissibility, which was that the report was riddled with hearsay. Under s 89(f) the first criterion, that the statement refers to a fact in issue or a fact relevant to a fact in issue, narrowed the inquiry to a 'fact in issue'. The authorities indicated that such facts were usually discreet and concerned matters like dates, legal status of persons or places. They would not include highly controversial facts such as those which the plaintiff sought to rely on in the instant case. The investigation report was not a public document either under the Evidence Act or, for that matter, at common law. Nor did it fall within any of the recognised exceptions to the hearsay rule as set out in s 89 of the Evidence Act. The report was, therefore, inadmissible (see pp 83, 85–86, below). *Sturla v Freccia* (1880) 5 App Cas 623, *Wilton & Co v Phillips* (1903) 19 TLR 390, *In the Estate of Beatty* [1919] VLR 81, *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284 and *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 applied. *Ioannou v Demetriou* [1952] 1 All ER 179 considered.

Per curiam. (i) Section 91 appears to be an all embracing definition of public documents. However, s 91 omits any reference to a 'quasi-judicial duty to inquire' category of documents (see pp 83–84, below). *Ioannou v Demetriou* [1952] 1 All ER 179 considered.

(ii) In Fiji recent changes have been made to the law relating to the admissibility of hearsay evidence. Under s 3(1) of the Civil Evidence Act 2002

evidence is not to be excluded in civil proceedings on the ground that it is hearsay. That is a commendable development in the law of evidence. In Tonga the Land Court has traditionally admitted hearsay evidence in land title cases. It may be timely for the law makers in the kingdom to follow the lead of the Republic of Fiji and review, generally, the statutory provisions relating to the hearsay rule in all civil proceedings (see p 86, below). *Garton v Hunter* [1969] 1 All ER 451 considered.

(iii) Whilst an applicant cannot put in evidence to support a strike out application and the respondent cannot put in evidence to rebut such an application, a party is able to have recourse to affidavits that have already been filed in the proceeding for some other purpose (see p 80, below). *Re Caines (deceased)* [1978] 2 All ER 1 applied.

(3) The court was not prepared to make the declaration sought by the defendant with regard to the Currency Equivalent Order 2003 as those issues were relevant to quantum rather than liability and it had been agreed that the instant proceedings related only to liability (see p 91, below). *Franklin Mint v Transworld Airlines Inc* [1984] 1 Lloyd's Rep 220 considered.

Per curiam. (i) There are two basic concerns about the court simply being invited to adopt the Tongan pa'anga figure stated in the Currency Equivalent Order. First, there is the fundamental abhorrence shared by most courts and embodied in cl 20 of the Constitution against any form of retrospective legislation. Secondly, the words in art 22 of the Convetion appear to be a mandatory direction to the court in judicial proceedings to convert the figure of 250,000 francs into the national currency as at the date of judgment. Such a mandatory direction to carry out the conversion exercise as at the date of judgement does not sit easily alongside a Currency Equivalent Order prescribing a figure which was the outcome of a particular conversion exercise carried out in 2002 (see pp 91–92, below).

(ii) An order for a declaration striking down the Currency Equivalent Order could be made only in the context of a successful application for judicial review and the minister would need to be heard on such application. Any application for judicial review at this stage would be well out of time (see p 90, below).

(4) The purposive construction given to the Convention made it clear that the Warsaw Convention should be regarded as an exclusive cause of action so that if a remedy could not be claimed under the Convention then no remedy was available. All the pointers were that in a non-passenger situation the same principle should also be applied. If air carriers were to be exposed to damages claims, falling outside the Convention, by non-passengers basing actions on nervous shock and psychological injuries, the floodgates would surely tumble and the Convention rules relating to international carriage by air would soon be subverted. Wherever the boundary lines were finally drawn for the still emerging nervous shock cause of action they would be unable to make any inroads into the now entrenched principle of construction that the Warsaw Convention was a comprehensive code which excluded any other form of domestic remedy by passengers or non-passengers alike (see p 96, below). *Sidhu v British Airways plc* [1997] 2 LRC 149 and *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, [2002] 5 LRC 721 approved. *South Pacific Air Motive*

Pty Ltd v Magnus (1998) 87 FCR 301 considered.
Per curiam. (i) It is well established that the Warsaw Convention embodies a comprehensive uniform international code which supersedes domestic law and common law rules relating to the nature and standard of liability of airline carriers. If there was any inconsistency between the text of the Convention in English or the text in Tongan as set out in the schedules to the Act and the corresponding text in French then the text in French shall prevail. There is a rather obvious error in art 20(1) of the English text which, as it reads, allows a carrier to avoid liability if it is *possible* for him to have taken measures to avoid the damage: the word italicised, of course, should read 'impossible' (see p 76, below).
(ii) The English courts have held that where the mental injury or illness lacks a physical cause or origin it can not constitute a 'bodily injury' within the meaning of art 17 of the Convention (see p 95, below). *Sidhu v British Airways plc* [1997] 2 LRC 149 and *Morris v KLM Royal Dutch Airlines* [2002] 5 LRC 721 applied.
[*Editors' note*: Articles 20, 22, 30 of the Warsaw Convention 1929, as amended by The Hague Protocol 1955, so far as material, are set out at pp 76, 92, 77, below.
Article 17 of the Warsaw Convention, so far as material, provides: 'The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'
Sections 89, 91 of the Evidence Act (Cap 15), so far as material, are set out at pp 85, 83, below.
Clause 20 of the Constitution of Tonga 1875, amended 1990, so far as material, is set out at p 91, below.
Section 3 of the Civil Evidence Act 2002 (Fiji), so far as material, is set out at p 86, below.]

Cases referred to in judgment

Application under cl 85 of the Constitution, Re [1908–1959] Vol 1 Tongan LR 9
Beatty, In the Estate of [1919] VLR 81
Caines (deceased), Re [1978] 2 All ER 1, [1978] 1 WLR 540, UK Ch D
Franklin Mint v Transworld Airlines Inc [1984] 1 Lloyd's Rep 220, US CA
Fuliyai v Kaianuanu Tonga LR (1923–1962) Vol II, 178
Garton v Hunter [1969] 1 All ER 451, [1969] 2 QB 37, [1969] 2 WLR 86, UK CA
Ioannou v Demetriou [1952] 1 All ER 179, [1952] AC 84, Cyprus PC
Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd [2002] UKHL 7, [2002] 5 LRC 721, [2002] 2 All ER 565, [2002] 2 AC 628, UK HL
Nugent v Michael Goss Aviation [2000] 2 Lloyd's Rep 222, [2000] 2 WLR 222, UK CA
Saumi v Air Fiji Ltd (29 October 2003, No HBC0500 of 2000S, unreported)
Sidhu v British Airways plc [1997] 2 LRC 149, [1997] 1 All ER 193, [1997] AC 430, UK HL

South Pacific Air Motive Pty Ltd v Magnus (1998) 87 FCR 301, 157 ALR 443, Aus Fed Ct
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] LRC (Comm) 91, [1992] 2 NZLR 282, NZ CA
SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1989] 1 Lloyd's Rep 319, NSW SC
Stollery, Weir, Re v Treasury Solicitor [1926] Ch 284, [1926] All ER Rep 67, UK CA
Sturla v Freccia (1880) 5 App Cas 623, [1874–1880] All ER Rep 657, UK HL
Te Runanga o Muriwhenua Inc v A-G [1990] 2 NZLR 641, NZ CA
Wilton & Co v Phillips (1903) 19 TLR 390, UK KBD

