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A Court of Appeal

Rogers and another *v* Hoyle (Secretary of State for Transport and another intervening)

[2013] EWHC 1409 (QB)

B [2014] EWCA Civ 257

2013 Feb 21; May 23 — Leggatt J

2014 Jan 15; March 13 — Arden, Treacy, Christopher Clarke LJJ

C *Aircraft — Carriage by air — Accident — Passenger killed in vintage plane accident — Claimants seeking to rely on report in negligence proceedings against pilot — Whether report admissible in evidence*

Evidence — Expert evidence — Admissibility — Aircraft piloted by defendant crashing and killing passenger — Air Accident Investigation Branch of Department of Transport investigating accident and producing report as to causes — Passenger's executors bringing negligence claim against pilot and D *seeking to adduce report in evidence — Whether rule that findings of courts, tribunals and inquiries inadmissible in subsequent proceedings applicable to report — Whether report admissible as containing statements of fact — Whether opinions stated those of sufficiently qualified expert — Whether admissible as containing expert evidence — Whether permission of court required to adduce expert evidence in report — Whether report to be excluded under court's discretionary power to control evidence — CPR rr 32.1(2), 35.4(1)*

E

The deceased was killed when a vintage bi-plane in which he was a passenger crashed. The claimants, who were the executors of the deceased's will, brought a claim in negligence against the pilot, alleging that he had lost control of the plane while executing an aerobatic loop for which he had insufficient training and experience. The claimants gave notice of their intention to rely on a report produced by the Department of Transport's Air Accident Investigation Branch ("AAIB"), a F body with statutory responsibility for the investigation of accidents involving aircraft. The defendant applied (i) for a declaration that the report was inadmissible because of the rule that the findings of courts, other tribunals and inquiries were inadmissible in subsequent proceedings and it was wrong to allow expert opinion evidence which did not comply with the provisions of CPR Pt 35[1], or (ii) alternatively, for the court to exercise its discretion to exclude the report from evidence pursuant to CPR r 32.1(2). The judge refused the application, holding that G the whole AAIB report was admissible as evidence in the proceedings, with it being a matter for the trial judge to make use of the report as he thought fit.

On the defendant's appeal—

Held, dismissing the appeal, that (1) the rule that the findings of courts, tribunals and inquiries were inadmissible in subsequent proceedings, the foundation of which was the preservation of the fairness of a trial in which the decision was entrusted to the trial judge alone, did not apply to the AAIB report since it contained not findings H but statements of fact and expressions of the opinions of its authors who, it was to be inferred, were experts in their respective fields; that in so far as the report consisted of statements or reported statements of fact it was prima facie admissible, it being

[1] CPR r 32.1: see post, first instance judgment, para 121.
Pt 35: see post, Court of Appeal judgments, para 60.

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immaterial that it constituted hearsay whether primary or secondary, and those statements were evidence which the trial judge could take into account as he would any other factual evidence, giving to it such weight as he thought fit; that the court was entitled to have regard to the expressions of opinion since it was open to someone with the appropriate special expertise to express an opinion based on the facts as he understood or assumed them to be, if and in so far as his conclusion was informed by or a reflection of that expertise; that the AAIB was a body with the requisite expertise, charged as it was with responsibility for investigating air accidents and having considerable qualified expertise and experience in doing so; that, although in so far as an expert's report merely opined on facts which required no expertise of his to evaluate it was inadmissible and should be given no weight, there was nothing to be gained, except in very clear cases, from excluding or excising such opinions; and that, accordingly, the report was admissible as a whole for its record of factual evidence and its expert opinion, it being a matter for the trial judge to make use of the report as he saw fit, leaving out of account any part which was inadmissible, and the judge had been right so to hold (post, Court of Appeal judgments, paras 31, 39–40, 43, 49, 51, 53, 55, 57, 100, 101).

Hollington v F Hewthorn & Co Ltd [1943] KB 587, CA distinguished.

(2) That CPR Pt 35 was not a comprehensive and exclusive code regulating the admission of expert evidence but rather regulated the use of evidence from experts who had been instructed to give or to prepare expert evidence for the purpose of the proceedings; that since the AAIB had not been instructed by, and was wholly independent of, any of the parties the expert evidence in its report did not fall within CPR Pt 35; and that, accordingly, that evidence was prima facie admissible and the claimant did not require the permission of the court to adduce it (post, Court of Appeal judgments, paras 62, 63, 67, 100, 101).

(3) That the report, as well as being admissible evidence, was of potential value because the AAIB was independent, its reports were the product of an impartial investigation and it had much greater ability than anyone else to obtain and analyse data relating to an aircraft accident which was likely not otherwise to be available or only with considerable difficulty and at considerable cost; that the circumstances in which it was appropriate to the exercise of discretion under CPR r 32.1(2) to exclude admissible evidence which was likely to be helpful were limited; that that discretion was to be exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost; that, while every case depended on its own facts, that objective did not call for or justify the exclusion of the AAIB evidence, which Parliament had provided should made public and the admissibility in evidence of which it had not legislated to restrict, but rather would tend to favour its inclusion; and that, accordingly, the judge had been right to decline to exclude the report in the exercise of his discretion under rule 32.1(2) (post, Court of Appeal judgments, paras 79–82, 97, 98, 100, 101).

Decision of Leggatt J post, p 269; [2013] EWHC 1409 (QB) affirmed.

The following cases are referred to in the judgment of Christopher Clarke LJ in the Court of Appeal:

Bird v Keep [1918] 2 KB 692, CA
Bristow Helicopters Ltd v Sikorsky Aircraft Corpn [2004] EWHC 401 (Comm); [2004] 2 Lloyd's Rep 150
Budden v Police Aviation Services Ltd [2005] PIQR P362
Calyon v Michailaidis [2009] UKPC 34, PC
DN v Greenwich London Borough Council [2004] EWCA Civ 1659; [2005] LGR 597, CA
European Gateway, The [1987] QB 206; [1986] 3 WLR 756; [1986] 3 All ER 554; [1986] 2 Lloyd's Rep 265
Folkes v Chad (1782) 3 Doug KB 157

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Hall (Arthur JS) & Co v Simons [2002] 1 AC 615; [2000] 3 WLR 543; [2000] 3 All ER 673, HL(E)
Hollington v F Hewthorn & Co Ltd [1943] KB 587; [1943] 2 All ER 35, CA
Humber Oil Terminals Trustee Ltd v Associated British Ports [2012] EWHC 1336 (Ch); [2012] L & TR 435
Hunter v Chief Constable of the West Midlands Police [1980] QB 283; [1980] 2 WLR 689; [1980] 2 All ER 227, CA; [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
Interflora Inc v Marks and Spencer plc [2013] EWHC 936 (Ch)
Kingston's (Duchess of) Case (1776) 2 Sm LC, 13th ed, p 644
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
Lambson Aviation (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira de Aeronautica SA (unreported) 11 October 2001, Tomlinson J
Land Securities plc v Westminster City Council [1993] 1 WLR 286; [1993] 4 All ER 124
Margolle v Delta Maritime Co Ltd [2002] EWHC 2452 (Admlty); [2003] 1 All ER (Comm) 102; [2003] 1 Lloyd's Rep 203
Masquerade Music Ltd v Springsteen [2001] EWCA Civ 563; [2001] EMLR 654, CA
Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC)
R v Kershberg [1976] RTR 526, CA
R v Tate [1977] RTR 17, CA
Secretary of State for Business, Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146; [2009] Bus LR 809, CA
Sunley v Gowland White (Surveyors & Estate Agents) Ltd [2003] EWCA Civ 240; [2004] PNLR 257, CA
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16; [2003] 2 AC 1; [2001] 2 All ER 513, HL(E)
Waddle v Wallsend Shipping Co Ltd [1952] 2 Lloyd's Rep 105

The following additional cases were cited in argument before the Court of Appeal:

Alexis v Newham London Borough Council [2009] EWHC 1323 (QB); [2009] ICR 1517
Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA
Barings plc v Coopers & Lybrand [2001] PNLR 551
Conlon v Simms [2006] EWCA Civ 1749; [2008] 1 WLR 484; [2007] 3 All ER 802, CA
English Exporters (London) Ltd v Eldonwall Ltd [1973] Ch 415; [1973] 2 WLR 435; [1973] 1 All ER 726
G v G (Minors: Custody Appeal) [1985] 1 WLR 647; [1985] 2 All ER 225, HL(E)
Garton v Hunter [1969] 2 QB 37; [1969] 2 WLR 86; [1969] 1 All ER 451, CA
Glenfield Motor Spares Ltd v Smith [2011] EWHC 3130 (Ch)
Hill v Clifford [1907] 2 Ch 236, CA
JP Morgan Chase Bank v Springwell Navigation Corpn [2006] EWHC 2755 (Comm); [2007] 1 All ER (Comm) 549
M and R (Minors) (Sexual Abuse: Expert Evidence), In re [1996] 4 All ER 239, CA
R v Robb (1991) 93 Cr App R 161, CA
R (Patel) v General Medical Council [2013] EWCA Civ 327; [2013] 1 WLR 2801, CA
Rehman v Brady [2012] EWHC 78 (QB)
Ross v Owners of Bowbelle (Note) [1997] 2 Lloyd's Rep 196
Sansom v Metcalfe Hambleton & Co [1998] PNLR 542, CA
Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV [1984] 1 WLR 271; [1984] 1 All ER 296

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Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321; [2004] Ch 1; [2003] 3 WLR 841; [2004] 4 All ER 325, CA
Shell UK Ltd v Total UK Ltd [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep 1
Stone (S) & Sons (Hounslow) Ltd v Pugh [1949] 1 KB 240; [1948] 2 All ER 818, DC
Summers (John) & Sons Ltd v Frost [1955] AC 740; [1955] 2 WLR 825; [1955] 1 All ER 870, HL(E)
Thornton v Royal Exchange Assurance Co (1790) Peake 37
Travel & Holiday Clubs Ltd, In re [1967] 1 WLR 711; [1967] 2 All ER 606
Ventouris v Mountain (No 2) [1992] 1 WLR 887; [1992] 3 All ER 414; [1992] 2 Lloyd's Rep 216, CA
Versloot Dredging BV v HDI Gerling Industrie Versicherung AG [2013] EWHC 1666 (Comm); [2013] 2 All ER (Comm) 465; [2013] 2 Lloyd's Rep 131
Welburn v Evert-M Ltd [2002] EWHC 2034 (Admlty)
Woodland v Stopford [2011] EWCA Civ 266; [2011] Med LR 237

The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

Labour Relations Board of Saskatchewan v John East Iron Works Ltd [1949] AC 134, PC
R v HM Coroner for South London, Ex p Thompson The Times, 15 May 1982

The following cases are referred to in the judgment of Leggatt J:

Bird v Keep [1918] 2 KB 692, CA
Bristow Helicopters Ltd v Sikorsky Aircraft Corpn [2004] EWHC 401 (Comm); [2004] 2 Lloyd's Rep 150
Budden v Police Aviation Services Ltd [2005] PIQR P362
Calyon v Michailaidis [2009] UKPC 34, PC
Carter v Boehm (1766) 3 Burr 1905
Conlon v Simms [2006] EWCA Civ 1749; [2008] 1 WLR 484; [2007] 3 All ER 802, CA
European Gateway, The [1987] QB 206; [1986] 3 WLR 756; [1986] 3 All ER 554; [1986] 2 Lloyd's Rep 265
Glenfield Motor Spares Ltd v Smith [2011] EWHC 3130 (Ch)
Hollington v F Hewthorn & Co Ltd [1943] KB 587; [1943] 2 All ER 35, CA
Hunter v Chief Constable of the West Midlands Police [1980] QB 283; [1980] 2 WLR 689; [1980] 2 All ER 227, CA; [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
Lambson Aviation (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira (unreported) 11 October 2001, Tomlinson J
Land Securities plc v Westminster City Council [1993] 1 WLR 286; [1993] 4 All ER 124
R v Kilbourne [1973] AC 729; [1973] 2 WLR 254; [1973] 1 All ER 440, HL(E)
Secretary of State for Business, Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146; [2009] Bus LR 809, CA
Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321; [2004] Ch 1; [2003] 3 WLR 841; [2004] 4 All ER 325, CA
Stupple v Royal Insurance Co Ltd [1971] 1 QB 50; [1970] 3 WLR 217; [1970] 3 All ER 230; [1970] 2 Lloyd's Rep 127, CA
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16; [2003] 2 AC 1; [2001] 2 All ER 513, HL(E)
Waddle v Wallsend Shipping Co Ltd [1952] 2 Lloyd's Rep 105

No additional cases were cited in argument before Leggatt J.

