IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 13 of 2011

BETWEEN

AEROLINK AIR SERVICES PTY LIMITED an Australian Corporation

having its offices at c/- Downs Barrington (St George),

Suite 16, Level 3, 4 Cross Street, Hurstville,

New South Wales 2220, Australia.

FIRST PLAINTIFF

AND

DANIEL PATRICK RYAN of 268 Cicada Glen Road, Ingleside,

New South Wales 2101, Australia, Company Director.

SECOND PLAINTIFF

AND

SUNFLOWER AVIATION LIMITED a limited liability company having its registered at Sunflower Hangar, London Avenue, Nadi Airport, Fiji Islands.

FIRST DEFENDANT

AND

ROSHAN ALI of Nadi and **SYLVIA GUKULA BALE** aka **SYLVIA COLLINGWOOD** of Fasa Subdivision, Nadi in the Republic of Fiji, Managing Director and Sales and Marketing Office Respectively as the Executor and Executrix and Trustee of the **ESTATE OF DONALD IAN COLLINGWOOD** late of Fasa Subdivision, Nadi, Retired Person, Testate.

SECOND DEFENDANT

Counsel	:	Mr. Young C.B. for the Plaintiffs Mr. Siwan K. with Ms. Lata S. for the Defendants
Date of Hearing	:	07th August 2023
Date of Judgment	:	28th September 2023

JUDGMENT

[1] The plaintiffs instituted this action against the defendants seeking the following reliefs:

A. Damages and/or equitable damages or compensation.
B. Interest pursuant to the Law Reforms (Miscellaneous Provisions) (Death and Interest) Act.
C. Post judgment interest of 4% per annum from the date of final judgment to the date of full satisfaction of the judgment sum.
D. Costs.
E. Such further or other orders as the Court thinks fit.

[2] The plaintiffs' case is that an agreement the 1st plaintiff agreed to lease two Embraer Bandeirante aircrafts to the 1st defendant for a period of 12 months with a month to month option after the expiration of 12 months. The memorandum of understand was signed on 31st January 2005.

[3] The 1st aircraft with registration No. DQ-WBI was provided to the 1st defendant in late February 2005 and the 2nd aircraft with registration No. VH-OZF was to be provided when it was required.

[4] As pleaded in paragraphs 10, 11 and 12 of the statement of claim the breaches committed by the 1st defendant are as follows:

1. The 1st defendant failed to pay any lease payments to the 1st plaintiff for the 1st Aircraft.
2. The 1st defendant failed to require the 2nd Aircraft within a reasonable time.
3. The 1st defendant failed to pay any lease payments to the 1st plaintiff for the 2nd Aircraft.

[5] The particulars of damage caused to the defendant for breach of agreement, as averred in the statement of claim, are as follows:

1. Unpaid lease payments in the sum of AUD 180,000.00for the 1st Aircraft for the first twelve months, and ongoing monthly payments of AUD 15,000.00 until the 1st Aircraft is returned.
2. Unpaid lease payments in the sum of AUD120,000.00 for the 2nd Aircraft.
3. Expenses associated with mechanical work undertaken in relation to the 1st and 2nd Aircrafts.

[6] At the pre-trial conference parties admitted the following facts:

1. The 1st defendant is a Fiji corporation able to sue and be sued in its corporate name and style.
2. The 2nd defendant is Company Director of the 1st defendant.
3. A memorandum of understanding (MOU) dated 31 January 2005 was signed by the parties.

[7] The defendants in their statement of defence aver that there was to be executed an operating lease between the 1st plaintiff and the 2nd defendant but same did not happen because the plaintiffs were not able to provide the aircraft bearing registration No. DQ-WBI in operational condition and the said aircraft did not have a Certificate of Airworthiness which the defendants were obliged to provide before the aircraft could be used.

[8] In paragraph 13 of the statement of defence the defendants also aver that due to the plaintiffs' failure to remove the said aircraft from the defendants' hanger despite being requested to do so and for the continued occupation of the space in the hanger, the plaintiffs owe the defendants $36,000.00 and that apart from the hanger charges plaintiffs owed the defendants $50,966 being expenses related to the maintenance and other expenses incurred by the defendants on the said aircraft.

