IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0016 OF 2004S
(High Court Civil Action No. 320 of 2001S)

BETWEEN:

AIR FIJI LIMITED

Appellant

AND:

FLORA SEU FONG HOUNG-LEE

Respondent

Coram: Barker, JA
Tompkins, JA
Scott, JA

Hearing: Thursday, 25 November 2004, Suva

Counsel: Mr N. Gedye and Ms G. Phillips for the Appellant
Hon A. J. Rogers, QC and Ms S. Sorby for the Respondents

Date of Judgment: February 2005, Suva

JUDGMENT OF BARKER & SCOTT, JJ. A.

Introduction

[1] The decision on this appeal and cross-appeal will offer a modest contribution from Fiji to the world-wide jurisprudence accumulated over the years about the regime for the compensation of victims of aviation accidents, embodied in a 1929 treaty known as the "Warsaw Convention". After 75 years, the provisions of the Convention are fraught with anomalies and conflicting interpretations. Various attempts to rectify anomalies and to make the Convention more relevant to the 21st century have not met with anything approaching unanimity amongst the 180 or so nations which are now parties to it.

[2] Fiji could not have acceded to the Convention in its own right, prior to independence in 1970. However, 35 years on, it still utilizes legislation, enacted by the British

Government before independence, linking Fiji to the Convention. In an ideal world, Fiji should by now have enacted its own legislation incorporating the most modern and enlightened version of the Convention i.e. the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air ("the Montreal Convention").

[3] The failure of Fiji to update the British subordinate legislation has led to the morally justifiable complaint of the present Respondent that she has been 'short-changed' in her legitimate claim for damages by that legislation. Made in 1969, it fixes the maximum amount which she, and others in a similar predicament, can receive by way of judgment on a claim for compensation, regardless of her ability to sustain a claim for a greater amount.

[4] The Respondent is the widow of Michael Anthony Houng-Lee ('the deceased'). She brought proceedings in the High Court in 2001 for damages pursuant to the Compensation to Relatives Act (Cap.29). The deceased died when a fare-paying passenger on a flight operated by the Appellant which met with an accident on 24 July 1999. The deceased perished in the accident. It is common ground that the deceased was travelling on a ticket for non-international carriage from Suva to Nadi.

[5] The imperial legislation, unchanged in Fiji since before independence, is the Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967, (the '1967 Order'). It is still part of the law of Fiji. The route of its continuing validity, through the vicissitudes of Fiji's constitutional dramas, appears to be by way of section 5 (1) and (2) of the Fiji Independence Order 1970, section 8 of the 1990 Constitution and s.195(2)(e) of the 1997 Constitution. The British Carriage by Air Act 1967 was the then expression in United Kingdom law of the Warsaw Convention (as amended by The Hague Convention ("Warsaw/Hague")) which regulated the international carriage of passengers and cargo by air. That Act also applied Warsaw/Hague, with variations, to domestic air carriage in the United Kingdom. The 1967 Order was applied to domestic air carriage in a host of then colonies (including Fiji), most of which are now independent nations.

[6] An amended version of Warsaw/Hague is a Schedule to the 1967 Order. The principal change from the strict terms of Warsaw/Hague was to provide that the maximum compensation for the death of or injury to a passenger be fixed at 875,000 gold francs

(as defined) for domestic carriage instead of the 250,000 gold francs provided for international carriage.

[7] Schedule 2 Part 1 of the 1967 Order sets out the amended Warsaw/Hague, still in force in Fiji. Article 22 relevantly provides:

> *"(1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of eight hundred and seventy-five thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed eight hundred and seventy-five thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.*
>
> .....
>
> *(4) The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole of part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply of the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.*
>
> *(5) The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."*

[8] Section 4(4) of Schedule 1, part 1, of the 1967 Order provides:

> *"The Governor of an Overseas Territory may, in such manner as he may think fit, from time to time specify the respective amounts which for the purpose of the said Article 22, and in particular of paragraph (5) of that Article are to be taken as equivalent to the sums expressed in francs which are mentioned in that Article."*

[9] The Carriage by Air (Fiji Currency Equivalents) Order 1969 was made by the then Governor of Fiji and was gazetted in the Fiji Royal Gazette Supplement on 8 August 1969 ("The Currency Equivalents Order" ("CEO")). It states:

"In the exercise of the powers conferred upon him by sub-paragraph (4) of paragraph 4 of Schedule 1 to the Carriage by Air Acts (Overseas Territories) Order 1967 and sub-paragraph (4) of paragraph 4 of Part 1 of Schedule 1 to the Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order 1967, the Governor has made the following Order:-

Amount of francs	*Equivalent in Fiji Currency*	
	$	*c*
250	*13*	*82.375*
5,000	*276*	*40*
125,000	*6,909*	*90*
250,000	*13,819*	*80*
875,000	*48,369*	*28"*

[10] No further CEO has been made since 1967, either by the Governor before independence or by the Governor-General (until 1987) or the President (after 1987) or any Minister after independence. Counsel for the Respondent stated from the Bar that the gold equivalent of 875,000 "gold francs" could today be worth about $F1.5 million.

[11] Section 5 of the Fiji Independence Order 1970 shows how a new CEO can be made in Fiji after independence.

