

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

CRI-2008-425-18

NATHAN DALE-EMBERTON
Appellant

v

CIVIL AVIATION AUTHORITY
Respondent

Hearing: 13 March 2009
Counsel: C S Withnall QC for appellant
P J Shamy for respondent
Judgment: 7 April 2009

RESERVED JUDGMENT OF DOBSON J

- [1] This is an appeal against two convictions entered in respect of charges:
- a) first pursuant to s 43A of the Civil Aviation Act 1990, which involved operating an aircraft in a careless manner; and
 - b) secondly pursuant to s 100 Civil Aviation Act, reg 3 Civil Aviation (Offences) Regulations 1997 and r 91.301(a) Civil Aviation Rule: General Operating and Flight Rules (Part 91), which involved, while operating under visual flight rules (VFR), flying in cloud when the

rules required that the aircraft only be flown with a defined extent of visibility.

[2] The conduct arose in the course of an attempted return flight from Milford to Queenstown ('the return flight') on 27 September 2005. The appellant was the pilot of an eight-seater Airvan GA8 aircraft. The primary evidence for the prosecution was from the four passengers in the plane at the time. They had been flown by the appellant from Queenstown to Milford ('the outward flight') earlier that day, in time to take a 9.30am scenic ferry trip on Milford Sound. Two charges of operating the aircraft in a careless manner, and operating in breach of the visibility requirements of VFR, parallel to the charges in respect of the return flight, were also pursued in respect of the outward flight. These were dismissed by District Court Judge Doherty in his reserved decision delivered on 21 May 2008.

[3] The hearing preceding that decision was conducted in the District Court at Queenstown on 21-25 January and 3-5 March 2008. The decision reviews in some detail the evidence from each of the four passengers in relation to weather conditions encountered on both flights. There was also expert evidence called for the prosecution from a meteorologist, a civil aviation officer with expertise in the aspects of flying relevant to the prosecution, and two civil aviation investigating officers. The appellant gave evidence, as did his employer and an expert on the piloting issues involved.

[4] The factual issues were joined on a straightforward basis: the prosecution case was that the appellant flew in cloud. The appellant denied that he did, but acknowledged that if the Court found he had flown in cloud, then it would be both a breach of the VFR and would also amount to operating the aircraft in a careless manner. The contest was therefore whether the prosecution could prove beyond reasonable doubt that the appellant had flown in cloud as alleged on both the outward and return flights.

[5] Mr Withnall QC, in arguing the appeal, was inclined to suggest that the case had misfired in the District Court because there was a mismatch between allegations of flying "in cloud", and the VFR which requires that when at or below 3,000 feet

above mean sea level, or 1,000 feet above the terrain, whichever is the higher, a pilot must have flight visibility of five kilometres and be clear of cloud and in sight of the earth's surface below. Mr Withnall suggested this mismatch meant that the Judge had focused on the wrong test. However, where the prosecution accepted the burden of establishing that the appellant flew "in cloud", rather than that he flew with insufficient visibility relative to the five kilometre limit in the VFR, then that involved a materially worse standard of conduct than was sufficient to found a prosecution, so could only have helped the appellant.

[6] The appeal is brought on the grounds that the Judge made numerous errors in evaluating the evidence:

- that the passengers' evidence as to the weather conditions amounted to opinion evidence rather than factual;
- that preference ought to have been given to the assessment of weather conditions by the appellant because he was better qualified to assess and describe the weather conditions encountered; and
- that a large number of inconsistencies rendered the passengers' evidence unreliable and that it was not borne out by photographs they took during the flights.

[7] Also, it was argued that, given the similarities in conditions as described by the passengers, the Judge's ultimate finding that the prosecution discharged its onus in respect of the return flight, but not in respect of the outward flight, was perverse. Further, it was argued that the Judge had wrongly reversed this onus by requiring the appellant to establish that he had not been flying in cloud.