Legislation referred to in judgment

Australia
Civil Aviation (Carriers Liability) Act 1959

Fiji
Civil Evidence Act 2002, s 3(1)

Tonga
Carriage by Air Act 1991, s 3(5)–(6), Sch 1
Carriage by Air Currency Equivalent Order 2003
Constitution of Tonga 1875, amended 1990, cl 20
Evidence Act (Cap 15), Pts V–VI, ss 89, 91, 94

Other sources referred to in judgment

Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955 (the Warsaw Convention), Pt III, arts 17, 20(1), 22, 24(2), 25, 28(1), 29, 30(2)
Montreal Protocols to the Warsaw Convention
Muriwhenua Fishing Report
Shawcross and Beaumont *Air Law* Issue 97, September 2004, paras 405, 407, 727

Applications

The plaintiff, John Cauchi, had commenced legal proceedings against the defendants, Air Fiji and Air Pacific Ltd, for damages following the death of his wife. Both parties raised interlocutory matters to be ruled on by the court prior to trial. The facts are set out in the judgment.

David Garrett and *Peter O'Brien* for the plaintiff.
Nathan Gedye for the defendants.

1 February 2005. The following judgment was delivered.

FORD J.

Early on the morning of Saturday 24 July 1999 the plaintiff's wife, Clare Bleakley, boarded an Air Fiji flight from Nausori airport in Suva to Nandi. Approximately ten minutes into the flight the Embraer Bandeirante aircraft impacted into the side of a rugged and steep ridge with the loss of 17 passengers and two crew. There were no survivors.

At the time of the fatal accident, the plaintiff and his wife, who were both Australian citizens, were living and working in Tonga. The 44-year-old deceased was employed by Ausaid as a programme manager. She was well qualified for the task having been in the process of completing a doctorate with her thesis subject being philosophy, applied anthropology and development studies as it applies to third world foreign aid. On her eventual return to Australia from Tonga the deceased had planned to establish a business in foreign aid consultancy.

The deceased had travelled from Tonga to Fiji on 17 July 1999 on Ausaid related work. She had purchased her tickets from the office of Jones Travel Agency in Nuku'alofa, Tonga. Her return booking from Tonga to Nadi had been made with the second defendant, Air Pacific. Her return booking from Nadi to Suva was with the first defendant, Air Fiji. The deceased's original return flight had been booked for Friday 23 July but whilst she was in Suva she changed that booking to Air Fiji flight PC 121 scheduled to depart from Suva for Nadi at 5.25 am on Saturday 24 July 1999.

It is common ground that the deceased was travelling on an international carriage by air which was to be performed by successive carriers. As such, the plaintiff's claim is governed by the provisions of the Warsaw Convention 1929, as amended by the Hague Protocol of 1955. Both the Convention and the Protocol were incorporated into the domestic law of Tonga by virtue of the provisions of the Carriage by Air Act 1991.

The Convention prescribes a set of rules governing the rights and liabilities of carriers performing international air carriage. It is well established that the Convention embodies a comprehensive uniform international code which supersedes domestic law and common law rules relating to the nature and standard of liability of airline carriers.

The uniqueness of the Warsaw Convention is rather dramatically illustrated through s 3(6) of the Carriage By Air Act, which provides that if there is any inconsistency between the text of the Warsaw Convention in English or the text in Tongan as set out in the schedules to the Act and the corresponding text in French (which is not included in the schedules), then the text in French shall prevail. As it happens, there is a rather obvious error in art 20(1) of the English text which, as it reads, allows a carrier to avoid liability if it is *possible* for him to have taken measures to avoid the damage. The word highlighted, of course, should read 'impossible'.

By virtue of art 28(1) of the Convention, proceedings were able to be issued by the plaintiff in Tonga at his option because the deceased had purchased her airline tickets in this country. The present action was commenced on 19 July 2001.

For completeness, and by way of background, I should record that the plaintiff also issued identical proceedings in Fiji against both defendants. The

Fiji writ was filed on 25 July 2001. An application was made by the defendants to have that proceeding struck out because the action had been filed one day after the two-year limitation period had expired. As I understand it, there was a delay in obtaining a judgment from the court on the strike out application and, after some 18 months, the plaintiff discontinued the Fiji proceedings.

Fixtures that had been made for the hearing of this case in September 2002 and February 2004 were adjourned by consent. It was clear that there were going to be interlocutory matters that needed to be resolved prior to trial. It took time for the parties to sort out the issues involved. Both parties have now raised interlocutory matters upon which they have sought the court's rulings prior to trial. There are several such matters and I will consider them in the same chronological order that they were dealt with by counsel at the hearing. They are:

1. Defendants' application to strike out second defendant;
2. Defendants' application for a ruling that the accident investigation report is inadmissible;
3. Applications by both parties for orders in relation to the Currency Equivalent Order gazetted on 21 February 2003 and
4. Defendants' application for an order striking out the nervous shock cause of action.

1. DEFENDANTS' APPLICATION TO STRIKE OUT THE SECOND DEFENDANT

The stated ground of the application is that whenever there are successive carriers then, in terms of art 30(2) of the Warsaw Convention, a plaintiff can bring his action only against the carrier who performed the carriage during which the accident occurred. In this case, the performing carrier was the first defendant, Air Fiji.

Article 30(2) reads:

> 'In the case of carriage of this nature (by successive carriers), the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.'

The plaintiff does not challenge the application of art 30(2) but he relies upon the savings provision and claims that by express agreement the first carrier, Air Pacific, assumed liability for the whole journey.

The plaintiff also claims, and counsel acknowledges, that this is the reason why he is anxious to retain Air Pacific as a defendant, that he has evidence which suggests that Air Pacific has taken steps to waive the compensatory limits payable under the Warsaw Convention. If accepted, such evidence would mean that the plaintiff would be entitled to a significantly higher amount than the sum he otherwise would have been entitled to recover under the Convention. The plaintiff does not claim to have any such evidence in respect of Air Fiji.

Article 29(2) of the Convention states that questions of procedure shall be governed by the law of the court seized of the case. The defendants do not dispute the application of the Tonga domestic procedural rules for

determining strike out applications. As the plaintiff submitted, the general common law principles in relation to the strike out of a party parallel those applicable to the strike out of a cause of action. They are well documented and were comprehensively reviewed by the New Zealand Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] LRC (Comm) 91, [1992] 2 NZLR 282. The NZLR headnote sums up the position:

> 'The discretion to strike out is one to be sparingly exercised, and would be justified only, if on the material before the Court ... the case as pleaded was so clearly untenable that the plaintiff could not possibly succeed. If the Court was left in doubt whether a claim might lie, or if disputed questions of fact arose, the case must go to trial. If the claim depended on a question of law capable of decision on the material before the Court, the Court could determine the question even though extensive argument might be necessary to resolve it.'

In his original statement of claim the plaintiff made the allegation that the second defendant had by express agreement assumed liability for the whole journey. His allegation at that stage was one of agency. It was alleged that Air Fiji was the interline carrier for Air Pacific and that, at all material times, Air Pacific was acting as an agent for Air Fiji. Those allegations were denied. An amended statement of claim filed on 7 October 2002 contained the same allegations.

