

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)**

Civil Case 14/15 SC/CC

BETWEEN: JOHN TARI OBED
Claimant

AND: AIR VANUATU (OPERATIONS) Ltd
Defendant

Hearing: 19th September 2017

Before: Chetwynd J

Counsel: Mr Tari for the Claimant
Mr Nalyal for the Defendant

JUDGMENT

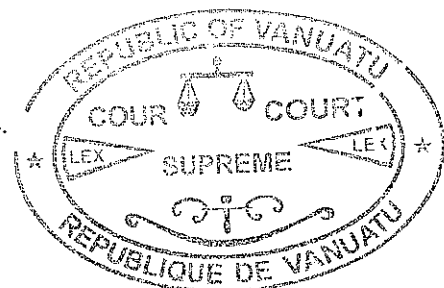
1. On Easter Monday 1st April 2013 at about 12:45 in the afternoon the Britten-Norman aircraft registration number YJ – RV16 took off from Pekoa airfield on Santo to fly to Walaha airfield on West Ambae. This was a regular scheduled flight for Air Vanuatu the defendant (“the airline”) numbered NF228. It is usually a 15 or 20 minute trip. The aircraft was piloted by John Tari Obed, the Claimant in this case (“Mr Obed”). After an uneventful flight there was, unfortunately a somewhat eventful landing. The aircraft ended up skidding off the runway and colliding with a flag pole and the old terminal building at Walaha. No one appears to have been injured in the accident.

2. In the Aircraft Flight Log ¹ completed by Mr Obed shortly after the accident there is an entry which reads, “NF228, loose (sic) all brakes went into old terminal”.

3. On 2nd April 2013 Mr Obed was suspended from flight duties, “...until the accident investigation into the flight of YJ-RV16 is concluded” ². What happened to Mr Obed after that is unclear. One of the agreed facts in this case is that he is no longer employed by the airline. There appear to have been two investigations into the accident, one by the Civil Aviation Authority of Vanuatu (“CAAV”) and one by the airline. The former was completed in June 2013 and the one by the airline sometime later. There is no claim that Mr Obed was dismissed and it can only be presumed that his contract expired by effluxion of time.

¹ See Exhibit “JTO 1”

² See annexure “JTO 6” to Mr Obed’s sworn statement filed on 9th July 2014.



4. On 9th July 2014 Mr Obed filed a claim for Judicial Review. The claim asked for a review of the airline decision to suspend him on 2nd April 2013, a payment of compensation and damages for distress and trauma. The case was initially managed by Harrop J. He records in a Minute dated 3rd October 2014 that the employment related issues had been resolved and the claim would no longer be conducted as a Judicial Review. An Amended Claim was filed on 27th November 2014 claiming the "crash landing" of YJ-RV16 was caused by the negligence of the airline. In another Minute dated 3rd December 2014 Harrop J notes;

"I have pointed out (to counsel) today my initial reaction that the possibility of claiming damages by way of compensation against the defendant, even if it was negligent and its negligence caused the crash landing, for saving lives, saving cargo and saving the aircraft is problematic."

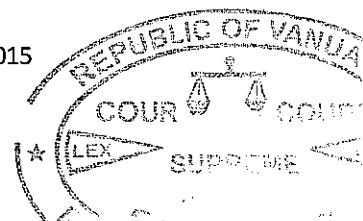
5. Following the hearing on 3rd December 2014 the airline was given time to either file a defence or file an application to strike out the claim. The airline chose the latter course and, after some false starts, a hearing was scheduled. On 6th June 2015 Harrop J notes that a Further Amended Claim had been filed. That seemed to render the application to strike out otiose. On 29th June 2015 the airline filed a defence and counter claim. In September the case file was transferred to my docket.

6. In February 2016 the parties requested time to negotiate a settlement. Unfortunately no settlement was possible and the case was set down for trial.

7. What is now before the Court is the claim set out in the Further Amended Claim filed in June 2015. The claim is based on negligence. Mr Obed avers the airline owed him (and all other employees) a duty of care. He says the airline has breached that duty to him by, basically, failing to ensure the brakes and the steering system of YJ-RV16 were properly maintained and that as a result the crash landing occurred and he suffered distress and trauma. The defence is a general denial and the counter claim is for a finding of contributory negligence (if there is a finding of negligence against the airline) and damages for the costs of repair to the aircraft.

