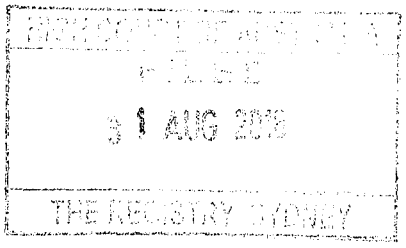
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S140 of 2018

BETWEEN: **PARKES SHIRE COUNCIL**

(ABN 96 299 629 630)

Appellant



AND

SOUTH WEST HELICOPTERS PTY LTD

(ABN 64 085 167 951)

Respondent

APPELLANT'S REPLY

Part I:

1. I certify that this reply is in a form suitable for publication on the internet.

Part II:

2. Respondent's submissions [**RS**] [19]-[27] are based on what it refers to as "the English translation" of the official French text of Articles 17 and 24 of the Warsaw Convention. It cites no evidence or authority for this "translation", which is in fact a rendering of the French text referred to as the "official American translation" in *Zicherman v Korean Air Lines Co*[1]. A comparison of the punctuation of the French text of Art 17 set out at the foot of p222 in *Zicherman* makes clear that it is a rendering into an English form, rather than a strict translation, and a rendering that in its opening words is different to the English text set out in the CACL Act. A precise translation of the key phrase would read "in the case of death, of wounding or of any other bodily injury suffered by a passenger", which links the damage more directly to that which is suffered by the passenger than in the English rendering. No translation evidence was led below and the respondent identifies no

[1] (1995) 516 US 217 at 221.

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juridical basis upon which such material can be introduced in submissions in an appeal *stricto sensu*. RS [19]-[27] should be disregarded.

3. A carrier will have a potential liability outside of the Warsaw Convention or its successors ("the Conventions") to a non-passenger who witnesses an aviation accident and suffers a psychological injury, who suffers a physical injury by virtue of an aviation accident, or who suffers property damage by virtue of an aviation accident. A non-passenger whose injury is psychological, arising following the death of a passenger, should be treated no differently.
4. Respondent's submission at [6] sets out the outcome for which it contends. The interpretation of Part IV of the CACL Act provided for in that statement results in a situation in which:
    a. the relational terms "by reason of" in s28 and "in relation to" in s35 are cast as widely as possible, and
    b. such remedies as are available for any harm which would be contemplated as arising by reason of a death of a passenger, or in relation to a death of a passenger, are solely those which are prescribed within Part IV.
5. To interpret ss 28 and 35 in this manner is to expand the substantive scope of Part IV of the CACL Act, together with the Conventions, beyond that apparent from the terms of the Act, read in context.

The "Cardinal Purpose"

6. The approach adopted by the Respondent proceeds upon a reading of the Conventions as adopted domestically by 2006 which mistakenly elevates the limitation of liability of carriers over other ends which the Conventions seek to achieve.
7. It is plain from the text of the Conventions that they seek to balance rights as between carriers and passengers. They eliminate the right of the carrier to contract out of liability and remove the need for the passenger to prove negligence (or contractual fault) in order to establish liability. In return the carrier receives a limitation of its liability. This was described in *Sidhu* as "plainly a compromise"[2].

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[2] *Sidhu v British Airways Plc* [1997] AC 430 per Lord Hope of Craighead at 447. See also *South Pacific Air Motive Pty Ltd v Magnus* (1998) 87 FCR 301 at 334G - 335B and at 336D - 338A.

8. The existence of those broader purposes is reflected in the Australian context. In the second reading speech for what became the CACL Act, it was stated the "most important objective"[3] in applying the principles arising from the Conventions to domestic aviation was to deprive carriers of the right to contract out of all liability. It was stated that the CACL Act was a "fair balance" between the interests of the carrier and the interests of the users of air transport[4].
9. The common feature of the cases[5] upon which the Respondent places reliance is a focus upon the inviolability of the "exclusive code" in the circumstances of its operation, not upon the operation of the code to persons outside of the direct carrier/passenger relationship.
10. This approach ignores the limited substantive scope of the Conventions. The Respondent assumes that the purpose of limiting carrier liability dominates, and erroneously elevates consideration only of the timing and nature of an event as the sole determinant of the Conventions' operation.