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The following additional cases, although not cited, were referred to in the skeleton arguments before Leggatt J:

Al-Hawaz v Thomas Cook Group Ltd (unreported) 27 October 2000, Keene J
Bradford City Metropolitan Council v K (Minors) [1990] Fam 140; [1990] 2 WLR 532
George v Eagle Air Services Ltd [2009] UKPC 21; [2009] 1 WLR 2133, PC
R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)

APPLICATION

By a claim form the claimants, Julia Mary Rogers and Jade Nicola Lucinda Rogers, as executors on behalf of the estate, and as dependants, of the deceased, Orlando Rogers, brought a claim in negligence against the defendant, Scott Hoyle, who had been the pilot of an aircraft which had crashed, killing the deceased who had been travelling in it as a passenger. The claimants gave notice pursuant to section 2 of the Civil Evidence Act 1995 of their intention to rely on a report produced by the Air Accident Investigation Branch of the Department of Transport ("the AAIB report") as hearsay evidence at the trial.

The defendant, contending that the report contained inadmissible opinion evidence and findings of fact, applied for (i) an order that those parts of the claimants' statement of case which referred to the AAIB report be struck out, and (ii) a declaration that the AAIB report was inadmissible in the proceedings, or (iii) alternatively, the court to exercise its discretion to refuse to admit the report in evidence on grounds that it was unsafe and undesirable to do so. On 11 December 2012 Master Fontaine gave directions for the application to be heard by a High Court judge.

The facts are stated in the judgment.

John Kimbell (instructed by *Stewarts Law LLP*) for the claimants.
Timothy Marland (instructed by *Clyde & Co LLP*) for the defendant.

The court took time for consideration.

23 May 2013. **LEGGATT J** handed down the following judgment.

Introduction

1 The issue raised by this application is whether a report produced by the air accident investigation branch of the Department for Transport ("the AAIB") is admissible as evidence in civil proceedings.

2 I am told that (save for one case in 2008 known to counsel but of which there is no report or transcript) this issue has not come before the High Court before. I have been referred to a number of reported cases in which reports of the AAIB were admitted in evidence. In none of these cases, however, was the admissibility of the AAIB's report contested. In the present case the objection is taken that the report constitutes inadmissible opinion evidence. To determine whether this objection is well founded, it is necessary to consider the nature and relevance of the report together with the basis and scope of the rule of law which excludes opinion evidence.

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The claim

3 The claimants bring this action as executors on behalf of the estate and as dependants of Mr Orlando Rogers, claiming compensation for his death. Mr Rogers died on 15 May 2011 when a Tiger Moth aircraft in which he was a passenger crashed near Witchampton in Dorset. The claimants allege that the accident was caused by the negligence of the defendant, Mr Hoyle, who was the pilot of the aircraft.

4 The claimants' case, in brief, is that Mr Hoyle agreed to take Mr Rogers and another acquaintance, Mr Diamond, on a short pleasure flight in a vintage Tiger Moth propeller bi-plane manufactured in 1940. The aircraft had room for only one passenger. Mr Diamond went first. During the first flight, two loops were performed—one at an altitude of 1,200 ft and one at 1,600 ft.

5 For the second flight, Mr Rogers replaced Mr Diamond as the passenger in the aircraft. The claimants say that Mr Hoyle intended to give Mr Rogers the same experience as Mr Diamond by performing aerobatic loops. They allege that in the course of the flight Mr Hoyle pulled up into a loop at an altitude of about 1,400 ft but lost control of the aircraft, which entered into a spin from which Mr Hoyle was not able to recover. The aircraft crashed into a field and Mr Rogers suffered fatal injuries. Mr Hoyle survived the crash.

6 It is the claimants' case that Mr Hoyle was negligent in that he attempted to perform a loop (a) when he had no or no sufficient training and expertise in aerobatic flying or spin recovery and (b) at a dangerously low altitude such that there was insufficient airspace to recover from a spin.

7 The defendant's case is that he was not attempting to perform a loop when the accident occurred. He says that the rudder pedals jammed and that he was not able to prevent the aircraft from stalling and flipping over into a spin from which, because the pedals were jammed, he could not recover.

The AAIB

8 The AAIB is part of the Department for Transport. It is the official body charged with the investigation of accidents and serious incidents involving aircraft which occur in or over the United Kingdom.

9 The powers of the AAIB are contained in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (SI 1996/2798) ("the 1996 Regulations") made under sections 75 and 102 of the Civil Aviation Act 1982. The 1996 Regulations were made to implement the European Union obligations of the United Kingdom under Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents (OJ 1994 L319, p 14) ("the 1994 Directive") and to carry out Annex 13 to the Convention on International Civil Aviation (Treaty Series No 8 (1953) (Cmd 8742)) ("the Chicago Convention"), signed in Chicago on 7 December 1944.

10 Alongside the 1996 Regulations there is now a parallel regime established by Regulation (EU) No 996/2010 of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC (OJ 2010 L295, p 35) ("the EU Regulation").

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A The EU Regulation, which has direct effect in member states, came into force on 2 December 2010. There is a substantial overlap between the EU Regulation and the 1996 Regulations. However, the 1996 Regulations have not been repealed. For present purposes it is sufficient to outline the statutory scheme for the investigation of air accidents established by the 1996 Regulations without also referring to the corresponding provisions of the EU Regulations.
B

The 1996 Regulations governing air accident investigations

11 The 1996 Regulations provide for the appointment of inspectors of air accidents who, as a body, are known as the AAIB: regulation 8. When an accident occurs in or over the United Kingdom, the chief inspector must appoint one or more inspectors to carry out an investigation:
C regulation 8(3). The 1996 Regulations give these inspectors a series of powers to enable them to carry out their investigations. In particular, for the purpose of enabling him to carry out an investigation into an accident or incident in the most efficient way and within the shortest time, an investigating inspector is authorised by regulation 9(1) to

D "(a) have free access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage; (b) ensure an immediate listing of evidence and controlled removal of debris, or components for examination or analysis purposes; (c) have immediate access to and use of the contents of the flight recorders and any other recordings; (d) have access to the results of examination of the bodies of victims or of tests made on samples taken from the bodies of victims; (e) have immediate
E access to the results of examinations of the people involved in the operation of the aircraft or of tests made on samples taken from such people; (f) examine witnesses; and (g) have free access to any relevant information or records held by the owner, the operator or the manufacturer of the aircraft and by the authorities responsible for civil aviation or airport operation."

F **12** For these purposes, investigating inspectors also have powers to summon and examine witnesses, to require anyone to answer questions or produce documents, to take witness statements signed with a declaration of truth, to inspect any place or aircraft and to take measures for the preservation of evidence: regulation 9(2).

13 The sole objective of the investigation of an accident or incident
G under the 1996 Regulations is the prevention of accidents. It is not the purpose of such an investigation to apportion blame or liability: see regulation 4, which reflects paragraph 3.1 of Annex 13 to the Chicago Convention and article 4(3) of the 1994 Directive.

14 On completion of an investigation, the inspector must prepare a report and submit it to the Secretary of State: regulation 11(1) and 11(4). The report must state the sole objective of the investigation and, where
H appropriate, contain relevant safety recommendations: regulation 11(3). A safety recommendation "shall in no case create a presumption of blame or liability for an accident": regulation 11(5).

15 If in the opinion of the investigating inspector the report is likely to affect adversely the reputation of any person, then that person (or, if the

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person is dead, whoever appears to represent best the interest of the deceased person) must be given the chance to comment on the relevant parts of the report in draft before it is published: regulation 12.

16 The AAIB's report of an investigation must be made public. This must be done within the shortest time possible and, if possible, within 12 months of the date of the accident: regulation 13.

17 The records of an investigation (other than those included in the report) may not be disclosed for any purpose other than accident investigation without a court order: regulation 18. A court may order such disclosure only if satisfied that the interests of justice in the proceedings or circumstances for which the relevant record is required outweigh any adverse impact which disclosure may have on that or any future accident investigation: regulation 18(4).

The AAIB report

18 The report of the AAIB's investigation into the accident with which these proceedings are concerned (the "AAIB report") was published on 14 June 2012. The AAIB report follows what I understand to be the standard format of such reports. Its contents include: a narrative history of the flight; information about the weather conditions, the aircraft and the pilot; a description of the wreckage found at the accident site and conclusions drawn from a detailed examination of the wreckage; information derived from a post-mortem examination of the deceased passenger, from radio transmissions between the pilot and air traffic control, from recordings of radar and global positioning system data and from interviews with witnesses (including the pilot); and analysis of the information obtained in the investigation leading to conclusions about the cause of the accident.

The claimants' reliance on the AAIB report

19 When the particulars of claim in these proceedings were settled on 11 May 2012, the AAIB report had not yet been published. The claimants' statement of case was therefore pleaded without reference to it. However, by the time the claimants came to serve their reply on 3 July 2012 the AAIB report was available, and in pleading the reply extensive reference has been made to the report.

20 At para 3 of the reply, the claimants have given notice pursuant to section 2 of the Civil Evidence Act 1995 of their intention to rely on the contents of the AAIB report as hearsay evidence at trial. Para 4 of the reply summarises findings contained in the AAIB report and states the claimants' intention to rely on the report in support of their case that the defendant was negligent. Para 4 continues:

> "For the avoidance of doubt, the claimants will not contend that the court is in any way 'bound' by the findings of the AAIB. The claimants simply rely on the AAIB report for the admissible factual evidence and the admissible expert evidence which it contains."

The remainder of the reply contains further references to the AAIB report including several quotations from it.

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The defendant's application

21 In response to these statements of intention to rely on the AAIB report, the defendant issued this application to contest its admissibility. On this application, the defendant seeks (1) an order that those parts of the claimants' statements of case which refer to the AAIB report be struck out, and (2) a declaration that the report is inadmissible in the current proceedings.