"5. - (1) The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970 (a) and this Order.

(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the appointed day by or under the existing Orders that prescription or provision shall, as from that day, have effect (with such modifications adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Fiji Independence Act 1970 and this Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.

(3) The Governor-General may, by order published in the Gazette, at any time before 10th April 1971 make such amendments to any existing law ((other than the Fiji Independence Act 1970 or this Order) as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions.

> *(4) An order made under this section may be amended or revoked by Parliament or, in relation to any existing law affected thereby, by any other authority having power to amend, repeal or revoke that existing law.*
>
> *(5) It is hereby declared, for the avoidance of doubt, that, save as otherwise provided either expressly or by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.*
>
> *(6) The provisions of this section shall be without prejudice to any powers conferred by this Order or nay other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law."*

[12] Section 5(2) (supra) provides authority for the adaptation of existing laws to meet any changed situation brought about by independence. On 15 October 2002, the President acting under s 103(2) of the Constitution, assigned "responsibility for all written laws regulating the business of [civil aviation] including the Civil Aviation Act 1974 to the Minister of Transport and Civil Aviation ('The Minister')". If any new CEO were to be made, it would therefore appropriately be made by the Minister.

[13] A new CEO, issued by the Minister, would overcome the problem of the obsolete CEO. It would still be issued under an imperial statute. Fiji could enact its own laws relating to the liability of international and domestic air carriers, preferably by adopting the most recent development – the Montreal Convention - which provides for a more enlightened regime than the long obsolete Warsaw Convention.

[14] The Montreal Convention, (which can conveniently be found as Schedule 6 of the New Zealand Civil Aviation Act 1990), has as one of its stated aims:

> *"The need to modernize and consolidate the Warsaw Convention and the importance of ensuring protection of the interests of consumers of international air carriage and the need for equitable compensation based on the principle of restitution."*

High Court Proceedings

[15] The Appellant contends that its limit of liability under any judgment in respect of a passenger's death, pursuant to Article 22(1) of Schedule 2 to the 1967 Order, is $F48,369.28, being the maximum amount fixed some 35 years ago by the CEO.

[16] On 14 November 2003, the High Court made an order for the trial of points of law as preliminary issues pursuant to Order 33 rr 3 & 4 (2). The preliminary issues were defined thus:

> *(a) Is the Carriage by Air (Fijian Currency Equivalence) Order an order to be applied by the Court at the date of judgment in these proceedings to convert into Fiji currency the sums mentioned in francs referred to in Article 22(5) of Schedule 2, Part 1, Chapter III of the Carriage by Air Act (application of Provisions) (Overseas Territories) Order 1967 ("the 1967 Order");*
>
> *(b) Is the market price of gold in Fiji currency as at the date of judgment as referred to in Article 22(5) to be used to determine damages awarded in these proceedings as at the date of judgment pursuant to Articles 22(1), (2)(a) and (3) of Schedule 2. Part 1, Chapter III of the 1967 Order.*

[17] In an *ex tempore* judgment, delivered on 25 March 2004, Singh J. upheld the Appellant's submission that the maximum judgment for damages that the Respondent could recover was F$48,369 as specified in the CEO of 1969. From that finding, the Respondent has cross-appealed. The Judge's ruling was given after he had considered extensive written submissions from both parties.

[18] The Judge also heard an argument that interest could be awarded under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act in addition to the maximum sum specified in the CEO, even if the maximum sum specified in the CEO had been reached under a damages award. He held that interest was payable under that Act at 6%, as from the date of filing of the writ. Presumably, the Judge meant that, whenever judgment comes to be entered for the capped figure of F$48,369, it is competent for a Judge at that date to consider awarding interest in addition to the capped amount. The award of pre-judgment interest, at the date of entry of judgment, is always in the discretion of the Judge.

[19] Although the right to award interest on top of the capped amount of damages was not one of the agreed preliminary questions referred to above, the point was fully argued both in the High Court and in this Court. The Appellant appealed against Singh J.'s finding that interest was allowed under Article 22 (5), claiming that, with the exception of the costs and expenses of a claimant under Article 22(4), there could be no additional amount payable to a claimant beyond the F$48,369 cap fixed by the CEO. Accordingly,

it is sensible for this Court to consider an appeal against the Judge's determination on that point.

[20] By way of cross-appeal, the Respondent appealed against Singh J's determination that the CEO fixed the maximum amount of any judgment to which the Respondent could be awarded.

[21] Article 25 of the 1967 Order provides that the limits of liability shall not apply *"If it is proved that the damage resulted from an act or omission of the claimer, his servants or agents done with the intention of causing damage or recklessly with knowledge that damage would probably result ... ."* If unsuccessful in her cross-appeal, the Respondent is free to pursue a claim that Article 25 applies on the facts of the accident in which the deceased was killed. This would involve a lengthy trial on liability.

Arguments on Cross-Appeal

Respondent in Support

[22] The Court first summarises the arguments on the cross-appeal which occupied most of the hearing. The Court records its gratitude to Counsel on both sides for their erudite and interesting submissions. The essentials of the argument of counsel for the Respondent are as follows:

(a) The Warsaw/Hague Convention and its adoption for Fiji by means of the 1967 Order, represented the implementation in this country of an international regime for regulating the consequences of losses arising out of air travel.

