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Neutral Citation Number: [2014] EWCA Civ 257

Case No: B3/2013/1817

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
MR JUSTICE LEGGATT
[2013 EWHC 1409 \(QB\)](#)**

Royal Courts of Justice
Strand, London, WC2A 2LL
13/03/2014

B e f o r e :

**LADY JUSTICE ARDEN
LORD JUSTICE TREACY
and
LORD JUSTICE CHRISTOPHER CLARKE**

Between:

Scott Hoyle

Appellant

- and -

Julia Mary Rogers

Jade Nicola Lucinda Rogers

Respondents

Secretary of State for Transport

International Air Transport Association

1st Intervener

2nd Intervener

**Robert Lawson QC and Timothy Marland (instructed by Clyde & Co LLP) for the Appellant
Michael Crane QC and John Kimbell (instructed by Stewarts Law LLP) for the Respondent
Malcolm Sheehan (instructed by the Treasury Solicitor) for the 1st Intervener
Akhil Shah QC (instructed by Holman Fenwick Willan) for the 2nd Intervener
Hearing date: 15th January 2014**

HTML VERSION OF JUDGMENT

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LORD JUSTICE CHRISTOPHER CLARKE:

1. On 15 May 2011 Orlando Rogers was a passenger in a vintage Tiger Moth propeller bi-plane manufactured in 1940 of which the appellant, Scott Hoyle, was the pilot. In the course of the flight the aircraft crashed to the ground. Mr Rogers was killed. Mr Hoyle was seriously injured but survived. The claimants, respondents to this appeal, who are Mr Rogers' mother and sister, bring this action as executors on behalf of his estate and as dependants, claiming damages for his death as a result of the accident, which they attribute to Mr Hoyle's negligence.
2. The Air Accident Investigation Branch ("AAIB") investigated the accident and on 14 June 2012 produced a report ("the Report"). The issue in this appeal is whether the judge was right to hold that the Report was admissible in evidence and to decline to exclude it as a matter of discretion.
3. Mr Robert Lawson QC on behalf of the appellant contends (a) that the admission of the Report would offend the rule in *Hollington v Hewthorn* [1943] KB 857; (b) that, insofar as the Report contains expressions of expert opinion, it does not comply with the mandatory provisions of CPR Part 35 and should be excluded on that ground as well; and (c) that, if the Report is potentially admissible, it should be excluded, as a matter of discretion, under CPR 32 and that the judge was wrong to decline to do so. In relation to the latter question the Secretary of State for Transport ("SoS") and the International Air Transport Association ("IATA") were given leave to intervene and have made representations as to the approach that the court should take. They have invited us to lay down guidelines for the future.

The AAIB and the Regulations

4. The AAIB is part of the Department for Transport. It was established in 1915. Its task is to investigate accidents and serious incidents involving aircraft which occur in or over the United Kingdom. Its powers are contained in the *Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996* ("the Regulations") which were made under sections 75 and 102 of the *Civil Aviation Act 1982*. These Regulations implement the EU obligations of the United Kingdom under *Council Directive 94/56/EC of 21 November 1994* ("the Directive") and put into effect the requirements of Annex 13 to the *Convention on International Civil Aviation*, signed in Chicago on 7 December 1944 ("the Chicago Convention").
5. Article 26 of the Chicago Convention provides that a State in which an accident to an aircraft occurs shall institute an inquiry in accordance with the procedure recommended by the International Civil Aviation Organisation ("ICAO"). That procedure is in Annex 13 to the Convention ("Annex 13").

6. *Regulation (EU) 996/2010* on the Investigation and Prevention of Accidents and Incidents in Civil  **Aviation**  ("the EU Regulation") establishes a parallel regime with direct effect in Member States. The EU Regulation came into force on 2 December 2010. There is a substantial overlap between the EU Regulation and the Regulations. The Regulations have not, however, been repealed. It is sufficient to outline the statutory scheme for the investigation of air accidents established by the Regulations without also referring to the corresponding provisions of the EU Regulation.

The Regulations

7. Regulation 8 provides for the appointment of Inspectors of Air Accidents who are collectively known as the AAIB. When an accident occurs in or over the United Kingdom the Chief Inspector (who reports to the SoS) must appoint one or more Inspectors to carry out an investigation. The team is supervised by a senior supervising Inspector. The Inspectors are not normally named in a report, and were not in the present case. But there is no great difficulty in establishing who they are and they do not seek to hide their identity. In the present case the identity of the senior supervising Inspector; the operations Inspector, who is a qualified and experienced pilot; and the engineering Inspector, who is a chartered aeronautical engineer, is known. There is usually, as there was here, a flight data Inspector who is qualified in avionics and/or flight data analysis. The investigation teams are commonly named in published reports, although they were not in this case.
8. The Regulations give the Inspectors a series of powers to enable them to carry out investigations, including (a) rights of access to the accident site and the aircraft or its wreckage, the flight recorders and any other recordings, and the results of the examination of bodies of victims and of examinations of the people involved in the operation of the aircraft; and (b) the right to examine witnesses and to have access to relevant information or records held by the owner, operator or manufacturer of the aircraft and by the civil  **aviation**  and airport authorities.
9. The power to examine witnesses includes power to summon them to give evidence; to require them to answer questions or produce documents; to take witness statements and to require the giver of the statement to make and sign a declaration of truth; and to inspect any place, building or aircraft and to take measures for the preservation of evidence: Regulation 9 (2). In practice the AAIB receives a high degree of cooperation and does not, to any appreciable extent, have to rely on its powers of compulsion.
10. These powers are, by Regulation 9, to be exercised, where appropriate "*in cooperation with the authorities responsible for the judicial inquiry*". By Regulation 9(5) this has the same meaning as in the Directive. This appears to be a reference to Article 5 of the Directive which provides for coordination of investigations when a judicial investigation is also instituted.
11. There are two critical features of an AAIB investigation. First, the sole objective of the investigation is the prevention of accidents and incidents. Second, it is not the purpose of the investigation to apportion blame or liability: see Article 3.1. of Annex 13; Regulation 4 of the Regulations, and Article 4 (3) of the Directive.
12. Regulation 10 provides that the extent of investigations and the procedure to be followed in carrying out investigations required or authorised under the Regulations is to be determined by the Chief Inspector taking account of the purpose described in Regulation 4, the principles and

objectives of the Directive and the lessons he expects to draw from the accident or incident for the improvement of safety.