22 On 11 December 2012 Master Fontaine gave directions for the application to be heard by a High Court judge.

The defendant's arguments

23 On behalf of the defendant, Mr Marland does not contend that there is any provision of the legal regime governing AAIB investigations and reports which prevents such reports from being used as evidence in court proceedings. His argument is based on the general law of evidence. Mr Marland submits that the AAIB report consists of inadmissible opinion evidence and that this extends to all "findings of fact" contained in the report, since findings of fact are statements of opinion. In support of this argument Mr Marland relies on authorities (which I will consider later in this judgment) in which findings of another court, a coroner, a wreck inquiry, a disciplinary tribunal and an inquiry commissioned by the Bank of England into its supervision of the Bank of Credit and Commerce International ("BCCI") have all been held inadmissible in civil proceedings. He submits that there is no material distinction between such findings and the findings contained in a report of the AAIB following an air accident investigation.

24 Mr Marland's primary contention is that the AAIB report is inadmissible in these proceedings as a matter of law so that the court has no power to receive it. Alternatively, he contends that, if that is wrong and the court has a discretion in the matter, it would be unsafe and undesirable to allow the report to be admitted in evidence.

The claimants' arguments

25 On behalf of the claimants, Mr Kimbell argues that the AAIB report contains statements of fact as well as statements of opinion. He accepts that the statements of fact are hearsay but points out that this is no longer a ground on which evidence can be excluded in civil proceedings. In so far as the report contains statements of opinion, Mr Kimbell submits that this evidence is admissible at common law because the opinions are those of duly qualified experts. He further submits that the authorities relied on by Mr Marland can all be distinguished as they reflect a specific rule (commonly referred to as "the rule in *Hollington v Hewthorn*" after the leading authority for it) which is confined to findings made in judicial proceedings and does not apply to a report of an investigation into an accident such as a report of a shipping surveyor, a factory inspector or the AAIB. In support of that contention, he enlists the support of *Phipson on Evidence*, 17th ed (2010), para 33-25.

26 Mr Kimbell agrees with Mr Marland that the decision whether the AAIB report may be received in evidence does not involve an exercise of discretion. His primary contention is that the report is admissible in these

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proceedings as a matter of law and that the court has no power to exclude it. Alternatively, Mr Kimbell contends that, if the court has a discretion, it is in the interests of justice to allow the report to be admitted in evidence.

Relevance

27 Before examining these competing arguments, it is logical to consider first what relevance (if any) the AAIB report has to the issues in this case. In the modern law of evidence relevance is the paramount consideration. The primary rule is that evidence is admissible only if it is relevant—that is, if it tends to prove or disprove, in the sense of making more or less probable, any fact in issue in the proceeding: see *Phipson on Evidence*, 17th ed, paras 7.08–7.09 and *R v Kilbourne* [1973] AC 729, 756. Conversely, evidence that is relevant (or of more than minimal relevance) is generally admissible. In former days when facts in civil as well as criminal cases were found by juries and there was fear that more weight would be given to certain kinds of evidence than they deserved, rules were developed to exclude reliance on evidence notwithstanding its relevance. The rule against hearsay is the classic example. The tendency of the law has been and continues to be towards the abolition of such rules. The modern approach is that judges (and, increasingly, juries) can be trusted to evaluate evidence in a rational manner, and that the ability of tribunals to find the true facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules.

28 The emphasis on relevance is not new. In *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, 594, a case that I have mentioned already and will come back to, the Court of Appeal said that: "nowadays, it is relevance . . . that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded."

29 The proper starting point, as it seems to me, is therefore to identify what, if any, relevant evidence the AAIB report contains.

Relevance of the AAIB report

30 The AAIB report contains statements of fact and statements of opinion. The statements of fact include observations made by the AAIB inspectors who attended the site of the accident. In particular, the report describes exactly where different parts of the wreckage were found and the nature and extent of the damage which the aircraft was seen to have sustained.

31 The AAIB report also records statements of fact made by the pilot and other witnesses. A key factual issue in this case is whether the aircraft was performing a loop when it went into a spin. Mr Hoyle denies that he was attempting a loop. The AAIB report refers to the evidence of a number of eyewitnesses to the activity of the aircraft in the period just before the accident. In particular, the report states that two witnesses, one of whom was a retired professional pilot, saw the aircraft at some distance away carry out a steep turn and then shortly afterwards commence a loop. It is reported that they did not see the conclusion of the manoeuvre but one was sufficiently concerned by the low level of the manoeuvre to express this to the other. Another witness who was in his garden is reported as having seen the aircraft do aerobatics before watching it spiral down. A fourth witness,

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A said to have been the closest to the accident site (at some 350m distance), is reported as having watched the aircraft reach the top of a loop before entering a spin.

32 The pilot, Mr Hoyle, was asked about his recollections of the flight and also about his knowledge of spin recovery. The report records that, when asked what the recovery actions from a spin should be, the pilot omitted to mention several of the crucial elements of correct spin recovery B technique for the Tiger Moth aircraft. He did not recall entering a loop but reported that he had encountered a restriction with the rudder pedal. He recalled the aircraft being in spin to the left and that, although he pushed hard on the right rudder pedal, it would not move.

33 All this evidence is of obvious relevance. Moreover, it would remain so even if the claimants' representatives were able to identify all the C eyewitnesses and call them to testify at the trial and whether or not Mr Hoyle gives evidence. Oral testimony can be tested by cross-examination, but the statements made to the investigating inspectors have the advantage of immediacy and for that reason could be thought more reliable than recollection at a trial which may not take place until several years after the accident.

D 34 As well as such factual evidence, the AAIB report contains evidence of the opinions of experts on technical matters. The AAIB use in house and third party experts in fields which include aeronautical engineering, wreckage analysis, meterology, pathology, analysis of flight data, and the piloting of aircraft. The opinions of such experts are incorporated in the report.

35 In some cases the report identifies the expert whose opinion it E records by description (although not by name). For example, the report states that an expert in aviation pathology carried out a post mortem examination on the passenger (Mr Rogers) and states the pathologist's main findings. Similarly, the report gives the results of an analysis of the recorded meterological data carried out by the Met Office to obtain an estimate of the wind and temperature profile in the area of the accident.

F 36 In other instances the person whose opinion is reflected in the report is not described. For example, the report states that the aircraft engine and structure appeared to have been in serviceable condition prior to the accident. Although these opinions are unattributed, it is reasonable to assume that they are those of an inspector who is an experienced aeronautical engineer. Likewise it is clear that someone with the relevant expertise must have performed the analysis presented in the report of data G extracted from flight track logs recorded by a global positioning system carried on board the aircraft and recovered from the accident site by the AAIB. Each log recorded the time, position and altitude of the aircraft at intervals ranging between 1 and 13 seconds during the flight, as well as the track angle and average groundspeed between each point. From this information (i) a diagram has been prepared showing the altitude of the aircraft at each recorded point on each of the two flights, and (ii) the track H followed by the aircraft on each flight has been plotted on a map.

37 A further category of evidence contained in the AAIB report consists of findings of the AAIB inspectors based on the information collected in their investigation. Thus, the report contains a narrative history of the flight and a description of surrounding circumstances such as the local weather

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conditions at the time of the flight. Much of this description is unlikely to be controversial or indeed controvertible. It may, however, be useful in filling gaps in the story which a party is presenting to the court and thus has "narrative relevance": see *Phipson on Evidence*, 17th ed, para 7-10.

38 Other findings of the AAIB are potentially more controversial. In particular, the report contains the AAIB's analysis and conclusions as to the probable causes of the accident. Given that the AAIB has great experience in investigating the causes of air accidents and has plainly carried out a thorough investigation in this case, any rational person who wants to find out what caused the accident would regard the AAIB's views as relevant to that question.

39 Although the three categories of evidence which I have mentioned are a convenient classification, they are by no means neat. The distinction between statements of fact, which report the direct observations of a witness, and statements of opinion is not always easy to draw and may be a question of degree. That is certainly so in this case. For example, the statements in the AAIB report of the inspectors' observations of the accident site and wreckage are intermingled with statements of opinion based on the inspectors' observations such that the two are hard to separate. To give one example:

> "The rear fuselage, which was intact, was aligned at approximately 25° to the ground marks made by the spinner and cowling which gave strong evidence that there was rotation about a vertical axis with the aircraft rotating to the right when the aircraft struck the ground. This direction of rotation was further corroborated by ground marks made by the tail skid dragging to the left (i e in the direction of the aircraft nose to the right)."

It can be seen that this passage combines statements reporting the location of the ground marks and wreckage which the inspectors observed with inferences drawn from those observations. Many similar examples could be given.

40 Other statements of what might be called mixed fact and opinion include reports of experiments which the AAIB carried out to test or exclude particular hypotheses. For example, to investigate the possibility that a camera carried by Mr Rogers during the flight might have interfered with the rudder or other aircraft controls, an assessment of the control movement was made with an occupant in the front seat of similar height and build to Mr Rogers wearing a similar flying jacket and carrying a similar camera in a similar position to him. The findings from this experiment are reported.

41 There is equally no clear line between the statements of fact and statements of opinion on technical matters contained in the AAIB report and the inspectors' findings of fact. That is not surprising given that the inspectors made relevant first hand observations and have technical expertise in aeronautical engineering and aircraft operations which is inevitably reflected in their analysis. The passage quoted above in which the inspectors found that the aircraft was rotating to the right when it hit the ground illustrates this.

42 The analysis in the report also reflects experience accumulated by the AAIB from other investigations. In some places this is explicit. For example, the report mentions that the AAIB has investigated several accidents where

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A pilots have carried out aerobatics with either insufficient training and/or at lower than recommended heights. A number of possible reasons are given which could account for such behaviour, although it is said that the reasons are not well understood. Irrespective of the reasons, it seems to me that the fact that such behaviour is in the AAIB's experience not uncommon may itself be relevant to the central issue in the present case of whether or not the
B defendant was in fact attempting to carry out an aerobatic manoeuvre when the accident occurred.

43 Overall, the AAIB report contains a wealth of relevant and potentially important evidence which bears directly or indirectly on the issues in this action, including the central issue of whether Mr Rogers's death was caused by negligence on the part of Mr Hoyle.

44 No doubt much of this evidence, or evidence to similar effect, could,
C in principle, be obtained from other sources. The claimants could attempt to trace and interview the eyewitnesses to the accident, could summon an AAIB inspector who attended the scene of accident to give evidence and could instruct experts in all the different disciplines consulted by the AAIB. However, the fact that the AAIB's investigation was carried out immediately after the accident when the evidence was fresh gives it an
D advantage which no subsequent investigation can replicate. In any case the fact that a matter which evidence tends to prove can be proved by other means does not make the evidence irrelevant. Furthermore, collecting from disparate sources all the evidence required to prove the matters contained in the AAIB report would involve substantial time and cost. In so far as some of the evidence could only be obtained from the AAIB, it would also require a court order.

E **45** If any non lawyer was told that the law does not permit a court to have regard to the AAIB report when deciding how the accident was caused, I am sure that he or she would express astonishment at the suggestion. Unless the court is prevented from doing so, it would be foolish and blinkered to ignore such a valuable resource.