8. By way of background, the airfield at Walaha has one runway. It is grass over compressed or compacted coral. It has an unusual, but not unique, arrangement of aircraft landing in one direction and taking off in the opposite direction. The runway slopes upward from the sea shore with the lowest point being about 51 feet above sea level and the highest point being about 151 feet above sea level³. The approach for landing would be over the sea and the aircraft would fly on a magnetic compass heading of 164 degrees. The landing runway is designated by the first two digits as runway 16. Take off is in the opposite direction downhill on a heading of 344 degrees

³ See annexure NK1 attached to the sworn statement of Naiany Karu filed on 22nd December 2015



and hence the take-off runway is runway 34. The runway is approximately 725 metres long and about 35 metres wide⁴.

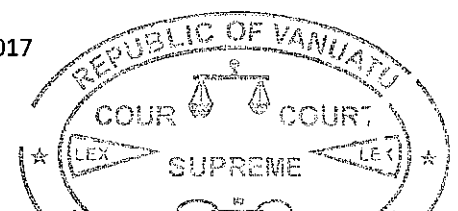
9. The one way runway configuration means that take offs and landings are dictated by geography and not, as is more usual, by wind direction. Aircraft generally land and take off into the wind but at Walaha they take off on runway 34 and land on runway 16 no matter what the wind direction is.

10. The aircraft involved, YJ-RV16, was a Britten-Norman Islander. Most people in Vanuatu have seen, even flown in an Islander. The aircraft was not new having been built in 1969 and arriving in Vanuatu from New Zealand in 1999. It is a twin piston engine aircraft with 9 passenger seats. The "right hand seat" at the front of the aircraft next to the pilot is used as passenger seat. The CAAV report referred to in paragraph 3 (and noted at foot note 3 on page 2) shows that the aircraft had been through its scheduled servicing and checks with the latest dated 20th November 2012. The airline report (also referred to in paragraph 3 but noted at foot note 4 *ibid*) states that the nose wheel steering mechanism had been inspected on 5th February 2013 and again on 19th March 2013. There was no evidence about the performance characteristics of the aircraft.

11. Mr Obed's evidence, confirmed by his statements to the CAAV, is that he turned onto finals (onto the heading of 164 magnetic) in preparation for landing 5 nautical miles (Nm) from the runway. His airspeed (the speed of the aircraft through the air) was 100 knots (light aircraft speeds are commonly measured in nautical miles per hour or knots, kts) and he had a tail wind of between 5 and 8 kts. At a distance of 3 Nm speed had been reduced to 80 kts and just before touchdown speed was 60kts. No evidence was given about the effect of a tail wind but it is a matter of logic and science that a tail wind (that is a wind blowing generally in the same direction an aircraft is travelling) has the effect of increasing the speed over the ground of the aircraft. I can take judicial note that 1 knot equals 1.15 miles per hour or 1.85 kilometres per hour.

12. Mr Obed states he touched down on the main landing gear (that is the wheels under the wings) about 50 metres in from the runway threshold. He began to lower the nose of the aircraft and when the nose wheel touched down the aircraft veered to the right. The available evidence suggests this would have been at or near a point 387 metres from the threshold (or useable beginning) of runway 16. This is where the CAAV report states finding evidence of distinct wheel marks. He then used the left brake to try and keep the aircraft travelling straight ahead. The brakes on an aircraft are operated by pressing the rudder pedals. Those pedals control the rudder of the aircraft, the nose wheel and the brakes. Unlike a car there are two brake pedals, the right pedal operates the right brakes on the main landing gear and the left pedal the left brakes. They operate independently and can be used to control

⁴ See annexure JL1 attached to the sworn statement of Joseph Laloyer filed 21st July 2017



direction. The brakes are operated by pressing the top of the pedal downwards. The rudder and the nose wheel are operated by pushing the pedals forward. To turn the aircraft to the right the right pedal is pushed forward and to turn left the left pedal is pushed forward. The pedals "pivot" so as one moves forward the other moves back. This arrangement allows a pilot to both brake and steer the aircraft at the same time.

13. Mr Obed says the left brake was not working and the aircraft was continuing turning to the right. To counter that he tried applying more power to the right engine. That did not stop the aircraft exiting the runway and it ran through some long grass. The CAAV report says this was at about 615 metres from the threshold. It then entered an area of shorter grass but rough terrain in front of the new terminal at about 642 metres from the threshold. The aircraft finally stopped 700 metres from the threshold. Both the CAAV and the airline reports mention skid marks on the ground but neither author was able to say where the aircraft first touched down.