13. Regulation 11 (1) requires the investigating Inspector to prepare a report *"in a form appropriate to the type and seriousness of the accident or incident"*. That report is by Regulation 11 (3) required to state the sole objective of the investigation and, where appropriate, to contain safety recommendations. Regulation 11 (5) provides that a *"safety recommendation shall in no case create a presumption of liability for an accident or incident"*. The report is required to protect the anonymity of those involved in the incident: Regulation 11 (4) (b). This reflects what Article 5.12.2. of Annex 13 provides.
14. Regulation 13 requires that, subject to regulation 12 (1), the Chief Inspector shall cause the report to be made public in the shortest possible time and, if possible, within 12 months of the accident or incident. Regulation 12 (1) provides that no report shall be published if it is likely to affect adversely the reputation of any person until the procedure under that regulation has been completed. That provides for notice to be served on the person affected or, if he is deceased, a person representing his interest, of any proposed analysis of facts and conclusions as to the cause (s) of the accident or incident which may affect the person concerned. The person notified has the chance to make representations within 28 days of the notice, and the report can only be published with any changes that the investigating Inspector sees fit to make in the light of them.
15. The report is a public document but the records of the investigation are not. Regulation 18 (1) provides that, subject to an important exception, no relevant record shall be made available by the Secretary of State to any person for purposes other than accident or incident investigation. A relevant record is an item referred to in certain sub-paragraphs of paragraph 5.12 of Annex 13. These include (a) all statements taken; (b) all communications between persons involved in the operation of the aircraft; (c) medical or private information regarding those involved in the accident or incident; (d) cockpit voice recordings and transcripts from such recordings; and (e) recordings and transcriptions of recordings from air traffic control units. Regulation 18 (5) provides that relevant records will not be treated as having been made available by the SoS in contravention of Regulation 18 where they are included in or appended to an AAIB published report.
16. The exception for England and Wales is where the High Court, on the application of a party to proceedings, orders that the relevant record shall be made available to the party applying for the purpose of those proceedings. This can only be done if the court is:

"satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom": Regulation 18 (2) and (4).

AAIB Reports

17. Appendix 1 to Annex 13 prescribes a format for reports, with details of what they are to contain. The AAIB reports, including the Report, follow a usual pattern, which reflects what Appendix 1 prescribes. The Report contains a Synopsis. This is followed by factual information consisting of a narrative history of the flight; meteorological information; pilot information; including the pilot's recollections; information about the aircraft; engineering information

including an examination of the wreckage at the accident site; an assessment of the possibility that the pilot's control of the aircraft was restricted; a detailed examination of the wreckage; pathological information from a post mortem examination on the passenger; a record of the transmissions between the pilot and Air Traffic Control; details of track logs for the flight recovered from the plane's global positioning equipment recovered from the site; other information (including reported observations of witnesses on the ground); and published CAA information and guidance on aerobatics and spinning. The Report then contains an analysis of the preceding information, leading to a conclusion.

18. This is typical of the content of AAIB reports which will usually contain a framework of factual material, a description of the state and location of the wreckage and an analysis of whatever flight data assists in an understanding of the cause of the accident or incident. Such reports often record tests, including tests to destruction, on wreckage, parts and components and a reconstruction of specific conditions.

19. The Synopsis includes the information that the aircraft:

"was seen by observers on the ground to pull up into a loop and during the manoeuvre it entered a spin from which it did not recover. The manoeuvre started at 1,500 feet agl and there was insufficient height for the pilot to recover from the subsequent spin".

20. The respondents seek to rely on this Report as evidence at any trial for the admissible factual and expert evidence which they say it contains. They do not suggest that it is in any sense conclusive; nor do they intend to rely on it to the exclusion of other factual or expert evidence. Their Reply shows that they intend to rely on it to establish, in summary, six matters.
21. The first is that Mr Hoyle had no formal training in aerobatic flying. This will, in any event, be apparent, from his licence and flying records.
22. The second is that immediately before the crash the aircraft was observed pulling up into a loop. This is what the Report records some witnesses to have observed. It is also the most controversial point. The appellant denies that he was pulling up into a loop and maintains that prior to the accident the rudder pedals jammed; he was holding the aircraft off in a nose up attitude which might appear to be the beginning of a climb but was in fact the beginning of a stall; because the pedals jammed he was unable to prevent the aircraft from stalling and flipping over into a spin from which, because of the jamming of the pedals, he could not recover. The respondents say that there are various reasons, largely drawn from the findings in the Report, why that cannot be right: see paragraph 11 of the Reply.
23. The third matter is that the loop manoeuvre started at around 1,500 feet above ground level in the same geographic location as a loop performed by the appellant with his first passenger of the day. This conclusion is derived from the data recording and plotting of the position of the aircraft referred to in the Report.
24. The fourth matter is that during the loop manoeuvre the aircraft entered into an unintentional spin to the right from which it did not recover. The appellant accepts that the aircraft flipped over and back into a fully developed spin but denies that that was as a result of an attempt to loop or some other aerobatic manoeuvre.

25. The fifth matter is that the appellant did not have sufficient knowledge or training in the correct spin recovery for a Tiger Moth.
26. The sixth is that there was insufficient height for the appellant to recover from the spin.