F *Use of AAIB reports in previous cases*

46 The relevance and usefulness of AAIB reports in civil proceedings can also be seen from cases where such reports have been relied on without this being a matter of controversy.

47 In *Lambson Aviation (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira de Aeronautica SA* (unreported) 11 October
G 2001 one of the issues in dispute was whether an aircraft crash had been caused by negligent handling of the aircraft by the pilots during the flight in question. In reaching his conclusion on this issue, the trial judge (Tomlinson J) referred to and placed reliance on various findings and information contained in the AAIB's report into the crash, observing at para 54 of the judgment that the AAIB's "expertise in this field is of course very considerable". It is clear that Tomlinson J regarded the report
H as containing both factual and opinion evidence on which he was entitled to rely and against which he was entitled to test other evidence in the case.

48 In *Bristow Helicopters Ltd v Sikorsky Aircraft Corpn* [2004] 2 Lloyd's Rep 150 an application was made to strike out or stay a claim

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arising out of a helicopter crash in British territorial waters on the ground that it was more appropriate for the claim to be tried in the United States. In dismissing the application, Morison J accepted that one of many factors which made England the most obvious and convenient forum was that "the report of the AAIB which is likely to feature largely in the litigation is to be published in England". It does not appear to have been disputed that the AAIB report was likely to contain relevant and important evidence nor to have occurred to those acting for the applicants to suggest that the report would not feature in the litigation at all as it was inadmissible.

49 In *Budden v Police Aviation Services Ltd* [2005] PIQR P362 it was agreed between the parties that the contents of the AAIB report into a helicopter crash could be admitted in evidence at the trial of a fatal accident claim arising out of the crash, with the parties being free to accept or dissent from any conclusions in the report. The central issue in the case was whether or not the crash had been caused by a mechanical problem. The judgment of Douglas Brown J makes extensive reference to the findings of the AAIB which he clearly regarded as an important source of evidence to be considered in conjunction with the evidence of the factual and expert witnesses called by the parties.

50 As the AAIB report was admitted in the *Budden* case by agreement, that case (like the *Lambson* case and the *Bristow* case) is not an authority on the issue of admissibility. But the judgment illustrates very well the considerable assistance which such a report may provide to a court which has to resolve a dispute about the cause of an aircraft accident and the extent to which courts would potentially be handicapped in seeking to establish the true facts if the law does not allow such reports to be relied on in the absence of agreement.

No statutory restriction

51 There is nothing in the legislation governing the investigation of air accidents which restricts the use that may be made of a report of the AAIB once the report has been published. In particular, there is nothing which prevents or limits the use of a report as evidence in court proceedings. This is in contrast to the AAIB's records of the investigation which, as mentioned earlier, will only be made available for the purpose of court proceedings if the court makes an order for disclosure after being satisfied that the interests of justice in the proceedings outweigh any adverse impact which disclosure may have on accident investigation.

52 There is also a contrast in this regard between AAIB reports and reports of marine accident investigations. Regulation 14(14) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (SI 2012/1743) has the effect that any part of a report of a marine accident investigation based on information obtained under sections 259 and 267(8) of the Merchant Shipping Act 1995 (which give inspectors powers to enter premises and board ships) shall be "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] . . . determines otherwise". There is no equivalent provision which restricts the admissibility of any part of the report of an air accident investigation.

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Hearsay evidence

53 It would once have been a bar to the admission of the AAIB report that it is hearsay evidence. Indeed, in so far as the report records statements made by witnesses to the AAIB inspectors, it contains "double hearsay". However, the rule against hearsay has been abolished in civil proceedings by the Civil Evidence Act 1995.

54 The hearsay rule was developed in an age when comparatively little information was written down or otherwise recorded and the best evidence of disputed facts was generally the evidence of eyewitnesses stating their recollection of events in court. A statement made out of court, if tendered as evidence of its truth, had the disadvantages that it was not first hand and could not be tested in cross-examination. However, in the modern age when vast amounts of information are recorded, the best evidence of relevant events in most civil cases is hearsay evidence. Notes, memoranda, transcripts, photographs, e-mails, text messages and many other forms of recording provide contemporaneous or more nearly contemporaneous and generally more reliable evidence than the recollections of witnesses testifying in court, often several years after the events in question.

55 Section 1 of the Civil Evidence Act 1995 provides that in civil proceedings evidence "shall not be excluded on the ground that it is hearsay". Section 4 of the 1995 Act directs a court in estimating the weight (if any) to be given to hearsay evidence to have regard to "any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence". That is no more or less than a court would be bound to do in any event in estimating the weight to be given to any evidence. The 1995 Act goes on to mention, in section 4(2), some particular considerations to which "regard may be had". These include:

> "(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness; (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) whether the evidence involves multiple hearsay; . . . [and] (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; . . ."

56 Mr Marland highlighted features of the AAIB report which he says give rise to concern: in particular, the fact that none of the statements of fact or opinion which it contains are attributed to any named individual; and that the report is based on an exercise in evaluating and discarding evidence which is not disclosed and where any unused material is not disclosed. I shall have to consider these points in the context of the argument that the report should be excluded from evidence as a matter of discretion. However, as Mr Marland accepted, they are all matters which go to the question of what weight (if any) should be given to the contents of the AAIB report. They do not provide any basis for contesting its admissibility.

Opinion evidence

57 I come then to the central issue on this application of whether the AAIB report is inadmissible on the ground that it consists of statements of opinion.

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58 As a general rule, evidence that a person holds an opinion on a relevant matter is not admissible to prove that the opinion is true. A reason often given for this rule is that opinion evidence is irrelevant. But the admissibility of an opinion does not depend simply on whether it is likely to be reliable and therefore logically probative. The main justification for excluding opinion evidence lies not in its irrelevance but in the nature of the judicial role.

59 A central part of a judge's task in a civil case is to evaluate the evidence adduced by the parties and to decide what conclusions may properly be drawn from that evidence. It is a cardinal principle, and an essential ingredient of the right to a fair trial before an impartial and independent tribunal, that in carrying out this task judges must form their own opinions by making their own evaluation of the evidence and must not defer to the opinion of anyone else. In the great case of *Carter v Boehm* (1766) 3 Burr 1905, 1918, in holding that the opinion of a broker was evidence to which the jury "ought not to pay the least regard" Lord Mansfield explained the reason as follows: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness."

60 There are important limits to this principle. In particular, it is proper that a judge should have regard to the opinion of a person who is better placed to form that opinion than is the judge. The obvious example is the opinion of an expert on a subject involving specialised knowledge.

61 Even where the subject matter is not one in which the witness has any special expertise, a witness may be in a privileged position to express an opinion because of his or her observation of the relevant events. For example, a witness may from observation give evidence of a person's age or the speed at which a car was travelling. These are strictly matters of inference and therefore opinion, but they are inferences which the witness is peculiarly well placed to draw and cannot reasonably be expected to separate from the observed facts. Another example is evidence of what the witness would have done in a hypothetical situation—e g if a particular misrepresentation had not been made. Such a question is not one on which there is any observed fact of the matter—since by definition the situation did not occur—but a person may through self-knowledge not possessed by any third party be better able than others to form an opinion of what he or she would have done.

62 Unless, however, the person expressing an opinion is in a significantly better position than the court to evaluate the facts on which the opinion is based and to draw conclusions from those facts, evidence of the opinion itself is not admissible.

The status of the AAIB report

63 What then is the status of the AAIB report? I will need to examine the authorities which are said to show that all or much of the report is inadmissible. But considering the question first purely as one of principle and without reference to authority, I see the position as follows.

64 First of all, as I have described, the report contains statements of fact as well as statements of opinion. On any view, the factual evidence in the

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A report is admissible since, as discussed earlier, the evidence is relevant and fact that it is hearsay is not a ground for its exclusion, nor is there any other rule of law which prohibits its reception.

65 Second, the opinion evidence in the report is also in principle admissible in so far as the opinions stated are those of qualified experts on subjects involving special expertise. Many of the opinions stated in the
B report on subjects such as aeronautical engineering, the piloting of aircraft, meterology, pathology and the interpretation of flight track logs and other data clearly fall into this category.

66 The main thrust of the defendant's objection to the report is directed to the AAIB's findings—consisting of the summary and analysis of information obtained in the investigation and the AAIB's conclusions about the causes of the accident. Mr Marland is right to say that as all these
C findings involve inferences drawn from facts they fall into the category of opinion evidence. The opinions expressed, however, are not those of a lay person. The AAIB is a body which is specifically established by statute and charged with responsibility for the investigation of air accidents and in consequence has very considerable experience and expertise in determining the circumstances and causes of such accidents. The findings in an AAIB
D report are therefore informed (whether explicitly or not) by knowledge gained from past investigations as well as the general aeronautical knowledge of the inspectors and the inspectors' own observations in carrying out the particular investigation. That knowledge and experience gives the findings in the report a special value as opinions of experts who are, moreover, entirely independent of the parties to the litigation.

67 Looking at the matter in principle and apart from authority,
E therefore, I would consider that the (whole) AAIB report is admissible in these proceedings.

The argument from authority

68 That, however, is not sufficient to decide the issue because Mr Marland is able to point to a substantial body of authority
F demonstrating that findings of tribunals and inquiries are not admissible in subsequent proceedings (unless they give rise to an issue estoppel). Judicial findings are statements of opinion, and yet it may be thought that they are a peculiarly authoritative kind of opinion with considerable probative value. None the less, the common law excludes such evidence. That being so, Mr Marland submits, findings of the AAIB must by parity of reasoning be
G inadmissible.

69 The authorities cited by Mr Marland include several cases where, as in the present case, there had been a previous investigation into the cause of an accident resulting in death or injury, and yet the findings of that investigation were held to be inadmissible in subsequent civil proceedings in which compensation for the death or injury was claimed.

H *Findings at inquests*

70 The first of these cases is *Bird v Keep* [1918] 2 KB 692, where the question arose whether the finding of a coroner's jury that a workman had died from suffocation by smoke was admissible as evidence of the cause of his death in later compensation proceedings brought by his widow. Between

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the time of the inquest and the hearing of the workman's compensation claim the doctor who had examined the body and had given evidence at the inquest had himself died and therefore could not be called as a witness. In these circumstances the claimant sought to put in evidence the deposition of the doctor's evidence before the coroner and the coroner's inquisition in order to prove the cause of death. The judge rejected both items as inadmissible but nevertheless, from other evidence, reached the same conclusion as the coroner that the cause of death was suffocation by smoke.

71 On appeal the judge's factual conclusion was upheld. It was therefore unnecessary for the Court of Appeal to decide whether the judge had been right to rule that the doctor's deposition and the coroner's inquisition were inadmissible. But two members of the court (Swinfen Eady MR and Bankes LJ, with Neville J preferring to express no opinion) gave their view that the ruling was correct. The doctor's deposition did not fall within any exception to the hearsay rule, and the argument that it should have been admitted was not pressed. As for the coroner's inquisition, Swinfen Eady MR said, at p 699: "I am of opinion that the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as prima facie evidence against any person of the facts found by the jury."

