

**LICE ELENIVULA SAUMI (as administratrix of the estate of NACANIELE SAUMI (dec'd)) v AIR FIJI LTD**

HIGH COURT CIVIL JURISDICTION

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SCOTT J

15 March 2002

10 [2002] FJHC 41

**Aviation — civil aviation — air accidents — claim for damages on ground of negligence — statement of claim sought to be struck out — whether statement of claim has no reasonable cause of action — whether Plaintiff's claim of negligence amounted to recklessness under the Order — whether claim for damages pursuant to the Carriage by Air Acts (Application of Provisions) Overseas Territories Order 1967 — whether claim for negligence would amount to recklessness if proved under Art 20 of the Order — Carriage by Air Acts (Application of Provisions) Overseas Territories Order 1967 (Cap 23) Arts 3, 20, 25, 29.**

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20 Nacanieli Saumi was a passenger on Air Fiji Flight PC 121 which crashed with the loss of all life aboard. Lice Elenivula Saumi (Plaintiff) is the administratrix of the estate of Nacanieli Saumi. The Plaintiff commenced proceedings and filed a statement of claim for damages on the ground of negligence. Air Fiji Ltd (Defendant) filed a statement of defence denying negligence and pleaded that any claim for damages by the Plaintiff shall be brought pursuant to the Carriage by Air Acts (Application of Provisions) Overseas Territories Order 1967 (the Order). The Plaintiff issued a summons seeking leave to amend the statement of claim and was intended for the Plaintiff's claim to be brought within the provisions of Art 25 of the Order. The Plaintiff's summons was met by cross-summons and sought that the statement of claim be struck out as it disclosed no reasonable cause of action. The counsel for Defendant submitted that the Plaintiff's claim is excluded under Art 3 of the Order since it is essentially a common law claim negligence and not an allegation of recklessness which should be brought pursuant to the Compensation to Relatives Act (Cap 29) and the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27). In answer, counsel for Plaintiff accepted the effect of Art 3 of the Order. He also accepted that the recklessness with knowledge required by Art 25 of the Order had not been pleaded and that mere negligence could not amount to recklessness with knowledge. He however argued that the facts already pleaded as negligence would, if proved, be capable in the overall context of being found to amount to recklessness as required by the article. He pointed to the words "an action" in Art 29 of the Order and submitted out that it could not be argued that "an action" had not in fact been commenced within the stipulated period.

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**Held** — (1) The principal purpose of imposing limitation periods within which actions must be brought is to prevent delay being used by one party to gain an unfair advantage over the other. In the present case, a claim for damages arising out of the accident was in fact filed promptly and it was not suggested by counsel for the Plaintiff that the Defendants have in any way been surprised or embarrassed by the claim. Although the Order is not mentioned in the claim, it seem that the effect of Art 3 being to exclude any other form of action the claim actually brought by the Plaintiff must be seen as falling within the Order.

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(2) While it is true that it would have been better if the draftsman of the statement of claim had not overlooked the Order but the ends of justice are seldom met by merely relying on unmeritorious technicalities. The action by the Plaintiff should be regarded as an action brought pursuant to the Order.

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Application granted.

No case referred to.

*D. Sharma* for the Plaintiff

*R. Smith* for the Defendant

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### Decision

**Scott J.** On 24 July 1999 Nacanieli Saumi was a passenger on Air Fiji Flight PC 121 which crashed with the loss of all life aboard.

10 On 8 November 2000 after the publication of an official report into the accident the Plaintiff commenced proceedings. The statement of claim asserts that the accident occurred as a result of the negligence of the Defendant, their servants or agents. Particular of the alleged negligence are set out in 11 subparas the last of which (subpara 12(j)) reads:

15 *The Plaintiff will further rely on the provisions of the Civil Aviation Act and the regulations made thereunder.*

In a statement of defence also filed in November 2000 the Defendant denies negligence and importantly pleads that any claim for damages by the Plaintiff has to be brought pursuant to the Carriage By Air Act (Application of Provisions) Overseas Territories Order 1967 (the Order — see Cap 174 — the Civil Aviation Act — Subsidiary Legislation S-190).