The next development in relation to this particular issue occurred on 7 July 2003 with the filing by the defendants of an application to strike out the second defendant. The ground of the application was then said to be:

> 'The first defendant was a carrier as contemplated by article 17 of the Convention. There is no possible cause of action against the second defendant and no need to proceed against it. It should be removed from the proceeding.'

That stated ground was consistent with the pleadings as they then stood. At that stage, there was no suggestion in the statement of claim that the second defendant had, by express agreement, assumed liability for the whole journey.

On 30 October 2003 the plaintiff was granted leave to issue interrogatories against both defendants which were duly complied with. There then seemed to be something of a lull in the proceedings until June 2004 when the court ordered a directions hearing to try and deal with the outstanding interlocutory matters. It was not until the second amended statement of claim was filed on 4 October 2004 that the plaintiff abandoned the agency pleading and expressly pleaded that the second defendant had assumed liability for the whole journey. The defendants immediately filed a further statement of defence in which they denied that particular allegation.

I mention these matters because one of the submissions made by plaintiff's counsel in response to the strike out application relates to the delay on the defendants' part in seeking such an order. The submission states: 'The presence of the second defendant went unremarked for a considerable period after the claims were filed.' It is not suggested that such delay is fatal to the

application and no authority is cited to that effect but, in any event, the reality is that the 'express agreement' pleading has only surfaced at a very late stage and so it cannot reasonably be claimed that the particular issue I now need to determine has gone 'unremarked' for any length of time.

The authorities make it clear that the onus is on the plaintiff to prove the assumption of liability by the second defendant. Shawcross and Beaumont *Air Law* Issue 97, September 2004, para 727, states:

> 'In the case of successive carriage, the passenger (or the personal representative of a deceased passenger) can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey. The plaintiff must prove the existence of any such express agreement.'

The plaintiff does not dispute that proposition. As I understand Mr O'Brien's submissions on this point, he frankly conceded that he does not have evidence of the existence of any such an express agreement at this stage but in addressing the court orally counsel said 'I believe there could well be documentation in existence that shows this express agreement'.

In his written submissions on this aspect of the case Mr O'Brien said:

> 'It also follows that the outcome of such a claim (the plaintiff's claim against the second defendant) will stand or fall on the evidence regarding an express agreement that the plaintiff is able to adduce at trial ... The plaintiff is in the process of gathering evidence on all the issues for trial including the issue of an express agreement by the second defendant. It is accepted that if, at trial, in the context of all the evidence *then* before the Court and the legal argument on that evidence, the Court is not satisfied on the balance of probabilities that there was any such express agreement, then Mr Cauchi's claim against the second defendant must fail. It is *not* accepted that Mr Cauchi can be required to demonstrate conclusively at this stage that such evidence is in existence. Provided there is a realistic possibility—as distinct from a vain hope—of producing such evidence on this aspect of his claim against the second defendant, Mr Cauchi should not suffer the terminal and irrecoverable consequences of having his claim against the second defendant struck out now. There is simply no basis in law or on the facts for denying him the opportunity to prove his case at trial in due course.' (My emphasis.)

In response, Mr Gedye submitted that there is not even a 'vain hope' of the plaintiff being able to adduce evidence to demonstrate the existence of an express agreement. Mr Gedye noted that, in his interrogatories, the plaintiff had specifically asked the defendants this very question and in their affidavits in reply Air Fiji's Finance Manager and Air Pacific's Executive General Manager, Corporate Support, had both sworn that no such express agreement existed. 'Either they have both committed perjury' Mr Gedye concluded, 'or there is, in fact, no such documentation'. Defence counsel also posed the rhetorical question, why, in any event, would the second defendant want to assume liability for the actions of the first defendant. There was

nothing in it for the second defendant, he submitted, and the proposition defied commercial common sense.

Plaintiff's counsel objected to the reference by Mr Gedye to the affidavits he had referred to because the rules provide that no evidence shall be heard on a strike out application. Whilst an applicant cannot put in evidence to support a strike out application and the respondent cannot put in evidence to rebut such an application, a party is able to have recourse to affidavits that have already been filed in the proceeding for some other purpose—Megarry V-C in *Re Caines (deceased)* [1978] 2 All ER 1 at 4. In this case the affidavits referred to had been filed in response to the earlier request for interrogatories.

The authorities make it clear that on a strike out application, if the defendant can make out a prima facie case that the claim as pleaded cannot possibly succeed and the plaintiff is unable to rebut that prima facie case then the defendant is entitled to an order there and then; he does not have to wait until trial.

In the English case of *Nugent v Michael Goss Aviation* [2000] 2 Lloyd's Rep 222 the Court of Appeal had to consider a strike out application in a case where, in order to overcome the damages limitation imposed by art 25 of the Warsaw Convention, the claimants needed to establish recklessness on the part of the pilot. Auld LJ noted that the pleadings were not capable of allowing the extreme inference necessary in a pilot error case that he knew that he was going to kill or severely injure his passengers and himself. In reference to the strike out application his Lordship said:

> 'Certainly there would need to be some indication in the pleading or outside it of the availability of evidence or facts sufficiently compelling to support such inference, and the claimants have produced none here. There is also the point that Mr. Shepherd advanced as a revealing weakness of the claimants' case—they have not, as they should have done, particularised adequately so serious an allegation ...' (See [2000] 2 Lloyd's Rep 222 at 230.)

His Lordship held that the case was 'doomed to fail' and had 'no real prospect of success'. The appeal against the strike out order made in the court below was dismissed. In the present case, likewise, no particulars have been provided in support of the pleading that the second defendant had expressly assumed liability for the whole journey.

In his submissions, Mr O'Brien indicated that, given time, the plaintiff may wish to issue further interrogatories and he may also wish to make inquiries of IATA in Washington in relation to the conditions of carriage in order to ascertain whether they might reveal the existence of an express agreement. The reality, however, is that the plaintiff has already had over five years in which to sort out his case. The plea from counsel sounded a rather desperate measure and a litigant cannot, of course, base a cause of action on a forlorn hope.

The court, nevertheless, did offer counsel an opportunity of making the further inquiries he referred to. The proposition put to counsel was that the plaintiff would be given an option. He could either have until the end of February 2005 (effectively over three months from the hearing date) in which

to undertake whatever further inquiries he wished and then file an amended statement of claim particularising the matrers relied upon to show the existence of an express agreement or, in the alternative, the court would proceed to determine the strike out application on the papers as they now stand. After reflecting on the matter over a luncheon adjournment and taking instructions from his client, counsel advised the court that the plaintiff wished the application to be determined on the papers as they stand.

Against that background, I have been left with little choice in the matter. I have reached the clear conclusion that the plaintiff has no prospects of proving his contention that the second defendant entered into an express agreement to assume liability for the whole journey. His cause of action against the second defendant, in other words, cannot possibly succeed and the second defendant is, accordingly, struck out as a party.