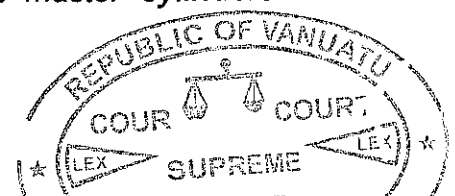
14. It is Mr Obed's opinion that the aircraft first veered to the right because the right hand cable from the rudder pedals to the nose wheel snapped. His evidence is that after the crash landing he was curious as to why the aircraft suddenly veered to the right. He checked the steering assembly. He avers in his Reply to Defence and Defence to Counter Claim filed on 11th August 2015 that the cable was "*badly corroded*" and that it was not a genuine manufacturer's cable. He repeats these allegations in his sworn statement filed on 12th October 2015. He also says the airline failed to inspect the aircraft and specifically failed to inspect the steering system and the brakes. In his evidence Mr Obed says he was unable to correct to turn to the right by using brakes because the left brake failed. His evidence is he reported there was a pool of hydraulic fluid under the brake pedals to the airline's engineers, "*... a few weeks before the incident at Walaha.*" He goes on to say that on each day he was flying the aircraft he checked for leaks but found none.

15. As regards the braking system of the aircraft there are statements about what was found by others. The CAAV report states in its findings:-

"The brake fluid reservoir on the left rudder pedals was empty, compared to the brake fluid on the right rudder pedals which was 100% full. Inspections of the left tyre showed a very small quantity of hydraulic fluid under the left inner tyre presumably having leaked from the brake assembly. However, the quantity of fluid was not sufficient to warrant that the fluid had all leaked out from the brake fluid reservoir. Close inspection of the grass surfaces on the runway showed no signs of hydraulic fluid leakage."

The report goes on to say:-

"A work card specific to the aircraft in question dated 13th March 2013 and signed off on 19th March 2013 showed the brake unit master cylinders



servicing and correct fluid levels check as having been carried out. However, there was no clear record of a daily check inspection sheet to verify that the correct fluid reservoir was present before the accident date."

16. The airline report states:-

"It was noted that the left hand brake reservoir was empty. A slight sign of hydraulic fluid could be seen under the left inner brake assembly.

No significant recorded maintenance defects with regards to the left hand brakes were noted for the period 01 April 2012 to 01 April 2013."

17. As regards the steering mechanism the CAAV report says:-

"The aircraft R/H steering cable snapped during the landing roll. There are two cables in the nose wheel steering system and there may be reason to believe that while the L/H system cables were genuine Islander parts, the other cable may have been made up of bogus parts."

The airline report states:-

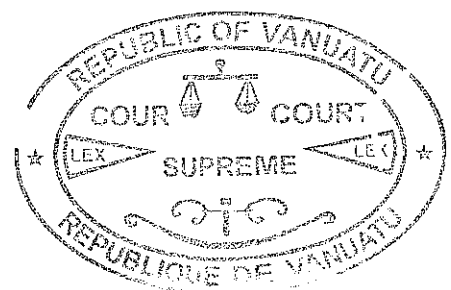
"The nose wheel steering mechanism is inspected every 100 hours. Prior to this accident, it was inspected on 5th February and March 19th 2013. This inspection covers various parts of the nose wheel steering, i.e. there is no individual task card for e.g. the cable."

18. Surprisingly neither the Claimant nor the Defendant produced any of the engineering or inspection reports for YJ-RV16. It is of course for the claimant to prove his claim on the balance of probabilities, he has to show that it is more likely than not that the airline failed to maintain YJ-RV16 and that that failure was negligence on the part of the airline. As was pointed out by Harrop J⁵ the Claimant must also show that the negligence resulted in the crash landing at Walaha airfield. So far as the first leg is concerned the lack of records might be said to support the claim but the reports, and in particular the CAAV report, do not.

19. I would also mention it was said in evidence the airline probably retained the broken steering cable. It was not produced in Court. No investigation was apparently carried out by either the CAAV or the airline concerning the provenance of the cable. What is said by the airline⁶ is that all their spare parts for the Islander were purchased from New Zealand from, "Martin Aviation Services Ltd, a New Zealand company certified by the Civil Aviation Authority of New Zealand". There appears to

⁵ See paragraph 3 above

⁶ See the sworn statement of Mr Simon Nompavos filed 26th July 2016



have been no forensic examination of the cable to establish whether it was corroded. There is no mention of corrosion in the CAAV report.

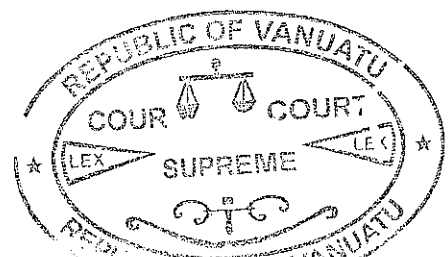
20. In the Particulars of Breach of Duty set out in the Further Amended Claim of June 2015 there is an averment by Mr Obed that he did, "*on several occasions report that there is a problem with the steering cable which require parts to be replaced*". No evidence of these reports was produced by Mr Obed. As is set out in paragraph 17 above the airline says there were inspections of the steering system in February and March 2013.

