66

AUSTRALIAN NATIONAL AIRLINES COMMISSION

v.

THE COMMONWEALTH OF AUSTRALIA AND
CANADIAN PACIFIC AIRLINES LIMITED

ORDER

In the plaintiff's action. Judgment for the plaintiff for $552,378.67 against the defendants. Judgment for the first defendant against the second defendant for $236,733.72 on the first defendant's claim for contribution. Judgment for the second defendant against the first defendant for $315,644.96 on the second defendant's claim for contribution.

In the second defendant's counterclaim. Judgment for the second defendant against the plaintiff and the first defendant for $281,259.30. Judgment for the plaintiff against the first defendant for $160,719.60 on the plaintiff's claim for contribution. Judgment for the first defendant against the plaintiff for $120,539.70 on the first defendant's claim for contribution.

Order that the first defendant do pay one-half of the costs of the plaintiff and the second defendant of this action, excluding the costs of the second defendant of its application for inspection of the Cockpit Voice Recorder of the plaintiff's aircraft VH-TJA for which separate provision has been made; otherwise no order as to costs.

Usual order as to exhibits.

AUSTRALIAN NATIONAL AIRLINES COMMISSION

v.

THE COMMONWEALTH OF AUSTRALIA AND
CANADIAN PACIFIC AIRLINES LIMITED

JUDGMENT MASON J.

AUSTRALIAN NATIONAL AIRLINES COMMISSION

v.

THE COMMONWEALTH OF AUSTRALIA AND
CANADIAN PACIFIC AIRLINES LIMITED

At 2136 hours, approximately, on 29th January 1971 at the Sydney Airport the plaintiff's Boeing 727 VH-TJA, taking off in a southerly direction along runway 16 in accordance with a clearance for immediate take-off given by the Aerodrome Controller (an officer of the first defendant in the Department of Civil Aviation, now the Department of Transport), struck a McDonnell-Douglas Super DC8 series 63 CF-CPQ owned and operated by the second defendant. This aircraft was stationary on the runway 382 feet north of taxiway India at the time of impact, having come to a halt after proceeding to backtrack in a northerly direction along the runway on the completion of its landing roll. Although no one was injured in the collision, each aircraft was extensively damaged. The plaintiff's aircraft sustained damage to the underside of its fuselage and the second defendant's aircraft lost eight feet of the top of its tail fin.

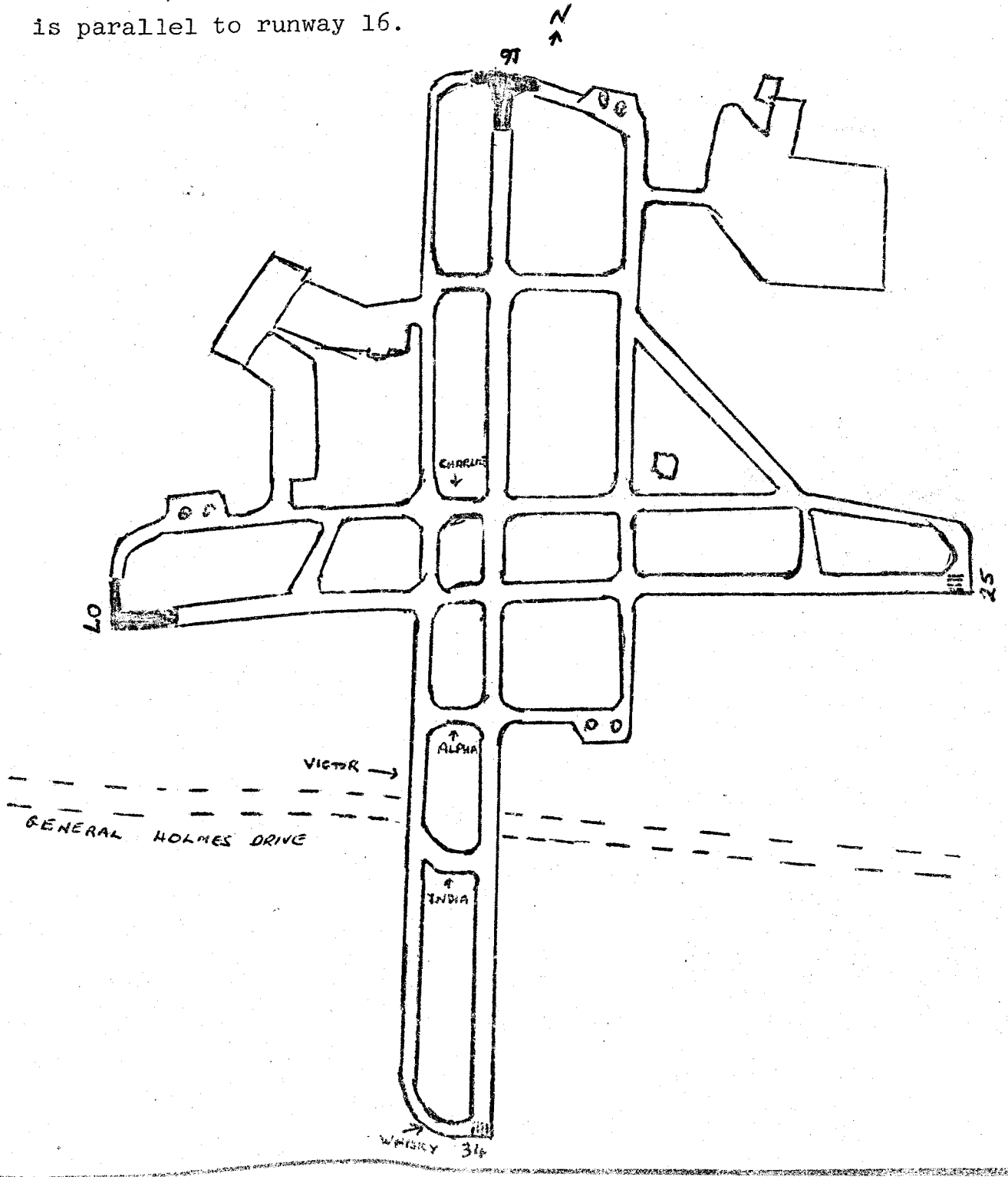
In this action the plaintiff seeks to recover damages for negligence which are now agreed at $789,112.39 from the two defendants. The first defendant denies negligence and alleges contributory negligence on the part of the plaintiff. The second defendant also denies negligence and alleges contributory negligence on the part of the plaintiff. In addition it has filed a counterclaim against the plaintiff and the first

defendant for recovery of the damage which it sustained, now agreed at $401,799, alleging negligence on the part of each of them. The plaintiff and the first defendant each deny negligence and allege contributory negligence on the part of the second defendant.

In January 1971 there were two runways at the Sydney Airport, runway 16 (its reciprocal being known as runway 34) and runway 07 (its reciprocal being runway 25). Although runway 16 had been the shorter of the two runways it was in process of reconstruction the purpose of which was to extend it a considerable distance into the waters of Botany Bay. On the night in question the then completed length of runway 16 was 8,900 feet, its width being 150 feet. Running along the centre line of the runway was a white line; running along each side of the runway, marking its boundaries, was a line of lights. Intersecting the runway at a distance of 4,292 feet from its northern threshold was runway 07, the centre and margins of which were marked in a similar fashion. Leading from runway 16 at various points along its course were taxiways to enable landing aircraft to vacate the runway and proceed to the terminals. The Domestic Terminals were situated to the east and the International Terminal (which had recently been reconstructed) was situated to the west of the runway.

The taxiways leading from runway 16 to the west are called in order from the north, Charlie, Alpha, India and Whisky. Charlie is on the northern side of runway 07 and parallel to it. Alpha is to the south of runway 07 and parallel to it. Alpha is situated to the north of General Holmes Drive, a highway which runs through a tunnel beneath the runway and

almost at right angles to it. The runway reaches its highest point above sea level as it traverses General Holmes Drive. This is not without significance, as will appear later. Taxiway India is parallel to runway 07, is to the south of General Holmes Drive and is 6,662 feet south of the northern threshold. Taxiway Whisky is situated further to the south; it is also parallel with runway 07. Taxiways Charlie, Alpha, India and Whisky are all connected by another taxiway called Victor which is parallel to runway 16.



On 19th January 1971 Air Traffic Control (ATC) operations at the airport were conducted from the top floor of an edifice now known as the old Control Tower (the Tower), a new Control Tower having been constructed subsequently in a different situation on the airport. The Tower was situated north-north-east of, and at a distance of 3,700 feet from, the intersection of runway 16 and taxiway India. On the night in question four members of ATC were on duty in the Operations Room. They were Mr. Hill, the Aerodrome Controller (ADC) who was responsible for the direction of take-off and landing operations, Mr. Davison, the Surface Movement Controller (SMC) who was responsible for the direction of surface movements at the airport, Mr. Gunn, a senior officer of ATC who was acting in a supervisory capacity as Senior Tower Controller, and Mr. King, the Flight Data Officer.

Situated in the Operations Room is a large console which forms part of the extensive communication equipment needed for ATC operations. This equipment has nine separate channels and a separate time injection channel (Channel 10) which operate continuously. There is, in addition, in continuous operation recording equipment which records on tape ("the Tower tape") all communications made on each channel as well as the time injection channel, thereby providing a record of the time when communications are made to and from the Tower. Of particular importance are the communications recorded on Channel 6 (ADC's channel) and Channel 8 (SMC's channel).

The plaintiff's aircraft (TJA) was bound for Perth. It was fully laden with a maximum load of fuel, its all-up weight being 159,000 lb., just short of its maximum permitted loaded

weight of 160,000 lb. It carried a crew of three on the flight deck - Captain James, an experienced pilot, First Officer Spiers and Flight Engineer Ryan. It was fitted with a Flight Data Recorder (FDR) and a Cockpit Voice Recorder (CVR). The FDR keeps a record of the heading of the aircraft whilst in motion, its indicated air speed, its altitude and its vertical acceleration. The CVR is an instrument which records on four separate channels communications received or made by members of the crew, including communications passing between them which are picked up on the Cockpit Area Microphone. As will subsequently appear, the records made by the CVR provided valuable evidence upon which I have placed considerable reliance. Despite opposition from the plaintiff and the first defendant, I granted inspection of the CVR to the second defendant - my reasons for allowing inspection are appended to this judgment.