[8] The recollection of the passengers was of being "in cloud" at various points on the outward flight, by reference to various measurements that seemed to have been natural to them. The prosecution focused on the conditions encountered at the highest point in that flight, when the aircraft crossed over the main dividing range at

the Adelaide Saddle, which is specified as being some 4,600 feet above mean sea level.

[9] Of the four passengers, Ms Felicity Austin was seated next to the pilot on the outward flight. She described flying in cloud like being “in a cotton wool roll”, she thought they flew in cloud for “sort of from 30 seconds onwards”, and was not sure where on the journey that had occurred. She did think it was somewhere around the middle of the journey, whereas the crossing of the Adelaide Saddle was quite close to the end of the flight.

[10] Ms Austin’s partner, Mr Trevor Robb, had the most restricted view on the outward flight, in the third row of seats in the aircraft. He recalled the weather being clear when they passed over Glenorchy at the northern end of Lake Wakatipu (this recollection appears to have been shared by the others). Mr Robb was not clear on the route followed from that point on. He put this down to a deterioration in the weather “big time”, and that the aircraft was in fog and cloud. He presumed it was raining and snowing. His impression was that the pilot had windscreen wipers on, when the aircraft was not fitted with any.

[11] The other couple, Ms Michelle Williams-Smith and Mr Thomas Smith, were in the second row of seats on both flights. Ms Williams-Smith had some prior experience of flying in small aircraft, and also of flying in mountainous terrain. She described the conditions as “total white-out...could barely see out...”. She recalled the pilot tilting the wings to steer through the Saddle and that the aircraft followed the valley down into Milford. She thought the left wing got maybe as close as 20 to 25 feet from the mountains, although it was hard in the snow to differentiate the snow in the air and the snow on the mountain.

[12] Mr Smith also described being in cloud as they went over a saddle (he did not know the name of it). At that time, he could not see anything. He did recall the weather improving as they went down into Milford, with higher clouds at that point.

[13] Photographs taken during the outward flight by three of the passengers were produced at the hearing. One of those taken by Ms Williams-Smith (Photo 156 in

Exhibit 4) was accepted by the Judge as showing the view at the time the aircraft crossed the Adelaide Saddle. It showed misty conditions, but virtually all of the mountainous terrain, some snow-covered and some bare, within the confines of the photograph is sufficiently clear for its topography to be made out.

[14] After completing their ferry trip around Milford Sound, the passengers returned to Milford aerodrome. At about 11.35am, the appellant took off with the passengers, but rather than retracing his steps over the route flown on the outward flight, he flew down Milford Sound out to sea, and flew to the north over the Kaipo Saddle which is some 1,640 feet above mean sea level. He then flew up Lake McKerrow, into the northern end of the Hollyford Valley and then turned north up the Pyke River valley, over Lake Alabaster. The appellant pursued this route in an attempt to check out a viable route back over the main divide to Queenstown. At a point north of Lake Alabaster, approximately where the Olivine River joins the Pyke River, he decided that he should not proceed further, turned around and retraced his steps to Milford aerodrome where he landed after a flight of some 42 minutes. The four passengers returned to Queenstown by road, and the appellant waited in Milford until later in the day when conditions cleared and he flew back to Queenstown.

[15] The passengers gave a somewhat similar range of views as to the visibility conditions encountered on this attempted return flight. The appellant was equally adamant in denying that he had flown "in cloud" at any time, on either flight. The tenor of virtually all the evidence bearing on weather conditions in the morning in question was to the effect that there had been a degree of deterioration between the first flight and the second. Apart from one helicopter in the air in the same area on the attempted return flight, it seems that none of the other tourist flight operators were flying into or out of Milford on the morning in question.