21. One thing is apparent from the evidence; the airline's aircraft are subject to inspections on a daily basis. This is a company requirement of the airline. This is in addition to inspections covered by legislation such as those referred to in section 17 of the Civil Aviation Act [Cap 258]. There are also the aircraft manufacturer's recommended maintenance schedules which set out inspections and maintenance work required on the aircraft. Many of these inspections are carried out by a specialised and qualified mechanic and technician. They are known as a LAME or Licensed Aircraft Maintenance Engineer. LAME's also carry out the actual maintenance work on the aircraft.

22. It is not in dispute that YJ-RV16 had been based away from Port Vila at Pekoa airfield on Santo for a period of 5 days. The relevance of that is there was no qualified approved LAME based at Pekoa. In order to provide for regular inspections in such circumstances the pilots were given training so they were qualified to carry out daily checks. These were known as A checks. There is no real dispute that Mr Obed was given such training in October 2012. A certificate to that effect was annexed to the Simon Nompavos's sworn statement of 26th July 2016 as SN1. There is some confusion as to whether that certificate was shown to the CAAV (they seem to say not) and if it was whether the CAAV accepted the training as being sufficient to qualify a pilot to carry out these daily checks. So far as the airline was concerned the pilots were required to do these daily A checks.

23. This was in addition to the pre-flight checks normally carried out by a pilot before every flight. Mr Obed acknowledges that he did carry out daily A checks on YJ-RV16 whilst it was at Pekoa. He also appears to say he daily checked the brake system for leaks (see paragraph 14 above). The distinction Mr Obed makes seems to be that A checks only require the pilot to check for leaks and not check on the level of hydraulic fluid in the master cylinders. The CAAV report seems to suggest that daily checks of hydraulic fluid levels are required.

24. The A checks did not require a pilot to minutely examine the steering cables but did require daily inspection of the "*Steering/centering mechanism rod and cable*



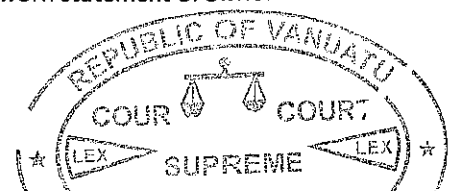
*attachments (as visible)*⁷. No evidence was made available as to whether the area of alleged corrosion or the exact site of the cable break would have been visible on such inspection. From Mr Obed's sworn statement of 12th October (Paragraph 3(d)) it was likely the actual site of the break in the cable was not visible during an inspection required under the A checks schedule. It is unlikely that the inspection would reveal if the cable was a genuine spare part. It is of note that the CAAV report is couched in language which makes it uncertain whether "bogus" parts had in fact been fitted. The report says, "*there may be reason to believe*" the right hand cable was made up of bogus parts. Later in the safety analysis the CAAV states, "*There is a possibility the aircraft was fitted with unapproved steering cables...*". There is no positive finding about the cable, no positive finding that it was not a genuine cable. As mentioned in paragraph 19 above, there was no forensic evidence at all about the cable.

25. Looking at the evidence as a whole one would have to say Mr Obed has not established that the airline failed to properly maintain the aircraft or arrange for faults to be repaired or to carry out regular inspections or that they were negligent in that regard. The evidence strongly suggests that the airline had established an inspection regime to take account of the fact a LAME was not available at Pekoia. Whilst I accept that the certification of training to carry out A checks did not mean that a pilot was properly qualified to maintain an aircraft it did mean the pilot was suitably trained and qualified to inspect the aircraft to determine if maintenance was required. If it was, as pilot in command, he would have the last word as to whether the aircraft would fly that day. One would have to presume that a pilot who thought crucial maintenance was required would not risk his safety or that of his passengers by flying without that maintenance having been carried out.

26. Even if I am wrong and the airline did allow Mr Obed to fly in an aircraft with faulty brakes and steering in breach of a duty of care to Mr Obed and was therefore negligent, on the balance of probabilities, Mr Obed has failed to prove that the accident occurred as a result of any negligence by the airline.