The nature of the Report

27. The Report is a mixture of statements of fact and statements of opinion. In paragraphs 30-42 of his judgment the judge carefully analysed what was factual evidence and what was opinion in terms which I do not intend to rehearse. Some of the statements of fact are observations made by the inspectors themselves e.g. of the location of the wreckage or the nature and extent of the damage. Some are reports of what the pilot told the inspectors. In this respect significance is also sought to be attached to the fact that, according to the Report, the pilot, when asked what the recovery aspects from a spin should be, failed to mention some of what the Report describes as the "*crucial inputs*". Some statements consist of what other unidentified eye witnesses (one a retired professional pilot) said they saw.
28. The opinion evidence includes (i) the finding of an unidentified expert in **aviation** pathology at the post mortem of the deceased passenger; (ii) an analysis of recorded meteorological data carried out by the Met Office in order to obtain an estimate of wind and temperature at the scene; (iii) an analysis of data extracted from the flight track logs recorded by the Global Positioning System on board, which must have been done by someone with relevant expertise, as a result of which the tracks and altitude of the plane for the two flights had been plotted; and (iv) an opinion that the loop manoeuvre was carried out at too low a height to enable recovery from the subsequent spin and that the location and alignment of the rear fuselage and the ground marks made by the tail skid dragging to the left indicated that there was a rotation to the right when the aircraft struck the ground (when the pilot thought he was spinning to the left). As the judge rightly observed, the distinction between fact and opinion is not always clear; some statements in the Report might be regarded as mixed fact and opinion and in relation to technical matters there was no clear line between statements of fact and statements of opinion.
29. The potential value of this material to anyone seeking to establish the cause of the accident (and any culpability therefore) is obvious. The inspectors are experienced and expert individuals fulfilling a public duty to investigate air accidents and incidents for the purposes of preventing further accidents or incidents in future. It is no part of their function to attribute blame or responsibility. There is, thus, no realistic possibility of their report being slanted so as to support or refute a claim that any individual or corporation is, or is not, at fault. Their investigation is carried out as soon as possible after the accident or incident. The investigators have the power, and, in practice, the ability to obtain the necessary information from a wide range of sources in order to establish, on the basis of information obtained soon after the relevant events, a composite picture of what happened and why. They need to do that in order to try and avoid it happening again. I agree with the judge when he said that a non-lawyer would be astonished that the report of the AAIB was not something to which a court could even have regard.
30. Mr Lawson made a number of submissions about what he submitted was the unsuitability of the Report as evidential material. The testimony referred to is unattributed; nothing the witness said is reported verbatim nor is it clear in what context and in response to what questions, leading or otherwise, he spoke. In those circumstances he submits the Report should effectively be treated

as making factual findings rather than recording evidence (as to which see paragraphs 52-54 below). One example is the passage in the Report which records that "*the owners' group had a verbal agreement that no solo acrobatics were to be undertaken until a pilot had been cleared to do so*". It seems to me, however, that these points go to the weight to be given to the evidence in the Report rather than its character.

31. Insofar as the Report consists of statements or reported statements of fact, it is, *prima facie*, admissible. It is immaterial that it constitutes hearsay, whether primary or secondary. Insofar as it consists of expert opinion I consider its status further below.

The rule in Hollington v Hewthorn

32. In this case the Court of Appeal held that the conviction of the defendant in the magistrates' court for careless driving was inadmissible in a subsequent action in which the plaintiff and his son (who had since died) claimed damages on the ground of the defendant's negligent driving. The rule extends so as to render factual findings made by judges in civil cases inadmissible in subsequent proceedings (unless the party against whom the finding is sought to be deployed is bound by it by reason of an estoppel *per rem judicatam*).
33. This doctrine is not new. It is to be found in the *Duchess of Kingston's case* (1776) 2 Sm L.C., 13th edn, 644, where Sir William Grey, Lord Chief Justice of the Common Pleas, said:

"What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but, not being applicable to the present subject, it is unnecessary to state them."

34. The rule also applies to the findings of facts of arbitrators: *Land Securities Plc v Westminster City Council* [1993] 1 WLR 286; of coroners or coroners' juries: *Bird v Keep* [1918] 2 KB 692; of persons conducting a Wreck Inquiry: *Waddle v Wallsend Shipping Co* [1952] 2 Lloyd's Rep 105, where Devlin J suggested that the law should be changed; and *The European Gateway* where Steyn J repeated the suggestion [1987] QB 206; and to the findings of individuals, of however great distinction, conducting extra statutory inquiries such as Lord Bingham's Report into the Supervision of BCCI: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1. The judge treated the rule as applicable to judicial findings, being, for this purpose, "*an opinion of a court or other tribunal whose responsibility it is to reach conclusions based solely on the evidence before it*". If that definition was intended to exclude a tribunal whose remit is to carry out its own investigation it is too narrow.
35. The rule, at any rate so far as it applies to criminal convictions, has been controversial for years. In *Hunter v Chief Constable of the West Midlands* [1980] QB 283, 319 Lord Denning MR, who had been counsel for the appellant in *Hollington v Hewthorn* described it as "*beyond doubt ... wrongly decided*". In the House of Lords in the same case Lord Diplock said that that was generally considered to be so. In *Arthur JS Hall v Simons* [2002] 1 AC 615, 702 Lord

Hoffmann said that the Court of Appeal in that case was "*generally thought to have taken the technicalities of the matter too far*".

36. Insofar as the rule precludes reliance on criminal convictions in subsequent civil proceedings it has been abrogated by statute: the *Civil Evidence Act 1968*. But it still applies in relation to findings of fact in civil proceedings: *Land Securities Plc v Westminster City Council* [1993] 1 WLR 286, 288E-F per Hoffmann J; *Secretary of State for Business Enterprise and Regulatory Reform v Aaron & Ors* [2008] EWCA Civ 1146; [20- 29], where Thomas LJ dealt with the rule and the exception to it in respect of Companies Act investigations where the investigators' findings of fact are admissible in disqualification proceedings; *Calyon v Michailaidis* [2009] UKPC 34.
37. One of the reasons given by Lord Goddard for the rule was that the court should require the "*best evidence*". This, as Lord Hoffman observed in *Land Securities Plc v Westminster City Council* [1993] 1 WLR 286, was a disguised reference to the rule against hearsay, now abrogated by the *Civil Evidence Act 1995*. In *Masquerade Music Ltd v Springsteen* [2001] EWCA Civ 563 at [85] Jonathan Parker LJ declared that the time had come when it could be said with confidence that the "*best evidence rule, long on its deathbed, has finally expired*".
38. The reasoning that has survived is that set out in the following passage of Lord Goddard's judgment (at 595):

"It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

39. As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.
40. In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone.