[16] The critical reasoning by the Judge on the charges in respect of both flights is reflected in the following paragraphs from his decision:

Queenstown to Milford

[95] Although I reject the evidence of the defendant and by in large accept that of the passengers as to their observations I am not sure that the

aircraft did fly into cloud on the Queenstown to Milford flight. I am sure the passengers now think they did fly through cloud but I am left with a reasonable doubt about it for the following reasons:

- a) The meteorological evidence was for a cloud base above that necessary for the crossing of the Adelaide Saddle.
- b) The passengers were under an increasing amount of apprehension because of the turbulent conditions and this may have led to them looking at the worst case.
- c) The passengers were only coming to grips with the perspectives and reality of mountain flying in deteriorating weather.
- d) The passenger with the best view (Felicity Austin) was not the most experienced of the passengers, weather-wise. She was not certain as to which stage of the flight the aircraft flew through cloud as she described. She thought it most likely in the middle of the journey, which was inconsistent with the others who described the incident as near the end of it.
- e) The two who were experienced in weather conditions (Trevor Robb and Michelle Williams-Smith) were not in optimum positions to observe the total situation, with the most experienced observer of weather (Trevor Robb) seated in the most restricted "full-visual" area, namely the back seat which is in the centre of the aircraft. His own photograph (Exhibit 3.7) gives a good indication of his restricted forward vision. Michelle Williams-Smith admitted it was difficult to differentiate between cloud and snow at this stage of the journey.
- f) The photographs (in particular Exhibit 4.16, which became known in the hearing as "photo 156") around the area of the Adelaide Saddle, tend to show deteriorating weather conditions but not cloud at the altitude at which the defendant was flying.
- g) It was unlikely that someone with the flying experience and abilities of the defendant would take the calculated, but extreme, risk of diving into cloud to cross a mountain pass which, if Felicity Austin is correct, must have been completely obscured and with no certainty or even knowledge as to conditions on the other side.

[96] Whilst I am sure the conditions were marginal and becoming increasingly so, I must give the defendant the benefit of the reasonable doubt that I have, as to whether at that stage of the journey what the passenger witnesses described, was actually flying in or through cloud rather than snow or even rain. I find the informant has not proved beyond a reasonable doubt that the defendant flew into cloud on the journey from Queenstown to Milford and therefore he neither flew carelessly nor breached VFR on that occasion.

Milford to Queenstown

[97] Again I reject the evidence of the defendant. His view that there was no issue and that he was incredulous others would think there was, is not credible itself. I specifically reject his version that there was good visibility throughout the time the passengers say they flew in cloud. To be sure this was so, I would have to be satisfied that each of the passengers were genuinely wrong or had colluded to tell a story about not just what they say they flew through but also the actions and reactions of a pilot they all described as being under and feeling the pressure of a dicey situation. I am not prepared to find so.

[98] I am sure the defendant flew through cloud on this leg of the journey in his aborted attempt to cross the Main Divide in the Pike River Valley area for the following reasons:

- a) Weather conditions were described by the passengers as still deteriorating with lowering cloud ceiling.
- b) Meteorological evidence described conditions likely to produce low cloud and lowering cloud base.
- c) By this stage the passengers were all aware of what mountain flying involved.
- d) They were all in a heightened sense of awareness because of discussion about alternative modes of returning to Queenstown and the nervous and panicky in-flight directions and responses of the defendant.
- e) I accept unequivocally the evidence of the passengers and in particular that of Trevor Robb. He was sitting in the right hand passenger seat and had effectively the same forward, side and upwards and downwards view as the pilot. He was specifically asked by the defendant to keep a lookout for the helicopter and he did that. To do so he must have been paying particular attention to what was going on around him. He described "whiteout" conditions. He described with clarity and specificity the actual conditions and related them to the aircraft ("you couldn't even see the propeller going round"). Trevor Robb struck me as a person who would "tell it as it was"; on his own admission he appears an unsophisticated person (he cannot use a computer) and as I have said earlier in this decision I assessed him as an honest man not easily rattled or given to hyperbole. He earns his living in a hard industry where such men are likely the norm. His experience is such that he ought to have been well suited to making the assessment and observation of the weather and conditions that he did.
- f) The evidence [of] Trevor Robb was supported by that of the others. The description of turning a full circle by Michelle Williams-Smith (which was not described by Trevor Robb and Felicity Austin and equivocally by Thomas Smith and appears to be inconsistent) does not detract from my

acceptance of her evidence of flying into cloud. All of the passengers were vivid in their descriptions. Those descriptions were so generally consistent with each other that they have led me to reject the defendant's directly contrary evidence.