2. ADMISSIBILITY OF ACCIDENT INVESTIGATION REPORT

Before the court is a 32-page accident investigation report which has a foreword dated 16 December 1999. The court was told from the Bar that it was released by the Government of Fiji, apparently along with other reports unrelated to this case, 'in a spirit of openness'. The report is attached to an affidavit filed on behalf of the defendants, sworn by Jayant Singh, who is described as Manager Corporate Services employed by the Civil Aviation of the Fiji Islands (CAAFI).

Mr Singh explained that the report was prepared by the Australian Transport Safety Bureau at the request of the Fiji Ministry of Tourism and Transport because the ministry did not have the resources to undertake such a large-scale investigation. A feature of the report is that it is unsigned and its author, as well as the investigators and witnesses it refers to, are all undisclosed. An affidavit from Alan Stray, Deputy Director of Air Safety Investigations at the Australian Transport Safety Bureau, shows that the omissions were deliberate because of the perceived need to be able to demonstrate to industry sources, in particular, that frank disclosure of information to the Bureau in accident investigations will be kept confidential.

The plaintiff seeks to have the report admitted into evidence either because it is a public document in terms of Pt V of the Evidence Act (Cap 15) or because it falls within one or more of the exceptions to the hearsay rule set out in s 89 of the Evidence Act.

The defendant (for the rest of this judgment I will proceed on the basis that the second defendant has been struck out of the proceeding) seeks a ruling that the investigation report is inadmissible as proof of its contents because:

> '—It is hearsay and none of the exceptions in section 89 of the Evidence Act apply;
>
> —It is opinion evidence which does not qualify for admission;
>
> —It is subject to public interest immunity which in this case outweighs any competing needs (of the nature of shortcutting proper proof by a plaintiff) in the Civil Court system.'

In response to the plaintiff's 'public document' submission, Mr Gedye relies upon a finding by Scott J in an unreported Fijian case *Saumi v Air Fiji Ltd*

(29 October 2003, No HBC0500 of 2000S, unreported), relating to the same accident and the same investigation report that this case is concerned with, where His Honour held that the report was not a public document under the relevant legislation in Fiji and, therefore, without production by its authors, it was inadmissible to prove its contents.

Mr Garrett made no secret of the fact that the plaintiff's case relies heavily upon the report. To understand its significance from the plaintiff's perspective, it is necessary to again return to the provisions of the Warsaw Convention. Relevantly, art 17 creates a presumed liability on the part of a carrier for damages sustained in the event of the death of a passenger. Article 22(1) then limits the carrier's liability to the sum of 250,000 francs unless, pursuant to art 25, it can be established that the 'damage resulted from an act or omission of the carrier, his servants or agents, alone with intent to cause damage or recklessly and with knowledge that damage would probably result'. In that event, the carrier is unable to avail himself of the 250,000 francs limitation.

In the present case the plaintiff pleads that the defendant is not entitled to rely upon the limitation prescribed in art 22 of the Convention because he will be able to prove (for ease of reference what I shall simply call) 'recklessness' in terms of art 25.

It is clear that many of the allegations of recklessness set out in the plaintiff's statement of claim mirror findings contained in the investigation report. Mr Garrett conceded that, in order to establish recklessness, the plaintiff was entirely dependent upon the findings made in the report. As counsel put it, there were no survivors from the accident and, hence, no one left to tell the tale. The only witness apparently was a resident of a nearby village. She heard the noise of the aircraft overhead; she went outside and watched it until it disappeared from her field of vision and then, several seconds later, she observed a bright flash and heard the sound of an explosion.

In rather colourful language, Mr Garrett submitted that even if Mr Cauchi was a billionaire, there was no way that he would have been able to carry out his own investigation and obtain the evidence set out in the investigation report. The report details the pilot's movements during the 12 hours or so prior to the flight and concludes that he would have had only two hours sleep the preceding night. The report also speaks about traces of alcohol being found in his body. In *Saumi* Justice Scott observed, in reference to the findings made in the report: 'As will be readily appreciated these allegations are highly damaging to the defendant.'

For his part, Mr Gedye was quite scathing in his condemnation of the report. He described it as a 'shoddy piece of work', a 'very hurried and shallow job ... riddled with speculation'. Counsel submitted:

> 'To establish proof of these types of allegations by a written document in the absence of its author, and the persons quoted in it, would be fundamentally unjust to the defendants. It would have the effect of reversing the onus of proof by placing all of the burden of proof (i.e. disproof) on the defendants.'

As I have indicated, the plaintiff's primary submission in relation to the

investigation report is that it is admissible as a public document under Pt VI of the Evidence Act. It appears to me, however, that this submission proceeds on a false premise. In his written submissions, Mr Garrett correctly noted that the starting point was s 91 of the Evidence Act, which defines a public document, but counsel went on to submit that the definition was 'not' inclusive. From that premise he submitted, by reference to reported decisions, that the investigation report came within the common law definition of a public document and, to that extent, it was admissible.

The definition in s 91, however, appears to me to be an all-embracing definition. The section reads:

> 'The following documents are public documents:
> (a) Documents forming the acts or records of the acts of—
> (I) the Sovereign authority,
> (II) official bodies and tribunals,
> (III) public officers, legislative, judicial and executive;
> (b) public records of private documents;
> (c) registers of births, marriages and deaths kept in obedience to any law.'

Section 94 then explains how the various categories of documentation identified in s 91 may be proved in evidence.

It is clear from the wording of s 94 that the reference to 'Sovereign Authority' in s 91(a)(I) is broad enough to encompass the respective 'Sovereign Authority' in Tonga or the government of any Commonwealth territory or a foreign state, depending upon the context.

The use of the word 'are' in the first line of s 91 indicates that the definition was intended to be exhaustive. No exceptions are provided for. In other words, the only public documents recognised in the Evidence Act are those listed in s 91. Mr Garrett did not focus on any particular limb of s 91. Instead he submitted that, as the report had been accepted by the Ministry of Tourism and Transport in Fiji, it was 'the very epitome of a public document as defined in the Evidence Act and at common law'. He also noted and stressed that the cover of the report bears the Republic's coat of arms.

Although it is not spelt out in the Evidence Act, public documents are generally admissible as to the truth of their contents—*Wilton & Co v Phillips* (1903) 19 TLR 390. Whilst the definition of a public document in s 91 largely codifies the common law position as stated in *Sturla v Freccia* (1880) 5 App Cas 623 (HL), approved by the UK Privy Council in *Ioannou v Demetriou* [1952] 1 All ER 179, it does not fully embrace the common law definition.

In *Sturla v Freccia* (1880) 5 App Cas 623 Lord Blackburn considered whether a report of a committee appointed by a public department of a foreign state and acted on by the government of that state, was admissible as evidence of the age of an appointee. Although he found that the report was inadmissible as it did not meet the conditions for admissibility, his Lordship stated (at 643–644):

> 'Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a

public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.'

In *Ioannou v Demetriou* [1952] 1 All ER 179 the Privy Council, on an appeal from Cyprus, considered whether a report of an inquiry by a surveyor of the land registry was admissible as evidence of customary rights. Their Lordships held that the report was inadmissible as it was not at all times open to public inspection. In reaching their conclusion, their Lordships applied the dictum of Lord Blackburn in *Sturla*. They characterised (at 185) the *Sturla* test as having 'dual requirements': 'the document should not only in fact be available for public inspection but it should also have been brought into existence for that very purpose ...'