The second defendant's Super DC8 (CPQ), which arrived in Sydney from Vancouver via Honolulu and Nandi on the night of 19th January, is a large aircraft. Indeed, it was probably the largest commercial aircraft flying into Australia at the time. Its length was 187 feet and its minimum turning circle was 132 feet. It carried a crew of four. In command of the aircraft was Captain Magrath, an experienced pilot who had not flown into Sydney since 1962. The other members of the crew were First Officer Mude, Second Officer Bjorndahl and Check Captain Ellert who was also an experienced pilot. CPQ carried an FDR, which was not serviceable, and a CVR. The CVR was serviceable but, owing to an error made immediately after the accident, the tape which recorded events in the crucial period of time was erased. In consequence, I do not have the

advantage of an objective record of CPQ's movements and of what occurred on its flight deck at the critical time.

The course of significant events on the night of 19th January began to unfold at 2129 hours when TJA, then at its berth at the terminal, received a taxiway clearance from SMC authorizing it to proceed to the holding point which is situated to the east of the northern end of runway 16, a position in which aircraft intending to take off are held until the runway is clear. An aircraft at the holding point is at right angles to the runway, looking across it, and must execute a left-hand turn or curve in order to take up its position on the threshold of the runway where it awaits its clearance for take-off. At 2130:38 TJA received from SMC an airways clearance. This is not a clearance to take off but an approval to fly the route or course proposed by the captain. In accordance with accepted practice, TJA then transferred from SMC to ADC. Having reported that it was ready, TJA at 2133:54 received from ADC the instruction "TJA. DC8 on short final. Line up behind that aircraft." The substance of this instruction was that the DC8 (CPQ) was close to landing and that as it passed down runway 16 TJA was to move on to the runway and line up behind it preparatory to receiving a clearance for take-off. The message was acknowledged by TJA.

The crew of TJA saw CPQ pass in front of them as it came in to land. TJA then moved out on to the runway with its engines idling. At 2134:53 when CPQ was in its landing roll, ADC called CPQ "E301 take taxiway right, call on 121.7." "E (for EMPRESS) 301" was the call sign of CPQ. 121.7 is the SMC frequency, ADC having a different frequency. This message

and its acknowledgment "Roger" were heard by the crew of TJA. Although the message was acknowledged by First Officer Mude in CPQ, the words "take taxiway right" were understood by him as "backtrack if you like". An instruction in those terms, if given, would have permitted CPQ to undertake a 180 degrees turn on the runway and, having done so, to taxi north along the runway before leaving it by runway 07 or one of the taxiways. Proceeding upon the footing that such an instruction had been given, CPQ made a 180 degrees turn on the runway and began to taxi to the north. Its 180 degrees turn was not observed by ATC which assumed that it had left the runway by taxiway India.

At 2135:38 ADC instructed TJA "TJA radar departure turn right heading one seven zero clear for immediate take-off." This instruction was acknowledged at 2135:44 by Captain James who turned on his headlights, applied the power and sent TJA into its take-off roll. Neither he nor any other member of the crew observed CPQ on the runway at that time. Indeed, Captain James and First Officer Spiers, the two crew members in a position to look down the runway, assert that they did not observe CPQ during the course of the take-off roll until rotation had commenced at 131 knots, that is, the speed at which the pilot eases back the control column at the rate of two degrees per second, up to fifteen degrees, to enable take-off to occur. During rotation the aircraft lifts off and, loaded as it was this night, it should have achieved a speed of 156 knots at a height of thirty-five feet above the runway. Shortly after the aircraft became airborne it struck the tail fin of CPQ at 2136:34 sustaining the damage already mentioned. As the hydraulic system of the aircraft was put out of action it

returned to the airport and landed, after jettisoning its fuel at sea.

Meanwhile, as CPQ had turned through 110 degrees of its turn Captain Magrath became aware that an aircraft was facing him at the northern end of the runway with its headlights on. However, he thought that it was being held at the threshold until the runway was clear. As CPQ taxied north, the crew realized that the aircraft (TJA) was approaching them. Captain Magrath then veered to the eastern side of the runway facing thirty degrees to the right of the direction of the runway so as to minimize the risk of a collision. CPQ was stationary at the time of impact.

CPQ was not in radio communication with ATC after it acknowledged the instruction sent to it at 2134:53 until 2136:03. Then, in response to its call, SMC instructed CPQ at 2136:07 "E301 cross runway 07." This was twenty-three seconds after TJA had commenced its take-off roll. The instruction was given in the mistaken belief that CPQ had left the runway via taxiway India and was proceeding along taxiway Victor towards runway 07. At 2136:30, immediately prior to the impact, SMC instructed CPQ "E301 hold position."

Although the impact was heard and felt by the crew of CPQ it was not so severe as to cause anyone except Second Officer Bjorndahl to think that the aircraft had been struck by TJA. The officers in the Tower were also unaware that a collision had taken place until TJA reported subsequently. At 2136:43 CPQ called SMC who at 2136:45 advised "E301 continue straight ahead along that taxiway cross runway zero seven", to which CPQ replied at 2136:50 "Roger you got a guy on final right

now?" This was a reference to another aircraft of the plaintiff, a DC9, TJN, which was coming in to land on runway 16. At 2136:54 SMC said to CPQ "E301 confirm you are on the taxiway" and CPQ responded at 2136:57 "Negative Sir, we're on the runway, we were cleared to backtrack on the runway." CPQ was then instructed to take the next taxiway left. Then at 2137:05 ADC instructed TJN to go "round", that is, to overfly the runway.

It is convenient in the first instance to examine the case presented by the plaintiff. It is largely based on the oral evidence of the crew of TJA, the oral evidence of experts, the transmissions to and from ATC - in particular the instruction to CPQ to take taxiway right with which CPQ did not comply - and the clearance for immediate take-off given to TJA at a time when CPQ was still on the runway. There is no contest as to the communications which passed to and from ATC or as to the time at which they were given, although there is dispute as to the clarity of those instructions. However, there is a serious question as to the reliability of the oral evidence given by the crew members of TJA and I should say at once that I regard the account which they have given of the events leading up to the collision as unsatisfactory and unreliable. My principal reason for so concluding is that their evidence is quite inconsistent with what appears on the CVR tape, a record which is unquestionably accurate.

Captain James' account is that before commencing his take-off roll he looked down the runway and "did not see anything". In the early stages of the roll he concentrated on keeping the aircraft straight on the centre line on the runway and on monitoring the instruments. The adjustment of

power distribution between the engines is the principal responsibility of the First Officer, who calls "Power set" when this distribution has been correctly achieved. Nevertheless the Captain is required to monitor the power as well as other instruments. Captain James transferred to instruments when at a speed of eighty to 100 knots and thereafter claims to have concentrated entirely on monitoring the instruments. At the time of the transfer he was "disturbed by a movement somewhere ahead" and to the right of the aircraft, a movement not on the runway but off it. He was unable to identify the source of the movement but was able to connect it in time with the instruction given by the Tower to another aircraft (TJN) to land. That instruction, according to the Tower tape was given at 2136:16, before TJA commenced rotation.

Captain James then says that almost immediately after rotation began he became aware of a red object across the runway in front of him. It was no more than a fleeting glimpse because his view was impeded by the glare shield as the nose of the aircraft rose. As the aircraft achieved the maximum "nose-up" attitude the impact with CPQ was felt and heard.

Captain James mentioned several factors which operated to impede or inhibit his vision down the runway on the night in question. First, there was the hump on the runway over General Holmes Drive. It tends to diminish the visibility of aircraft beyond the hump. Even so, it is apparent that from the cockpit of a Boeing 727 at the northern end of the runway, the flaps of a jet aircraft beyond the hump can be seen in daytime. And, as will become evident later, CPQ was, during the critical period of time, on the hump and not beyond it. The

presence of the hump did not, therefore, obscure CPQ from the vision of the crew of TJA. Secondly, reference was made to the presence of lights in Botany Bay and on the far shore of the bay and to lights marking the construction work at the end of the runway. Although the existence of these lights was a handicap it did not prevent Captain James from discerning an aircraft on the southern half of the runway near taxiway India. Thirdly, reference was made to the weather. There had been intermittent rain, including heavy showers, during the day. The main cloud base was at 3,000 feet with scud or scattered cloud covering five-eighths of the sky down to 800 feet according to the crew of TJN, although a meteorological bulletin issued at 2128 at the airport stated that there was three-eighths cloud at 900 feet. The wind was 150 degrees - five to ten knots. Although the report referred to light continuous rain it seems to have been intermittent at the relevant time - either light rain or drizzle - but its effect on visibility was slight. Indeed, the crew of a Qantas tug stationary at the intersection of taxiways Charlie and Victor state that it was not raining there at the time of the collision and that it seemed reasonably clear. However, the runway was wet and there were pools of water at the airport and this added to the glare.

Finally it was suggested that Captain James' opportunity to see CPQ was minimal or limited because he was required to concentrate on the instruments. This I do not accept. Instead I prefer the evidence of other experienced pilots who were called, including Captain Jennings, the pilot of TJN, who make it plain that the captain of a jet aircraft can observe the runway at the commencement of and during the

take-off roll.

Relevant to this question was the lighting of CPQ. Although I have some diffidence in accepting the evidence of the crew of CPQ because they did not impress me as accurate witnesses, I do accept their evidence that CPQ's lights were all on for the entire time the aircraft was on the runway. This evidence was confirmed by the crew of the Qantas tug and by the officers of ATC. The evidence to the contrary was slight. It came from the crew of the plaintiff's DC9 which was due to land on runway 16 after TJA had taken off. They asserted that they did not see the lights of CPQ immediately they came through the cloud but only after the lapse of some seconds. However, their recognition of the lights may have been prompted by the fact that CPQ flashed its lights to attract attention to its position on the runway. CPQ's lights included the forward landing lights, nose-wheel lights, leading edge lights, wing-tip navigation lights, anti-collision lights, tail lights and cabin lights. I am therefore of the opinion that CPQ was carrying its full complement of lights whilst it was on runway 16. As it travelled south along the runway its red top and bottom anti-collision lights would have been visible, together with its white tail lights and its wing-tip lights. In its 180 degrees turn which took almost one minute to execute, there was ample opportunity to observe its lights as it lay athwart the runway. Despite the factors to which Captain James refers, CPQ should have been visible to him and to First Officer Spiers on the runway in the vicinity of taxiway India and I am satisfied that he did in fact see CPQ on the runway shortly after he commenced his take-off roll.

