# HIGH COURT OF AUSTRALIA

**AUSTRALIAN NATIONAL AIRLINES COMMISSION** v.
THE **COMMONWEALTH** [1975] HCA 33; (1975) 132 CLR 582

High Court

High Court of Australia
Mason J.(1)

**CATCHWORDS**

High Court - Practice - Action - Discovery and inspection - Privilege - Public interest - Action for damages caused by ground collision between aeroplanes - Application for inspection of cockpit voice record tape - Agreement between Director-General of Civil Aviation and pilots' organization limiting permissible use of recorded information - Threat by pilots' organization to withdraw agreement for installation of recorder if information used otherwise than for agreed purpose - Claim of privilege by Minister of State founded upon public interest - Discretion of court - Whether tape recording personal property - Whether document - High Court Rules O.31, r. 2(2) (a)*.

* Order 31 r. 1 of the High Court Rules provides: "(1) A party to an action may take out a summons for directions at any time before judgment." Rule 2 provides: "(1) Upon the hearing of the summons, the Court or a Justice may give such directions with respect to the proceedings as the Court or Justice thinks proper. (2) Without prejudice to the generality of the last preceding sub- rule, the Court or a Justice may - (a) make such order as is just with respect to - (i) discovery and inspection of documents; . . . (iii) inspections of real or personal property . . . " Rule 3 provides "An affidavit shall not be used on the hearing of a summons for directions except by leave of the Court or a Justice".

**HEARING**

Sydney, 1975, May 26-28, 30; June 2-6, 9, 11, 12, 17-20, 23, 24;
August 29. 29:8:1975

**DECISION**

August 29.
MASON J. delivered the following written reasons for judgment on the second defendant's application for inspection of the CVR 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 play back 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. (at p587)

2. 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 (1) of the statement of claim and sub-pars 9 (a), (b), (c) and (1) of the counterclaim delivered by the second defendant. However, when the application was renewed at the trial, Mr. Shand 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. (at p588)

3. 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. (at p588)

4. 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. (at p588)

5. 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. (at p589)

6. Following the making of this agreement the Director-General required the plaintiff to install CVRs in its commercial aircraft. (at p589)

7. 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." (at p589)

8. 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." (at p589)

9. 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 par. 8 of the Yeend affidavit." (at p590)

10. 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. (at p590)

11. 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] UKHL 2; (1968) AC 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. (at p590)

12. 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 Co. Ltd. v. Anglo-Persian Oil Co. Ltd. (1916) 1 KB 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: "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" (1916) 1 KB, at p 830 . (at p591)

13. 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 & Co. Ltd. [1942] UKHL 3; (1942) AC 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 (1916) 1 KB 822 ; 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 [1968] UKHL 2; (1968) AC 910 ; Rogers v. Home Secretary (1973) AC 388 ). (at p591)

14. 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. (at p591)

15. 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. (at p592)

16. It is now firmly established by Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 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) AC 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) AC 704 decides otherwise, it does not correctly state the law. (at p592)

17. 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. (at p592)

18. 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. (at p593)

19. 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. (at p593)

20. 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. (at p593)

21. 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. (at p594)

22. 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 Miinister'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. (at p594)

23. 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. (1975) 1 Ch 185 and Hoare J. in Cassidy v. Engwirda Construction Co. (1967) QWN 16 to the decision in Beneficial Finance Corporation Co. Ltd. v. Conway [1970] VicRp 39; (1970) VR 321 . (at p594)

24. 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.