

**Report of the Board of Review on the Accident to Boeing MD-11 B-150 at
Hong Kong International Airport on 22nd August 1999**

Ruling on Cost

Pursuant to Civil Aviation (Investigation of Accidents) Regulations,
Cap. 448, Laws of Hong Kong

Before

Ernest Michael Kam Hung LIN (Chairman)

And

Captain William Dennis LOWE (Assessor)

And

Mr. Peter Francis SHEPPARD (Assessor)

Hong Kong SAR
May 2006

- 1.1 By section 15 of the Report of Board of Review on the Accident to Boeing MD-11 B-150 at Hong Kong International Airport on 22nd August 1999 dated 30th November 2004 (hereinafter referred to as 'the Review Report'), the Board reserves its jurisdiction relating to the Board's costs. This has been rendered necessary for logistic reasons: the evidence of the review hearing had taken up nine of the ten working days set down for these proceedings (with the last day being used for deliberations in chambers amongst the Board members); at the end of which time had to be given to the parties to consider the evidence and prepare submissions. Therefore at the end of the evidence, the Board set out a timetable for the parties to file their written submissions. After all written submission had been tendered, the Board would obviously require further time to consider the same before making rulings.

- 1.2 In order not to further delay the publication of the Report and the findings of the Board of Review, and in order to avoid the logistic difficulties and the extra expenses of conducting yet another oral hearing in open court for the sole purpose of determining on the question of costs, the Board has decided to submit the part of the Review Report relating to all the principal findings on 16th December 2005 for the Chief Executive to consider whether it should be made public under Regulation 15. By section 15 of the Review Report, the Board has expressly reserved its jurisdiction on the question of costs of the Board under Regulation 14(7).

- 1.3 It is contended by the Applicants that after submitting the Review Report to the Chief Executive, the Board has discharged all of its statutory functions and become functus officios. We do not agree. We take the view that Regulation 14 does not dictate that all issues, in particular the power to order payment of the Board's costs, must be dealt with at the same time of the principal rulings and in one go. In any event the Board could not have dealt with the question of costs since it would not be in a position to make its rulings before considering the parties' submissions; whereas the parties could not have made any constructive submissions on the issue of costs before the Board's rulings were made known to

them. As there are no provisions in the Regulations for the parties to view a draft Review Report before its submission to the Chief Executive, the parties cannot have known the contents of the Board's rulings in advance; therefore they could not have been in a position to make any submission on the question of costs. Before considering the parties' submissions, it would not be fair for the Board to make any order of costs. If the Board could not reserve its jurisdiction on costs and, the submission of the Review Report has the effect of terminating all statutory functions (as contended by the Applicants), the power under Regulation 14(7) could never be exercised. Such a dilemma was recognized by the UK Board of Review on the accident to Boeing BV 234 LR Chinook Helicopter, G-BWFC on 6th November 1986 when it dealt with the question of its expenses under the United Kingdom's equivalent of Regulation 14(7). At the end the UK Board of Review suggested amendment of the UK Regulations (see the last para. of Section 5.2 of the Review Report).

1.4 We take the view that if by the submission of the Review Report on the principal issues the review proceedings were deemed completed and that the power relating to costs could not be reserved, Regulation 14(7) would be nugatory and this could not have been the intention of the legislation. By necessary implication, we find that the Board has the power to reserve its power to rule on the issue of costs and that the review proceedings are not deemed completed until the Board has had the time to consider the issue and made ruling on the same.

1.5 By a letter 24th March 2005 from the Chairman of the Board, parties are invited to tender their written submissions on the issue. A timetable had been set out for the filing of written submissions. The Board has since received submissions from the Hong Kong Airport Authority, the Applicants and Counsel for the Board. On 20th December 2005, the Applicants filed their Reply submissions. We note that none of the parties applied for an open court hearing for the determination of the issue. We do not see the benefit of holding yet another public hearing since the issues can be sufficiently canvassed by way of written submissions and the parties' arguments cannot possibly be further advanced by way of a court hearing. For the

considerations and reasons already stated above, we do not consider it necessary to conduct an open hearing to rule on the issue. For the avoidance of doubt, this ruling shall form part of the Review Report.

2.1 Regulation 14(7) provides that

“the board may, if it thinks fit, order a person who appears or is represented at the review to pay in respect of the board’s cost such reasonable sums as may be specified in the order”.

It is thus clear that the Board’s discretion to order cost is only against either “a person who appears” or “is represented” at the review hearing and the cost is only in respect of the “board’s cost”. Costs incurred by any of the parties attending the review proceedings are not recoverable. Nor does the Board have the power to order costs against anyone who had not appeared or was not represented in the review. It follows that the Board does not have the power to include the costs incurred by any party to the review proceedings as part of the Board’s costs. For this reason we reject the submissions by the Hong Kong Airport Authority that its expenses for calling Professor Graham as its witness should be treated as part of the Board’s costs and be recoverable from the Applicants.

2.2 The Board is essentially considering whether the expenses incurred by the Board for the review proceedings should be borne by the tax-paying public or by the party responsible for bringing about the review proceedings. We are aware that the fundamental purpose of investigating accidents under the Regulations is not a fault-finding exercise or “to apportion blame or liability” but, as set out in Regulation 4, “to determine the circumstances and causes of accident with a view to the preservation of life and the avoidance of accidents in the future”. The review hearing has been conducted under the guidance of this stated principle. The present proceedings are therefore different from normal criminal or civil litigations for which cost normally follows cause. We take the view that any costs

order made pursuant to Regulation 14(7) should not be used or perceived as a means of sanction.