First Officer Spiers confirms Captain James' account. However, he says that before rotation he saw a flashing red light ahead. He assumed that it was not on the runway because it was not a matter of concern to him. As he was about to call "Rotate", he became aware of an aircraft on the runway by reason of the presence of white lights which he could not identify specifically or locate in terms of distance. As the aircraft became airborne he saw the red tail fin (which was pointing to his left) pass beneath him. Although Flight Engineer Ryan was unable to maintain a continuous watch on the runway by reason of the position of his seat on the flight deck and his duties, he did catch a glimpse of a white light across the front of the aircraft at about the rotation point.

The evidence of the members of the crew of TJA is at variance with the CVR tape. This tape has no time injection channel. It records transmissions and events the time of which can be established by reference to the Tower tape which records some common communications. From these points of reference it is possible to deduce the time at which statements recorded on the CVR tape were made. In this respect, although the playing time span of the Tower tape and the CVR tape for the period from 2130:38 to 2133:48 correspond exactly, there is a slight discrepancy, namely two seconds, between the playing time span of the Tower tape and the CVR tape for the period between 2133:48 and 2136:57.

The discrepancy is due to the circumstance that the CVR tape takes slightly longer to play. It may have been stretched at some stage. Be this as it may, the possible variation in times of up to two seconds is not significant

according to the expert evidence or in my judgment. However, it should be noted that I have assumed the Tower tape to be correct and therefore the times assigned in the second of the two periods, as well as the first, are times calculated by reference to the times of common communications established by reference to the Tower tape.

The remarks made on the CVR tape were acknowledged in evidence to have been made by individual members of the crew of TJA. I set out hereunder an extract of the contents of the CVR tape with the time and the name of the speaker (where that is established) indicated in relation to each remark - the presence of brackets around a word indicates that there is doubt as to its correctness.

" 2134:59 Sounds like a bloody bullfrog croaking (doesn't) he. [Spiers]
Yeah (ah that's) right.

2135:03 Whose aircraft was it. [James]

2135:06 Was that a CPA.

2135:08 CPA yeah.

2135:19 Geez it looked big ha ha ha, yes.
It looked like the wolf's car driving past the building you know the bonnet it comes and comes and comes and comes and comes and the little character sitting in the little cabriole back ha ha. [James]

2135:44 Tango Juliett Alpha 1209. [Spiers]

2135:45 Ground off. [James]

2135:52 List complete. [Spiers]

2135:53 Gee I would have thought he (is/was) still

on the runway but in any event - (hope) to be airborne airborne before then. [James]

2136:10 Power set. [Spiers]

2136:12 How far ahead is he. [James]

2136:24 Rotate. [Spiers]

2136:34 (Sound of impact.) "

The remark "How far ahead is he" is recorded on the Tower tape as well as the CVR tape. How this came about is not clear.

Some eight to ten minutes after the impact the CVR tape records the following conversation between the members of the crew of TJA:

" You know I didn't realize until he turned round it was too far we were 120 knots. [James]

That's right I there was no point in calling anything then. [Spiers]

No. [Spiers]

Except rotate at the right speed. In fact if we'd a tried to stop it it would have been a bloody worse mess. [Spiers]

Yeah.

I didn't realize that he was there until he [James]

That's right. [Spiers]

Turned further round and I saw the headlights. [James] "

Although there is some difficulty in determining all that was said by the crew from the playing of the CVR tape, it sufficiently appears that Captain James became aware at a time when TJA was at a speed of no more than thirty-five knots

some nine seconds after TJA had acknowledged the clearance for immediate take-off that CPQ was ahead and apparently still on the runway. There are several elements of uncertainty in the remark which he made at 2135:53 - "Gee I would have thought he (is/was) still on the runway but in any event - (hope) to be airborne airborne before then." It is not clear whether the word used was "is" or "was" and there is some doubt as to the word "hope" and as to what precedes it. However, these uncertainties do not detract from the certainty to be gathered from the sense of the remark that Captain James observed CPQ at that time apparently still on the runway. That this was so is confirmed by the remark later made at 2136:12 - "How far ahead is he". The two remarks indicate that there was a continuing preoccupation on the part of Captain James with CPQ which was evidently ahead of him during his take-off roll.

I do not regard the terms of the later mid-flight discussion as providing adequate reason for taking a different view. The contemporaneous remarks of Captain James are a better guide to his observations than the version subsequently given in mid-air which relates only to the events immediately preceding the collision.

A further reason for rejecting the oral evidence of the crew is that although on hearing the CVR tape they acknowledged that the remarks in question were made, they asserted that they had no recollection of them and could give no explanation as to how they came to be made. This evidence I do not accept. There were other features of the evidence of Captain James and First Officer Spiers which I found unacceptable, in particular Captain James' endeavour to establish that he had

little or no time or opportunity to keep a look-out down the runway when commencing and during the course of his take-off roll, and First Officer Spiers' inability to give any indication of the time when he observed the red flashing light before rotation.

Whilst this conclusion has significance in relation to the issue of contributory negligence, it does not dispose of the plaintiff's case of negligence against the defendants. The case against the first defendant is based principally upon the presence of CPQ on the runway at the time when the clearance for take-off was given to TJA. Although the officers in the Tower, in particular Hill, Davison and Gunn, thought that CPQ, which executed its 180 degrees turn in the vicinity of taxiway India, had turned into that taxiway and had left the runway, it is acknowledged that they were mistaken in this view.

The crew of CPQ were adamant that they executed the turn slightly to the south of taxiway India, with the undercarriage of the aircraft wholly on the runway, at no time proceeding beyond it into the fillet of taxiway India. It is possible that they were mistaken as to the precise position of the undercarriage during the turn, bearing in mind that the turning circle of the Super DC8 is 132 feet, only eighteen feet less than the width of the runway, and that they did not have the undercarriage directly in view during the turn. However, I accept the substance of what they say as to the location of the turn on the footing that if the undercarriage did travel beyond the margin of the runway into the fillet of taxiway India it did so to a slight extent only. Certainly I am satisfied that at no time did CPQ turn laterally into the runway

as if departing from the runway in accordance with the taxi-ing instruction given to it at 2134:53. I am likewise satisfied that at no stage was CPQ clear of the runway. On the contrary, the execution of the 180 degrees turn on the runway could not have presented to an observer in the Tower who was keeping it under close observation the impression that it had vacated the runway or was vacating the runway.

Owing to the failure of the FDR and the erasure of the relevant portion of the CVR tape in CPQ its movements, unlike those of TJA, are not established with precision. It is reasonable to fix its position as south of runway 07 and north of taxiway India at 2134:53 when it received the taxi-ing instruction, but from 2134:57, the time when it acknowledged this instruction, until the time of impact, evidence does not establish directly its precise position at any given point of time. However, Mr. D. J. Whalley, a senior engineer employed by the Air Safety Branch of the Department of Air Transport, reconstructed from the evidence the path taken by CPQ and the time which it would have taken to execute the movements which it made (Ex. CA14). I accept this reconstruction as being substantially accurate. It was based on a number of assumptions: that CPQ landed 1,000 feet south of the threshold of the runway, that it decelerated uniformly in its landing roll which finished near taxiway India, that it made a minimum radius 180 degrees turn at a nose-wheel speed of three knots, that it took a particular time to accelerate to a taxi-ing speed of ten knots and that, having done so, it taxied north at this speed veering to the right of the runway where the impact occurred. According to the reconstruction, CPQ commenced its turn at 2135:08, was

half-way through the turn at 2135:36 (two seconds before ADC cleared TJA for immediate take-off), completed its turn at 2136:03 (when it called SMC and was instructed to cross runway 07), reached a ten-knot taxi-ing speed at 2136:13 and commenced its turn towards the edge of the runway at 2136:28.

The ATC officers whose function it was to give directions to CPQ and TJA on the night in question were inexperienced. Mr. Hill had been licensed as an ADC for one month only prior to that time and Mr. Davison, the SMC, had been on duty for a fortnight only. Neither officer had previous experience as ADC or SMC at Sydney in conditions similar to those which obtained at the time of the collision. In fairness to them it should be said that there were several factors which operated or may have operated to impair their vision of an aircraft on runway 16 in the vicinity of taxiway India. First, the existence of the hump on the runway apparently made it more difficult for an observer in the Tower to distinguish at night the runway lights from taxiway lights in the vicinity of taxiway India and consequently to identify the relationship of an aircraft to runway and taxiways in that area, a situation which was aggravated by light rain or drizzle and the increased glare attributable to the presence of pools of water on the runways and taxiways. Secondly there was a problem with the windows of the Tower which tended to fog or become misty. The evidence as to the condition of the windows that night is not altogether clear, but there was rain on the windows and according to Mr. King, the Flight Data Officer, this had an effect on ATC's capacity to observe CPQ.

These conditions rendered accurate observation and the ascertainment of the precise whereabouts of an aircraft

more difficult to achieve in the vicinity of runway 16 and taxiway India on that night. Mr. Davison said that it was not possible to determine the location of an aircraft by merely glancing at it, an opinion shared by Mr. Powell, Senior Regional Adviser, ATC, Sydney. Mr. Davison said that to ascertain the location of an aircraft it was necessary to keep it under continuous visual observation for as long as ten seconds. Mr. Powell thought likewise, although he put the time as high as fifteen seconds. I accept their evidence and conclude that continuous observation for not less than ten seconds, and perhaps fifteen seconds, was essential to the accurate observation and location of CPQ. Mr. Davison went on to say in cross-examination:

> "I will ask you about your present state of mind: is it now your view that on that night it was impossible for you to tell visually, in the conditions of that night, whether an aircraft was on 16 between India and General Holmes Drive or on Victor between India and General Holmes Drive?---Not impossible but difficult.
>
> You failed to be able to observe it on that night, did you not?---That is correct, yes.
>
> Would you agree that it is quite unsafe now - your present view is that it is unsafe to rely on visual observation to make that decision in those circumstances?---Entirely, yes, rely entirely on visual observations."