72 Mr Marland submits that, by analogy, the findings of the investigation conducted by the AAIB are not admissible in these proceedings as evidence of the facts found by the AAIB.

Marine accident inquiries

73 The next case is *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105 where the plaintiff claimed compensation for her husband's death following a ship wreck. For the purpose of the civil claim the court had to determine the cause of the wreck. That question had already been the subject of an inquiry before a wreck commissioner assisted by two naval architects and a ship's captain as assessors. It was common ground, however, that the report of the wreck inquiry was not admissible in the subsequent civil action. Devlin J said, at p 131:

> "Frequent references have been made during the course of the trial before me to the evidence given at the inquiry. The report has not been tendered and I have not been told what conclusion was reached about the cause of the loss. I think this is strictly correct; the report is not admissible and the parties are entitled to have the matter considered and determined afresh."

74 Devlin J none the less went on to observe that it "will not be very satisfactory if I arrive at a different result from that reached by a very experienced commissioner assisted by skilled assessors", and recommended that

> "the competent authorities might consider whether the useful purposes that wreck inquiries serve would not be increased if the report was made available to any court which had to determine the cause of the loss. It is not necessary that the findings of fact made in the report should be treated as binding. The opinion of the commissioner based on the facts he finds has at least as high a value as that of an expert based on the facts which he

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A assumes to be proved; and it has the advantage of being quite independent of either side."

75 This recommendation was repeated and endorsed 34 years later by Steyn J in *The European Gateway* [1987] QB 206. In that case too there had been a formal investigation (as a wreck inquiry is now known) into a collision between two ships. In a later action for damages brought by the B owners of one of the two ships against the owners of the other, a preliminary issue was tried to determine whether the findings of the court of formal investigation gave rise to an issue estoppel. Steyn J held that they did not as the court of formal investigation was not a court of competent jurisdiction on the question of the owners' civil liability. Reference was made in argument to old decisions of the Admiralty Court in which the reports of such investigations had been treated as inadmissible and therefore C necessarily incapable of founding an issue estoppel. Although Steyn J did not attach great weight to those authorities in relation to the question which he had to decide, he expressed no doubt as their correctness. He concluded his judgment by drawing attention to Devlin J's recommendation in *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105, 221): "What is needed is a statutory provision enabling a judge hearing the [later] action to D make such evidential use of the report as a whole as he thinks fit."

76 Twenty-seven years after Steyn J repeated and endorsed Devlin J's recommendation, however, and 60 years after the recommendation was originally made, the law has not been changed. Mr Marland submits that these authorities demonstrate that, without legislation enabling AAIB reports to be used as evidence in civil proceedings, reports of air accident investigations by the AAIB are likewise inadmissible.

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The BCCI inquiry

77 Another more recent authority on which Mr Marland strongly relies is *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. This was an appeal to the House of Lords from a decision striking out a claim by former depositors of BCCI against the F Bank of England on the ground that it had no realistic prospect of success. The Treasury and the Bank of England had previously instituted an independent inquiry to review the adequacy of its supervision of BCCI, presided over by Bingham LJ. Although they disagreed as to whether regard could be had to the Bingham report in determining what allegations had a realistic chance of being proved, all the members of the Appellate Committee G were in agreement that the findings and conclusions in the report would not be admissible at any trial of the action. Thus, Lord Steyn said, at p 238, para 5, that, although the report was "self-evidently an outstanding one produced by an eminent judge", such use of the report was ruled out "by settled principles of law". Other Law Lords expressed similar views.

78 Those same settled principles of law, Mr Marland submits, rule out the use of the AAIB report by the claimants in the present case.

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The Hollington case

79 The leading authority for the rule of law of which the cases cited by Mr Marland are all illustrations is *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

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80 That case concerned a road traffic accident in which the plaintiff's car was damaged and his son (who was driving the car) was injured in a collision with the defendant's car. The plaintiff and his son claimed damages on the ground that the collision had been caused by the defendant's negligent driving. However, before the action came to trial the son died and the father had no other witness who could give evidence of how the accident had happened. To prove that the defendant had driven negligently, the father sought to rely on (a) the defendant's conviction in the magistrates' court for careless driving at the time and place of the collision and (b) a statement made by the son to the police after the accident.

81 At the trial the defendant called no evidence and submitted that there was no case to answer. The judge ruled that both the defendant's conviction and the son's statement were inadmissible but nevertheless gave judgment for the plaintiff on the basis that the defendant's negligence could be inferred from the position and condition of the two vehicles after the accident. On appeal, the Court of Appeal reversed that finding but held that the judge had been right to exclude evidence of the defendant's conviction and of the son's statement. As a result, the appeal was allowed and the claim failed for want of proof.

82 The son's statement was held to be inadmissible because it was hearsay and did not fall within any of the settled exceptions to the hearsay rule. That was also one reason given by the Court of Appeal for holding that the defendant's conviction for careless driving was inadmissible. But the main reason was that the finding of the criminal court was said to be irrelevant. Goddard LJ, who gave the judgment of the court, stressed the question of relevance saying, at p 596, that "it is relevancy that lies at the root of objection to the admissibility of the evidence".

83 The central passage in the court's reasoning is the following, at p 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 recognised 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."

Subsequent history of the Hollington case

84 The *Hollington* case [1943] KB 587 has always been a controversial case. The actual decision—that a conviction by a criminal court is not admissible in civil proceedings as evidence that the offence was committed—has been reversed by statute: see section 11 of the Civil Evidence Act 1968. That change in the law was made on the recommendation of the Law Reform Committee in its 15th report, *The Rule in Hollington v Hewthorn* (1967) (Cmnd 3391). In that report the committee was scathing of both the decision and the reasoning in the case, at paras 3–4:

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A "3. Rationalise it how one will, the decision in this case offends one's sense of justice . . . It is not easy to escape the implication in the rule in *Hollington v Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although, in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as B that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one.

"4. It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular criminal offence or civil wrong is an expression of opinion by the court. But it is of a different character from an expression of opinion by a private individual."

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85 The Law Reform Committee went on to point out some of the material differences between an expression of opinion by a private individual and by a court, including the fact that courts are aided by a procedure designed to ensure that the material needed to enable them to form a correct opinion is available. The committee continued, at para 8:

D "We approach the rule in *Hollington v Hewthorn* from the premise . . . that any material which has probative value on any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the E self-same issue arises in subsequent legal proceedings."

86 Despite these premises and its recommendation that the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 should be abolished in relation to criminal convictions, however, the Law Reform Committee did not recommend the abolition of the rule as regards findings made in earlier civil proceedings.

F 87 In so far as the rule in *Hollington v F Hewthorn & Co Ltd* continues to apply to such findings, it has attracted further criticism. In *Hunter v Chief Constable of the West Midlands* [1980] QB 283, 319, Lord Denning MR (who had been counsel for the unsuccessful appellant in *Hollington v F Hewthorn & Co Ltd*) said:

G "Beyond doubt [the *Hollington* case] was wrongly decided. It was done in ignorance of previous authorities. It was done per incuriam. If it were necessary to depart from it today, I would do so without hesitation."

On appeal to the House of Lords in the same case Lord Diplock (with whose speech the other members of the appellate committee agreed) echoed this view, saying that *Hollington v F Hewthorn & Co Ltd* "is generally considered to have been wrongly decided": see *Hunter v Chief Constable of* H *the West Midlands Police* [1982] AC 529, 543.

88 However, *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 has not been overruled and, since these comments were made, the pendulum seems to have swung back some way. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, as

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already mentioned, the rule in *Hollington v F Hewthorn & Co Ltd*was treated as settled law. In *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, the Court of Appeal held that, even if the *Hollington v F Hewthorn & Co Ltd* could originally have been confined to cases where the earlier decision was that of a criminal court, it had stood for over 60 years for a much broader proposition and establishes that factual findings in earlier civil proceedings are not admissible as evidence of the facts so found. That decision was followed in *Conlon v Simms* [2008] 1 WLR 484, where the Court of Appeal held that the rule in *Hollington v F Hewthorn & Co Ltd* applied to render inadmissible in later civil proceedings findings made by a solicitors' disciplinary tribunal.

89 In *Calyon v Michailaidis* [2009] UKPC 34 reliance was placed in proceedings in Gibraltar on a judgment of a Greek court which had found that the claimants were the lawful owners of an art collection. The defendant in the Gibraltar proceedings had not been a party to the Greek proceedings. The Gibraltar Court of Appeal nevertheless held that the Greek judgment was conclusive of the question of ownership. On appeal to the Privy Council the board held, following *Hollington v F Hewthorn & Co Ltd*, that, far from being conclusive, the Greek judgment was not admissible as evidence at all.

90 Thus, unless and until it is reconsidered by the Supreme Court, the rule in *Hollington v F Hewthorn & Co Ltd* must, except in so far as it has been reversed by statute, be taken to represent the law.

The justification for the rule

91 Some at least of the criticism which the *Hollington* case [1943] KB 587 has attracted may be attributable to the way in which the Court of Appeal explained its decision in that case. As I have indicated, the main reason given for holding that the defendant's conviction for careless driving was inadmissible was that it represented the magistrates' opinion and that on the subsequent trial of the issue in the civil court that opinion was irrelevant.

92 If that proposition is taken at face value, it is absurd. It amounts to saying that the fact that a criminal court was satisfied (to the criminal standard of proof) that the defendant drove carelessly is no reason to think it any more probable that he in fact drove carelessly. Courts, of course, are far from being infallible. Yet even the most cynical commentator on the legal system would surely baulk at the suggestion that the decision of a criminal court is no more likely to be right than wrong. The Law Reform Committee found this implication in the judgment of the Court of Appeal not easy to escape. But I do not find it conceivable that a future Lord Chief Justice and the other distinguished members of the Court of Appeal in the *Hollington* case actually intended to assert and base their decision on such a proposition.

93 When the Court of Appeal described the opinion of the criminal court as "irrelevant", I therefore do not think that the term was being used in the sense defined earlier to denote evidence which is not logically probative. What I believe they meant is that the opinion of another court, like the opinion of a bystander, is not a matter to which a court required to decide the issue ought to have regard. The underlying rationale in my view, albeit

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not clearly spelt out in the judgment of the Court of Appeal, is the rationale to which I referred earlier for the exclusion of opinion evidence in general: namely, that it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else, however reliable that person's opinion is likely to be. In so far as the evidence before the later court is the same as the evidence before the earlier court, the later court is in as good a position to draw inferences and conclusions from the evidence. In so far as the evidence is different, the opinion of the earlier court does not assist the court's task.

94 Reasoning of this kind, again expressed in terms of "relevance", is to be found in *Bird v Keep* [1918] 2 KB 692, the case mentioned earlier in which a coroner's inquisition was held not to be admissible in later civil proceedings. Thus, Swinfen Eady MR said, at p 701, that the inquisition

> "merely amounted to the opinion of the coroner's jury as to the cause of death on the evidence adduced before them. This is irrelevant to the issue involved in the present proceedings, and the cause of death has to be determined for the purpose of this arbitration on the evidence adduced before the county court judge."