Expert evidence

41. As *Hollingthorn v Hewthorn* recognises in terms, different considerations apply to scientific or expert witnesses. Insofar as an expert gives evidence of fact (e.g. where he found the wreckage to be) his evidence is as admissible as that of any other person. Where his evidence is evidence of opinion it is admissible because it is the product of a special expertise which the trial judge is unlikely to possess and which, even if he did, it is not his function to apply.
42. As to the latter, it was suggested that the authors of the Report were not shown to have the necessary credentials to give evidence or, at least, that it was not possible to discern whether they did or not, especially since they are not named in the report. It might not, for instance, be the case that the investigator who was a pilot had any or any sufficient experience of planes of the vintage concerned, or of their use for aerobatic manoeuvres.
43. I do not regard this objection as well founded. The identity of the principal investigators is known and their expertise must be a matter of public record or at least readily discoverable. The bar to be surmounted in order to count as an expert is not particularly high, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility. I have little difficulty in inferring that the authors of the Report may be treated, at this juncture, as being experts in their respective fields, as Tomlinson J, as he then was, did in *Lambson Aviation v Embraer Empresa Brasileira de Aeronautica SA*: see para 90 below.
44. In *Sunley v White (Surveyors & Estate Agents) Ltd* [2003] EWCA Civ 240 this Court regarded as admissible a draft soil report issued by a company although the report was unsigned, provisional and did not carry the name or qualifications of the author. These were matters which Clarke LJ, with whom Longmore LJ agreed, treated as "*essentially going to weight*". Part of the grounds of admitting the report was that it showed the type of survey report that the claimant would have received if the defendants had not been negligent – a question of fact. But the claimant was also permitted to resile from a concession previously made so as to allow them to rely upon the report for statements in it in relation to "*contamination ...and upon the figures*". This was a reference to the author's opinion as to the extent of underground contamination at a petrol filling station and the cost of necessary remedial works.
45. Nor do I regard it as any objection to the admission of the Report that it is the result of a team effort to which several experts contributed. In a field such as this that will inevitably be so: see *R v Kershberg* [1976] RTR 526 (not necessary for every stage of an analysis of urine to be done personally by the certifying analyst); *R v Tate* [1977] RTR 17. Nor does the fact that the senior (supervising) Inspector will have been in overall charge mean that he is to be regarded as no more than a non expert co-ordinator, since he will have at least one of the expert backgrounds of those preparing the report.
46. One of the reasons for the rule in *Hollington v Hewthorn*, as explained by Lord Goddard, was that, if an earlier judgment was not to be conclusive, it:

"ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."
47. In *Calyon v Michailaidis* the Privy Council held that a decision of a Greek Court was not admissible as evidence in proceedings in Gibraltar involving someone who had not been a party to the Greek proceedings. The Board cited Lord Goddard's words above and observed at [27] that :

"...the essential reasoning is compelling: unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon."

48. The Committee concluded that, even if it was open to them to do so, they would not depart from the rule and admit the Greek judgment as evidence. The judgment did not indicate the substance of the evidence on which the court relied so that a judge of the Gibraltar Supreme Court would be in no position to determine what weight to give to the Greek judgment on the point.
49. Mr Lawson submitted that the case for the exclusion of the Report was as compelling as it was in respect of Mr Hewthorn's conviction or the decision of the Greek Court in *Calyon*. I do not agree. The Report is not a bare finding such as one of carelessness or ownership of a painting. The statements of fact contained in the Report, e.g. as to the position of the wreckage or the reported observations of the eye-witnesses, are evidence which the trial judge can take into account in like manner as he would any other factual evidence, giving to it such weight as he thinks fit.
50. The expressions of opinion in the Report include: (i) the conclusion of the pathologist that the fact that the strap attachment wire of the passenger's harness failed and he sustained a head injury probably did not affect the outcome; (ii) an estimate of the wind and temperature profile in the area of the accident which resulted from an analysis of recorded meteorological data; (iii) the opinion that the engine appeared in a serviceable condition; (iv) the view that, in the light of his response to a question as to what the recovery actions from a spin should be, the pilot had insufficient knowledge or training on the aircraft's correct spin recovery technique such that he would probably not have been able to recover from an unintentional spin; and (v) a conclusion that the manoeuvre started at 1,500 feet agl and there was insufficient height to recover from the spin.
51. I regard these expressions of opinion as ones to which a Court is entitled to have regard. It is open to an expert, that is to say someone who has the appropriate special expertise, to express an opinion based on the facts as he understands, or assumes, them to be, if and insofar as his conclusion is informed by, or a reflection of, that expertise. This includes matters such as the causation of an accident. The AAIB appears to me, as it did to the judge, to be a body with the requisite expertise, charged as it is in the Regulations and the EC Regulations with responsibility for investigating air accidents and having considerable qualified expertise and experience in doing so.
52. It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate. However, as the judge observed, it is common to find in many expert's reports opinions of that character, which are not helpful and to which the court would not have regard. As to those he thought it preferable:

"...to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions".

53. Insofar as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment:

"Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in Secretary of State for Business Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146 at para 39:

"It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible."