The correctness of this view of the difficulty of determining at night the location of an aircraft in the vicinity of taxiway India was recognized after the accident when a procedure was introduced requiring the Controller to direct a landing aircraft departing from runway 16 via taxiway India to "call 121.7 vacating the runway" or "when clear". In addition, after the accident emphasis was given to the Controller's discretion generally to require an aircraft to call when clear of

the runway in circumstances in which it was difficult to observe an aircraft at night.

It had not been the practice of ATC to direct a landing domestic aircraft to call on SMC frequency on or after landing. However, it had been and was the practice of domestic aircraft to call the Tower when departing the runway. This practice was in accordance with the directions contained in Aeronautical Information Publications (AIPs) published by the Aeronautical Information Service (Air Navigation Act 1920, as amended). AIP RAC/OPS 1-48 par. 4.1.2 required the pilot in command of a landing aircraft to change from ADC frequency to SMC frequency as he leaves the runway after landing. However, in the case of landing international aircraft it was the practice to direct them to call SMC; generally this direction was given at the time when taxi-ing instructions were issued. After the accident international aircraft were instructed by ATC to change to SMC frequency after they vacated the runway.

The procedure which was followed in relation to a landing aircraft by the Sydney Tower at the beginning of 1971 was that the aircraft initially came within the jurisdiction of the Approach Controller who in due course handed it over to ADC. ADC, after giving landing instructions, would give taxi-ing instructions as the aircraft was coming towards the end of its landing roll. At the same time he would in most instances give it instructions to call on SMC frequency. In some instances this instruction would be given shortly after. At the time of giving this instruction, or more probably at the time the aircraft left the runway - the evidence is not clear on the point -

ADC would pass along the console in the Operations Room to SMC a progress strip stating the type of aircraft, call sign, its departure point and estimated time of arrival. The aircraft then passed under the control of SMC. It was the practice of SMC to await a call from the aircraft in accordance with the last instruction given by ADC. Only in the event of an unusual lapse of time without a call would SMC call the aircraft himself or through ADC. This practice was no doubt based on the expectation that the landing aircraft, whether domestic or foreign, would comply with par. 4.1.2 of AIP RAC/OPS 1-48.

Sydney Tower relied on visual observation of aircraft at night as well as during the day. It was not the practice to specifically request an aircraft to report when it was clear of the runway. Nor did ADC defer the giving of a take-off clearance until a landing aircraft called SMC. However, ADC had a discretion to require a pilot to report that he was clear of the runway in conditions of difficult visibility. And ADC could at all times if in doubt ascertain the whereabouts of an aircraft by radio communication.

Mr. Hill gave evidence of instructing CPQ to take taxiway right and to call on 121.7 and of CPQ's acknowledgment. His evidence was then as follows:

> "That communication having been given to you, did you see anything of the movements of Empress three zero one at that stage?---Yes, he turned into taxiway India.
>
> Were you able to observe that from your position?---Yes.
>
> Did he turn completely into taxiway India?---I thought he did, yes - what I saw.
>
> What did you see? Would you explain to his Honour in your own words what you actually observed, Mr. Hill? ---I saw the aircraft following the instructions as

given to him - turn into taxiway India and taxi away from the runway.

How far away from the runway was he when you saw him last?---Clear of the runway.

Clear of the runway?---Yes.

How far clear of it?---I couldn't tell you that."

It is now acknowledged that Mr. Hill was in error in thinking that CPQ left the runway, taxied down India and turned into Victor. Apart from the factors inhibiting accurate observation to which I have referred and Mr. Hill's lack of experience, he encountered a busy traffic pattern in which he had two aircraft waiting to take off (TJA and EWN behind it), an aircraft which had just landed (CPQ), another aircraft about to land on runway 16 (TJN) and yet another aircraft (FNS) further out coming in to land on runway 07. On giving CPQ taxi-ing instructions it was necessary for Mr. Hill to look at the radar screen to pick up FNS. He thereby interrupted his observation of CPQ. Once he looked away from CPQ he could not determine its position with accuracy in relation to the runway and the taxiway by merely glancing back to it.

The inference which I draw, then, is that Mr. Hill failed to keep CPQ under that degree of continuous observation which was essential to the ascertainment of its precise whereabouts prior to clearing TJA for take-off. The consequence is that he failed to keep a proper watch on the runway with a view to ensuring that it was clear before giving a take-off clearance to TJA.

The error which Mr. Hill made was, I think, inconsistent with his having maintained a sufficiently continuous watch on CPQ. Had he kept a look-out he would necessarily have

observed that CPQ was executing a 180 degrees turn, not merely a ninety degrees turn, as a preliminary to moving down taxiway India. The time taken in executing a 180 degrees turn (fifty-five seconds) should have excited suspicion. Mr. Hill's evidence suggests that he was under the impression that CPQ first turned ninety degrees, then taxied down India (a distance of not less than 400 feet), next turned ninety degrees and taxied along Victor. In fact CPQ executed a continuous 180 degrees turn, a manoeuvre which should have been apparent to a person who was observing CPQ. Moreover, Mr. Hill's and Mr. Davison's belief that immediately before the accident CPQ was commencing to turn right from taxiway Victor into taxiway Alpha is itself indicative that they were not watching CPQ closely for the intersection of Victor and Alpha is at least 400 feet away from the position actually occupied by CPQ at the time and on a different angle of vision to an observer in the Tower. In my view, Mr. Hill and Mr. Davison saw CPQ commence its turn and assumed that it was the beginning of a turn into taxiway India and that such a turn would be executed in accordance with the instruction given, without verifying the fact by visual observation or radio communication.

Mr. Davison was not free from responsibility for what occurred. Once CPQ was passed to him he should have kept it under observation, and again I find that he paid less than adequate attention to that aircraft. He had this to say in cross-examination about his observation of CPQ:

"That is right, and that required you to keep it under continuous observation for a period such as ten seconds or more, did it not?---On occasion, yes.

So that you could be as certain as possible that it was in the right place and heading in the right direction?---Yes.

And it was not sufficient for that purpose merely to glance at it, was it?---No.

That is precisely all you did when you first tried to observe its position after you believed it to have left the runway, is it not?---Yes.

So you will agree that that was totally inadequate so far as your observing its position on that evening?---In retrospect, yes."

And later he said:

"Mr. Davison, it just would not be correct for you to say that you observed this DC8 aircraft when it was moving off the runway, would it?---I am sorry it would not be correct. Would you say the question again please?

It would not be correct, would it, for you to say that you saw this DC8 aircraft when it was moving off the runway?---No.

You, on what you have told us, did not again see it after it passed you on the landing run until it was near the intersection of India and Victor?---Until I glanced up when it called, yes."

Furthermore, he allowed a period of seventy seconds to elapse after 2134:53 when ADC gave CPQ taxi-ing instructions in which time no call was received from that aircraft without calling it up to ascertain its position or the reason for its failure to call. RAC/OPS 1-48 par. 4.1.2, as I have remarked, obliged CPQ to call SMC on vacating the runway and it is the first defendant's case that the instruction at 2134:53 should have been understood as an instruction to call SMC on frequency 121.7 when vacating the runway. Mr. Gunn conceded that SMC should have called CPQ thirty seconds after 2134:53 in view of

its failure to call. On the other hand, Mr. Powell thought that a call should be made by SMC if an aircraft has failed to call up thirty to forty seconds after leaving the runway. I prefer Mr. Gunn's opinion to that of Mr. Powell who throughout his evidence gave me the impression that he was determined to avoid making any concession. His opinion was obviously suited to the first defendant's case.

What I have already said points to the conclusion that in the circumstances which prevailed at the time, ATC, through ADC or SMC, should have maintained radio communication with CPQ either to confirm that it had left the runway in accordance with the instruction given to it or simply to ascertain its whereabouts before clearing TJA for take-off. Such confirmation might have been sought by directing CPQ at the time the instruction was given at 2134:53 to call ADC on vacating the runway. Steps should then have been taken to follow up CPQ's failure to call on the expiration of a reasonable time for executing a turn into taxiway India. Expert evidence called for the plaintiff suggested that a direction to call ADC or SMC on vacating the runway should always be given when all taxi-ing instructions are issued to an aircraft on landing. Although this may be desirable practice - indeed AIP RAC/OPS 1-48 par. 4.1.2 contemplates that a landing aircraft will call on vacating the runway - I am not persuaded that it is standard international practice or that it is the only satisfactory means of determining when an aircraft leaves the runway in conditions in which visual observation is unreliable. However, I am satisfied, as I have said, that ATC was negligent, not only in failing to keep CPQ under proper visual observation so as to ensure it was clear of

the runway before clearing TJA, but in failing to establish CPQ's position by radio communication, in particular on its failure to call SMC thirty seconds after the instruction at 2134:53.

The errors made by ATC indicate deficiencies in the procedures which it then followed. Although it must have been apparent to Mr. Hill that it was unsafe to rely exclusively on visual observation in the circumstances which prevailed, it was not enough to leave to an inexperienced ADC a discretion to resort to radio communication. Mr. Gunn should have insisted on radio communication. And greater emphasis should have been given in the instructions to Controllers to resort to it if any doubt at all existed as to the accuracy of visual observation. Secondly, there was a lack of co-ordination between ADC and SMC in the failure to follow up CPQ's omission to call SMC after 2134:53.