(b) As is shown in the Convention Debates (as recorded in the literature), the reason for the adoption of the "Poincaré Franc" as the unit of compensation was based on the then inherent stability of the value of gold. Also, the drafters sought to utilise an internationally-referenced unit of currency, independent of any domestic law or monetary system.

(c) The value of gold from 1969 to the present has fluctuated enormously and the use of gold as the common denominator in the international monetary system ended in 1978 (See *Shawcross and Beaumont*, Air Law, VII 556).

(d) The power conferred on the Governor by the 1967 Order was not intended to destroy the beneficial effect of the Warsaw Convention and to keep levels of compensation unconnected with the value of gold from time to time.

(e) The power of the Governor (now the Minister) is required to be exercised in terms of s.4(4) of the 1967 Order, "from time to time." This expression clearly envisaged that a proper equivalence in local currency be maintained with the current value of gold.

(f) Consequently, the 1969 Order was *ultra vires* because it did not contain a formula which would properly give effect to the relevant value of gold as expressed in Fijian currency at the date of any judgment.

(g) Alternatively, the 1969 CEO was not a proper exercise of power with any validity in 2004 because, in disobedience to the 'from time to time' prescription in the 1969 Order, it failed either to provide some formula to keep the compensation caps in line with the current gold value or else it failed to insert a "sunset clause", giving a limited life to the CEO.

(h) Alternatively, based on the strict wording of Article 22(5) of the Convention, the 1969 Order does not affect the equivalence in Fiji's currency of the 875,000 francs as at any future date of judgment, but rather as at 1969.

(i) The sum specified by the CEO can become "leached" by inflation. Even if it be difficult to specify the intervals at which a CEO should be reviewed from "time to time", inaction for 35 years cannot be fulfillment of the obligation to issue CEOs "from time to time". Particularly, this is so, given the discontinuance of the gold standard and the effects of inflation in Fiji over 35 years.

(j) Whilst s.4(4) may have conferred a discretion to specify amounts, that is not what the 1969 Order purported to put into effect. What the 1969 Order purported to do was fix a conversion from the sums specified in Article 22 into Fiji currency. However that purported specification, fixed temporarily as at the date of the 1969 Order, is completely contrary to the last sentence of Article 22(5), which requires that conversion of the sums mentioned in Article 22 into national currencies be made at the date of the judgment.

(k) This argument is advanced by W K Hastings in an academic article written in 1996 concerning the cognate provisions of the New Zealand legislation, particularly s.7 of the Carriage by Air Act 1967 (NZ) and the Carriage by Air (New Zealand Currency Equivalence) Notice 1984. The learned author contends, speaking of the then New Zealand legislation and CEO:

> *"It is possible to argue that the Minister did not take into account the clear words of the Convention in gazetting the 1984 Notice. This argument can also be made with respect to the United Kingdom Order and could have been made with respect to the CAB Order but appears not to have been. The 1984 Notice refers to the "sums mentioned in francs" in Article 22, and thus appears to be what Article 22(5), at first glance, requires. Nevertheless, Article 22(5) states a mandatory temporal condition in the case of judicial proceedings. It requires conversion of the sums stated in francs to be "at the date of the judgment." While the 1984 Notice will obviously be alive at the date of any subsequent judgment, the Convention requires conversion to take place at the date of Judgment, not the application of an amount that has already been converted before the judgment, which is what the 1984 Notice does. As s.7 gives the entire Convention force of law, and as s.10(4) makes explicit reference to Article 22(5), it is possible to argue that the 1984 Notice is not a Notice which meets the requirements of the Article 22(5). In other words, the 1984 Notice has nothing to do with Article 22(5), an Article having force of law in New Zealand, because the Notice can never be a "conversion ... according to the gold value of such currencies as the date of judgment."* ((1996) 26 VUWLR 143, 155)

(l) These arguments have equal force when applied to the Fijian statutory regime. Article 22(5) states a mandatory temporal condition in the case of judicial proceedings in that it requires a conversion to take place at the date of judgment; it does not permit application of an amount that has already been converted at a date earlier than the date of judgment, which is what the 1969 Order purports to do. The 1969 Order cannot be and, could now never be, a "*conversion ... according to the gold value of such currencies at the date of judgment.*" The

1969 Order therefore cannot apply to Article 22(5), and should be regarded as ineffective.

[23] An alternative argument for the Respondent was that the 1969 CEO infringed the guarantee in s.40(1) of the Fiji Constitution that a person has the right not to be deprived of property by the State, otherwise than in accordance with a law.

[24] The property right in question was said by counsel to be an 'inchoate' right, namely, an entitlement for a victim of an air accident or the relatives of a victim to receive, as maximum provable damages under Article 22(5) of the Warsaw Convention, gold to the amount there specified or else to have judgment entered in the Fijian currency equivalent of that amount of gold. The right was "inchoate" until a person became entitled to sue as a result of an air accident. Counsel relied on a discussion of "property", as a 'bundle of rights' by the High Court of Australia in *Yanner v. Eaton* (1999), 201 CLR 351, 365-7. That was a case of an aboriginal man claiming a customary right to harpoon crocodiles in the face of a statute which gave 'property' rights in such fauna to the Crown.