- 2.3 The Board reiterates its earlier ruling that the subject matters raised in the Notices of Review were proper matters for consideration by the Board of Review in that the findings under review could adversely affect the reputation of the Applicants. In seeking to review the same, the Board accepts that the Applicants had been legitimately exercising their legal rights under the Regulations.
- 2.4 Although there are technically two Applicants to the review, Captain LIU was at all material times an employee of CAL. Both Applicants relied on the same grounds in their applications for review. The contents of the two Notices for Review were identical. Throughout the review proceedings, both Applicants were represented by the same legal team. Captain LIU did not elect to give evidence personally or call any witness or other evidence separately for his own review application. Nor was there any separate representations or submissions made on his behalf. For all intents and purposes, the Board does not consider Captain LIU a party separate and distinct from CAL. Consequently we do not think there should be any separate or additional cost order, if at all, against him.
- 2.5 On 13th February 2003 the Board granted leave to four other interested parties, including the commander of the ill-fated CI642, namely Captain LETTICH to participate in the review hearing. Captain LETTICH elected not to be personally present or represented, nor did he take any active part in the review hearing. All other three parties elected to call evidence in response to the Applicants' contentions. We take the view that ultimately the hearing was initiated and necessitated by the Applicants' applications.
- 2.6 Pursuant to the Notices of Review the Applicants sought to review part of the Conclusions relating to the Cause (Report 3.2.1) and all of the probable

Contributory Causes (Report 3.2.2) of the accident. In addition five items of the Findings and two out of the three Casual Factors of the accident were challenged by the Applicants. At the end, the Board refused all but a minor part of the applications and confirmed most of the Inspector's Findings and Conclusions the Applicants sought to review: see section 14 of the Review Report. In particular, the Board confirmed the Inspector's conclusion that the principal cause of the accident was the commander's "*inability to arrest the high rate of descent at 50 ft RA*" and rejected the Applicants' contentions to the contrary.

- 2.7 The Applicants called only one witness, viz., Captain EVERS. His evidence and cross-examination (including his rebuttal evidence) took up about half of the nine-day court hearing. The rest of the proceedings had been taken up by evidence adduced by the other parties. These evidence and some of the issues taken by the interested parties were in direct response to the issues taken by the Applicants; in particular, issues such as cross-wind landing techniques were directly related to the Applicants' challenge of the part of the Inspector's Conclusion relating to the cause of the accident (see Report 3.2.1).
- 2.8 As was noted in section 14.3 of the Review Report, members of the Board had reservations about Captain EVERS' independence as an expert witness. We found his opinions of the Report unsupported by any available evidence. In particular, we took exception of his contention that the Report had been "*systematically constructed so as to justify a conclusion of pilot error as a cause of accident*" (see section 14.4 of the Review Report). We also note that shortly before the commencement of the review hearing, the Applicants sought to amend the grounds of review: instead of relying on the severe downdraft or microburst as the cause of the accident, the Applicants contended that accident was attributed to the abruptly shifting winds or windshear (see section 2.7 of the Review Report); which contention we did not accept.


- 2.9 We take the view that since the public had been put to considerable expenses for an exercise built on contentions ultimately unsubstantiated by evidence, it is reasonable that CAL should be held responsible for at least part of the costs incurred by Board.
- 2.10 Notwithstanding the above comments, members of the Board find that the review proceedings do afford an opportunity for the Board to revisit some of the issues in greater details and from a slightly different angle. Although the same issues had previously canvassed by the Inspector in the Report, we think the review proceedings have nonetheless been relevant and useful in the interests of public safety and in achieving the ultimate goal of preservation of life and avoidance of accidents in the future. For this reason the Board considered it appropriate to include in its rulings comments and recommendations which we believe are conducive to this goal.
- 2.11 Having considered the above matters, members of the Board take the view that it is fair that CAL should bear half of the costs incurred by the Board
- 3.1 By the letter dated 24th March 2005 (referred to in section 1.5 above), parties had been invited to make submissions on the general issue of costs as well as quantum. Enclosed with the said letter was a skeleton bill of costs for the Board of Review as at 7th January 2005 prepared by the Costs Unit of the Department of Justice. The said bill of costs has since been updated to 30th November 2005 and had been served on all parties for their comments.
- 3.2 Regulation 14(7) only confers a general power to order a party to pay for the Board's cost. It does not specify what kind of expenses could be properly considered as the board's costs. We think that common sense dictates that the Board's costs should be those of and incidental to the review hearing; subject to the test of reasonableness.

- 3.3 The relevant Regulations do not endow this Board with the power of ordering costs to be taxed. In any event, in view of the unique nature of the review proceedings, we do not consider the principles set out in Order 62 of the Rules of the High Court (CAP. 4, Laws of Hong Kong) applicable for the present purpose. It is therefore appropriate to make a simple lump sum order.
- 3.4 Having examined the updated bill of costs, the Board is satisfied that all the items listed thereon have been expenses reasonably incurred and properly assessed for matters incidental to the review hearing and can be properly considered as the Board's cost under the Regulations. We are satisfied that the assessed amount of HK\$2,954,713.33 is a fair estimate of the Board's costs. We note that none of the parties, in particular the Applicants, elected to comment on the propriety or reasonableness of any of the items listed on the updated bill of costs.
- 3.5 The total assessed amount is \$2,954,713.33. By reasons of the matters stated above, we think it reasonable that CAL should be ordered to pay half of the above sum at HK\$1,477,356.00 and we so order.

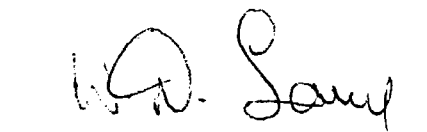
Dated this 19th day of May 2006.



ERNEST MICHAEL KAM HUNG LIN



PETER FRANCIS SHEPPARD



WILLIAM DENNIS LOWE