20 In January 2001 the usual orders were made on the summons for directions. In April 2001 the Plaintiff issued a pre-trial conference notice under O 34 r 2. In July 2001 the Plaintiff issued a summons seeking leave to amend the statement of claim. The amendment which was sought was entitled:

*Elaboration of the claim under the Civil Aviation Act (as set out in clause 12(j)).*

30 and was intended to present the Plaintiff's claim in such a way that it could be brought within the provisions of Art 25 of the Order. Article 25 exceptionally, in cases of recklessness, enables awards of damages to exceed the limit imposed by Art 22. This Article which is subject to s 2 of the Carriage by Air (Fiji Currency Equivalents) Order 1969 — LN 105/69 — Cap 174 Subs S-205 limits awards to only F\$48,369.00.

35 The Plaintiff's summons was met by a cross-summons dated 25 February 2002 seeking to strike out the statement of claim as disclosing no reasonable cause of action (RHC O18 r 18(a)).

40 After discussion with counsel it was agreed that the second summons should logically be dealt with first. It will be however noted the very helpful written submissions filed by counsel (2 November 2001 and 8 March 2002 by Mr Sharma, 25 February 2002 by Mr Smith) are relevant to both applications.

45 Put shortly Mr Smith's submission is that the Plaintiff's claim which as a matter of fact makes no mention of the Order is specifically excluded by Art 3 of the Order since it is essentially a common law claim in negligence (not including an allegation of recklessness) albeit brought pursuant to the Compensation to Relatives Act (Cap 29) and the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27).

50 In answer, Mr Sharma accepted the effect of Art 3 of the Order. He also accepted that the recklessness with knowledge required by Art 25 had not been pleaded and that mere negligence could not amount to recklessness with knowledge. He however argued that the facts already pleaded as negligence would, if proved, be capable in the overall context of being found to amount to

recklessness as required by the article. He pointed to the words “an action” in Art 29 and submitted out that it could not be argued that “an action” had not in fact been commenced within the stipulated period.

5 Given the date of the accident, the limitation period imposed by Art 29 and the provisions of Art 3 the effect of allowing this application would be wholly to shut out the Plaintiff from bringing any claim at all against the Defendant, even a claim limited to \$48,000. Such a dramatic consequence to a deceased’s estate would, I am satisfied, need pressing justification.

10 The principal purpose of imposing limitation periods within which actions must be brought is to prevent delay being used by one party to gain an unfair advantage over the other. In the present case a claim for damages arising out of the accident was in fact filed promptly and it was not suggested by Mr Smith that the Defendants have in any way been surprised or embarrassed by the claim. Although the Order is not mentioned in the claim it seems to me that the effect  
15 of Art 3 being to exclude any other form of action the claim actually brought by the Plaintiff must be seen as falling within the Order.

It would have been better if the draftsman of the statement of claim had not overlooked the Order but the ends of justice are seldom met by merely placing reliance on unmeritorious technicalities.

20 In my view this action should be regarded as an action brought pursuant to the Order. Whether in fact the Plaintiff will be able to satisfy the stringent test imposed by Art 25 in another matter.

At the hearing of this application I indicated that I would refuse it. I did so for the reasons now given. Before however leaving this application I feel it  
25 appropriate to make one or two further observations. Both the Order and the Fiji Currency Equivalents Order date from the 1960’s. They are clearly out of date and need to be replaced. A currency unit named a franc and consisting of 652 mgs of gold of millesimal fineness 900 (Art 22 (5)) no longer exists. 875,000 of such francs would now be worth far more than F\$48,000 which in turn is now worth  
30 far less than it was in 1969. To limit the unsuspecting domestic airline travelling public to a maximum claim of F\$48,000 brought within 2 years for death arising from an accident seems to me difficult to reconcile with the rights which are supposed to be protected by the Fair Trading Decree 1992. In my view this is an area of the law which could with advantage be referred to the Law Reform  
35 Commission for their consideration.

*Application granted.*

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