Appellant in Opposition

[25] (a) Article 22 of the Warsaw Convention provides an upper limit or cap on the amount of damages able to be recovered by way of judgment. Claimants have to prove their entitlement to damages in the usual way under the laws of the country where suit has been filed. Upon proof of damages, judgment can be entered in the currency of that country and not in Convention (Poincaré) francs or any gold value. Some claims may not reach the cap set by the CEO because they are small (e.g. a claim for the death of a child or a claim for minor injuries). Contributory negligence by the passenger may reduce any award of damages.

(b) The power of a State, as a party to the Warsaw Convention (as the United Kingdom was), to specify an equivalent of Convention francs in a national currency amount is exercisable in terms of Article 22(5) of the Convention. Any CEO applies at the date of any judgment In theory, in this case, another CEO could be made before the date of judgment on the Respondent's claim.

(c) There could thus be one CEO in force at the date when proceedings are issued and another at the eventual date of judgment.

(d). Section 4(4) of the 1967 Order could have no function if the Governor (or his Fiji successor) could use the market price of gold of the day to specify conversion rates on any judgment day.

(e) A finding along the lines of the Respondent's submission would have wide international repercussions. CEO's have been made, for example, in Belize, United Kingdom, New Zealand, Tonga, Malaysia, Hong Kong and South Africa. In the case of Belize, also a former British colony, the CEO was made under the authority of the self-same UK legislation as was the Fiji CEO. Tonga is a case of a Pacific nation which has passed its own legislation incorporating the Convention. It has also made a CEO.

(f) CEO's have been relied on by countless claimants, insurers and carriers, world-wide, for death, injury, baggage and cargo claims. The relevant UK CEO was accepted as unchallenged by the House of Lords in *Holmes v. Bangladesh Biman Corp* [1989] 1 All ER 832 and by Morison J. in the UK Commercial Court in *J. K. N Westland Helicopters Ltd. v. Korean Air* (19 May 2003).

(g) World-wide, there has never been a challenge to a CEO. This fact indicates a universal acceptance of CEO's in a host of different legal systems.

(h) House of Lords authorities, such as *Sidhu v. British Airways* [1997] 1 All ER 193 and *Fothergill v. Monarch Airlines Ltd.* [1980] 1 All ER 690, lay down that the Convention should receive a purposive construction. Exceptions should not be permitted except where the Convention provides for them. All losses cannot necessarily be recovered by a claimant. When defining the situations where compensation is payable, the Warsaw Convention, in the interest of certainty and uniformity, strikes a balance between a claimant's right to compensation and the carrier's need for certainty as to its potential liability.

(i) Under normal principles of statutory interpretation, Article 22(5) of the Convention, section 4(4) of the 1967 Act and the 1969 CEO should all be read together as forming one regime, with the CEO being the implementation mechanism to give effect to part of Article 22(5).

(j) If there are two interpretations of a statute, one of which would make it unworkable, the Court should adopt the construction which makes the statute workable.

(k) The Respondent's submissions are contrary to the presumption of the validity of delegated legislation and the presumption that lawmakers do not pass legislation in defiance of their obligations under an international treaty. For example, if a country purported to shorten the limitation period for bringing a claim under the Convention, that would be acting in defiance of the Convention and therefore impermissible under Article 23. However, the CEO was made under the authority of Article 22(5) of the Convention.

(l) Although one could argue (as Singh J. effectively found), that the last sentence of Article 22(5) does not apply when a CEO had been issued, the preferable argument is that, where a CEO has been issued, effect is given on judgment day to that last sentence of Article 22(5) by the use of the formulae in the 1969 order.

(m) It is valid to apply international law approaches to interpreting the Convention to situations where, as here, the Convention has been applied to a domestic air carriage regime. International law favours a broad non-technical approach to the interpretation of treaties.

(n) Alleged frustration of a presumed intent cannot provide a ground for invalidating the 1969 Order or s.4(4) of the 1967 Act. Any system which fixes limits is vulnerable to value fluctuations and obsolescence. There was no evidence to suggest that the 1969 Order, when it was made, was other than a genuine attempt at converting the Convention franc entitlements into Fijian currency.

(o) The nomination of a gold standard is no guarantee of the continuity of real value, given the fluctuating stability of gold, either internationally or in relation to any national currency. If the value of gold were to slump heavily and for a long time, a CEO could be more favourable to a claimant.

(p) There is no basis for attacking the 1969 Order by saying that the Governor exercised his power unlawfully at that time. Any invalidity must be fixed as at the date of making such Order.

(q) The Governor's power in issuing the CEO was broad and discretionary. The Court cannot substitute its own view nor can it revise an international treaty.

(r) The only way in which to change the CEO is by exerting political pressure on the Government to do so or else by challenging, by means of judicial review, a refusal by the Minister to issue a CEO after an application has been made to amend the existing one.

[26] The right to receive damages, unaffected by the cap in Article 22, is not "property" contemplated by s 40 of the Constitution. In any event, even if it were "property" and the CEO effected a deprivation of property, that deprivation was "in accordance with a law".