The questions that determined the outcome of the case in *Ioannou* were:

(a) Was a judicial or semi-judicial inquiry held?

(b) Was the inquiry held with the object that the report would be made public?

(c) Was the report at all times open to public inspection?

(d) Were the statements made in the report made with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report upon?

Significantly, in terms of the present case, the s 91 definition of a 'public document' omits any reference to the 'quasi-judicial duty to inquire' category of documents identified by Lord Blackburn.

In the New Zealand case of *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 the Court of Appeal had to consider whether the Muriwhenua Fishing Report was a public document exempted at common law from the hearsay rule, as had been found by the High Court. Cooke P (as he then was) delivering the judgment of the court concluded (at 652):

'With respect, we differ from the High Court Judges on this point. As they said, the report is publicly available and open to scrutiny and criticism; but we are unable to share their view that this is enough to satisfy the rationale of the exception. The report is a far cry from the entries in parish registers etcetera of which Lord Blackburn spoke. It was not brought into being "with the intent that it should be retained and kept as a register to be referred to, ever after ..." Availability for public

reference was an incidental result more than a purpose. The Courts are not constrained to hold that it was brought into existence for the very purpose of public reference. Accordingly, we accept the Crown's submission that the report is not admissible at common law.'

In the present case, I am satisfied that the accident investigation report was brought into being for the stated purpose of air safety. The fact that it is now in the public arena is, to use the terminology from *Muriwhenua*, an incidental result rather than a purpose.

In general, the definition of 'public documents' in s 91 relates to documents such as birth/death certificates, registers of marriage, business records, court orders, legislation and the like. The definition is not broad enough, in my view, to encompass a document such as the investigation report in the present case.

Even if the report could be classified as a public document, however, there is an even more fundamental objection to its admissibility and that relates to its hearsay contents. The report is riddled with hearsay—in some cases double hearsay. Section 89 of the Evidence Act prohibits the admissibility of hearsay evidence unless it falls within one or other of the exceptions listed.

Mr Gedye describes the defendant's hearsay objection as 'not a mere technicality' but—

'a basic tenet of evidence law which is based on fundamental fairness and justice. The defendants cannot test or cross-examine the authors. They have no way of identifying or testing the various anonymous persons whose alleged statements are recorded in the report.'

Counsel further submitted:

'One key matter in the document is the reported results of toxicology testing (of the pilot). This too is "double hearsay": a report by ATSB of what an unnamed, unidentified doctor told the investigators. The basic facts relevant to the toxicology tests are not supplied. The statement is extraordinarily brief. With scientific or medical testing of this nature, the timing and circumstances in which the samples were taken, and the chain of custody of the samples from Fiji to Melbourne and the precise details of the testing are all critical. Neither the defendants nor the plaintiff can access the medical records or call the Australian pathologist(s) as witnesses. Air Fiji does not accept that the medical procedures were carried out properly.'

Mr Garrett suggested that the report could fall within any one of several exceptions to the hearsay rule listed in s 89 but I do not accept that submission. Perhaps the most relevant of the exceptions Mr Garrett referred to is sub-s (f), which reads:

'Where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of the duty enjoined by the law of the country in which such book, register or record is kept.'

The first criterion—that the statement refers to a fact in issue or a fact relevant to a fact in issue, narrows the inquiry to a 'fact in issue'. The authorities indicate that such facts are usually discreet and concern matters like dates, legal status of persons or places (see *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284 (relating to birth certificates), *In the Estate of Beatty* [1919] VLR 81 (fact of baptism) and *Sturla v Freccia* (1880) 5 App Cas 623 (HL) (age)). They would not include highly controversial facts such as those which the plaintiff seeks to rely upon in the present case. Nor can I accept that the report is a statement contained in an 'official book, register or record' as is required by the subsection. The investigation report is very much a stand-alone document. I do not accept, therefore, that the report falls within exception (f).

The other exception Mr Garrett sought to place particular reliance upon was sub-s (a), which reads 'Where the statement forms part of the facts or transaction which is being investigated by the Court'. Counsel submitted that the report in this case 'is surely concerned with the fact which is being investigated'. That may well be the case but the exception does not say 'concerned with'. The court can only interpret the actual words used in the statute and the words used are 'forms part of'. There is a significant difference in meaning and it cannot be said that the report falls within that category of documentation.

My conclusion, therefore, is that the investigation report is not a public document either under the Evidence Act or, for that matter, at common law. Nor does it fall within any of the recognised exceptions to the hearsay rule as set out in s 89 of the Evidence Act. The report is, therefore, inadmissible.

Having reached that conclusion, I note in passing that in Fiji recent changes have been made to the law relating to the admissibility of hearsay evidence. Section 3(1) of the Civil Evidence Act 2002 provides:

> 'In civil proceedings, evidence must not be excluded on the ground that it is hearsay.'

That, if I may say so, appears to be a commendable development in the law of evidence. It is consistent with the observation made by Lord Denning MR in *Garton v Hunter* [1969] 1 All ER 451 at 453:

> 'Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.'

In Tonga the Land Court has traditionally admitted hearsay evidence in land title cases. It may be timely for the law makers in the kingdom to follow the lead of the Republic of Fiji and review, generally, the statutory provisions relating to the hearsay rule in all civil proceedings.

APPLICATIONS FOR ORDERS RELATING TO THE CURRENCY EQUIVALENT ORDER 2003

There are two applications before the court relating to the Currency Equivalent Order 2003. The first, filed by the defendant on 7 July 2003, is expressed in the alternative. The defendant seeks an order striking out those

parts of the statement of claim which are in excess of the limits payable under the Currency Equivalent Order 2003. In the alternative, it seeks a declaration that the plaintiff's damages claim is limited to the Currency Equivalent Order 2003.

The second application is filed by the plaintiff and is dated 27 September 2004. It seeks 'a declaration that the Currency Equivalent Order made by the Government of Tonga and gazetted on 22 January 2003 be deemed, for the purposes of these proceedings, not to have been made'.

To understand what the applications are all about, it is necessary to again return to the Warsaw Convention. As indicated earlier in this judgment, unless the plaintiff is able to establish what, for ease of reference, I have referred to as 'recklessness' on the part of the carrier or his servants or agents under art 25, then, under art 22, he is unable to recover in a death claim, such as the present, more than 250,000 francs.

Article 22(5) then provides:

> 'The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness 900. The sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.'

The interesting background to this provision is described in the following passage of the United States Court of Appeals decision in *Franklin Mint v Transworld Airlines Inc* [1984] 1 Lloyd's Rep 220:

> 'Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limits subject to change by the act of one government ... Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article ... The conferees accepted the Swiss position and stated the limitation in terms of the Poincaré frank defined as ... 65½ milligrams of gold at a standard fineness of nine hundred thousandths.'

It is basically for this reason that art 22 does not speak about French francs. The currency referred to is simply 'francs'. The court was told from the Bar that the 'Poincaré' franc, no doubt named after Raymond Poincaré the French premier who had stabilised the franc on a gold basis in late 1926, was a mythical currency that never, in fact, existed. While the gold price continued to be set by law it was always possible to calculate the Convention limit simply by converting the gold value of the specified unit into the value of the national currency. The reference to gold of a 'standard fineness of nine

hundred thousandths' is a reference to gold of a purity of 90%.