[9] The defendants pray for the following reliefs:

1. That the plaintiff's claim against them be struck out with costs against the plaintiffs on indemnity basis.
2. Judgement against the plaintiff jointly and or severally in the sum of $87,566.16 pursuant to paragraph 13 of the counter claim.
3. General damages and compensation for breach of contract in the sum of at least $100,000.00.
4. Interest on all awards, judgment sum at the rate of 13.5% per annum from 31/01/2005 to the date of full payment.
5. Costs of the counter claim on indemnity basis against the plaintiffs.
6. Any further or other orders this Honourable Court deem just.

[10] In this matter the plaintiffs' claim is based on the Memorandum Understanding signed between the parties. In paragraph one of the Memorandum of Understanding it is stated;

> The lease of the 1st aircraft shall be for 12 months, with a month to month option after that period @ $15,000AUD per month. The second aircraft when required will be @ $10,000AUD per month under the same lease agreement as the first aircraft.

[11] It is absolutely clear that the parties intended to enter into a lease agreement which did not happen. In explaining why then parties did not enter in an agreement the first named second defendant said that in fact an agreement was drafted but did not singe since the aircraft could never be operated. The court is therefore of the view that the parties never intended to use the memorandum of understanding as a legally enforceable contract.

[12] In the statement of claim the plaintiffs have pleaded that if the court cannot rely on the Memorandum of Understanding, they rely on sections 75 and 77 of the Fijian Competition and Consumer Commission Act 2010 (FCCC). Memorandum

of Understanding is not a legally binding document in English Law. It is only an understanding between the parties to it.

[13] Section 75 of FCCC provides;

> (1) A person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
> (2) Nothing in this division shall be taken as limiting by implication the generality of subsection (1).

Section 77(1) of FCCC provides:

> A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services –
>
> (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use which they do not have;
> (b) represent that services are of a particular standard, quality or grade they do not have;
> (c) represent that goods are new or unused, if they are not or reconditioned or reclaim;
> (d) represent that a particular person has agreed to acquire goods or services when that person has not;
> (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
> (f) represent that the person has a sponsorship, approval, or affiliation that person does not have;

(g) make a representation concerning that a price advantage of goods or services exist if it does not;

(h) make a representation concerning the availability of facilities for the repair of goods or of spare parts for goods when they are not;

(i) make false or misleading representation concerning the place of origin of goods;

(j) make false or misleading representation concerning the need of any goods or services;

(k) make representation concerning the need for any goods or services;

(l) make representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that person does not have.

[14] At the trial 2nd plaintiff and the 1st named 2nd defendant testified.

[15] The evidence of the 2nd plaintiff is that the 1st aircraft at the time it was given to the defendants was fully functional and the defendants' difficulty in using the aircraft was, it had to prove to the Civil Aviation Authority that he could operate it and maintains it. He stated further that the Civil Aviation Authority came to him and asked them whether they could support the defendants in spare parts which the plaintiffs agreed with and sent over most commonly used parts so that they could handle the issues with the aircraft and the witness also said the parts were already on the site in the hanger. The 2nd plaintiff in his evidence referred to his letter dated 05th October 2005 (P4) where he has said in the 3rd paragraph;

> He also wants an agreement in place between Aerolink Air Services and Sun Air in rein regards to the supply of spares. We will send an

agreement over for your approval. If you are satisfied with the agreement please sign the bottom and fax it back to us.

[16] The person referred to in the above letter is Mr. Peter Herring of the Civil Aviation Authority of Fiji.

[17] There is no evidence that such an agreement was ever entered into between Aerolink and Sun Air.

[18] In Daniel Collingwood's reply (P5) to the said letter, he has stated:

> That you need to get some revenue for the aircraft is understood, it is far overdue. However, WBI was to be delivered to us some 12 months ago and we had relied on it to be in service for 1995. That this has not happened is not our responsibility, rather the arrangements made on the vast reparation of the aircraft and subsequent delay. As you are aware we have had little to do with this as you had elected your own "team" to do the work at out facility.
>
> I can assure you when the work is complete the C of A application will be lodged (this week) given your instructions.