It is necessary now to mention the reliance which the plaintiff placed on directions contained in AIPs and Airways Operating Instructions (AOIs). ATC is a service maintained and operated in accordance with the power conferred on the Minister by reg. 93 of the Air Navigation Regulations. Its functions include the prevention of collisions between aircraft, expediting and maintaining an orderly flow of air traffic and the control of the initiation, continuation, reversion or termination of flight in order to ensure the safety of aircraft operations (reg. 94(1)). The Director-General is authorized by Air Navigation Orders, AIPs or NOTAMS to give such instructions and directions on matters within the functions of ATC as he considers necessary (reg. 94(2)). NOTAMS, as well as AIPs, are publications published by the Aeronautical Information Service (Air Navigation Act 1920, as amended, s. 8(1)), a service

established and conducted by the Minister, which collects and disseminates information and instructions relating to aerodromes, ATC services and facilities, communication and air navigation services and facilities (s. 7). AIPs are issued to airlines operating in and into Australia and by the conditions attached to their licences under the Air Navigation Act they are required to comply with the directions contained in them.

It is convenient to refer in the first instance to the relevant provisions contained in AOI which set forth the instructions and directions to be complied with by ATC in the course of its operation. RAC-0-5, pars. 2 and 5 provide as follows:

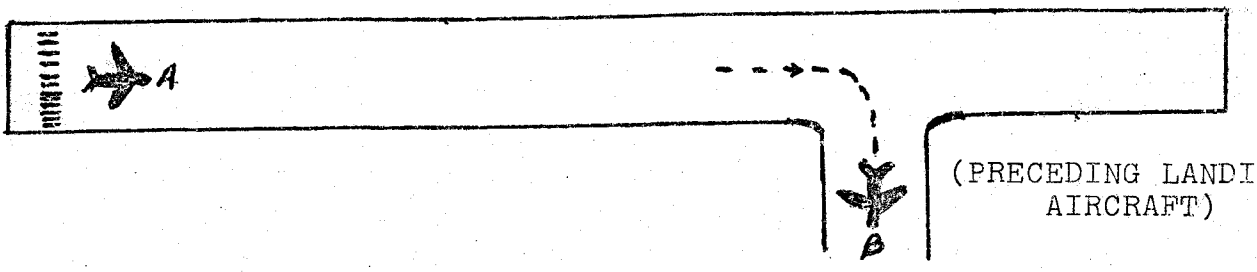
> "2 - In providing ATC service in accordance with this section of AOI, the prime responsibility of air traffic controllers is the ever important safety function of preventing collisions and advising known weather hazards. Traffic expedition, although important, must always take second place."
>
> "5 - Whenever there is the slightest doubt or even a suspicion of doubt as to the actual traffic situation, which could mean there may be a conflict between aircraft, then air traffic controllers are to assume that such a condition does in fact exist, and they are to act in a manner which will remove the possible conflict. . . ."

Paragraph 7.1.1 (under the headings "Functions of ATC" and "Aerodrome Control") states:

> "Aerodrome control is the exercise of the functions of ATC arising from ANR 144(b) or ANO Part 95.2 as appropriate. This service is provided (a), to authorise aerodrome traffic to taxi, take off or land, and (b) to ensure the safe, orderly and expeditious flow of this aerodrome traffic."

RAC-2-26 deals specifically with the situations in which take-off will be permitted following the preceding landing of an aircraft. Under the heading "Separation in the Traffic Circuit"

it contains what is entitled "Case (b)" in par. 4.1. There follows a diagram in this form:



below which are the words "A shall not be permitted to commence take-off until B has vacated and is taxying away from, the runway."

To the same effect is the instruction contained in AIP RAC/OPS 1-35 under the heading "4.5 - Separation Minima for Take-off."

> "4.5.1 - An aircraft will not be permitted to commence its take-off until:
>
> . . . . . .
>
> (b) a preceding landing aircraft using the same runway or path has vacated it and is taxying away from the runway or path;
>
> . . . . . "

It was therefore the duty of ATC and of ADC in particular not to clear TJA for take-off until CPQ had vacated runway 16 and was taxi-ing away from it. Mr. Hill was negligent in giving the clearance when CPQ was still on the runway as a result of his failing to keep CPQ under adequate visual and radio observation so as to ascertain its whereabouts before giving TJA a clearance for immediate take-off. Mr. Davison was negligent in the two respects which I have already mentioned. In consequence ATC and the first defendant were negligent in that a take-off clearance was given to TJA when CPQ was still on the runway because adequate visual and radio observation on

CPQ with a view to establishing its whereabouts was not maintained.

I do not consider that ADC was negligent at 2134:53 in omitting to specify when the call on 121.7 should be made. The instruction was intended to be read as requiring a call on SMC frequency when the first part of the instruction had been executed, that is, when the aircraft left the runway, and that is how it should have been understood, because it would be contrary to good airmanship and to AIP RAC/OPS 1-48 par. 4.1.2 for an aircraft to change from ADC to SMC frequency whilst it was still on an active runway. It was further suggested that the instruction was deficient in that it omitted to specify the particular taxiway by which CPQ should depart from the runway. However, I am satisfied that this did not involve any departure by ATC from sound practice.

Next, it was submitted that the instruction given to CPQ was not clearly enunciated and that it was spoken too quickly, in a clipped fashion, and that this led to its misinterpretation by CPQ. Although it is my impression as a person inexperienced in receiving radio communications that the messages from ATC on the night in question were enunciated with unnecessary speed, nevertheless I think that the crew members of CPQ, had they been attending with care, would have understood the instruction without difficulty. Accordingly, in my view there was no negligence on the part of the first defendant on this score.

I come now to the plaintiff's case against the second defendant. I reiterate my earlier comment concerning the oral evidence of the crew of CPQ. Generally, I found their

evidence to be unreliable. I am at a loss to understand how they can assert that the instruction given at 2134:53 was clear when they completely misunderstood it and placed upon it a construction which it will not bear. The explanation perhaps lies in the circumstance that the crew of CPQ knew that if the instruction was not clear, it was the responsibility of First Officer Mude as a matter of good airmanship to ask that the message be repeated or to state his understanding and ask that it be confirmed - in fact neither course was followed. Nor am I impressed by the account given by the crew of CPQ as to the circumstances in which the relevant portion of the CVR tape in CPQ came to be erased. According to their evidence, Captain Ellert invited Mr. McMahon, an engineer employed by the second defendant who was travelling as a passenger, to come to the flight deck after the accident and before the aircraft reached the terminal and to disconnect the power supply to CVR to ensure that the tape was preserved. The tape was a self-erasing tape and at any time the last half-hour's recording only is preserved. Consequently, if the record of events leading up to the collision was to be preserved it was essential to disconnect the power; otherwise continued operation would result in erasure of the relevant portion of the tape. In the event, Mr. McMahon disconnected the wrong switches. I find it difficult to accept that Captain Ellert and Second Officer Bjorndahl were ignorant of the location of the switch or that they took no steps to acquaint themselves with its location, especially as Captain Ellert had taken the trouble to examine the relevant manual. Although First Officer Mude was aware of the location of the switch he was not asked to participate; nor did he offer to

participate in disconnecting the power.

There are other features of the evidence to which I shall call attention subsequently which provide further ground for questioning the reliability of the testimony given by the crew of CPQ.

I come now to the principal allegations of negligence against the second defendant. The first, which I find established, is that CPQ in particular through First Officer Mude and Captain Magrath paid insufficient attention to the communication at 2134:53 and thereby failed to understand and comply with it. I do not accept that the four members of the crew were listening and heard the instruction clearly as an instruction to backtrack, although I accept that First Officer Mude understood and believed it to be an instruction to "backtrack if you like".

Why it was that insufficient attention was given to the communication the evidence does not reveal. Perhaps Captain Magrath expected an instruction to backtrack. He had not flown into Sydney since 1962 and First Officer Mude had been to Sydney only once or twice previously, Captain Ellert had last flown into Sydney in 1967 and Second Officer Bjorndahl not at all. In this respect, the second defendant was in breach of reg. 215(1)(b) of the Air Navigation Regulations which requires that the officer in command should have flown into the airport not more than twelve months before. Lack of familiarity with the extensions to runway 16 may have led them to expect a backtracking instruction as taxiways India and Whisky were not in existence at an earlier time. Be this as it may, I infer that insufficient attention was given to the instruction from ADC.

As I have already indicated, I do not accept that

the instruction was clear in the sense in which it was understood by the crew of CPQ and I find that First Officer Mude was negligent in failing to seek confirmation of the instruction in one of the modes previously mentioned. Apart from what must have been a lack of clarity in the message understood in the sense claimed there were three elements in its content which should have excited inquiry.

First, it appeared to suggest that SMC was giving taxi-ing instructions on an active runway (an unusual procedure at a major airport equipped with taxiways) for the message did not specify a mode of exit from the runway. Secondly, as understood by CPQ, it required CPQ to change to SMC frequency whilst the aircraft was backtracking on an active runway - a procedure fraught with potential danger and contrary to good practice. The claim made by CPQ that the runway ceased to be active because an instruction for backtracking had been given is in my opinion no answer in the circumstances. Thirdly, although a need for backtracking sometimes arises owing to the existence of an obstruction on, or the carrying out of repairs to, taxiways, such a circumstance, if it existed, would normally be notified in NOTAMS available to CPQ. No such notification had been given in this case as the taxiways were trafficable. The unusual character of the instruction as it was understood by the crew provided some additional reason to query it, the more so as First Officer Mude would have heard the instruction to TJA to line up behind CPQ when it landed.

Moreover, Captain Magrath should have perceived TJA at the northern end of the runway with its landing lights on when CPQ had turned through 110 degrees, that is, at about

2135:42. He should then have appreciated that a situation of potential danger existed, for the presence of an aircraft that end of the runway with its landing lights on indicated that it was taking off or about to take off. At this stage CPQ should have reported its position to the Tower. Had it done so the collision would probably have been averted as TJA was cleared for take-off at 2135:38.

First Officer Mude says that he had attempted to communicate with SMC earlier to report his position in response to the instruction at 2134:53 but had been unsuccessful. His evidence is confirmed by other members of the crew. However, the Tower tape contains no evidence of such a call and the officers of the Tower (whose evidence I prefer) say that had such an attempt been made when another communication with the Tower was taking place it would have resulted in a white light showing on the console in the Control Room - yet no such light was observed.