54. The judge concluded that the whole of the Report was admissible, it being a matter for the trial judge to make use of the Report as he or she thought fit. Even if he had concluded that it contained some inadmissible material he would not have thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible.
55. Subject to the second and third grounds of appeal, I agree with this conclusion. It is not apparent to me that any part of the Report should be regarded as simply expressing an opinion on matters of fact (as opposed to recording evidence) in relation to which the expertise of the AAIB has no relevance. But even if any part of the Report was (or proves on close analysis hereafter) to have that character, the correct approach is as outlined by the judge.
56. Mr Lawson submitted that there was a close affinity between Lord Bingham's report in relation to BCCI and the Report itself in that (a) they both involved someone making findings and reaching conclusions on the basis of an evaluation of evidence which he/they had sought and obtained; (b) the reports followed limited terms of reference; (c) they resulted from an inquiry behind closed doors with no counsel to the inquiry, without the claimants or the defendants being present and in circumstances where some of the material relied on had not been made public (8 appendices to Lord Bingham's Report were not publicly disclosed). In those circumstances the Report should be inadmissible just as was that of Lord Bingham. In *Three Rivers* the House made a clear distinction between Lord Bingham's narrative of evidence (admissible) and his findings of fact (inadmissible). The report fell into the inadmissible category.
57. The comparison is not in my judgment apposite. The Report is admissible for its record of factual evidence (of whatever degree of hearsay) and its expert opinion. Lord Bingham was not acting as an expert but in a judicial or quasi-judicial role.

Expert evidence under the Civil Evidence Acts and the Civil Procedure Rules

58. Section 3 of the *Civil Evidence Act 1972* provides:

"(1) Subject to any rules of court made in pursuance of ... this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section "relevant matter" includes an issue in the proceedings in question."

59. In the light of the *Civil Evidence Act 1995* it is no longer requisite that the expert be called to give evidence orally. Section 1 (1) of that Act provides that *"In civil proceedings evidence shall not be excluded on the ground that it is hearsay"*.

60. The relevant rules for the purposes of section 3 (1) of the 1972 Act are in CPR 35. These include the following:

"Duty to restrict expert evidence

35.1

Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Interpretation and definitions

35.2

(1) A reference to an 'expert' in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings.

(2)

Experts – overriding duty to the court

35.3

(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Court's power to restrict expert evidence

35.4

(1) No party may call an expert or put in evidence an expert's report without the court's permission.

....

General requirement for expert evidence to be given in a written report

35.5

(1) Expert evidence is to be given in a written report unless the court directs otherwise.

Contents of report

35.10

(1) An expert's report must comply with the requirements set out in Practice Direction 35.

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) ..."

61. Mr Lawson submits that the Civil Evidence Acts and CPR 35 constitute a comprehensive code regulating the use of expert evidence. Under it a party is not entitled to call an expert or put in an expert report without the permission of the Court and, unless the Court otherwise directs, the report must comply with the requirement of the Practice Direction. The Report does not qualify under these rules.
62. This submission is not well founded. Section 3 of the 1972 Act does not purport to be all embracing or to restrict or alter the position at common law. The expert with whom CPR 35 is concerned is a person "*who has been instructed to give or prepare expert evidence for the purpose of proceedings*". The expert evidence referred to in CPR 35.1 and 35.5 and the expert's report referred to in CPR 35.4 and CPR 35.10 are the evidence and report of such a person. The purpose of CPR 35 is to regulate the evidence of experts instructed by the parties, to ensure that they act as experts, and to regulate the use and content of their reports. The expert evidence in the Report does not fall within CPR 35. The AAIB was not instructed by, and is wholly independent of, any of the parties.
63. CPR 35 is not a comprehensive and exclusive code regulating the admission of expert evidence. It regulates the use of a particular category of expert evidence. As the authors of *Phipson* observe, citing Lord Mansfield in *Folkes v Chad* (1782) 3 Doug 157:

"even at common law the opinions of skilled witnesses were admissible wherever the subject is one upon which competency to form an opinion can only be acquired by special study".

In 1782 there could be no question of hearsay expert opinion: but the law has moved on.

64. The courts have in practice received expert evidence outside the confines of CPR 35. Thus in *DN v London Borough of Greenwich* [2004] EWCA Civ 1659 this Court held that the trial judge was wrong to decline to allow the defendants to a professional negligence claim to rely on the opinion evidence contained in the witness statement of a school educational psychologist who was said to have been negligent. That decision was applied by Jackson J, as he then was, in *Multiplex Constructions (UK) Ltd v Cleveland Bridge Ltd* [2008] EWHC 2220 (TCC) where he ruled that an engineer giving factual evidence could also proffer statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience. If CPR 35 is to be treated as an exclusive code it would appear to render inadmissible as evidence, expert literature exhibited to the report of an expert called under CPR 35 – as Arnold J observed in *Interflora Inc v Marks and Spencer Plc* [2013] EWHC 936 (Ch).
65. In *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] EWHC 1336 (Ch) Sales J heard evidence from two experts called as such under CPR Part 35 as to the cost of building a replacement for an oil jetty. One of them - Mr Bartlett for the claimants ("HOTT") - relied on certain estimates provided by a company called Foster Wheeler for a particular project. Foster Wheeler had relied on an indication of costs provided to them by a company called Nuttalls. The judge much preferred the evidence of the other expert. He also ruled that HOTT was not entitled to rely on the Foster Wheeler reports and the Nuttalls indication of cost of works as hearsay expert opinion. He considered that in substance HOTT was seeking to make use of that material in the same way as a party would seek to adduce and use an expert report. As a result it was subject to the CPR Part 35 regime when it sought to get the judge to accept and rely on the material as expert opinion rather than factual background. The position – he said - was "*different from the kind of official reports referred to in Phipson, which (as there observed) 'are not the reports of 'experts within CPR Part 35'.*"
66. I would not regard the material in that case as wholly inadmissible. If it was it is difficult to see how Mr Bartlett could deploy it. It was, however, plainly not the evidence of an expert as defined in CPR Part 35 and was, therefore, subject to very limited weight – for the reasons set out in para 145 of Sales J's judgment where he identified the weakness in Mr Bartlett's evidence by reference to the weakness in the Nuttalls costs indication and the Foster Wheeler reports, including but not limited to the absence of any one from those companies being called to give evidence and subject to cross examination.
67. Accordingly, in my judgment, the report was *prima facie* admissible and, since it did not fall within CPR 35, the claimant did not require the permission of the court to adduce it.