Similarly, Bankes LJ said, at p 704:

> "In my opinion the finding of the coroner's jury as to the cause of death was not relevant to any issue which the learned county court judge had to determine. He had to decide on the evidence before him what the cause of death was. It cannot be relevant to that inquiry that he should be informed what a coroner's jury thought of the matter upon materials which were before them but which were not and could not be placed before the county court judge."

95 As the cause of death was the key issue which the county court judge had to decide, the notion that the finding of the coroner's jury was not relevant to that issue is, if taken literally, again impossible to credit. It would amount to saying that the finding of an inquest is no more reliable a guide to the cause of a person's death than spinning a coin. As in the *Hollington* case [1943] KB 587, I cannot suppose that this is what the Court of Appeal meant to suggest. Once again, the point that I believe the distinguished judges were intending to make was that the finding of the coroner's jury was not a matter which the county court judge ought properly to take into account for the reason that it was his duty to reach his decision as to the cause of death solely on the basis of the evidence adduced in the civil proceedings.

96 Furthermore, the reference by Bankes LJ to the fact that the materials which were before the coroner's jury "could not be placed" before the judge reflects the fact that in the context of the later proceedings the record of the evidence given in the coroner's court was hearsay and hence (as the law then stood) inadmissible in the civil proceedings. Indeed, along with the coroner's inquisition, the applicant had tried to put in evidence in the county court the doctor's deposition which was held to be inadmissible for just that reason. In circumstances where the evidence on which the coroner's jury had reached their conclusion was inadmissible, it would seem illogical that an opinion based on that evidence should be admitted.

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97 The same point applied in the *Hollington* case. The claimant's son had given evidence in the magistrates' court, but any note of that evidence would have been inadmissible in the later civil proceedings because it was hearsay—as indeed the son's statement to the police after the collision was held to be. Again, it would seem illogical to treat the finding of the magistrates as admissible when the evidence on which the finding was based was not admissible in the later proceedings.

98 Apart from the question of whether it is right in principle to treat an opinion as admissible if the evidence underlying it is not, to do so would cause serious practical difficulties. If evidence was adduced in the later proceedings to contradict the finding, it is difficult to see how the court could rationally decide what weight to give to the finding of the earlier court without considering the evidence on which the finding was based. But if that evidence is inadmissible, then such consideration is not permissible.

99 Some of these difficulties are alluded to in the *Hollington* case [1943] KB 587 and formed an additional strand of the Court of Appeal's reasoning. Thus immediately before the passage quoted earlier in which the finding of the criminal court was said to be irrelevant, Goddard LJ said, at p 595:

> "It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result."

Goddard LJ returned to this point when stating that the same rule as renders criminal convictions inadmissible in later proceedings also applies to judgments of civil courts. He said, at p 596:

> "If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as 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."

100 Now that the hearsay rule has been abolished in civil proceedings, a record of the evidence given in an earlier case is in principle admissible in later proceedings. Hence it can no longer be an objection to admitting the findings of the earlier court to say that the evidence on which the findings were based is not admissible. For example, if *Bird v Keep* [1918] 2 KB 692 wERE decided today, the doctor's deposition and other evidence which was before the coroner's court would be admissible in the subsequent civil proceedings. So it would no longer be true that the materials which were before the coroner's jury could not be placed before the later court.

101 It might be said that in these circumstances there is no benefit to be gained by treating the finding of the earlier court as itself admissible and arguably no justification for doing so given that, if the validity of the finding is challenged, the only way of determining what weight should be attached to it is to examine the evidence on which the finding was based. It may be, indeed, that this was the point that Goddard LJ was making in the somewhat elliptical passages quoted above. On one reading the thinking underlying those passages is that the magistrates' opinion could have no weight over and above the strength of the evidence on which it was based. This may also

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explain why Goddard LJ went on, as part of the same chain of reasoning, to say that the magistrates' opinion was irrelevant and why he seems to have thought that the impossibility of determining what weight should be given to their opinion without considering the evidence on which it was based was another way of making the same point. If the weight which ought to be given to the earlier court's finding is entirely dependent on the weight of the evidence on which the finding was based, then it may be said that all that ultimately counts is the evidence adduced at the first trial and that the court's opinion should be left out of account.

102 This interpretation of the *Hollington* case [1943] KB 587 is also supported by the opinion of the Privy Council in *Calyon v Michailaidis* [2009] UKPC 34 at [27] where Lord Rodger of Earlsferry said:

> "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."

103 In the case of judgments in previous civil proceedings, I respectfully agree that this reasoning is compelling, once it is recognised that the opinion of a civil court on a question of fact is not as a matter of principle entitled to be treated as authoritative other than as between the parties to the proceedings. (Different considerations apply to criminal convictions, which can be seen as more nearly resembling judgments in rem.)

104 As in the case of the rule which excludes opinion evidence generally, therefore, the true justification for the rule in *Hollington v F Hewthorn & Co Ltd*, as I see it, is not that the opinion of an earlier court is irrelevant but lies in the requirements for a fair trial. The responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge—all the more so where the party to whose interests the conclusions are adverse was not a party to the earlier proceedings. That, I think, was the principle which the Court of Appeal was expounding in the *Hollington* case. In relation to previous judgments of a civil court this approach was, moreover, endorsed by the Law Reform Committee. In explaining why it did not recommend any change to the law with regard to the admissibility of such judgments, the committee said, at para 38:

> "As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend on the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve on it in the second."

105 It does not follow that there would be no advantage in a rule which treats findings of an earlier civil court as admissible in later proceedings. The problem of deciding how much weight should be given to such a finding only arises if evidence is adduced at the trial of the later proceedings to contradict

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it. But that may not happen. It did not happen, indeed, in the *Hollington* case itself where the defendant called no evidence at the civil trial. So if the finding of the magistrates' court had been admissible, the civil claim would have succeeded in that case without any need to examine the evidence on which the finding of the criminal court was based. Even if the finding of the earlier court has no independent weight, therefore, treating the finding as admissible to prove facts found by the earlier court would still serve a useful purpose.

106 On one view at least that is now the position in relation to criminal convictions since the *Hollington* case was reversed by section 11 of the Civil Evidence Act 1968. The question of what weight the conviction has in subsequent civil proceedings when evidence is adduced to prove that the defendant did not in fact commit the offence has not been conclusively resolved. Different views were expressed in *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, where the question was considered. Lord Denning MR expressed the view, at p 72, that the conviction does not merely shift the burden of proof but is a weighty piece of evidence in itself. Buckley LJ disagreed. In his view, proof of the conviction gives rise to a statutory presumption "which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability without itself affording any evidential weight to be taken into account in determining whether that onus has been discharged": see p 76.

107 There seems to me much to be said for applying Buckley LJ's approach to findings made in previous civil proceedings. It would save needless repetition of evidence without causing any injustice to a party who wishes to adduce evidence to contradict a fact found by the earlier court.

The scope of the rule

108 The reason why I have considered the justification for the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 at such length is that it is necessary to identify its justification in order to determine how far the rule extends. The justification for the rule explains why the rule as it is usually stated applies only to previous judicial findings. What characterises a judicial finding for these purposes is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it.

109 One aspect of a judge's duty to reach a decision based on the evidence before the court is that a judge is not expected to have, nor strictly permitted to use, technical knowledge of the subject matter of the case. A judge hearing an aviation case, for example, is unlikely to have any relevant knowledge of piloting or aeronautical engineering or any relevant experience of aircraft accidents. If it so happens that the judge has acquired some knowledge of such matters, perhaps from hearing other cases, then such knowledge is not something of which he or she can properly take judicial notice and use to reach or justify findings. Nor (for the same reason) does the fact that the judge has such knowledge or experience entitle his or her findings to any greater weight. There is in this regard a material distinction between judicial findings, which must be based on the evidence adduced by the parties, and the opinions of an expert who is entitled and

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A indeed expected to reach conclusions by applying his or her previously acquired knowledge.

110 This distinction between judicial findings and expert opinions is confirmed by authority. In *Land Securities plc v Westminster City Council* [1993] 1 WLR 286 the court was asked to decide whether an arbitrator's award fixing the market rent for a property in a rent review arbitration was admissible as evidence in another rent review arbitration relating to a B comparable property. Hoffmann J held that it was not. It was argued that the rule in *Hollington v F Hewthorn & Co Ltd* did not apply because the arbitrator who had made the award was an expert valuer. Hoffmann J rejected that argument stating, at p 289:

> "Mr Clark is no doubt an expert valuer but I do not think he gave his award in that capacity. An arbitrator is obliged to act solely on the C evidence adduced by the parties. Mr Clark may, by reason of his expertise, have known about matters which cast doubt on points which went unchallenged in the arbitration. If he had been acting as an expert he would have been able to take this knowledge into account. As an arbitrator he would not."

D **111** The *Land Securities* case was distinguished in *Glenfield Motor Spares Ltd v Smith* [2011] EWHC 3130 (Ch), which also raised a question as to the admissibility of a determination reached on an earlier rent review. In the *Glenfield Motor* case, however, the earlier dispute had been referred, not to arbitration, but for expert determination. The decision maker was therefore not obliged to act solely on the evidence adduced by the parties but was able to make use of his own expert knowledge when determining the rental value of E the property. On the facts of the *Glenfield Motor* case Newey J held that the (unreasoned) expert determination relied on in that case was of little if any assistance on the question in dispute in the later proceedings—namely, what was the usable area of the site—and that the county court judge had therefore been wrong to attach substantial weight to the determination. That was a matter of weight, however, and not admissibility.

F **112** All the cases cited by Mr Marland involve judicial findings. Mr Marland did not identify any authority, and I am not aware of any, in which the rule in *Hollington v F Hewthorn & Co Ltd*, or any extension of or analogy with that rule, has been held to apply more broadly. For the reasons given, there is in my view a good explanation for that.

113 The line between judicial findings and expert opinions is not a bright one. One type of case which falls into a grey area is where the court is G assisted by assessors. In such a case it is the judge and not the assessors who makes the decision, but in so far as the judge is assisted in the decision making process by assessors who have special skill and experience, the decision is not based on the evidence in the case alone. This accounts for the difficulty felt by Devlin and Steyn JJ as regards the application of the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 to the findings of a wreck inquiry or formal investigation in which the commissioner sits with H nautical assessors. Because the decision is ultimately that of the commissioner alone, it is no doubt strictly correct—as Devlin J observed in *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105—that the findings are not admissible in later civil proceedings. But because the commissioner is assisted by skilled assessors, the findings have a value

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comparable to the opinions of an expert. That explains the desire of Devlin J and Steyn J for a statutory provision to enable the judge hearing a later civil action to make evidential use of the findings of the inquiry.

Conclusion as to the AAIB findings

114 It is not necessary to hope for legislative intervention, however, where the findings are those of an expert investigator and not a judge. None of the authorities relied on by Mr Marland concerned such findings and, for the reasons given, I consider that the rule in the *Hollington* case does not apply to them. AAIB inspectors do not act as judges whose role is limited to evaluating evidence put before them. As well as the evidence of others, the inspectors are able to take into account their own first hand observations, their own technical knowledge, and their own experience (as well as the collective experience of the AAIB) gained from other accident investigations. Those characteristics give the opinions of the AAIB a value for a court seeking to determine the cause of an air accident which could not and should not in principle be accorded to the opinions of another judge.