In a statement made on 1st February 1971, Captain Magrath claimed that First Officer Mude called the Tower when they saw TJA approaching and said, "Sydney E301 we are still on the runway". First Officer Mude then read the statement and said he agreed with it. However, neither Captain Magrath nor First Officer Mude gave evidence of making such a communication - indeed, First Officer Mude conceded that no such communication was made. This incident provides additional reason for doubting the evidence of the crew as to the attempt to communicate with the Tower.

In the result I do not accept that CPQ endeavoured to communicate with the Tower before 2136:03. Its failure so

to do in my opinion constituted negligence in the two respects already mentioned: first, in that CPQ should have queried or sought confirmation of the instruction at 2134:53 as it understood the instruction; secondly, in that it failed to call the Tower on observing TJA with its landing lights on at the northern end of the runway at a time when CPQ had turned through 110 degrees. CPQ's delay for seventy seconds in calling SMC at a time when it was turning on an active runway compounded its earlier failure to query or confirm the instruction and its later failure to report on seeing TJA. Prudence and good airmanship dictated that an earlier call should have been made to report its position and to obtain instructions as to the means of exit from the runway. Such a call would have resulted in remedial action by the Tower before it was too late.

It was also suggested that CPQ might have averted the accident at the last minute by taxi-ing off the runway. This suggestion was made by the plaintiff in its closing address. It was not stated in the particulars of negligence and was not explored in cross-examination. As there is no evidence to indicate what might have happened had CPQ run off the runway on wet ground, I am not prepared to make a finding in favour of the plaintiff on this submission.

I find, therefore, that CPQ was negligent in three respects: first, in not paying attention to the instruction to take taxiway right; secondly, in not querying or seeking confirmation of that instruction; and thirdly, in failing to call SMC on 121.7 reasonably promptly after receiving that instruction and in particular after observing TJA with its landing lights on at the northern end of the runway.

Relevant to the issue of contributory negligence on the part of the plaintiff are the views which I have already expressed as to the oral testimony of Captain James and First Officer Spiers, the contents of the CVR tape and the conclusions to be drawn from the FDR of TJA. It is necessary then to refer to certain requirements in the AIPs and the Air Navigation Regulations.

AIP RAC/OPS-0-12 par. 9.4 under the heading "Traffic Clearances" provides:

> "An air traffic clearance proposed by ATC does not relieve the pilot in command from complying with statutory requirements nor from his responsibility for the ultimate safety of his aircraft."

The relevant provisions in the Air Navigation Regulations are as follows:

> "138(7.) An aircraft that is about to take off shall not attempt to do so until there is no apparent risk of collision with other aircraft."
>
> "139(1.) An aircraft shall not be operated on the ground in such manner as to create a hazard to itself or to other aircraft . . . ."
>
> "143. The pilot in command of an aircraft which is being operated on or in the vicinity of an aerodrome shall -
>
> (a) observe other aerodrome traffic for the purpose of avoiding collision."
>
> "238. Immediately prior to take-off, the pilot in command shall manoeuvre his aircraft so that he is able to observe traffic on the manoeuvring area of the aerodrome and incoming and outgoing traffic, in order that he may avoid collision with other aircraft during the take-off."

These provisions make it clear that the ultimate responsibility for the safety of his aircraft lies with the pilot in command and that he has a duty before and during take-off to observe other aircraft so as to avoid a collision.

In addition, according to the evidence of experienced pilots called by the plaintiff, Captain Maltin and Captain Jennings (the pilot of the plaintiff's aircraft TJN), it was the duty of the crew of TJA as a matter of good airmanship to keep a proper look-out down the runway from the time when TJA was lined up for take-off through to rotation. This duty remained notwithstanding the requirement flowing from the use of the word "immediate" in the take-off clearance that the instruction should be complied with immediately (AIP Com 0-05).

It follows from my earlier comments on the events which occurred during TJA's take-off roll that I am satisfied that Captain James and First Officer Spiers failed to keep a proper look-out before the commencement of the take-off roll and immediately after that commencement. Captain James was therefore in breach of the direction contained in AIP RAC/OPS-0-12 par. 9.4 and of regs. 139(1), 143(a) and 238. What is of more importance is that Captain James became aware nine seconds after receiving the take-off clearance that CPQ appeared to be ahead of him and still on the runway. According to the expert evidence of Mr. Whalley, TJA was then travelling at no more than thirty-five knots and was no more than 500 feet from the northern threshold of the runway. As the threshold was 5,806 feet north of the point of impact, TJA had ample opportunity to brake and bring itself to a halt in time to avoid the collision. This conclusion is supported by the evidence of Mr. Rivers, an aeronautical engineer employed by the second defendant. I accept Mr. Whalley's evidence that the point of impact was 400 feet north of General Holmes Drive.

There is overwhelming expert evidence, including

that of Captain James, which satisfies me that it is a fundamental rule of good airmanship that the pilot of an aircraft taking off should stop his take-off roll if he sees an aircraft or obstruction on the runway ahead of him or if he sees what appears to be an aircraft or obstruction on the runway ahead of him. Captain James took a calculated risk that CPQ would leave the runway in time or, more probably, that he would be able to overfly it. In fact had CPQ not been moving north along the runway it is possible that TJA would have overflown CPQ without striking it. However, the risk was considerable and it should not have been taken.

In my opinion there was negligence on the part of all three parties to the action which contributed to the concurrence of the collision and to the damage which was sustained by the plaintiff and the second defendant. It is necessary, then, to apportion the liability for that damage. It is agreed that the apportionment of liability for the plaintiff's damage between the defendants and for the second defendant's damage between the plaintiff and the first defendant is governed by the Law Reform (Miscellaneous Provisions) Act 1946 the provisions of which are made applicable by s. 79 of the Judiciary Act 1903, as amended. Under s. 5(2) of the Law Reform (Miscellaneous Provisions) Act 1946 it is necessary to determine the extent of the responsibility of each of the defendants for the damage sustained by the plaintiff and under s. 10(1) of the Law Reform (Miscellaneous Provisions) Act 1965-1968 it is necessary to determine the extent to which the damages sustained by the plaintiff shall be reduced having regard to the plaintiff's "share in the responsibility of the damage". A just

and equitable apportionment as between the plaintiff and the defendants and as between the defendants themselves of the "responsibility" for the damage involves a comparison of culpability. Culpability does not mean "moral blameworthiness but degree of departure from the standard of care of the reasonable man" (Pennington v. Norris (1956), 96 C.L.R. 10, at p. 16).

On any view it seems to me that the culpability of the first defendant was greater than that of the other parties. Safety in prevention of collisions is the primary responsibility of ATC and the duty of ADC to keep a proper look-out and to ensure that a landing aircraft is clear of the runway before he gives a clearance for take-off is of fundamental importance to the safety of operations at an airport. The failure of ATC to keep a proper look-out and the issue of a clearance for immediate take-off without maintaining adequate visual and radio observation of CPQ was, in the circumstances, a serious departure from the standards of the reasonable man. The departure was the more serious in that neither Mr. Hill nor Mr. Davison in my view kept CPQ under sufficiently continuous observation (which was essential to accurate ascertainment of whereabouts in the conditions which prevailed) and were content to assume that CPQ had left the runway on the basis of inadequate visual observation when it should have been apparent that the location of the aircraft should have been established by radio communication.

The responsibility of CPQ for the damage sustained by the plaintiff, although significant, in my opinion was of a slightly lower order. It consisted in: (1) the failure to pay sufficient attention to the taxi-ing instruction from ADC;

(2) a failure to query or confirm what must in the circumstances have been to First Officer Mude and the crew of CPQ an instruction which was less than clear, and whose contents were unusual in several respects; and (3) a failure to call SMC reasonably promptly, in particular when CPQ first observed TJA at the northern end of the runway. In each instance the departure of CPQ from the standard of care of the reasonable man lay in a failure to give proper attention to what should have been done. As between the two defendants I would apportion liability for the plaintiff's damage in the proportion of four parts as against three parts to the second defendant.

The responsibility of the plaintiff for the damage is in my opinion less than that of the defendants collectively. I rate the plaintiff's responsibility as less than that of the first defendant and equal to that of the second defendant. In so far as there was a failure on the part of Captain James and First Officer Spiers to keep a proper look-out this failure seems to me to be of notably less significance than the failure of ATC, in particular ADC. ADC bore the primary responsibility for ensuring that the runway was clear for take-off and his opportunity for observing CPQ was greater because he was in closer proximity and had the means of maintaining direct radio communication. However, Captain James' failure to discontinue the take-off nine seconds after observing CPQ apparently on the runway, when he could with ease have brought TJA to a halt before the point of impact, stands in a different position. The decision that CPQ would leave the runway in time or, more probably, that he could overfly CPQ was a serious departure from the standard of the reasonable man. However, having regard to

the fact that it was made at a time when the aircraft was in the course of its take-off roll and to the apparent lack of certainty in Captain James' mind as to CPQ's position, I rate the plaintiff's responsibility as certainly less than that of the defendants' combined responsibility, as somewhat less than that of the first defendant, and as equal to that of the second defendant.

I would, in the circumstances, reduce the plaintiff's damages by thirty per cent and I would apportion liability for the damages as so reduced between the defendants so that the first defendant bears four-sevenths and the second defendant bears three-sevenths.

On the second defendant's counterclaim I would reduce, on account of that defendant's contributory negligence, the damages which it sustained by thirty per cent. The residual figure I would apportion between the plaintiff and the first defendant as follows: as to the plaintiff three-sevenths, as to the first defendant four-sevenths.

Both the plaintiff and the second defendant claim interest on damages up to judgment. The claim is based on s. 94 of the Supreme Court Act 1970 (N.S.W.), as amended, which confers a power on the Supreme Court of New South Wales to award interest in respect of damages as part of the judgment, a power which is said to be applicable in these proceedings by virtue of s. 79 of the Judiciary Act 1903, as amended. Whether this step in the argument is well founded is a familiar question not without its difficulties - see John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd. (1973), 129 C.L.R. 65, at pp. 80-81, 84, 88, 94-95; Pedersen v. Young (1964), 110 C.L.R.

162.