[17] A major part of the arguments on appeal was the perceived perversity of the Judge finding that the passengers' evidence as to the outward flight was inadequate to establish the charges beyond reasonable doubt, but the same passengers' evidence was adequate in respect of the return flight. Accordingly, it is necessary to review the nature of the evidence on the outward flight in somewhat more detail for the purpose of undertaking the comparison that this submission requires.

[18] All four of the passengers recalled hearing over the headphones that they were wearing an exchange between the appellant and Mr Darryl Palmer, an air traffic controller manning the tower at Milford aerodrome, as they approached Milford on the outward flight. There is a measure of consistency between the impressions all four passengers gained of this exchange. Ms Austin recalled the "weather man being surprised that we were there", and questioning whether the appellant had left Queenstown before he received an updated weather report. Mr Robb recalled Mr Palmer's reaction to the appellant contacting him in terms questioning whether the appellant had listened to the forecast and "what the hell are you doing here?". Ms Williams-Smith put it in terms that the tower told the appellant that he should not have come, and Mr Smith picked up a comment to the effect of "what are you doing out there, did you get my warning?", or words to that effect.

[19] Mr Palmer acknowledged having a discussion with the appellant at some point during that day, but was not clear as to when it was. He recalls expressing surprise that the flight over from Queenstown had been made. In re-examination, he acknowledged that his voice may have expressed surprise but that he did not think he would have said "what the hell are you doing here" or anything like that. Mr Palmer did acknowledge that when the appellant advised he was in light snow showers across the Adelaide Saddle, Mr Palmer was surprised that the pilot continued with the flight.

[20] This is one instance of passengers, obviously concerned for their own safety in strong winds and less than ideal visibility, taking more from what they observed than was in fact occurring. I accept the range of explanations include that Mr Palmer was downplaying his exchange with the appellant when he gave evidence, and I have not had the advantage the Judge enjoyed of observing the demeanour of all the witnesses. Notwithstanding that, it appears the Judge treated Mr Palmer as a reliable witness, and it is inherently more likely that there is an unconscious extent of exaggeration in the passengers' recollection than an inadequate recollection by Mr Palmer.

[21] The Judge was understandably cautious in the extent of reliance he placed on the photographs taken during the outward flight by the passengers and produced as part of their evidence. There was no detailed evidence of the type of cameras used, or the extent to which their lenses could give an impression of relatively lighter or darker visibility conditions than would have appeared to the naked eye at the time. However, there can be no suggestion that any of the cameras used could record a view of mountain scenery out of the aircraft window if the aircraft was enveloped in cloud to an extent reducing the visibility to virtually zero. Ms Williams-Smith's photograph taken at the time the aircraft crossed the Adelaide Saddle (photo 156 in exhibit 4) is inarguably taken when the aircraft was not "in cloud". The extent of visibility revealed by that photograph confirms the ability of persons in the aircraft to see a mixture of snow-covered and bare mountainous terrain below and to the relevant side of the aircraft. Without other data such as the altitude at which the aircraft was flying at the time, and its relationship both to the land form in the foreground and the mountain slope in the distance of the photograph, it would not be a reliable basis for establishing whether the range of visibility in the direction the photograph was taken is more or less than five kilometres. However, that is not the basis on which the factual allegations on which the prosecution was based were contested. It does seem most likely that the descriptions by the various passengers of the aircraft being "in cloud" on the outward flight related to a point at or about when that photograph was taken. It therefore casts a realistic doubt on the accuracy of the passengers' recollection.