Decision on Cross-Appeal

[27] There was no argument against the proposition that it is permissible for a State which is a party to the Convention, to issue a CEO. The authority is found in Article 22(5) – *"These sums may be converted into national currencies in round figures".* These words are rather vague, but given the wide interpretation which has to be accorded to international treaties and the numerous examples world-wide of CEO's, the words are sufficiently apt to permit the issue of CEO's. The authors of Shawcross & Beaumont, at VII 554, opine that the above wording in Article 22(4) "*clearly envisages national legislation on the matter".*

[28] The learned authors note that the expression of Convention limits in national currencies has become progressively more difficult, especially because changes to the international monetary system in 1978 "produced something of a crisis".

[29] Before 1978, many countries (including the United Kingdom) had enacted legislation specifying national currency equivalents of Convention francs. Without such legislation, a country's official gold value of its currency might fluctuate sharply from the free market value or there might be different official rates for different purposes.

[30] The authors then go on to discuss conversion practices since 1978. They characterise as a "counsel of despair" a suggestion that the limitation provisions of the Convention had become meaningless and unenforceable. That suggestion was rejected by the United States Supreme Court in *Franklin Mint Corpn v Trans World Airlines Inc* [1984] 2 Lloyd's Rep. 432: (1984) 104 SC 1776 (*'Franklin Mint'*). As was noted by Rogers, CJ. Comm. D in *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* (1988), 22 NSWLR 734, it is the duty of the Court to search for ways to uphold an international agreement and not to set it at naught because of changed circumstances.

[31] In the last-mentioned case, since Australia did not have a CEO, the Judge was faced with a number of alternatives for converting the gold francs named in the Convention into Australian currency. Whilst considering the method unsatisfactory, for the reasons expressed in his judgment, the Judge considered that the market price of gold should be the appropriate conversation mechanism. He considered that Special Drawing Rights with the International Monetary Fund (SDRs) would provide the most satisfactory alternative which would most closely follow the intention of the framers of the Convention. However, he declined to adopt that standard because the Australian Minister of Transport had indicated in Parliament that a change to SDRs was to be considered at a future time. SDRs are the basis for the Montreal Convention which has effectively superseded Warsaw in many countries, including New Zealand, but not Australia. SDRs have also been the stated bases for conversion in some CEOs, e.g. in the United Kingdom.

[32] In the event that the Court accepted the argument that the CEO was ineffective for the reasons stated earlier, counsel for the Respondent submitted that the Court should

adopt the course followed in the *SS Pharmaceuticals* case, *faute de mieux*. That case was taken on appeal, but the New South Wales Court of Appeal did not rule on those of the Judge's observations and findings on the Convention relevant to this appeal.

[33] In the view of the majority, the argument presented by the Appellant on the cross-appeal must prevail. This Court cannot interfere with the CEO, which having been validly made, is still part of the law of Fiji. The majority readily acknowledges the objective justice of the argument that the CEO is obsolete and should have been amended several times over the last 35 years. However the Court has no jurisdiction to substitute its own views.

[34] Having identified the injustice, the Court is unable to legislate to remedy it. Nor can it alter the terms of the CEO, validly made in 1969, by the imputation of a 'sunset' clause or by the addition of some mechanism tying the values expressed in the CEO with the current gold value. The CEO was authorised by Article 22(5). Any failure of the Executive to obey the 'from time to time' instruction could be a matter for a possible administrative law remedy.

[35] In dealing with a provision in an international treaty which has been adopted by many other countries, the Court must act cautiously. Unlike the interest question dealt with later, there has been no suggestion from any Court in any part of the world that would permit a Claimant to go behind a CEO in an attempt to raise the momentary limits set by a CEO. We see no warrant for the Courts of Fiji to be the first.

[36] We find no basis for concluding that the CEO had not been validly made in 1969. The original purpose, which must have been an attempt by the Executive to give practical effect to Article 22(5), can no longer be achieved through passage of time. However, there is no doctrine of desuetude which would terminate the order at some unspecified date after it had been made. As was said by the majority in *Franklin Mint*:

> "Legislative silence is not sufficient to abrogate a treaty." ([1984]2 Lloyds L.R 435).

[37] An up-to-date conversion of Convention francs to a local currency by means of a CEO could be beneficial to claimants. Without specific legislation, a country could have an official value of its currency in terms of gold which value might deviate sharply from the

free market value. The distinction between official and free market rates became more pronounced after 1968. (See *Shawcross & Beaumont* (op. cit) 605).

[38] The rationale behind a CEO is to remove uncertainty. It is not tenable to say that it must relate to 'the date of judgment' as distinct from the date on which it was promulgated. As was demonstrated in the *SS Pharmaceuticals* and *Franklin Mint* cases, gold values fluctuate daily. Just as it is wrong not to have issued a CEO for 35 years, it would be equally wrong to issue one on a daily basis. To do so would be ignoring the Article 22(5) empowerment of a CEO and to revert to the uncertainty displayed in the *SS Pharmaceuticals* case which occurred in a jurisdiction which had not issued a CEO.

[39] Assuming that the CEO was not *ultra vires* its empowering legislation at the date when it was made, to say that it should have included a 'sunset' clause is too vague a requirement. After what period should the 'sunset' clause come into effect? At the date of any such forecasted expiry, the currency of the particular country might be in a perilous state. The gold standard as against that currency might be low. There are just too many imponderables to make a 'sunset' clause an option.