115 This is not to say that all the findings in the AAIB report are of equal significance. To the extent that they reflect or may be taken from their nature to reflect matters of expertise, the court will accord them weight. To the extent that they consist of inferences drawn from factual evidence which involve no special expertise and which the court is equally well qualified to draw, the court will not accord weight to the findings over and above the evidence on which they are based.

116 In this regard the AAIB report is similar, as it seems to me, to many experts' reports commissioned by parties to litigation. It is common to find in such reports (particularly from experts in certain disciplines) some statements of opinion based on an evaluation of factual evidence of a kind which does not deploy any expert knowledge and which the court is as well placed to make as the author of the report. Such evidence is not helpful and is not evidence to which the court will have regard. It seems to me preferable, however, 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.

117 Even if some opinions expressed in an expert's report are regarded as inadmissible rather than as simply not entitled to any weight, there is nothing to be gained by seeking to exclude or excise them. 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* [2009] Bus LR 809, 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

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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."

118 I therefore conclude that the whole of the AAIB report is admissible as evidence in these proceedings, with it being a matter for the trial judge to make such use of the report as he or she thinks fit. Even if I had concluded that the AAIB report contains some inadmissible material, I would not have thought it sensible to engage in an exercise of editing out parts of the report. Even on that view, the whole report should be before the court, with the judge at trial taking into account what is admissible and ignoring the remainder.

Discretion

119 As noted earlier, each party argued as its primary case on this application that the decision whether to admit the AAIB report as evidence is not one in which the court has a discretion. I have held that the report is in principle admissible in these proceedings. I do not accept, however, that the court has no relevant discretion.

120 I agree with Mr Kimbell's submission that the AAIB report does not fall within CPR Pt 35. Part 35 gives the court both the power and the duty to restrict expert evidence which would otherwise be admissible to that which is reasonably required to resolve the proceedings. However, the term "expert" in Part 35 is confined by rule 35.2 to "an expert who has been instructed to give or prepare evidence for the purpose of court proceedings". Thus, even though the AAIB report includes expert evidence in a general sense, because it has not been prepared for the purpose of court proceedings it is not evidence regulated by Part 35. The claimants therefore do not require the court's permission under rule 35.4 in order to adduce this evidence.

121 It does not follow, however, that the court has no relevant discretion. In addition to its inherent jurisdiction to control its own procedure, CPR Pt 32 gives the court express powers to control the evidence it will receive. Thus CPR r 32.1 states:

> "(1) The court may control the evidence by giving directions as to— (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court.
>
> "(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

It is clear from rule 32.1(2) that this rule gives the court a discretion to exclude the AAIB report in whole or in part even though the report is relevant and admissible.

122 On behalf of the defendant Mr Marland submits as a fallback position that if the court has a discretionary power—as I have held that it does—to exclude the AAIB report, then it should. To support that contention he has advanced two arguments. The first is based on the fact that 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

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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. Mr Marland submits that in these circumstances it would be unsafe for any court to give any weight at all to anything in the AAIB report and that it should be excluded from evidence as a matter of discretion.

123 The points made by Mr Marland will all be considerations which the trial judge can take into account when assessing what weight should be given to statements contained in the AAIB report. But in my view they come nowhere near to providing a sufficient reason for excluding the report from evidence. In the first place there are countervailing points, mentioned earlier, which indicate that the report, despite its drawbacks, is likely to be of significant evidential value. Secondly and in any event, the question of what weight should be given to the contents of the report is pre-eminently a matter for the trial judge. That is so (a) because what weight the report has as evidence will depend in part on what other evidence is adduced at the trial and (b) because the responsibility for making that assessment lies with the judge who conducts the trial and whose responsibility it is to judge the facts.

124 The second argument which Mr Marland makes for excluding the AAIB report is one of policy. He suggests 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 from doing so in future, which would in turn impede the AAIB's effectiveness and jeopardise aviation safety.

125 I can see no reasonable basis for this suggestion. I can understand how people might become less willing to co-operate with accident investigations if they perceive a risk that this could result in them being called as witnesses, or even made defendants, in subsequent proceedings. It is to reduce that risk and allay such concerns that reports of investigations are anonymised and the 1996 Regulations do not allow the records of an investigation to be disclosed without a court order. However, I am unable to conceive how the risk of becoming involved in litigation could be, or could be seen to be, increased by allowing the published report of an investigation to be used as evidence in civil proceedings. If anything, the opposite is likely to be true. If the report cannot be used as evidence, there will be a greater need to try to identify and summon to give evidence those who contributed to its contents and a stronger argument that disclosure of relevant records of the investigation is necessary in the interests of justice.

126 The arguments advanced for excluding the AAIB report as a matter of discretion are therefore in my view without substance.

The claimants' statements of case

127 Although I have held that the AAIB report is admissible in evidence, I do not consider that all the references made to it in the claimants' reply are appropriate. Two basic rules of pleading are: that a statement of case should

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A plead the material facts which a party avers as part of its case and not the evidence on which the party will rely to prove those facts; and that a reply should plead facts which are relied on to answer a case made in the defence and not facts which form part of the basis for the claim itself.

128 The reply served by the claimants in this case transgresses both these rules. While there can be no objection to the claimants pleading their intention to rely on the AAIB report, it is not proper practice to plead the B evidence which the report contains, and still less to do so in the reply. Nor is it appropriate for the claimants to plead in the reply—as they do particularly at paras 11(6) and 12—a further statement of their case as to respects in which the defendant was allegedly negligent, especially when this statement is formulated in slightly different terms from the allegations of negligence pleaded in the particulars of claim. The lack of clarity which this engenders C is illustrated by the fact that para 12 of the reply is inconsistent with para 11 of the particulars of claim as regards the altitude at which the defendant allegedly attempted a loop.

129 To comply with good practice, the reply therefore needs to be amended to delete (i) all references to the AAIB report apart from the statements of the claimants' intention to rely on the report pleaded in paras 3 D and 4, and (ii) those allegations which are not matters of reply but particulars of the claim.

Conclusion

130 For the reasons given, I conclude that the AAIB report is admissible as evidence in these proceedings, and I will make a declaration to that effect. There will be no need to make an order striking out any part of the E claimants' statements of case provided that an application to make suitable amendments to the reply is made when matters consequential on this judgment are dealt with after it is handed down.

Application refused.
Declaration that report admissible as evidence in proceedings.

F

11 June 2013. Leggatt J granted the defendant permission to appeal.

SARAH ADDENBROOKE, Barrister

APPEAL

G By an appellant's notice filed on 2 July 2013 the defendant appealed on the grounds that the judge had erred in holding that the report was admissible in the proceedings since (i) the report was caught by the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 and therefore was inadmissible; (ii) it was wrong in principle to allow expert opinion evidence outwith the parameters of CPR Pt 35; and (iii) if the report were potentially admissible it should be excluded as a matter of discretion under CPR Pt 32 H and the judge had been wrong to decline to do so.

On 8 November 2013, the Court of Appeal granted permission to the Secretary of State for Transport to intervene in the appeal and to file witness evidence, on the ground that the approach taken by the judge in exercising his discretion to admit the report into evidence would significantly prejudice

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the AAIB's ability to carry out its statutory duty to investigate the circumstances and causes of aviation accidents and to make safety recommendations. By an order sealed on 25 November 2013 the court (Tomlinson LJ) granted the International Air Transport Association permission to intervene in the appeal, on the ground that the use of reports prepared by the AAIB in legal proceedings would deter co-operation with accident investigations.

The first intervener applied for evidence which it had filed to be admitted. The claimants objected to the admission of the evidence but, in the event that the evidence were admitted, applied for evidence in response to be admitted.

The facts are stated in the judgment of Christopher Clarke LJ.

Robert Lawson QC and *Tim Marland* (instructed by *Clyde & Co LLP*) for the defendant.

The rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 extends to an investigatory report, and reports of the Air Accident Investigation Branch ("AAIB") are therefore inadmissible as evidence in civil proceedings: see *Bird v Keep* [1918] 2 KB 692; *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105; *The European Gateway* [1987] QB 206; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Conlon v Simms* [2008] 1 WLR 484; *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809; *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 and *Calyon v Michailaidis* [2009] UKPC 34. [Reference was also made to *Duchess of Kingston's case* (1776) 2 Sm LC, 13th ed, p 644.]

The Civil Evidence Act 1972 and CPR Pt 35 provide a comprehensive code regulating the use of expert opinion evidence: see *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC). CPR Pt 35 only permits the admission of expert evidence under certain defined parameters. An AAIB report does not meet these requirements and so cannot be admitted as expert opinion evidence even if it contains expressions of expert opinion. [Reference was made to *Interflora Inc v Marks and Spencer plc* [2013] EWHC 936 (Ch); *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] L & TR 435 and *Folkes v Chad* (1782) 3 Doug KB 157.] Further, in order for expert opinion evidence to be admissible in civil proceedings the court must be satisfied as to the credentials of the proposed expert: see *Sansom v Metcalfe Hambleton & Co* [1998] PNLR 542; *Barings plc v Coopers & Lybrand* [2001] PNLR 551; *JP Morgan Chase Bank v Springwell Navigation Corpn* [2007] 1 All ER (Comm) 549 and *Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 WLR 271. An AAIB report is not the product of an identified individual and so should also be excluded for that reason.

In any event the AAIB report should be excluded as a matter of discretion under CPR Pt 32 because the interests of justice do not outweigh any adverse international or domestic impact if AAIB reports are allowed to be used as evidence in civil proceedings, and there is nothing in the material served by the claimants which suggests that there will be any prejudice to them if the report is excluded.

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A *Malcolm Sheehan* (instructed by *Treasury Solicitor*) for the first intervener.

The admission of AAIB reports as evidence in civil proceedings is likely to prejudice the AAIB's discharge of its statutory functions.

The judge erred in his approach to the exercise of his discretion since he failed to carry out a balancing exercise between the interests of justice and any prejudice which would be caused to current or future aviation B investigations or consider the United Kingdom's relations with other states or international organisations.

Akhil Shah QC (instructed by *Holman Fenwick Willan LLP*) for the second intervener.

The test which the court should apply when exercising its discretion requires it to consider the interests of all parties to the dispute, and whether C those interests outweigh the adverse domestic and international impact which such action may have on an existing investigation or on any future safety investigation.

Michael Crane QC and *John Kimbell* (instructed by *Stewarts Law LLP*) for the claimants.

There is no rule at common law rendering the contents of AAIB reports D inadmissible: see *Lambson Aviation (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira de Aeronautica SA* (unreported) 11 October 2001; *Budden v Police Aviation Services Ltd* [2005] PIQR P362 and *Bristow Helicopters Ltd v Sikorsky Aircraft Corpn* [2004] 2 Lloyd's Rep 150.

The rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 is not E engaged since the report does not contain "judicial findings". [Reference was made to *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Glenfield Motor Spares Ltd v Smith* [2011] EWHC 3130 (Ch); *In re Travel & Holiday Clubs Ltd* [1967] 1 WLR 711; *Land Securities plc v Westminster City Council* [1993] 1 WLR 286 and *Hunter v Chief Constable of the West* F *Midlands Police* [1980] QB 283.] The modern law of evidence is not subject to the technical rules which dictated the approach in *Hollington v Hewthorn*: see *Garton v Hunter* [1969] 2 QB 37, *Masquerade Music Ltd v Springsteen* [2001] EMLR 654 and *Ventouris v Mountain (No 2)* [1992] 1 WLR 887.