Discretion

68. The judge had a discretion under CPR 32 (1) and (2) to exclude evidence that would otherwise be admissible. He declined to do so.
69. Before the judge Mr Marland for the defendant (now appellant) relied on two considerations that should lead to exclusion. The first submission was that the nature of the Report made it an unacceptable and unsafe piece of evidence in that (judgment, para 122):

"the AAIB Report is an anonymised document so that the authors of the statements contained in the report not only cannot be questioned but cannot even be identified. In particular, the hearsay reports of the accounts of witnesses of fact summarised in the report are: (a) not verbatim; (b) not attributed to named individuals; and (c)

not signed with a statement of truth. Opinions given in the report are: (a) not attributed to any individual, hence there are no credentials; and (b) not given in accordance with Part 35. Further, the findings contained in the AAIB Report are: (a) not attributed to any individual within the AAIB; and (b) based on an exercise in evaluating and discarding evidence which is not disclosed and where any unused material is not disclosed."

70. The second submission was that if information contained in the report were allowed to be used as evidence in litigation this would deter people able to assist in the investigation of air accidents or incidents from doing so in future, which would impede the AAIB's effectiveness and jeopardise  **aviation**  safety.
71. The judge regarded these arguments as without substance. As to the former, the points made would all be matters for the trial judge to take into account when assessing what weight should be given to the statements in the Report but did not provide a sufficient reason for excluding it from consideration altogether. As to the latter, he could see no reasonable basis for the suggestion of deterrence. He accepted that people might be less willing to cooperate with the AAIB if they perceived a risk that this would result in their being called as witnesses or even made defendants. But he failed to see how that risk could be, or be seen to be, increased by allowing the published report to be used as evidence. If anything the effect of not allowing the report to be used as evidence would mean that there was a greater need to try and identify and summon to give evidence those who contributed to its content, and a stronger argument that disclosure of relevant records of the investigation was necessary in the interests of justice.

New evidence - Admissibility

72. On the hearing of the Appeal evidence has been filed by the Secretary of State in the form of a statement from Mr Keith Conradi, the Chief Inspector of the AAIB, in support of the third ground, to the admission of which the respondents object, since there is no case advanced that it could not have been adduced below. The fact that the Secretary of State and IATA have been allowed to intervene in this appeal should not, they submit, entitle the appellant to secure the admission of evidence which would not be admissible under the principles in *Ladd v Marshall* [\[1954\] 1 WLR 1489](#).
73. The Secretary of State submits that, given that he has been allowed to intervene and seeks to do so in order to secure guidance as to how the discretion should be exercised, it makes no sense to ignore the evidence that has been filed which addresses the very concerns which led to his intervention in the first place. By an order dated 8 November 2013 Tomlinson LJ permitted him to file evidence.
74. We have considered the evidence *de bene esse* together with the evidence in response of Mr Healy-Pratt, the Head of the  **Aviation**  and Travel Department of the respondents' solicitors, who has considerable prior experience in the  **aviation**  insurance market; and I shall postpone, for the moment, consideration of the question whether we should admit it.

New evidence – content

75. The evidence of Mr Conradi is to the following effect. The sole objective of an AAIB investigation, as is explained to the public and to those involved in an investigation, including witnesses, is to determine the circumstances and causes of an accident (or incident) and make

safety recommendations, if necessary with a view to the preservation of life and the avoidance of accidents and incidents in the future. Anything that undermines the AAIB's ability to obtain truthful information promptly would be detrimental to public safety and so contrary to the public interest. If AAIB reports were frequently admitted into evidence in litigation there is the possibility that this would deter some people who were able to assist from doing so in the future. Witnesses may perceive a risk of their being called to give evidence or even made defendants to subsequent legal proceedings. Witness cooperation may be less forthcoming. If witnesses have to be summoned to give evidence (only rarely necessary now) the quality of their evidence may be of less value. Witnesses are likely to be more guarded in what they say. They may refer or be advised to refer to their employer organisation before dealing with the AAIB. Those organisations would likely refer the matter to their legal advisers to consider how evidence given might affect future litigation. This would slow down the progress of an investigation with a potential impact on the quality of any evidence, and could delay the development and formulation of any safety recommendation. The regular admission of reports in evidence is likely to lead to requests for the underlying material since parties may argue that they need access to the underlying records to test the report's findings and conclusions. Organisations may not be prepared to provide information anonymously and in confidence if there is a risk it can be used against them or for commercial gain. The volunteering of information may dry up. Whistleblowers may remain silent.

76. In addition, investigators may have to mention to those concerned that any report is admissible in civil proceedings, which would likely restrict the free flow of information; they may be driven to the use of compulsory powers; and they may write reports with a view to having to defend them in court rather than maximising safety benefits. They may feel that any conclusions would have to be provable to the civil standard and that they would need to corroborate and track evidential chains to a much greater extent than is current practice. Reports may be drafted in such a way as to minimise the possibility of blame being inferred. In addition appearances in court would increase the workload of inspectors and reduce time available for actual investigation. There could, also, be an adverse effect on the public's perception of the independence and remit of the AAIB since investigations would be perceived as prepared with a view to the possibility of future litigation and not therefore objective. The AAIB is likely to be drawn into litigation and asked its opinion on liability. International airline bodies, pilots' unions and  aviation  manufacturers would advise their members to be cautious about what they say to the AAIB.

77. Reliance is placed on Note 1 to Article 5.12.1 of Annex 13 which provides:

"Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety."