It appears that all worked well with the conversion formula until 1978 when gold was abandoned as a currency and the official price of gold was abolished. The *Franklin Mint* case referred to this development as a 'plain but highly troublesome fact'. The issue that then arose, of course, was how the value of the Poincaré frank was to be determined.

That was the matter in contention in *Franklin Mint*. The plaintiff, Franklin Mint, had contracted with the defendant, Transworld Airlines Inc, for the carriage from the United States to England of 714 lbs of numismatic materials with a value in excess of $6,500. The items were either lost or destroyed in transit. Article 22(2)(a) of the Warsaw Convention limited the plaintiff's claim to 250 Poincaré francs per kilogram. The headnote to the case continues:

> 'The dollar value of that limit was calculated by converting the gold value of the specified unit into US dollars. However, by international agreement and United States domestic legislation gold had now lost its monetary function and no longer had an official price but since the term of article 22 of the Convention continued to write gold as the unit of conversion, the issue raised was what unit of account was now to be used to convert judgments under the Convention into US dollars. Four alternatives were put forward by the parties: (I) the last official price of gold in the United States; (II) the free market price of gold; (III) the Special Drawing Rights (SDR), a unit of account established by the International Monetary Fund (IMF) and recently proposed as a substitute for gold in the as yet unratified Montréal Protocols to the Convention and (IV) the exchange value of the current French franc.'

The judge in the court below in *Franklin Mint* had held that the last official price of gold was the appropriate standard and, on that basis, he awarded the plaintiff $6,475.98. The plaintiff appealed, claiming that the limit should have been calculated by other methods. After carefully reviewing each of the stated four alternatives the US Court of Appeals concluded, as summarised in the headnote:

> 'That while the Convention had not been formally abrogated, enforcement by national judicial tribunals was impossible without their picking and choosing among alternative units of conversion according to their view of which was best as an initial policy matter; the Court here had no power to select a new unit of account and the Convention's limitation of liability was unenforceable in the United States.'

The judgment noted that different countries were applying different units of conversion and the alternatives the court was being invited to consider yielded limitations on TWA's liability ranging between $6,500 and $400,000. The court said (at 223):

> 'The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which provides judgments of equal value in different currencies ... it is thus clear that neither international nor domestic sources of law specify a unit of account for the purposes of this Convention.'

At the time of Clare Bleakley's untimely death, the position in Tonga in relation to the application of art 22 of the Warsaw Convention stood as it did in the USA at the time of the *Franklin Mint* decision. Had that remained the position then it would have been necessary at the appropriate time for this court to rule on the unit of account required to convert any judgment under the Convention into Tongan pa'anga or, in terms of the *Franklin Mint* decision, to declare that the Convention limitation was unenforceable.

On 22 January 2003 there came a significant relevant development when the Minister of Finance in Tonga made what is described as the 'Carriage by Air Currency Equivalent Order 2003'. Notice of the order was published in the Tonga Government Gazette dated 21 February 2003. In the order, which was made pursuant to s 3(5) of the Carriage by Air Act 1991, the Minister of Finance specified the amounts in Tongan pa'anga which were equivalent to the sums expressed in francs in art 22 of the Warsaw Convention. The sum of 250,000 francs was expressed as being equivalent to $40,663.85 Tongan pa'anga.

The defendant claims that the figure of $TOP40,663.85 is, thus, the maximum amount of its liability under the Convention. It has already openly paid that sum into court.

The plaintiff does not agree. He claims that his entitlement falls to be considered in terms of the position as it stood at the date of his wife's death. At that stage there was no Currency Equivalent Order in force. The January 2003 Order, Mr Garratt submits, cannot be given retrospective effect.

The plaintiff has another concern about the 2003 Currency Equivalent Order. It is fair to describe it as a major concern. It has led, unfortunately, to an acrimonious and vitriolic exchange of correspondence, affidavits and memoranda between the plaintiff and his counsel on the one part and Mr Gedye on the other. It led to complaints, counter-complaints and threats of complaints being made to more than one law society and a formal application was filed with the court at one stage seeking an order preventing Mr Gedye from continuing to act in the proceeding.

The claimed basis for the plaintiff's concern was the alleged active involvement of Mr Gedye in the making of the Currency Equivalent Order in question. It was contended that the Order was made by the Minister of Finance 'with the active assistance and, in effect, on the instructions of Mr Gedye'. It was further alleged that Mr Gedye's involvement was improper given his 'vested interest' in the outcome.

Fortunately, the application to have Mr Gedye precluded from acting as counsel in the matter was resolved prior to the hearing and that issue is no longer before the court. It is still necessary, however, for me to refer to these matters because they form the basis of the plaintiff's application in relation to the Currency Equivalent Order.

In fairness, I should promptly point out that, for his part, Mr Gedye strongly denies any allegation of impropriety whatsoever. In responding to a formal complaint that had been lodged against him with the Tonga Law Society, Mr Gedye suggested that the problem had arisen because, as Mr Garratt admitted, he 'quite frankly had no knowledge of the significance of' the request being made to the minister.

The dispute I have been referring to has its origins in s 3(5) of the Carriage by Air Act 1991, which reads:

> 'The Minister of Finance shall from time to time by notice in the Gazette specify the respective amounts which for the purposes of Article 22 of the First Schedule (the Warsaw Convention) are to be taken as equivalent to the sums expressed in francs which are mentioned in that Article.'

On 7 August 2002 Mr Gedye sent a letter to the Minister of Finance (copied to plaintiff's counsel) explaining his involvement in the present case. He then went on to point out to the minister that no notice had ever been issued as required by s 3(5) of the Carriage by Air Act 1991 and he enclosed a formal request for that step to be taken. His request was in the form of a detailed submission and it concluded with a recommendation that the minister should adopt the International Monetary Fund's Special Drawing Right (SDR) as the unit of conversion.

Mr Gedye set out the detailed conversion calculations which, relevantly for a death claim, showed that 250,000 francs equalled 16,600 SDRs and, in turn, 16,600 SDRs equalled Tongan pa'anga $40,633.85. The minister appears to have acted on Mr Gedye's recommendation and issued the Currency Equivalent Notice in question, adopting counsel's precise figures.

The thrust of the plaintiff's objection to these developments appears in his two affidavits dealing with the matter. He first acknowledges that neither of his counsel had appreciated the significance of Mr Gedye's request to the Minister of Finance. He also accepted that Mr Gedye was entitled to ask the minister to issue a notice under the Act. The plaintiff, however, goes on to depose that Mr Gedye's involvement should have ceased at that point and he should not have forwarded the minister the additional detailed information and currency calculations. The plaintiff also queried whether the minister consulted or obtained advice from any other source before issuing the formal notice.

In relation to the conversion calculations, the plaintiff attached as an exhibit to one of his affidavits a letter from a gold bullion dealer which showed that if the conversion calculations had been based on the current value of gold instead of SDRs then, as at 17 August 2004, the currency equivalent figure would have amounted to Tongan pa'anga $348,000 compared with the figure in the Currency Equivalent Order of $40,663.85.

Against that rather convoluted background, I now turn to consider the applications before me. I find that I can dispose of them in relatively short time.