27. There are some aspects of Mr Obed's explanation for the accident which are puzzling. In normal operation the direction the nose of the aircraft points to (yaw) is controlled by two main mechanisms, the rudder and the nose wheel. On the ground at slow speeds direction is controlled by the nose wheel. In the air and at higher speeds on the ground it is the rudder which controls "direction" or yaw. Mr Obed's evidence is that the rudder was not effective at controlling direction or yaw at speeds less than 60 kts. For the airline Mr David Key's evidence was that directional control of the aircraft by the rudder would only be lost at or close to stall speed. In normal conditions that could be between 30 and 35 kts. In other words a pilot could maintain directional control and stability on the ground for some time during the landing roll by

⁷ See the Britten-Norman Islander Maintenance Schedule annexed as SN3 to the sworn statement of Simon Nompavos



using the rudder. There has been no evidence or suggestion that the cables to the rudder were broken or that the rudder mechanism was in any way defective. The cables which control the rudder are not the same cables which control the nose wheel.

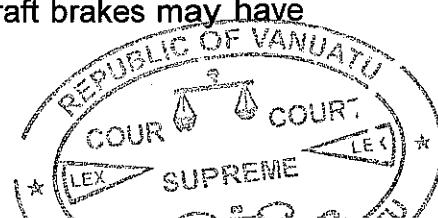
28. The evidence is clear that the right nose wheel cable was broken. No evidence was led about how that affected control. One could assume that the right cable was attached to the right limb of the rudder pedals and caused the aircraft to turn right. If that is so why could Mr Obed not turn the aircraft to the left with the left cable still intact ? There may well be a simple explanation but none was given.

29. As set out in paragraph 2 above the initial explanation for the accident was written on the Aircraft Flight Log. There is no mention of problems steering the aircraft in that entry. I appreciate there is no space and quite probably no requirement for a detailed explanation to be written there but why was there no reference to loss of nose wheel steering there. In the airline report there is reference to a conversation with the Air Vanuatu Walaha agent when again there was only reference to brake failure.

30. Turning now to the question of the speed and the actual landing area. Mr Obed has always maintained that his airspeed at touchdown was 60 kts. This would translate to a 68 kts ground speed. In addition he is adamant he touched down about 50 metres from the threshold. Two passengers were interviewed by the CAAV and two by the airline. It is not known whether these were the same passengers. In the airline report both passengers are said to have stated that the aircraft was travelling very fast on the runway. There is a sworn statement by one passenger who flew that day, Mr Dick Rasa. He had flown into and out of Walaha airfield many times. He boarded the aircraft at Pekoa. He was sat just behind the pilot Mr Obed. He states that the aircraft, "... touched the airport runway about 90-100 metres in from the start of the runway". He goes on to say the aircraft started to, "... taxi at a fast speed toward the terminal". The aircraft was travelling very fast when it started vibrating and it suddenly swerved to the right. This evidence was unchallenged.

31. Finally, there is the question of overloading. The CAAV deals with this issue in one of its findings where it says the aircraft landed above its certified landing weight in the aircraft flight manual and no c of g (centre of gravity) calculation had been completed prior to departure (from Pekoa) in accordance with CAAV rule 135.305(a)(b). These matters presumably would affect the flying (and landing) characteristics of the aircraft. However, no evidence was produced as to exactly what effects there would be on the aircraft.

32. Given the contradictory evidence it is not possible to say exactly what caused this accident or why it happened. There is some independent evidence to say the pilot may have been at fault and there is some to say the aircraft brakes may have



been faulty. Neither Mr Obed as claimant nor the airline as counterclaimant can prove the cause of the accident. Mr Obed has failed to prove the airline was negligent or that such negligence caused the accident. The weight of the evidence does not support such findings. His claim against the airline must fail and is therefore dismissed. On the other hand, the airline has failed to prove, on balance, that Mr Obed was negligent by allowing the aircraft to fly whilst overloaded or by failing to sign documents prior to departure or by failing to land safely or indeed that any negligent act on his part caused damage to the aircraft. The airlines counterclaim must also fail and is therefore dismissed. Given that result I shall make no order as to costs.

33. There is one final matter I would like to comment on. The report from the CAAV was only made available after an order to produce it was served on the Director. There is a section in the report which states that it shall not be used to apportion blame or determine liability. Quite clearly the CAAV does not want to be seen taking anyone's side. I understand the desire, indeed the need for the CAAV to be seen as independent and unbiased in its investigations. However, I hope the CAAV can moderate its position slightly because as regards any future incident it may be the only body or authority in the jurisdiction with the expertise and resources to produce a meaningful report. I am happy to say in this case I found the report informative and well balanced and as a consequence it was a great help to me. I accordingly record my thanks the Director and his staff for their assistance.

Dated at Port Vila this 27th day of September 2017.

BY THE COURT


.....
David Chetwynd
Judge