New evidence - submissions

78. Mr Malcolm Sheehan on behalf of the Secretary of State submits that the judge was in error in not carrying out a balancing exercise between the interests of justice, on the one hand, and any prejudice that the admission of the Report would be likely to cause to current or future

investigations and the relations of the United Kingdom with other States or international organisations, on the other. Unless the interests of justice are shown to outweigh any such impact, the Report should be excluded. Mr Akhil Shah QC on behalf of IATA makes a similar submission and contends that there ought to be a presumption that the admission of AAIB reports in evidence would have an adverse domestic and international impact on safety investigation.

79. I do not accept that the court should exercise its discretion by adopting the approach suggested for a number of reasons.
80. First, the Report is, as I would hold, admissible evidence. It is also of particular potential value on account of (i) the independence of the AAIB; (ii) the fact that its reports will be the product of an impartial investigation into the causes of the accident by experts who are not concerned to attribute blame and in whose investigations injured passengers and the families of deceased passengers do not actively participate; and (iii) the fact that it has a much greater ability than anyone else to obtain and analyse data relating to an accident which is likely not otherwise to be available or only with considerable difficulty and at considerable cost. The circumstances in which it is appropriate to exclude evidence that is admissible and likely to be helpful must be limited. For the judge to be denied sight of a report of this character – authoritative, independent, prompt and detailed – and for any experts called to be unable to refer to it in court, when it is freely available to the public, is difficult to justify. Some measure of the value of AAIB reports is to be found in the fact that, according to the evidence of Mr Healy-Pratt, AAIB reports have been routinely referred to and used as evidence in English litigation; their use considerably assists the efficient and speedy resolution of claims; and the majority of potential civil claims arising from civil  aviation  accidents settle on the basis of AAIB reports.
81. Second, the exercise of the discretion is to be carried out in accordance with the overriding objective of dealing with cases justly and at proportionate cost. Whilst every case must depend on its own facts, that objective does not appear to me to be inherently likely to call for, or justify, the exclusion of evidence of this kind. On the contrary it would tend to favour its inclusion. In practice many litigants who would wish to advance claims in respect of dead or injured passengers would find it either impossible or very difficult to access the relevant information such as cockpit voice/flight data recordings, and to finance the gathering of the necessary evidence to mount a claim, unless, perhaps, there was a crash of a large commercial aircraft with a large number of persons killed or injured.
82. Third, the test which it is suggested the court should employ is, in effect, an application to the Report of the test applicable by Regulation 18 to the production of a relevant record. Parliament has, however, made a distinction between the report and relevant records. It has provided for the report to be made public and has noticeably not legislated, as it could have done, so as to provide that the report shall be inadmissible or that its admissibility must depend on the application of the same or a similar test to that applicable to relevant records. In respect of relevant records it has, in line with Annex 13 of the Chicago Convention, provided for a different regime. IATA submits that, since the report is the product of the relevant records, the test for exclusion under CPR 32 should mirror that under Regulation 18; but, in my view, the conclusion does not follow from the premise.
83. There are other bodies which fulfil similar roles to that of the AAIB. The Rail Accident Investigations Branch has duties prescribed for it by section 7 of the *Railways and Transport Safety Act 2003*. Its procedures are contained in the *Railways (Accident Investigation and*

Reporting) Regulations 2005. The Act and the regulations under it implement the European Railways Safety Directive 2004/49/EC. Neither the Act nor the regulations restrict the admissibility of RAIB reports.

84. The Marine Accident Investigation Branch ("MAIB"), which is part of the Department for Transport, operates under the *Merchant Shipping Act 1995* and the *Merchant Shipping (Accident Reporting and Investigation) Regulations 2012*. The latter regulations provide, by regulation 14 (14) and (15) that if any part of an MAIB report or any analysis it contains is based on information obtained pursuant to an inspector's powers under sections 259 and 267 (8) of the *Merchant Shipping Act 1995* "that part" of the report is "inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame unless a Court or tribunal, having regard to the factors mentioned in regulation 12 (5) (b) or (c) determines otherwise". This appears to contemplate that such a report is or may be prima facie admissible. Prior to 2005 MAIB reports were regularly received in evidence in civil proceedings. An example is *The "Saint Jacques II"* [2003] 1 Lloyd's Rep 203. The *Merchant Shipping (Accident Reporting and Investigation) Regulations 2005* introduced a similar restriction to Regulation 14 (14) of the 2012 Regulations save that if the report contained the specified information the whole report was inadmissible in the relevant proceedings.
85. As is apparent Parliament sometimes does and sometimes does not preclude the use of reports in civil proceedings and, when it does, may do so in whole or in part.
86. Fourth, the test contended for would in practice impose an onus on the party seeking to deploy admissible evidence to satisfy the court that it should be admitted when the onus should be on the party seeking to exclude it to persuade the court that it should take that course.
87. I am also unpersuaded that if the judge had had the additional evidence and submissions which we have had, he either would or should have reached a different decision.
88. I do not underestimate for a moment (i) the vital importance of the work of the AAIB and the significance of that work in respect of air safety; (ii) the need for its functions and its independence to be properly understood; and (iii) the desirability of the AAIB retaining the confidence of a wide range of persons both here and abroad – such as pilots, passengers, air transport undertakings, manufacturers of aircraft and their equipment, proprietors of airports and aerodromes, and regulatory authorities. I do not, however, regard the admissibility of AAIB reports as so likely to prejudice the interests which the AAIB is there to serve, that they should generally be excluded from consideration in court. I say that for a number of reasons.
89. First, there is no good reason why the admissibility of the Report, and others like it, should impede or inhibit the Inspectors in their work. The Inspectors are professionals who are not in any way concerned with establishing or refuting civil liability. They have no need to be circumspect in carrying out their investigation, or in compiling their report, because someone may want to make some use of it in subsequent litigation. Whilst I would expect any report to indicate if a conclusion expressed was no more than one as to possible, as opposed to probable, cause(s) the inspectors have no need to consider whether a court would regard their conclusions as having been proved to the civil standard, let alone whether there was what the law would treat as fault – neither of which are for them to say. They are at liberty to express conclusions in the form of possibilities if that is all they are able to conclude. They are not required to secure any level of corroboration. Insofar as they have a position to "defend" it arises from what they have written in a report which, as they are aware, is a public document. The court will not treat

their report as directed in any way toward questions of liability and neither they nor anyone else should do so either. Nor have investigators any good reason to feel inhibited on account of the fact that their reports may be referred to in later civil proceedings. They can, and no doubt do, decline any request to opine on liability.