[40] The decision of the United States Supreme Court in the *Franklin Mint* case provides authority for the view we have taken.

[41] The legislation in the United States delegated to the Civil Aeronautics Board (CAB) the task under Article 22(5) of converting Convention francs into national currency. That body used the price of gold to fix the liability limits under the Warsaw Convention. Although this method gave few problems whilst the gold standard ensured, after 1968 the gold-based international monetary system began to collapse. In 1979, when the Franklin Mint valuable cargo was lost by the airline, the CAB order limited a carrier's liability to $US9.07 per pound weight. This figure was based on the last official price of gold in 1969 – i.e. $US42.22 per ounce. Since 1969, the price of gold had increased dramatically with unstable fluctuations. The Court gave as an example the value of gold in January 1980 at $US490 per ounce and $US850 in April 1980.

[42] Consequently, when Franklin Mint's valuable cargo was lost in March 1979, the amount of compensation under the Convention was $US6,475. If the CAB notice had been

based on the then value of gold, the amount of the compensation cap would have been much greater.

[43] The majority decision of seven Justices of the United States Supreme Court held, reversing the Court of Appeals, that, as is the case with the cognate Fiji legislation, the legislature had delegated the task under Article 22(4) of converting the Convention limits into "any national currency". The Courts were bound to respect that arrangement unless the properly delegated authority was exercised by the CAB in a manner inconsistent with domestic or international law. The CAB's decision to continue to use the value of gold fixed in 1969, even after repeal of the gold standard by legislation, was consistent with domestic law and the Convention itself. That repeal had been unrelated to the Convention.

[44] The majority concluded that tying the Convention's liability to today's gold market would fail to effect any purpose of the Convention's drafters and would be inconsistent with well-established international practice. One of the Convention's objectives was to set a stable, predictable and internationally uniform limit that would encourage the growth of the then fledgling industry. However, in the long-term effectuation of the Convention's objective, international uniformity might require periodic adjustment of the limits by the CAB in order to account for the currency's changing value relative to other western currencies and conversion rates adopted by other members states. The majority stressed the need for a constant value to remain equitable for carriers and passengers alike.

[45] The *Franklin Mint* case brings into focus an important point. Air carriers enter into insurance arrangements on the basis of the likely limits of liability in the jurisdiction in which they operate. This would be especially the case for a small domestic carrier such as the appellant. We take judicial notice of the likelihood that the insurance premiums for such a carrier would rise dramatically if its maximum liability for death or injury per passenger was $1.5 million instead of the CEO limits. Very high insurance premiums could threaten the viability of any small domestic carrier and possibly larger carriers. Admittedly, there would always be the possibility of a new CEO being issued which could trigger an increase in premiums. For passengers, accident insurance is readily

available which, although not an ideal solution, can help assuage the difficulties caused by an obsolete CEO.

[46] With respect to the argument that the CEO must express the conversion based on the value of gold as at the date of any judgment, we construe Article 22(5) as authorising into a national currency a conversion for use at the date of any judgment and not at the date on which the CEO is made. Such is a purposive interpretation of an international treaty as interpreted in the many countries which have issued CEO's. Many airlines and air users who have, worldwide, adjusted and settled their claims on the basis of a CEO. Not to mention the numerous contracts of insurance which have been consummated on the basis of the CEO's.

[47] An interpretation of Article 22(5) which would require a multitude of conversions on different judgment days would not accord with either the broad and purposive interpretation which must be accorded to an international treaty or with its objectives.

[48] Consequently, the Court must reject the attack on the current CEO, should it still be in force at the date of judgment in the Respondent's claim.

[49] Kirby P, made observations in the New South Wales Court of Appeal in the *SS Pharmaceuticals* case ([1984] 1 Lloyds R 288, 295) about the unsatisfactory state of the law in Australia in words appropriate to this present case.

> *"The unfortunate events of the present case (apparently not the first instance of like damage to consigned goods) naturally stimulates a feeling of dissatisfaction with the carrier. But it is essential that these perfectly natural reactions to the predicament of the consignor (or the passenger or family in the case of death or injury) should be subjected to the dispassionate application of the international instrument, properly construed. If the result of such a construction is deemed unsatisfactory, it will be an argument for improved international arrangements, enhanced domestic legislation or for securing the protection of private insurance. It does not justify a Court of law adopting a construction of art. 25 which is different from that intended by, and expressed in the article."*

This Court respectfully adopts those comments.

[50] Before parting with this aspect of the case, the Court expresses the strong wish that speedy consideration be given by the Legislature of Fiji to enact its own legislation regarding domestic and international air carriage. Despite the inaction of 35 years, the

present is a good time to legislate in this area, given the ability now for Fiji to adopt the Montreal Convention in its own right, to become a signatory state, and to promulgate a CEO which is meaningful in the 21st Century. Anyone could be the victim of an aviation disaster. It would come as an unpleasant surprise to one's executors and dependants to know that such a meagre level of compensation would be payable in that event and that, moreover, the limit of compensation could depend on the regime adopted by the country of the flag of a particular carrier.