However, it is my view that s. 79 does not operate to pick up and apply in proceedings in the High Court a provision such as s. 94 which is contained in a statute designed to define and regulate the powers and procedure of the Supreme Court and which confers power on that Court to order interest on damages in judgments entered by that Court in proceedings before it. No matter how widely it may travel in some respects s. 79 does not in my view pick up and apply in this Court a provision which empowers a particular court of a State to make orders and enter judgments in proceedings in that Court. The relevant powers of this Court are conferred by the Judiciary Act and the High Court Procedure Act 1903, as amended; as I see it they are not to be supplemented by the operation of s. 79 of the Judiciary Act in the manner suggested. Section 26A of the High Court Procedure Act, which provides that judgments of the Court shall carry interest, should be regarded as a comprehensive expression of the entitlement in this Court of a litigant to interest on damages to the exclusion of any provision in State law which would otherwise be made applicable by virtue of s. 79.

Quite apart from this conclusion which is in itself fatal to the case for interest on damages, the action was commenced in this Court on 4th March 1971 before the Supreme Court Act came into operation on 1st July 1972. Section 16(1) of the Act provides:

> "Subject to the rules, and unless the Court otherwise orders, this Act does not apply to, and the repeals and amendments made by this Act do not affect, any proceedings commenced in the Court before the commencement of this Act."

This provision makes it clear that s. 94 was not

intended to apply to proceedings already pending unless it became applicable by virtue of the Rules of Court or an order made by a judge. Although Pt. IB of the Supreme Court Rules appears to make the Act applicable to certain pending actions commenced under the Common Law Procedure Act 1899 (N.S.W.), as amended, the rules have no application to an action pending in this Court. According to the plaintiff and the second defendant, this deficiency should be overcome by the making of an order under s. 16(1), the power thereby conferred, it is again suggested, being exercisable by this Court by virtue of s. 79 of the Judiciary Act.

Even if, contrary to the view which I have expressed, s. 79 be apt to pick up and apply in proceedings in this Court a power to award interest on damages possessed by the Supreme Court, as the plaintiff and the first defendant contend, it is not apt to pick up and make applicable in these proceedings a power vested in a Supreme Court judge to make an order that the Supreme Court Act, a statute designed to define and regulate the powers and procedures of the Supreme Court, shall apply to proceedings commenced in that Court before 1st July 1972. It will be observed that the power conferred by s. 16(1) is to order that the Act shall apply to proceedings commenced before this date. It is not a power to order that particular provisions of the Act shall apply to such proceedings.

Not only is the power one which in terms has no application to proceedings in this Court but it is a power which read mutatis mutandis would be inappropriate to be exercised in relation to proceedings in this Court. An order should not be made the effect of which would be to apply to proceedings

instituted in the High Court what is, admirable though it may be, an alien code of procedure which in many respects differs from the procedure prescribed by the statutes and rules which relate to this Court.

Finally, I should say that if I had a discretion to make an order applying the provisions of the Supreme Court Act, including s. 94, to these proceedings I should not exercise the discretion so as to make such an order. At the time when the action was commenced in this Court the first defendant was not subject to a liability for interest before judgment on damages. To exercise the discretion in the manner sought by the plaintiff and the second defendant would be to impose on the first defendant a substantial liability to which it was not exposed when the action was commenced and for which no claim was made until a very late stage in the trial. In the circumstances, assuming the existence of the discretion, I think it fairer that the law as it existed at the time of the commencement of the action should apply, notwithstanding the hardship sustained by the plaintiff and the second defendant in being kept out of their money during a period of severe inflation.

Whether in any event an award of interest could be made against the first defendant is another question which need not be explored. It would call for a consideration not only of s. 79 but of ss. 56 and 64 of the Judiciary Act as well as s. 78 of the Constitution.

In the result, in the plaintiff's action there will be judgment for the plaintiff in the sum of $552,378.67 against the two defendants. There will be judgment for the first defendant in the sum of $236,733.72 against the second

defendant on the first defendant's claim for contribution and judgment for the second defendant in the sum of $315,644.96 against the first defendant on the second defendant's claim for contribution.

In the second defendant's counterclaim there will be judgment for the second defendant in the sum of $281,259.30 against the plaintiff and the first defendant. There will be judgment for the plaintiff in the sum of $160,719.60 against the first defendant on the plaintiff's claim for contribution and judgment for the first defendant in the sum of $120,539.70 against the plaintiff on the first defendant's claim for contribution.

I order that the first defendant do pay one-half of the costs of the plaintiff and the second defendant of this action, excluding the costs of the second defendant of its application for inspection of the Cockpit Voice Recorder of the plaintiff's aircraft VH-TJA for which separate provision has been made; otherwise no order as to costs.

REASONS FOR JUDGMENT ON APPLICATION BY SECOND DEFENDANT FOR INSPECTION OF COCKPIT VOICE RECORDER TAPE

Before the trial of this action application was made by the second defendant for an order under O. 49 r. 3 that the plaintiff preserve the CVR tape of its aircraft VH-TJA and produce it for inspection and playback for recording by the second defendant. The application came on before the Chief Justice who refused an application by the Australian Federation of Air Pilots ("the Federation") for leave to intervene and adjourned the application until the trial of the action on an undertaking by the plaintiff that the tape would be preserved and produced for inspection if the Court so ordered. The application for inspection was renewed under O. 31 r. 2(2)(a) at the trial when, after hearing argument, I decided that I would hear the tape played before giving my ruling. On hearing the tape I concluded that it contained material relevant to the issues in the action and that the objections to production and inspection advanced by the first defendant and supported by the plaintiff could not be sustained. I then granted inspection of the tape to the second defendant and indicated that I would subsequently publish my reasons for this decision.

The application was initially based on the ground that it was thought that the CVR tape contained communications passing between the crew of that aircraft and Aerodrome Control (ADC) at Sydney Airport which were relevant to issues arising under sub-pars. 9(a), (b), (c) and (l) of the statement of claim

and sub-pars. 9(a), (b), (c) and (l) of the counterclaim delivered by the second defendant. However, when the application was renewed at the trial, Mr. Shand Q.C. for the applicant stated that the real ground for the application was not correctly expressed by the affidavit in support of the summons and that the conversations thought to be recorded on the CVR tape were not between TJA and ADC but between members of the crew of TJA which were relevant to the case of contributory negligence alleged by the second defendant against the plaintiff in that it was believed that the conversations recorded would throw light on the time when the crew of TJA became aware of the presence of the second defendant's aircraft CPQ on the runway ahead as TJA was in the course of its take-off roll. In this respect it had then been established that the Tower tape recorded at 2136:12 the remark "How far ahead is he", a remark which the plaintiff had admitted in answers to interrogatories to have been made by Captain James of TJA.

The plaintiff's advisers did not assert that the CVR tape was not relevant to the issues in the action, the usual ground on which discovery and inspection is resisted. However, they did assert that the tape was not relevant to the particular issues on the pleadings initially identified by the second defendant's advisers. This submission was well founded but it was not to the point once the second defendant amended the ground on which the application was based .

The application was then resisted on two grounds. The first ground advanced by the first defendant was that the remark "How far ahead is he" made thirty-four seconds after TJA received its take-off clearance was a sufficient admission for

the second defendant's purposes in that it might be inferred from the making of the remark that Captain James had earlier observed CPQ on the runway ahead of him and at a time which would have allowed him to discontinue his take-off roll with safety. The acceptance of this submission would have required me to make a number of assumptions in relation to the evidence yet to be presented and in relation to issues of fact yet to be determined, all favourable to the second defendant and adverse to the plaintiff, a course which was plainly unacceptable.

The second ground was based on a claim of privilege or on a claim in the nature of privilege. This ground was initially taken in an affidavit dated 4th February 1975 sworn by Mr. G. R. Masel, the solicitor for the plaintiff, supported by an affidavit dated 28th February 1975 by Mr. F. E. Yeend, Assistant Secretary of the Australian Department of Transport in charge of the Air Safety Investigation Branch, and later supported by an affidavit sworn on 26th May 1975 by Mr. C. K. Jones, Minister for Transport in the Australian Government. These affidavits made it plain that the Federation had initially opposed the installation of CVRs in commercial aircraft engaged in regular public transport operations and had later agreed to their installation on the basis of an informal agreement reached between the Federation and the then Director-General of Civil Aviation in December 1964. The substance of this agreement was that information recorded on CVRs would be used by the Department only for the purposes of investigation of accidents and then only -

(a) when a flight crew member was killed in an accident or was injured to the extent that his recollection

of events preceding and during the accident may be impaired;

(b) when the Minister indicated his intention, pursuant to the power conferred on him by reg. 287 of the Air Navigation Regulations, to appoint a Board of Accident Inquiry to inquire into the causes of an accident;

(c) when any flight crew members involved requested that the record be analysed to determine a point upon which there might appear to be a conflict in other evidence; or

(d) if, having regard to the particular circumstance of an accident and at the request of the investigator, the Federation and the flight crew members concerned agreed that the record should be analysed to see whether it could throw light on the cause or any particular aspect of an accident (par. 8 of Mr. Yeend's affidavit).

The Federation also indicated that as a matter of policy it would refuse to agree to a request made pursuant to par. (d) in any circumstances.

Following the making of this agreement the Director-General required the plaintiff to install CVRs in its commercial aircraft.

After the accident the plaintiff delivered to the Department of Civil Aviation the CVR tape in TJA for use in the air accident investigation. However, on 5th February 1971 the Director-General received an urgent telegram from the Executive

Vice-President of the Federation, reading as follows:

> "I wish to advise you of presidential directive issued 4/2/71 as follows due to breach of agreement by DCA ref voice recording on VHT JA Sydney Boeing 727 accident all pilots are to ensure that the voice recorder is either off or deactivated as from midnight February 5th 1971 otherwise the aircraft is not to operate until further advice."

Mr. Yeend's affidavit stated: "In the face of this threat the investigator did not examine the cockpit voice record from the Plaintiff's aircraft."