90. Second, any suggestion that the admissibility of reports might have an inhibitory effect sits uneasily with a number of things. Even if the report is not admissible in evidence it is undoubtedly something which will be available for would-be claimants or those against whom they claim. What is said in the report can thus, on any view, be used (even if not evidentially) as the foundation of a claim or defence. Reports have in fact been used as evidence in a number of cases without any point being taken on admissibility: *Lambson Aviation v Embraer Empresa Brasileira de Aeronautica S.A.* (2001), unreported, Tomlinson J; *Budden v Police Aviation Services Ltd* [2005] P.I.Q.R. P 362, where the admissibility of the report was agreed as was the evidence given by three inspectors at the inquest; *Bristow Helicopters Ltd v Sikorsky Aircraft Corp* [2004] 2 Lloyd's Rep 150 where the fact that an AAIB report in relation to a helicopter crash 29 miles north east of Cromer was "*likely to feature largely in the litigation*" (per Morison J) was held to support the position that England was the most convenient forum; and *Stisted and Ors v Smith and Others* [2012] QB HQ12X00355 where an AAIB report was appended to the Particulars of Claim. The same has happened in at least two other cases.
91. The evidence of Mr Healy-Pratt is that the AAIB report tends to constitute the principal point of reference and commentary for the parties' experts and legal representatives at trial and set the parameters within which issues of causation and liability are argued.
92. Further, the AAIB has entered into Memoranda of Understanding ("MOU") with (i) the Crown Prosecution Service; (ii) the Association of Chief Police Officers and (iii) the Coroners' Society, providing for cooperation and evidence/information sharing.
93. The MOU with the CPS records that confidential statements or declarations made by a witness cannot be disclosed by the AAIB but that a witness who has provided a witness statement or declaration will be given a copy and advised that he may share it with other investigators if they wish. The MOU with the Coroners' Society records that the regulations applicable to the AAIB require that AAIB inspectors shall not disclose, inter alia, statements taken from persons by those inspectors in the course of their investigation or records revealing the identity of those persons, opinions written or expressed in the analysis of information, or drafts of preliminary or final reports or interim statements and that they may not make available cockpit voice and image recordings or their transcripts.
94. Senior inspectors responsible for the production of reports, as well as other investigators, regularly give evidence of the results of their investigation in public at Coroners' Inquests, where they may be questioned by those affected. Such evidence is usually transcribed (and under rules coming into force last year is required to be) and is commonly used in later civil proceedings. It is not apparent that the work of the AAIB has in any way been adversely affected by any of this or that the authors of AAIB reports have become more guarded in their opinions on that account. It is difficult to believe that professional investigators will be inhibited, or the work of the AAIB impaired, by the admissibility in evidence of AAIB reports that have already been made public and are likely to have featured in any coronial investigation.

95. Third, whilst the possibility of being a witness or a defendant may have an inhibitory effect, anyone familiar with the working of the AAIB should understand and, if he asks, will have to be told, that any report will be made public. The fact that the report, as well as being a public document, is admissible in evidence is unlikely to be of critical significance. In addition, as the judge pointed out, if the report cannot be used in evidence it will be necessary for those who seek to rely on it to seek to obtain the relevant records identifying the name and contact details of the witnesses and what they said; and the case for saying that such disclosure is in the interests of justice will be stronger because none of the contents of the report will be admissible in any other way. So the inadmissibility of the report may lead to a greater likelihood of witnesses being identified and called. At present there appear to be only three known instances of applications for relevant records in the United Kingdom: see *Shawcross & Beaumont Air Law*, vol 1 Chapter VI, para 238, footnote 5.
96. Fourth, it does not seem to me that the admissibility of these reports is likely significantly to affect the willingness of people to give information and assistance to the AAIB. Participants in this field are well aware of the importance of safety in air transport; of the independence of the AAIB; of the fact that it is not its function to attribute blame; of its statutory powers; and, also, that any report it makes will be public, so that anyone interested can see what it concludes. They have shown themselves over the years largely willing to cooperate with the AAIB without compulsion. Many of those concerned have a strong vested interest in participating in aircraft investigation, the effect of which may be exculpatory as well as inculpatory, because of their commercial interest in safety. Witnesses interviewed by the AAIB are likely to find themselves interviewed by others, such as the police or the Coroner's officer, and the risk of being called as a witness in a criminal trial or at an inquest is likely to be of more concern than the prospect of the witness' evidence being referred to in a report in which the witness – as is the practice – is not named, I regard the possibility of the current culture of cooperation markedly changing because reports are ruled admissible as insufficiently likely to justify exclusion of the Report.
97. In my view the judge was not in error in refusing to do so. If, on the basis of the new evidence I had taken the view that his discretion was wrongly exercised, but that on the evidence before him, it was not, it would be necessary to decide whether the Court should, exceptionally, permit the new evidence to be admitted in order to overturn the exercise of a discretion, even though the *Ladd v Marshall* test was not satisfied.
98. That situation does not, however, arise. I would decline to admit the new evidence and dismiss the appeal, whilst indicating that, even if it had been admitted, the result would have been the same.
99. Nothing in this judgment should be taken to mean that anything in the Report is to be treated as conclusive or *prima facie* conclusive of anything; or as shifting the incidence of the burden of proof; or as precluding any party from challenging anything in it, or as restricting or limiting any other admissible evidence that any party may choose to call.

LORD JUSTICE TREACY

100. I agree.

LADY JUSTICE ARDEN

101. I agree.

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