[51] Given that legislation takes time to be passed, in the meantime, a new CEO should be issued by the Minister under the existing inherited British legislation. This Order should reflect a more meaningful value in Fijian currency of the entitlements of claimants under the Warsaw Convention in the Courts of Fiji. The Court respectfully suggests to the Minister that this course be adopted promptly, in order to diminish the injustice of the present CEO.

[52] The Court sees no merit in the Respondent's constitutional point for the reasons set out in the Appellant's submissions quoted earlier. As Singh, J pointed out in his judgment, section 40 of the Constitution is aimed at compulsory acquisition by the State of real and personal property.

Decision on Appeal relating to Interest

[53] Singh J in the Court below recorded the alternative arguments on whether interest can be awarded on any judgment in addition to the amount specified in the CEO as the maximum damages recoverable under the Warsaw Convention. He held that it could be, on the basis that interest is different from damages and that a defendant could keep a Claimant out of his/her entitlement by delaying tactics. He noted the contrary argument that the Convention would have provided for interest had it chosen so to do – just as it had made a specific provision for costs in Article 22(4). The Respondent mounted in this Court an alternative argument that the award of statutory pre-judgment interest was a matter of procedure.

[54] The authorities on awarding interest on Warsaw Convention claims are diffuse and are discussed in *Shawcross & Beaumont* (op.cit) *at* VII 579-593.

[55] The principle authority against the award of pre-judgment interest on top of the Warsaw Convention damages cap is *Swiss Bank Corporation v Brinks-MAT Ltd.* [1986] QB 53: The case for refusing interest awards above the liability limits rests on the point that Article 22(1) restricts the liability of the *carrier* rather than the *damages* which may be awarded. Also, the inclusion of Act 22(4) indicates that an additional sum for costs and expenses would not have been allowed, were it not for that provision. On the *expressio unius* principle, interest could not be claimed, whereas costs could.

[56] Bingham J (as he then was) in *Swiss Bank* said at 858, in support of the latter view:

> *"It seems to me as a matter of construction that the inclusion of the clause in article 22 indicates that the awarding of costs or legal fees on top of the sum limited would not have been permissible under the Convention but for that express provision. It is of course noticeable that there is no reference to interest either in article 22(4) or elsewhere in that article or in any other article. It would seem to me that, had those who framed the Convention intended interest to be awarded in addition to the monetary limits and to be treated in the same way as Court costs or legal expenses, it would have been the subject of special mention.*
>
> *The contrary view, argued on behalf of the plaintiffs, rests, on two main foundations. The first is that the liability of the carrier arises when the cause of action against him accrues, in this case on non-delivery of the goods, and that it is that liability and no other which is the subject to the limitation. That submission, attractive though it is, seems to me to fall foul of article 22(4) which is clearly designed expressly to allow the award of costs which have by no means been incurred at the moment when the cause of action accrues. The limitation, furthermore, applies to limit harm or monetary loss which a plaintiff may well not have suffered until well after the moment that the cause of action accrues. It does not, therefore, seem to me that, on that basis, the construction which I have put upon article 22(4) is excluded.*
>
> *It is, furthermore, urged that interest on damages is not to be regarded as part of the damages themselves, and that, therefore, the convention limits should not be treated as excluding an award of interest on top of those damages. That again is an attractive submission, and, as I have indicated, I accept that we are dealing here with interest on damages and not with interest as part of damages. The submission would, however, if correct, have made it quite unnecessary to include article 22(4), because whatever may be said about interest can be said with equal or greater force about Court costs and legal expenses, which are in no sense part of any award of damages. Yet, as I have said, it was evidently thought necessary to include a special sub-clause permitting the award of such costs and expenses, which would not, I think, have been necessary had the Plaintiff's construction of the Convention been correct."*

[57] Bingham J at 859-60 and *Shawcross and Beaumont* (op.cit.) at VII, 591, note the diversity of views in United States Courts and also decisions in favour of awarding

interest in some civil law jurisdictions. Rogers, C. J. Comm. D followed *Swiss Bank* in the *SS Pharmaceuticals* decision with approval in the following words at 749:.

> *"At the time of the Warsaw Convention, the aviation industry was in its infancy. It was necessary that an airline should be able to contain its exposure to liability if it was to become financially viable. The limit of its exposure to liability was therefore fixed. That liability was not to be distorted by the vagaries of the length of time a dispute took to come up for determination or what might be the rates of interest prevailing in the particular country the Courts of which were disposing of the dispute. It would be curious if the framers of the Convention intended that the limit of liability of a fledgling airline should be affected by whether the amount of the loss should be affected by the rate of interest in a low inflation country, such as Germany, or in a high inflation and interest rate country such as New Zealand. It seems to me that giving effect to the proper purpose of the Convention suggests that the conclusion of Bingham J is to be followed. As I read the judgment, it was considerations of this kind that moved the Second Circuit Court of Appeals to come to the same conclusion in O'Rourke v Eastern Air Lines Inc 730 F 2d 842 (1984).*
>
> *The plaintiffs have presented a submission which does not appear to have been put to Bingham J. The plaintiffs pointed out that art 28(2) provides that questions of procedure should be governed by the law of the Court seized of the case. The submission then went on to point to authority holding that an award of interest is, according to the law of New South Wales, a question of procedure: see Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture (1981 146 CLR 206 at 222 per Barwick CJ; Australian National Airlines Commission v Commonwealth (1975) 49 ALR 338 at 340; 6 ALR 433 at 436 per Mason J; State Bank of New South Wales v Commonwealth Savings Bank of Australia (1984) 154 CLR 579 at 585 per Gibbs CI. However, it seems to me that the meaning of "procedure" in art 28(2) of the Convention is not determined by the law of the forum. Costs also are a question of procedure in most countries yet art 22 deals with it in terms. I refuse to allow interest so as to exceed the limit."*