Mr Garratt was unable to produce any authority, and I know of none, that would allow the court to make the type of deeming order he seeks. Mr Gedye submitted that an order for a declaration striking down the Currency Equivalent Order could only be made in the context of a successful application for judicial review and the minister would need to be heard on such application. I accept that submission. Any application for judicial review at this stage, of course, would be well out of time.

The bulk of Mr Garratt's submissions addressed the unfairness of

retrospective effect being given to the Currency Equivalent Order. That, however, is a different question going to the construction and interpretation of the order. It does not allow the court to simply deem the order never to have been made for the purposes of this particular piece of litigation. I, therefore, reject the plaintiff's application.

The defendant then seeks an order striking out those parts of the statement of claim 'which are in excess of the limits payable under the Currency Equivalent Order 2003', but it has not been able to identify any particular part or parts of the statement of claim which are said to be in excess of the order's limits. The statement of claim, in fact, appears to make no reference to the Currency Equivalent Order.

In the alternative, the defendant seeks a declaration that the plaintiff's damages claim is limited to the Currency Equivalent Order 2003. I am not prepared to make such a declaration, however, for two reasons. First, as I reminded counsel at the interlocutory hearing, it was agreed some time ago that the trial would be heard in two parts dealing with liability first and then, if necessary, quantum. An order was made to that effect on 1 August 2003 and it is still extant. The issues relating to the Currency Equivalent Order are relevant to quantum rather than liability.

Secondly, I am not satisfied that I have heard all relevant argument on the topic. The explanation for this may have been pressure of time because towards the end of the second day of the hearing one of the counsel had to depart early to catch an international flight but, whatever the reason, virtually no submissions were presented to the court by either counsel in relation to this specific application by the defendant. Mr Garratt did refer to one authority, *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1989] 1 Lloyd's Rep 319, which did seem to have relevance and he produced a copy of the judgment of Rogerson J in the Supreme Court of New South Wales but it appears that the case was later taken on appeal. The appeal judgment was neither produced or commented upon. It should have been; even though it may not have dealt with the point counsel was seeking to rely upon.

Without wishing to prejudge my decision after I have heard full argument, I can indicate that I have two basic concerns about the court simply being invited to adopt the Tongan pa'anga figure stated in the Currency Equivalent Order. First, there is the fundamental abhorrence shared by most courts and embodied in cl 20 of the Constitution, against any form of retrospective legislation. Clause 20 of the Constitution of Tonga reads:

> 'It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.'

• As long ago as 1911 Skeen CJ observed, in *Re an Application under cl 85 of the Constitution* [1908–1959] Vol 1 Tongan LR 9, in relation to an ordinance which appeared to have retrospective effect:

> 'Here in Tonga we are governed by and circumscribed by a written Constitution (and laws enacted thereunder). The Constitution is precise

and clear in its language and it expressly forbids any retrospective legislation, and guards in a far more determined manner than English law any vested rights.'

Subsequently the Privy Council, referring to cl 20 of the Constitution, said in *Fulivai v Kaianuanu* Tonga LR (1923–1962) Vol II 178 at 183:

'What it does do (clause 20) however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted.'

The court has not resiled in any way from either of those statements of principle and they are equally applicable today. As I see it, they pose a formidable obstacle for the defendant in its stand over the Currency Equivalent Order.

Secondly, the final sentence in art 22(5) of the Warsaw Convention reads:

'Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.'

Mr Gedye relies upon the final words of that sentence to rebut Mr Garratt's submission that the Currency Equivalent Order is retrospective in effect but, even accepting that approach (and I express no final views on the matter at this stage), it still leaves open the earlier words in the sentence. Those words appear to be a mandatory direction to the court in judicial proceedings to convert the figure of 250,000 francs into the national currency *as at the date of judgment*. Such a mandatory direction to carry out the conversion exercise as at the date of judgment (whenever in the future that is going to be) does not sit easily alongside a Currency Equivalent Order prescribing a figure which was the outcome of a particular conversion exercise carried out back on 1 August 2002. The fluctuating currency situation can easily be seen simply by recalculating Mr Gedye's August 2002 figures as at today's exchange rates. As I understand the calculations, even if the court could be persuaded to accept the SDR unit of conversion, if the conversion exercise carried out on 1 August 2002 was to be repeated as at 31 January 2005, instead of $TOP40,633.85, the limitation figure would amount to approximately $TOP48,206.50.

I say no more on these matters but they will need to be the subject of more focused argument before me in due course. In the meantime, I decline to make any orders in relation to the Currency Equivalent Order 2003.

DEFENDANT'S APPLICATION FOR AN ORDER STRIKING OUT THE NERVOUS SHOCK CAUSE OF ACTION

The plaintiff's claim is based on two alleged causes of action. First, a next-of-kin claim under Ch III of the Warsaw Convention in which he seeks damages for economic loss and other heads of claim including nervous shock. Secondly, and in the alternative, there is a common law cause of action in negligence for damages resulting from nervous shock. Exactly how the plaintiff sees the two causes of action overlapping is something that was not fully explored before me.

The allegations made in respect of the nervous shock claim under the

Convention and at common law are identical. In summary, the plaintiff alleges that he never received any communication from the defendant regarding the accident. He had to make his own inquiries and he received conflicting advice. In the end, he telephoned the Suva police only to be told that there were no survivors. The plaintiff immediately travelled to Fiji. He was unable to visit the crash site and he was advised not to try and identify his wife's body. He was, however, shown a display of photographs of the crash site including photos of the victims. In one of photographs, he was able to recognise one of his wife's arms protruding from a gash in the fuselage. He was able to recover some personal items including rings worn by his wife. In his statement of claim the plaintiff describes his ordeal as 'horrific' and he alleges that it caused him to suffer 'extreme stress'.

The defendant does not object to the nervous shock claim being included in the Warsaw Convention cause of action. Article 24(2) allows a claimant a certain amount of flexibility in settling the precise nature of the suit he decides to bring under Pt III of the Convention. Although it does not appear from the pleadings, the defendant no doubt takes the pragmatic view that, as it has accepted liability and is prepared to pay the plaintiff what it claims is his full lump-sum entitlement under the Convention, it is up to the plaintiff how he wants to label the lump sum proceeds.

In all events, there is no dispute over the nervous shock head of damages claim under the Warsaw Convention. The situation regarding the nervous shock common claim, however, is vigorously opposed by the defendant. The primary submission Mr Gedye makes on behalf of the defendant is that, under the scheme of the Warsaw Convention, a plaintiff cannot bring a concurrent common law action in negligence. 'It is well settled law' Mr Gedye submitted 'that the Convention is an exclusive cause of action and if a remedy cannot be claimed under the Convention, it cannot be claimed at all'.

The defendant made some other submissions in the alternative, two of which I can deal with briefly. First, it is alleged that the nervous shock cause of action was pleaded in an amended statement of claim filed outside the two-year limitation period prescribed by art 29 of the Convention. That submission is correct but it is not an answer if the plaintiff is able to pursue the claim in a common law action outside the Convention. He is still within the six-year limitation period for common law claims.

Secondly, it is alleged that claims for pure mental injury such as nervous shock are not permitted under the Convention. That would appear to be the case but, again, it is no answer if a claim is able to be brought at common law outside the Convention.