There is no statutory definition of an expert, and the threshold for G admissibility is low: see *R v Robb* (1991) 93 Cr App R 161 and *In re M and R (Minors) (Sexual Abuse: Expert Evidence)* [1996] 4 All ER 239. There is no requirement for the report's author to be identified: see *Sunley v Gowland White (Surveyors & Estate Agents) Ltd* [2004] PNLR 257; *R v Kershberg* [1976] RTR 526; *R v Tate* [1977] RTR 17; *S Stone & Sons (Hounslow) Ltd v Pugh* [1949] 1 KB 240 and *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415.

H The opinion evidence in the report falls outside CPR Pt 35: see *DN v Greenwich London Borough Council* [2005] LGR 597 and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC). CPR Pt 35 regulates the giving of evidence by persons instructed to prepare expert evidence for the purpose of proceedings: see *Interflora Inc v*

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Marks and Spencer plc [2013] EWHC 936 (Ch) and *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] L & TR 435. [Reference was also made to *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647; *Ladd v Marshall* [1954] 1 WLR 1489; *Alexis v Newham London Borough Council* [2009] ICR 1517; *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577; *Hill v Clifford* [1907] 2 Ch 236; *R (Patel) v General Medical Council* [2013] 1 WLR 2801; *Rehman v Brady* [2012] EWHC 78 (QB); *Ross v Owners of Bowbelle (Note)* [1997] 2 Lloyd's Rep 196; *Shell UK Ltd v Total UK Ltd* [2009] 2 Lloyd's Rep 1; *John Summers & Sons Ltd v Frost* [1955] AC 740; *Thornton v Royal Exchange Assurance Co* (1790) Peake 37; *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] 2 All ER (Comm) 465; *Welburn v Evert-M Ltd* [2002] EWHC 2034 (Admlty) and *Woodland v Stopford* [2001] Med LR 237.]

Lawson QC replied.

The court took time for consideration.

13 March 2014. The following judgments were handed down.

CHRISTOPHER CLARKE LJ

1 On 15 May 2011 Orlando Rogers was a passenger in a vintage Tiger Moth propeller bi-plane manufactured in 1940 of which the defendant, 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 ("the 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 defendant contends (1) that the admission of the report would offend the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587; (2) that, in so far as the report contains expressions of expert opinion, it does not comply with the mandatory provisions of CPR Pt 35 and should be excluded on that ground as well; and (3) that, if the report is potentially admissible, it should be excluded, as a matter of discretion, under CPR Pt 32 and that the judge was wrong to decline to do so. In relation to the latter question the Secretary of State for Transport 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

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A contained in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (SI 1996/2798) ("the Regulations") which were made under sections 75 and 102 of the Civil Aviation Act 1982. These Regulations implement the European Union obligations of the UK under Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and
B incidents (OJ 1994 L319, p 14) ("the Directive") and put into effect the requirements of Annex 13 to the *Convention on International Civil Aviation* (Treaty Series No 8) (1953) (Cmd 8742) ("the Chicago Convention"), signed in Chicago on 7 December 1944.

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
C Organisation ("ICAO"). That procedure is in Annex 13 to the Convention ("Annex 13").

6 Parliament and Council Regulation (EU) No 996/2010 of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC (OJ 2010 L295, p 35) ("the EU Regulation") establishes a parallel regime with direct effect in member
D 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.

E *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 UK the Chief Inspector (who reports to the Secretary of State) must appoint one or more inspectors to carry out an investigation. The team is supervised by a senior supervising inspector. The inspectors are
F 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
G 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 (1) 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
H (2) 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

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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 co-operation 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 co-operation 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 co-ordination 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 blame or 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 (1) all statements taken; (2) all communications between persons involved in the operation of the aircraft; (3) medical or private information regarding those involved in the accident or incident;

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(4) cockpit voice recordings and transcripts from such recordings; and (5) 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 Secretary of State 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, at regulation 18(2)(4):

> "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."

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 [above ground level] and there was insufficient height for the pilot to recover from the subsequent spin."

20 The claimants 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.

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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 defendant 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 para 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 defendant 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 defendant 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 defendant 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 defendant 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 paras 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 (1) the finding of an unidentified expert in aviation pathology at the post mortem of the deceased passenger; (2) 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; (3) 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 (4) 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

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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 paras 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 In so far 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. In so far as it consists of expert opinion I consider its status further below.

The rule in Hollington v F Hewthorn & Co Ltd [1943] KB 587

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).

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33 This doctrine is not new. It is to be found in the *Duchess of Kingston's case* (1776) 2 Sm LC, 13th ed (1929), p 644, 645 where Sir William de Grey, Lord Chief Justice of the Court of 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 on 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 on 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 on 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 Ltd* [1952] 2 Lloyd's Rep 105, where Devlin J suggested that the law should be changed; and *The European Gateway* [1987] QB 206 where Steyn J repeated the suggestion; and to the findings of individuals, of however great distinction, conducting extra statutory inquiries such as Lord Bingham's report into the supervision of the Bank of Credit and Commerce International SA: *Three Rivers District Council v Governor and Company of the 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": para 108. 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 Police* [1980] QB 283, 319 Lord Denning MR, who had been counsel for the appellant in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, described it as "beyond doubt . . . wrongly decided". In the House of Lords in the same case [1982] AC 529 Lord Diplock said that that was generally considered to be so. In *Arthur JS Hall & Co 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 In so far 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* [2009] Bus LR 809, paras 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 in the *Hollington* case for the rule was that the court should require the "best evidence". This, as

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A Hoffman J 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] EMLR 654, para 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".

B **38** The reasoning that has survived is that set out in the following passage of Lord Goddard's judgment in the *Hollington* case [1943] KB 587, 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
C 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 recognised 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."

D

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.
E 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
F 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.

G *Expert evidence*

41 As the *Hollington* case [1943] KB 587 recognises in terms, different considerations apply to scientific or expert witnesses. In so far 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
H 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

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investigator who was a pilot had any or any sufficient experience of planes of the vintage concerned, or of their use for aerobatic manoeuvres. A

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 did in *Lambson Aviation (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira de Aeronautica SA* (unreported) 11 October 2001: see para 90 below. B

44 In *Sunley v Gowland White (Surveyors & Estate Agents) Ltd* [2004] PNLR 257 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": para 49. 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 on the report for statements in it in relation to "contamination . . . and on 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. C D

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. E F

46 One of the reasons for the rule in the *Hollington* case [1943] KB 587, 596, 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* [2009] UKPC 34 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 para 27 that: G

> "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." H

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

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A 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 B 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, eg 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: (1) the conclusion C 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; (2) an estimate of the wind and temperature profile in the area of the accident which resulted from an analysis of recorded meteorological data; (3) the opinion that the engine appeared in a serviceable condition; (4) 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 D 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 (5) a conclusion that the manoeuvre started at 1,500 feet above ground level and there was insufficient height to recover from the spin.

51 I regard these expressions of opinion as ones to which a court is E 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 in so far 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 F 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 G which the court would not have regard. As to those he thought it preferable, at para 116:

> "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 H the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions."

53 In so far 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

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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* [2009] Bus LR 809, 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 (1) they both involved someone making findings and reaching conclusions on the basis of an evaluation of evidence which he/they had sought and obtained; (2) the reports followed limited terms of reference; (3) 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 (eight 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 District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 the House of Lords 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.

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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 Pt 35. These include the following, as amended by rule 5(b)(c)(d)(q)(i)(ii) of the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092):

"*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.

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"(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. A

"(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."

61 Mr Lawson submits that the Civil Evidence Acts and CPR Pt 35 constitute a comprehensive code regulating the use of expert evidence. B 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 C law. The expert with whom CPR Pt 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 rr 35.1 and 35.5 and the expert's report referred to in CPR rr 35.4 and 35.10 are the evidence and report of such a person. The purpose of CPR Pt 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 D report does not fall within CPR Pt 35. The AAIB was not instructed by, and is wholly independent of, any of the parties.

63 CPR Pt 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 on Evidence* 18th ed (2013) observe at para 33-09, citing Lord Mansfield in *Folkes v Chad* (1782) E 3 Doug KB 157: "even at common law the opinions of skilled witnesses were admissible wherever the subject is one on 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 Pt 35. Thus in *DN v Greenwich London Borough Council* [2005] LGR 597 this court held that the trial judge was wrong to decline to F 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 in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) where he ruled that an engineer giving factual evidence could also proffer statements of opinion reasonably G related to facts within his knowledge and relevant comments based on his own experience. If CPR Pt 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 Pt 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* H [2012] L & TR 435 Sales J heard evidence from two experts called as such under CPR Pt 35 as to the cost of building a replacement for an oil jetty. One of them—Mr Bartlett for the claimants 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

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Nuttalls. The judge much preferred the evidence of the other expert. He also ruled that the claimants were 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 the claimants were 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 Pt 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 on Evidence*, which (as there observed) 'are not the reports of "experts within CPR Pt 35" '": para 149.

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 Pt 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 Pt 35, the claimant did not require the permission of the court to adduce it.

Discretion

68 The judge had a discretion under CPR r 32.1(1)(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, at 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

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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 co-operate 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 claimants 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 defendant 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 claimants' 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 co-operation 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

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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 UK 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

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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 (1) the independence of the AAIB; (2) 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 (3) 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 Pt 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 ("the RAIB") 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

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A Reporting) Regulations 2005 (SI 2005/1992). The Act and the Regulations under it implement Parliament and Council Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ 2004 L220, p 16). Neither the B Act nor the Regulations restrict the admissibility of RAIB reports.

84 The Marine Accident Investigation Branch ("the 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 (SI 2012/1743). The latter Regulations provide, by regulation 14(14)(15) that if any part of an MAIB report or any C 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, having regard to the factors mentioned in regulation 13(5)(b) or D (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 *Margolle v Delta Maritime Co Ltd* [2003] 1 All ER (Comm) 102. The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005 (SI 2005/881) introduced a similar E 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 F 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.

G 88 I do not underestimate for a moment (1) the vital importance of the work of the AAIB and the significance of that work in respect of air safety; (2) the need for its functions and its independence to be properly understood; and (3) 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, H 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

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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. In so far 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 (trading as Knight Air Scheduled Services) v Embraer Empresa Brasileira de Aeronautica SA* (unreported) 11 October 2001, Tomlinson J; *Budden v Police Aviation Services Ltd* [2005] PIQR P362, 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 Corpn* [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 v Smith* [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 (1) the Crown Prosecution Service; (2) the Association of Chief Police Officers and (3) the Coroners' Society, providing for co-operation 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

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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 UK: see *Shawcross & Beaumont Air Law*, looseleaf ed, vol 1, Division 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 co-operate 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 co-operation 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

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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 [1954] 1 WLR 1489 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.

TREACY LJ

100 I agree.

ARDEN LJ

101 I agree.

Applications to admit new evidence refused.
Appeal dismissed.

NICOLA BERRIDGE, Solicitor