[58] United States authorities on the award of interest are conflicting. The Court finds as helpful a decision of the United States Court of Appeals for the Ninth Circuit in *Motorola v Kuehne & Nagel Inc.* (No. 00-17374DC No. CV 99-03 – 03659-16 October 2002). This decision is helpful in that it analyses previous United States decisions and refers to the *Swiss Bank* case. It had not been decided at the time of the *SS Pharmaceuticals* case.

[59] After its detailed analysis, the Court concluded at P. 24-25 of its judgment:

> *"Although the liability caps obviously restrict carriage they are not an absolute ceiling on a carrier's total payout. And the history of the Hague Protocol indicates that the Warsaw signatories did not understand the absence of the Convention's explicit authorization for costs and attorney's fees to have precluded a Court from shifting those costs to the carrier. Thus, finding an implicit authority to award prejudgment interest to assure that the plaintiff receives the full value of the capped damages – shifting to the defendant the burden of the time value of money – likewise could not offend the Convention.*

> *As discussed in Section 11.A, above, those courts that have ruled against prejudgment interest have been persuaded that the post-Warsaw Convention treatment of attorney's fees and costs through explicit provisions weighs against finding implicit authority for an additional award of interest. There is some force to that reasoning. None the less, given the history we have reviewed above, we are reluctant to consider the treatment of fees and costs dispositive on the issue of prejudgment interest. That the contracting parties have elected to deal with one set of particular costs to carriers does not signal a conscious understanding that prejudgment interest is barred absent an amendment to the Warsaw Convention. Indeed, given that the longstanding, conflicting court rulings on pre-judgment interest have not motivated the contracting parties to adopt one position or the other, we cannot accept that the failure to address prejudgment interest in the post ratification era means it was foreclosed by the 1929 Warsaw Convention.*
>
> *Having thus reviewed the various sources that might assist our interpretation of the Convention, we are persuaded that the district court adopted the better view. Nothing in the text or history of the Warsaw Convention generally or Article 22 in particular shows the Convention's drafters intended to exclude an award of prejudgment interest. Such interest is consistent with the purposes of the Convention and comports with the available evidence of the post ratification understanding of the contracting parties. We therefore hold that, in an appropriate case, a court may exercise its discretion to award prejudgment interest."*

[60] This Court prefers the reasoning of the US Court of Appeals in the *Motorola* case to that of the US Court of Appeals, Second Circuit, in *Commercial Union Insurance Company v Alitalia Airlines* (2003) 347 F. 3d 448 cited by the Respondent. Although decided after *Motorola*, there is no mention of *Motorola* in the judgment. The discussion in *Commercial Union* on pre-judgment interest is brief and relies on a previous decision. It does not present as convincing an argument against the award as did Bingham J's judgment in *Swiss Bank.*

[61] The above quotations from *Swiss Bank* and *Motorola* show that the arguments are fairly evenly-balanced. This Court is more attracted to the reasoning in *Motorola* on the basis that interest is consistent with the purposes of the Convention. The ability to award interest acts as a disincentive to defendants who may wish to delay proceedings and their prompt resolution.

[62] With great respect to the eminent Judges in the *Swiss Bank* and *SS Pharmaceuticals* decisions, this Court is, on balance, more persuaded by the reasoning in the *Motorola* case. One can take comfort from the fact that Bingham J in *Swiss Bank* did not find a decision obvious or easy.

[63] The authorities cited by the Respondent tend to show that pre-judgment interest is a matter of procedure. *Lesotho Highlands Development Authority v Impregilo Spa* (UK Court of Appeal, 31 July 2003 at p15 of the unreported judgment). This view strengthens the reasoning shown in the *Motorola* case.

[64] Accordingly, the Court declares unanimously that there is an entitlement for the Respondent to seek pre-judgment interest, in addition to the capped damages available under the Convention. Such interest is always in the discretion of the Judge whether to award it and on what basis.

Answer to Questions

[65] In accordance with the view of the majority, the answers to the questions posed as preliminary issues and recorded in para 16 above are:

(a) In the absence of a new Currency Equivalent Order being made before the date of judgment in the Respondent's action against the Appellant for damages under the Compensation to Relatives Act, the Carriage by Air (Fijian Currency Equivalence) Order 1969, is to be applied as at the date of judgment.

(b) No.

Decision

[66] Accordingly, both appeal and cross-appeal are dismissed.

[67] Since each party has been partially successful, the Court makes no Order as to costs.

R. D Barker J.A.

Barker, JA

Scott, JA

FIJI COURT OF APPEAL

Solicitors:

Munro Leys, Suva for the Appellant

Howards, Suva for the Respondents