I return to the defendant's principal submission that the Warsaw Convention provides the exclusive cause of action and sole remedy for a plaintiff against a carrier. As authority for this proposition, the defendant relies upon certain passages from the authoritative text on carriage by air—Shawcross and Beaumont *Air Law* and two relatively recent decisions of the House of Lords. The passages from Shawcross and Beaumont, appearing respectively at paras 405 and 407, read as follows:

'Two types of issue can be distinguished. The first concerns cases in which the carrier is clearly liable under the Convention rules. In such a case must the claim be framed in terms of the Convention or can it be based on some other cause of action? This issue can be described for convenience as "the cause of action issue". A second concerns the possibility of using non-Convention causes of action to circumvent the limitations on the carrier's liability set out in the Convention; it is clear that this is not to be permitted ...

What is clear is that if the carrier is liable under the Convention, there can be no liability on any other basis. If, for example, the claim under the Convention is time-barred as a result of the two-year limitation period in article 29, the plaintiff cannot invoke any other basis of liability. Where the Warsaw Convention applies, its limitation and theories of liability are exclusive.'

The first of the House of Lords decisions relied upon by the defendant is *Sidhu v British Airways plc* [1997] 2 LRC 149. That case involved a British Airways flight from London to Malaysia on 1 August 1990. While the passengers were in transit at Kuwait airport terminal during a fuel stopover the airport was attacked by Iraqi forces who had invaded Kuwait four hours previously. The passengers were taken to Baghdad as prisoners and released several weeks later. The appellants, who numbered four of the passengers, failed to bring a claim under the Warsaw Convention within the prescribed two-year limitation and so they proceeded to issue proceedings against the airline at common law based on negligence. The common law action had been struck out in the court below and that decision was upheld by the House of Lords on appeal. After reviewing the history of the Convention and the authorities Lord Hope concluded his speech with the oft-quoted passage (at 171):

'The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.'

Earlier in his speech His Lordship, in reference to the 'purpose' of the Convention, had said:

'Thus, the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.' (See [1997] 2 LRC 149 at 165.)

The more recent House of Lords decision relied upon by Mr Gedye is *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 5 LRC 721. The House of Lords had before it two conjoined appeals involving the question whether an air carrier was liable under art 17 of the Warsaw Convention for mental injury sustained by a passenger without any accompanying 'bodily injury'.

Kelly Morris had been travelling as an unaccompanied minor. She fell asleep and woke to discover that the man sitting next to her was caressing her left thigh from the hip to the knee. She was very distressed. Although she did not suffer any physical illness or injury she was subsequently diagnosed as suffering from clinical depression.

In the second appeal Philip King was a passenger on board a helicopter which had taken off in bad weather from a floating platform in the North Sea oilfield. The two engines of the helicopter failed and the machine, engulfed with smoke, landed heavily back on the helipad. Mr King did not sustain any physical injuries but he was very traumatised by the ordeal and later developed several psychiatric conditions, including a moderate post-traumatic stress disorder.

Once again the House of Lords comprehensively reviewed the history of the Convention and the authorities, concluding that neither action could succeed. The House reaffirmed that where the mental injury or illness lacked a physical cause or origin, it could not constitute a 'bodily injury' within the meaning of art 17 of the Convention. The house approved the earlier decision of *Sidhu*. In his speech, Lord Hope of Craighead restated the principle that the Convention excluded other forms of remedy at common law. His Lordship went on to say ([2002] 5 LRC 721 at [66]):

'But it the Convention defines those situations in which compensation is to be available, and it sets out the limits of liability and the conditions under which claims to establish liability, if disputed, are to be made. A balance has been struck between these competing interests, in the interests of certainty and uniformity.'

Mr Garrett submitted that the whole issue of the exclusivity of the Warsaw Convention is 'very complex'. He noted that, while the decisions of the House of Lords may have settled the position in England for the time being, they are not binding on this court. He also stressed what he described as a 'crucial distinction' between the two House of Lords decisions and the present case, namely that in the English cases the claimants were passengers whereas the plaintiff in the present case was a non-passenger.

One of the authorities Mr Garrett referred to was the decision of the Australian Federal Court in *South Pacific Air Motive Pty Ltd v Kenneth Magnus* (1998) 87 FCR 301. That case was concerned with a chartered flight from Sydney to Norfolk Island involving a party of students. Shortly after takeoff from Sydney airport the plane ditched in the waters of Botany Bay. No one was killed in the accident but three years later some passengers and parents of passengers issued representative court proceedings based on common law negligence.

The airline sought summary dismissal of the claim on the basis that it was outside the two-year limitation period. The flight in question was a domestic carriage and, therefore, it was not covered by the Warsaw Convention as such

but, as many of the principles embodied in the Convention were reflected in the (Australian) Civil Aviation (Carriers Liability) Act 1959, the Convention itself came in for close analysis by the court. Of particular significance to the case before me was the way in which the court approached the nervous shock claims by non-passengers.

Beaumont J referred back to Lord Hope's statement in *Sidhu* that the Warsaw Convention provided the exclusive cause of action and sole remedy for a passenger. Whilst recognising that his Lordship was referring to passengers who were in a contractual relationship with the airline, Beaumont J concluded (at 318):

> 'The policy considerations mentioned by Lord Hope are equally pertinent here, notwithstanding the absence of a contract of carriage between the carrier and this class of claimants.'

His Honour, following the *Sidhu* approach, held that non-passengers had no rights to damages outside the Act.

On the same point, the two other members of the court, Hill and Sackville JJ, reached the opposite conclusion, holding that the Act had no application to claims by non-passengers for psychological injuries.

While acknowledging that the majority decision in *South Pacific Air Motive* was not binding in Tonga, Mr Garrett submitted that the three judgments showed the diversity of opinion on the topic and, for that reason, the common law cause of action should not be struck out at this stage.

Whilst I accept the force of Mr Garrett's submission, I find the decisions of the House of Lords in *Sidhu* and *Morris* highly persuasive in relation to the issue I now have to determine. It seems to me that the purposive construction given to the Convention, as exemplified in those decisions, makes it clear that the Warsaw Convention should be regarded as an exclusive cause of action so that if a remedy cannot be claimed under the Convention then no remedy is available. In this regard, I find, with respect, the reasoning of Lord Hope in both cases compelling and on all fours with what I perceive to be the intendment of the scheme.

Although I acknowledge that the House of Lords was dealing with claims by passengers, all the pointers are that in a non-passenger situation the same principle should be applied with, perhaps, an even more aggressive fervour. If air carriers were to be exposed to damages claims falling outside the Convention by non-passengers based on causes of action such as nervous shock and psychological injuries, the floodgates would surely tumble and the Convention rules relating to international carriage by air would soon be subverted. It seems to me that, wherever the boundary lines are finally drawn for the still emerging nervous shock cause of action, they will be unable to make any inroads into the now entrenched principle of construction that the Warsaw Convention is a comprehensive code which excludes any other form of domestic remedy by passengers or non-passengers alike.

For these reasons I uphold the defendant's application and the plaintiff's second cause of action is struck out.

In summary, therefore, my decision is:

1. The second defendant is struck out as a party;

2. The accident investigation report is ruled inadmissible;
3. No order is made in relation to the Currency Equivalent Order;
4. The nervous shock cause of action is struck out.

I make no order as to costs in relation to the Currency Equivalent Order but the defendant is awarded costs in respect of the other applications, to be either agreed or taxed.