***Zicherman* and Art 17, 24**

11. The decision in *Zicherman* does not advance the Respondent's argument. Scalia J recognised at 221-224 that it was for domestic legislatures to fill in not only those factors expressly recognised in Art 24, but also to determine the scope of what constitutes legal cognisable harm for the purpose of Art 17. As Scalia J noted at 221-224, the correct approach to interpretation is not simply to take the ambit of the possible words of Art 17 at their broadest. The example given at 222 of mental distress suffered by a stranger who reads of an airline death in the press as a form of injury that is plainly outside Art 17 illustrates the point. Mental injury suffered by a non-witness was not compensable in Australia in 1959 when Parts II, III, IV and V were enacted, including s 28 and ss 35-37 in essentially the form they took in 2006.
12. No contrary view is suggested by the drafting minutes behind the Warsaw Convention. What can be taken from an isolated comment of the British delegate is, at best, ambiguous. The better explanation of both the reasons for the structure of Art 17 and 24, and their construction, is that given by Leeming JA at [291].

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[3] Australia, House of Representatives, *Parliamentary Debates* (Hansard) 7 April 1959 at p3.

[4] Ibid at p5.

[5] At [41] - [44] of its submissions

13. This view of the operation of Art 17 and 24 is supported by the change to the opening wording of Art 24 brought by the Montreal (No 4) Convention[6].

Part IV of the CACL Act

14. The same is true in the interpretation of both ss28 and 35 of the CACL Act. The task in which the Court is engaged is not simply to assume the widest possible ambit of the words of s28, and then refine by reference to the remaining provisions of Part IV those types of claim which are allowed within that ambit and which are refused. This is not altered by the need to read the words "in respect of" in 35(2) cohesively and in light of the words "by reason of" in s28. The reasoning of Leeming JA at [278] is apt.

15. Neither the plain words of s28 or s35(2), nor the second reading speech, give any indication that liability as limited should arise in any circumstance in which a person conceivably suffered harm by reason of the death of a passenger, with that same (and all other) liability to be extinguished unless the person can bring themselves within s35(3) - (10).

16. The operation of s37 should be seen as recognising that, absent its operation, claims for contribution between tortfeasors or for recovery by employers would be extinguished by virtue of the fact that they are inevitably derivative claims hinging upon a duty of care or other legal obligation owed by carrier to passenger. It is no cause for a more expansive interpretation of the words "in respect of" in s35(2)[7].

Comparative Torts Analysis

17. In this context the Respondent's comparative torts analysis does not assist in answering the fundamental question of the substantive scope of the Convention. The differing approaches adopted by other signatory nations does not compel a conclusion that a broader approach should be taken to the operation of the exclusive code in circumstances in which the limitation of the carriers' liability is not to be given the primacy for which the Respondent contends.

18. The Warsaw Convention represented a compromise on the part of the signatory nations in an endeavour to reach common ground. The result was to confine the

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[6] Note this is partially addressed, without a conclusion being reached, by Leeming JA at [302] - [310]

[7] See Leeming JA at [287], [328].

subject matter which the Conventions seek to regulate. It is left to the signatory nations individually to deal with the remainder.

19. The comparative torts analysis of the Respondent shows merely that there is no consistent approach adopted by the signatory nations as to the manner in which they address claims in the nature of the nervous shock actions brought by the members of the Stephenson family.

Contractual Argument

20. The fact that others may contract upon behalf of a passenger does not derogate from the proposition that contractual relationships underpin the operation of the exclusive code. Although others (such as employers) may be the contracting party from a privity perspective, the relevant point is that the contract is for the benefit of the passenger.

Dated:

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