[22] The photographs produced by Ms Austin include one focused within the cabin showing the head, upper body and left arm of the pilot. The unfocused background visible through a part of the windscreen and the window to the left-hand side of the pilot shows rocky outcrops and snowy mountainside in somewhat indistinct, misty conditions. Two further photographs produced by Ms Austin show views of mountainous terrain in similarly misty conditions. To the extent that mist somewhat obscures details at a distance, and is sufficiently dense to obliterate what is behind it but does not completely obliterate vision, then these photos reveal misty conditions rather than cloud. Again, were the factual issue for the Court to have been whether the appellant breached VFR by flying with less than five kilometres visibility in the flight path ahead of him, then these photographs might have provided some assistance, although on their own could not have been determinative of an extent of visibility less than five kilometres. They do not support the case that the aircraft was “in cloud”, certainly at the time these photographs were taken.

[23] Ms Austin did state that she did not take any photographs when the aircraft was “like being in a cotton wool roll”, because:

...I didn't think there was any point because it wasn't exactly scenic.

[24] Bearing all this in mind, there was ample scope for the Judge to come to the view he did in respect of the outward flight.

[25] As to the attempted return flight, it was clearly important to the Judge that Mr Robb was now in the passenger seat affording the best view of the weather conditions. As is apparent from the reasoning cited above, the Judge obviously formed a very positive view of Mr Robb as a reliable and honest witness. His evidence was on the attempted return flight, the aircraft went down Milford Sound and out to the sea, turning north, with good visibility down to the ground, essentially because the aircraft was flying very low. Mr Robb's recollection was that he could not see even half way up the hills once they were back over land. Mr Robb could see Lake McKerrow as they flew over it, but could not see into the Hollyford Valley which was on the right-hand (his) side of the aircraft, stating that there was “cloud all around us”. He was able to see Lake Alabaster when the aircraft was above it, but he said “it was a nightmare coming towards us”. Mr Robb recalled that the appellant

did not turn the plane around “until we were white, completely whited out”. He said that if they had remained in that fog any longer, “you would have lost your sense of direction”. At the time he said you could not even see the propeller going around. A few moments after the aircraft had turned around, he was able to see Lake Alabaster again.

[26] The recollection of the remaining passengers varies in the detail as to when they were in cloud on the attempted return journey, but that is the recollection, in some form, of all of them.

[27] The critical difference between the recollections of the appellant and that of Mr Robb is that the appellant is adamant that he saw the cloud ahead of him, sufficiently early to turn around and head back down towards Lake Alabaster, before being in the cloud. In supporting the appellant’s recollection, Mr Withnall urged that it accorded with common sense: the pilot was testing the extent of available visibility, had followed a route that was open in terms of visibility, and therefore would have afforded him a visual warning as to when that visibility would cease. Any responsible pilot, quite apart from any individual sense of self-preservation, would ensure that he or she did not put the aircraft into the cloud before undertaking what amounts to a U-turn. In contrast, Mr Shamy suggested that the appellant had a real incentive to get back to Queenstown, and to get the passengers back, and that he simply tried too hard, running out of room before he appreciated the need to turn back.

[28] In the more general sense, there is evidence as to meteorological conditions from:

- Mr Palmer’s observation at Milford aerodrome;
- Mr James Travers, a meteorologist based in Wellington; and
- Mr Andrew Campbell, the civil aviation expert who had very extensive experience in flying in this area, and in projecting weather conditions encountered relative to weather forecasting detail.

[29] All this evidence confirms the prospect of encountering cloud where Mr Robb says the aircraft did. Indeed, the appellant does not deny encountering cloud. The narrow issue is therefore whether the Court could be satisfied beyond reasonable doubt that Mr Robb's perception of visibility having been reduced to an extent that the aircraft was in cloud is accurate, or is somewhat exaggerated as the Judge found the passengers' accounts to have been in respect of the conditions on the outward flight.

[30] Mr Robb's reliability is enhanced in one sense by the evidence of his sighting of the helicopter that also flew over Lake McKerrow and tested the visibility turning right (south) into the Hollyford Valley, whereas this aircraft turned left (north) up the Pyke River valley. Mr Robb was able to identify the helicopter in the sky when the appellant could not see it. That helicopter was also unsuccessful in finding a visible route through any of the passes, and returned to Milford aerodrome shortly before the appellant's aircraft.