The affidavit went on to say:

> "In my opinion the availability of cockpit voice records is most important in the public interest for the purpose of adequately investigating the cause of an accident to an aircraft where this is possible, having regard to the limitations set out in paragraph 8 hereof. The invasion of privacy involved is in my opinion justified and has been accepted by the pilots concerned only to the extent that the use of cockpit voice records is confined to the investigation of the causes of air accidents for accident prevention purposes. I am further of the opinion that if an order is made for the production for inspection and play-back for recording of the cockpit voice records from the Plaintiff's aircraft the Australian Federation of Air Pilots will not agree to any relaxation of the conditions under which cockpit voice recorders are now available to investigators of aircraft accidents and might seek to have cockpit voice recording equipment withdrawn from Australian aircraft. Such action would significantly reduce the capacity of the Department to maintain the highest possible level of safety for the air travelling public."

In his affidavit the Minister stated that if information recorded on a CVR were to be used otherwise than in accordance with the conditions of the agreement already referred to, members of the Federation would cease to agree to the installation or carriage of CVRs on any aircraft. He went on to say:

> "I consider that information recorded on a cockpit voice recorder on an aircraft the flight crew of which includes members of the Australian Federation of Air Pilots is within a class of information which, in the public interest, should not be disclosed otherwise than in accordance with the conditions set out in paragraph 8 of the Yeend affidavit."

It was common ground that the CVR and the tape in question were the property of the plaintiff, not of the first defendant. The tape was in the possession of the plaintiff, having been returned by the first defendant to the plaintiff after the Federation made it clear that it would not consent to use of the tape in the air accident investigation. From this it might be thought that the tape was not played by the first defendant. However, it was revealed after argument on the application had concluded and after I had announced my decision to hear the tape, that the Department of Civil Aviation had made a copy of the tape whilst the original was in its possession and that this copy had been retained. Moreover, it subsequently became apparent that the plaintiff had caused the original tape to be played in the presence of the crew of TJA, the plaintiff's solicitor and the President of the Federation. The contents of the tape were therefore known to the plaintiff's advisers in the course of preparation of their case. What was known to the first defendant of the contents of the tape does not appear, although it seems clear that the original tape was played under the supervision of an officer of the Air Safety Investigation Branch so that the copy might be made.

It was in these circumstances that the novel objection to production and inspection had to be considered. It was conceded that the objection was not supported by any

judicial decision in Australia or for that matter in the common law world. However, it was submitted that inspection of the tape should be refused in conformity with the principle underlying the doctrine of Crown privilege, namely that a document the production of which would be harmful to the public interest, notwithstanding its relevance to issues in litigation, should not be ordered to be produced. This approach, it was urged, accorded with Conway v. Rimmer, [1968] A.C. 910, in that the detriment to the public interest likely to flow from production of the tape would outweigh the detriment to the public interest in the administration of justice which might be occasioned by refusing production.

In its application to documents, Crown privilege is not confined to documents in possession of the Crown or to documents which the Crown has brought into existence. It extends to documents which are not in the possession of the Crown, and which are brought into existence by another party when those documents contain confidential information supplied by the Crown, production of which would be harmful to the public interest (Asiatic Petroleum Company Ltd. v. Anglo-Persian Oil Company Ltd., [1916] 1 K.B. 822). There a copy of a letter written by the defendants to their agents in Persia containing confidential information from the Admiralty as to the progress of the campaign in Persia was held privileged from production. Swinfen Eady L.J. pointed out, at p. 830: "The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production."

It has always been recognized that the cases in

which production will be refused on the ground of Crown privilege are "exceptional cases", to use the words of Viscount Simon L.C. in Duncan v. Cammell, Laird & Company Ltd., [1942] A.C. 624, at p. 643. Thus to sustain the claim of privilege it must appear that the public interest will be prejudiced because (1) the contents of the document are such that disclosure will have this effect, as for example, information the publication of which would injure national defence or diplomatic relations with other countries, e.g. information of the kind involved in the Asiatic Petroleum case; or (2) the document is of a class that should be kept secret in the public interest, as for example, Cabinet minutes, communications passing between departmental heads or a departmental head and his minister, notwithstanding that the contents are not such that their publication would injure the public interest (see Conway v. Rimmer; Rogers v. Home Secretary, [1973] A.C. 388).

The CVR tape does not fall within the first category of documents attracting Crown privilege. Its contents have no intrinsic importance to the working of government, national defence or foreign relations. No harm will ensue to the nation if the citizenry becomes aware of what Captain James said as TJA careered down the runway on 19th January 1971. Nor does the tape fall within the second category of documents privileged from production.

However, it would be an error to regard the categories of documents which attract privilege as necessarily closed. As time passes it is inevitable that new classes of documents important to the working of government will come into existence and that detriment to the public interest may occur in

circumstances which cannot presently be foreseen. None the less, it is significant that the tape is very different from the documents which have been recognized as attracting Crown privilege; it is not a document brought into existence in the processes of executive government; nor does it record information gathered or provided in the processes of executive government.

It is now firmly established by Conway v. Rimmer and the more recent decisions of the House of Lords ending in Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2), [1974] A.C. 405, that in considering a claim for privilege by the Crown the Court must weigh the competing considerations and determine whether on balance the public interest is better served by production or refusing production. In each case it is a matter of weighing the detriment supposed to flow from production against the prejudice to the administration of justice which may result from a refusal to order production. In making its decision the Court may, when it considers it appropriate so to do, examine the document in respect of which the claim is made. In expressing this view I proceed upon the footing that to the extent to which Robinson v. State of South Australia [No.2], [1931] A.C. 704, decides otherwise, it does not correctly state the law.

The detriment to the public interest which might flow from production of the tape in this case was the possibility that a valuable adjunct to air safety would be withdrawn from commercial aircraft as a consequence of industrial action by the Federation and its members. That this was a serious possibility I accepted because the Minister so regarded it. However, as I have pointed out, the supposed detriment would not flow from the publication of confidential information of importance to the

State or from the publication of a document ordinarily kept secret to ensure the efficient working of government, but from threatened industrial action taken on the ground that the use of the tape for the purposes of civil litigation goes beyond the purposes agreed upon by the permanent head of the Department of Civil Aviation and the Federation when the Federation was prevailed upon to agree to the installation of CVRs in commercial aircraft. In essence the apprehended detriment would result from industrial action taken on the ground that the Federation objected to an order which this Court might think fit to make in the exercise of its jurisdiction.

On the other hand, the detriment to the public interest in the proper administration of justice which would have been occasioned by a refusal of inspection was considerable. The Minister, it will be observed, did not take this into account. He was not in a position to do so without having knowledge of the contents of the tape and without assessing their relevance and importance to the issues which were to arise for determination in the action. It was with a view to making an assessment of this kind, an assessment which in my judgment was essential to a proper evaluation of the public interest in allowing inspection of the tape, that I decided to hear the tape played, despite opposition from counsel for the first defendant who made it clear that the Minister objected to my hearing it as this in itself would go beyond the purposes agreed upon between the Director-General and the Federation.

The information recorded on the tape was relevant to the issues in the action, in particular to the allegation of contributory negligence on the part of the plaintiff, and might,

in the opinion I then held, significantly, even decisively, influence the outcome of the action - an opinion which has since been confirmed. In the result, I concluded that on balance the public interest was better served by allowing, rather than refusing, inspection of the tape. In so deciding, I had two principal considerations in mind.

The first is that it is central to our conception of the administration of justice that documents relevant and material to the issues arising in litigation should not be withheld from the parties and that each party enjoys as an incident of his right to a fair trial the right to present as part of his case all the relevant and material evidence which supports or tends to support that case. The existence of Crown privilege as an acknowledged exception should not be seen as a reason for diminishing the force or the importance of this conception of the administration of justice, but rather as embracing a group of "exceptional cases" in which the public interest in the proper administration of justice has been outweighed by a superior public interest of a self-evident and overwhelming kind.

The second consideration, closely connected with the first, is the need to maintain public confidence in the administration of justice. The withholding from parties of relevant and material documents, unless justified by the strongest considerations of public interest, is apt to undermine public confidence in the judicial process. This is of particular importance here where an industrial union, not a party to the proceedings, objects to the making of the order sought and to the admission in evidence of the tape and threatens by industrial action to terminate the use of CVRs, thus causing the detriment

to the public interest now apprehended. It would be quite intolerable if the Court were to deprive a party of the ordinary incidents of a fair trial in the face of threatened action of this kind when it has appeared that the material sought to be excluded could have, as indeed it has had, a decisive influence on the outcome of the action. The evident unfairness of pursuing such a course against the second defendant was accentuated in this case by the circumstance that the plaintiff's advisers had knowledge, and the first defendant had knowledge or the means of knowledge, of the contents of the tape which, as appears from my reasons for judgment in the action, were quite inconsistent with the version of events given in evidence by the crew of TJA.

It was for these reasons that I decided that the public interest required that inspection of the tape should be granted to the second defendant and I overruled the Minister's objection. It was assumed, and in my opinion correctly assumed, that an order for inspection would entitle the defendant to have the tape played under supervision in the presence of representatives of the other parties to the action.

As I considered that the second defendant was entitled to inspection of the tape on the footing that it constituted "personal property" within the meaning of O. 31 r. 2 (2)(a), I did not need to decide whether the tape was a "document" within the meaning of this rule. Had it been necessary to decide the question, I should have been disposed to the view that the tape was a document. In this respect I prefer the decisions of Walton J. in Grant v. Southwestern and County Properties Ltd., [1974] 2 All E.R. 465, and Hoare J. in Cassidy v. Engwirda Construction Company, [1967] Q.W.N. 16, to the

decision in Beneficial Finance Corporation Company Ltd. v. Conway, [1970] V.R. 321.

As the hearing of the application and the playing of the tape for the purposes of the application occupied one and a half days of the trial, the plaintiff and the first defendant should be ordered to pay the costs of the second defendant of the application to that extent. I make no order as to the earlier costs of the application.

IN THE HIGH COURT OF AUSTRALIA

AUSTRALIAN NATIONAL AIRLINES COMMISSION

v.

THE COMMONWEALTH OF AUSTRALIA AND CANADIAN PACIFIC AIRLINES

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY 29 AUGUST 1975

RM73/00063