[31] Another fact finder might assess the grounds for treating Mr Robb as reliable in a different way. The Judge treated his extensive experience as a commercial fisherman as relevant in ascertaining and recalling the precise weather conditions encountered by the aircraft. One might say that extensive experience of maintaining a "weather eye" at sea involves a focus on wind and rain as influencing sea conditions, somewhat differently from wind and visibility conditions as are critical for flying, particularly under VFR. Nonetheless, it is experience in analysing weather conditions where his life might literally depend on the accuracy of his analysis.

[32] The Judge treated Mr Robb as not given to hyperbole. Mr Robb was adamant that, during the turn in cloud in the Pyke River valley, he could not even see the propeller. At face value, that seems relatively unlikely, but the Judge acknowledged this evidence and did not suggest that it was in any way incredible.

[33] It is easier to identify with the Judge's analysis of the evidence in respect of the outward flight, and the grounds for identifying a reasonable doubt, than it is with the converse analysis of the evidence in respect of the return flight.

[34] However, without seeing the demeanour of witnesses, the inconsistencies as between the witnesses are not sufficient to rebut the reliance the Judge was comfortable in placing on Mr Robb's account of that flight. That is particularly so, given the reliability attributed to Mr Robb's evidence.

[35] I accept that, to a greater or lesser extent, the inconsistencies in the evidence of the other passengers that were of concern to the Judge in respect of the outward flight ought to have been recognised in the same way in respect of their evidence on the return flight. However, they assume materially less relevance given the weight the Judge was entitled to place on Mr Robb's evidence, plus the enhanced corroboration from the evidence of others reconstructing the conditions that would have been incurred. In the end, I would agree that there was enough to find the charges in respect of the return flight established beyond a reasonable doubt.

[36] A discrete criticism Mr Withnall argued was that the District Court Judge had reversed the onus by requiring the appellant to establish that he had not been flying in cloud. That reflects the terms of paragraph [97] of the Judge's decision, quoted above at [16]. The Judge's reasoning suggests an approach that to accept the appellant's version that there was good visibility, the Judge would have to be satisfied that each of the passengers was genuinely wrong. Inconsistently with that, the prosecution would not have discharged the burden on it if, taken overall, the Judge was left with a reasonable doubt that the evidence from one or more of the passengers to the effect that the aircraft had flown through cloud left scope for a reasonable doubt that they were correct in that recollection. In the context in which paragraph [97] appears, I treat the Judge's comments focused on in this challenge as reflecting a point in his reasoning where he has found one or more of their accounts to make out the proposition that the aircraft had flown in cloud, which he reasoned he would be entitled to rely on unless he was satisfied that they had made a genuine mistake or were falsifying their recollection as a result of collusion. Seen in that way, I do not treat the paragraph as wrongly inverting the onus so as to require proof by the appellant of the contrary proposition, namely that he had not been flying in cloud. The reasoning comes at a point where the Judge had rejected the appellant's version of events. He had done so by an analysis preferring the version of the

passengers and not because he had imposed any onus on the appellant to establish his version, in order to defeat the charges he faced.

[37] I can readily appreciate the importance to the appellant of the consequences on his future flying career of this conviction. I can also understand the genuine unease he has at the way in which the Judge has progressed through his reasons for the decisions, on one flight for him, and on the other against him. However, after a thorough review of all the materials, I cannot accept that that inconsistency is a perversity rendering the conviction unsafe. The quality of the evidence was different in respect of the two flights.

[38] Accordingly, I dismiss the appeal.

A handwritten signature in black ink, appearing to read 'Richard Dobson', written in a cursive style.

Dobson J

Solicitors:

Richard McCabe, NZ Airline Pilots Association, Auckland for appellant
Crown Solicitor, Christchurch for respondent