[19] The 2nd plaintiff in his evidence said that the year 1995 must be a mistake and it should be 2005 and WBI is the registration of the Aircraft. The 2nd plaintiff testified further that the aircraft was operational and the problem was that the defendants did not have the approval to operate it and Don Collinwood was having a difficulty in getting the approval of the Civil Aviation Authority to operate it.

[20] However, from the evidence and the communications exchanged between the parties it is clear that the first aircraft could not be operated due to the nonavailability of Certificate of Airworthiness and it had taken a long time for

the maintenance of the first aircraft and the maintenance was done by the plaintiffs.

[21] The witness for the defendant testified further that when the aircraft is leased basically it comes with the Certificate of Airworthiness which is supposed to be done by the owner of the aircraft. However, the plaintiffs' position is, Certificate of Airworthiness must be obtained by the operator of the aircraft. The defendants' defence is based on the ground that the plaintiff failed to provide the Certificate of Airworthiness. But none of the parties cited any law or regulation as to which party is obliged to provide the Certificate of Airworthiness. The court has to decide this issue on the available evidence. It is more so because there is no legally enforceable agreement between the parties identifying the responsibilities of each party.

[22] In the letter dated 17th October 2005 (P5) sent to the 2nd plaintiff by Don Collinwood, which I have referred to above, Don Collingwood has assured that he would apply for the Certificate of Airworthiness once the work is complete, based on the instructions of the 2nd plaintiff. After giving an undertaking to apply for the Certificate of Airworthiness, the defendants cannot subsequently blame the plaintiff for not obtaining the same.

[23] The evidence shows that non availability of the Certificate of Airworthiness was not the only reason that prevented the defendants from operating the first aircraft but also the defects and corrosion in the aircraft. The evidence of the 1st named 2nd defendant is that the maintenance work was done by the plaintiffs and the defendants paid costs of maintenance and due to the defects and non-availability of the Certificate of Airworthiness they could not operate the aircraft and therefore, the plaintiff is not entitled to make any claim for the first aircraft.

[24] He testified further that they could not get the second aircraft because the first one was still under repair. Referring to attachment to the letter dated 17th

October 2005 (P5) sent by Don Collingwood to the 2nd plaintiff the witness said that part of the crew maintenance cost was paid by the plaintiffs but there is still some outstanding. As per the account sheet attached to the letter (P5) crew maintenance and other expenses incurred by the defendants on behalf of the plaintiffs is $161,580.12 and after deducting the payments the balance due is $80,839.22 which has been admitted by Aerolink in its letter dated 26th October 2005 (P6) sent to Don Collingwood. However, in the counter claim the defendant's claim $36,600.00 for the continued occupation of the hanger despite being requested to remove the aircraft from the hanger and $50,966.16 being expenses related to the maintenance and other expenses incurred by the defendants on the aircraft but the defendants are, if at all, only entitled to recover what has been prayed for in the counterclaim.

[25] Since there was no executable agreement between the parties the plaintiffs relied on sections 75 and 77(1)(d) & (j) of the FCCC which I have reproduced above. However, in the written submissions the learned counsel for the plaintiff has referred to section 54 of the Fair Trading Act, 74 and 75 of the FCCC. The provisions of section 54 of the Fair Trading Act are similar to that of section 75 of the FCCC.

[26] Section 74(1) of the Act provides:

> For the purpose of this division, where a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

[27] The learned counsel's submission is that Collingwood did mislead the plaintiff and Ryan when he did the following:

(i) Being aware that the MOU was signed that obligated Aerolink to provide two aircrafts.

(ii) Accepting the first aircraft by taking it into Sun Air hanger.

(iii) When told by Ryan that he had already entered into an agreement to require a second aircraft and not pretesting.

(iv) Removing the old logo of Air Fiji from the first aircraft and then replacing (on his own initiative) with the Sun Air logo.

(v) Acknowledging that Aerolink was entitled to be paid rental as per the letter of 17 October 2005 (exhibit 5) where he said "That you need to get some revenue for the aircraft id understood, it is far overdue.

(vi) Informing that Sun Air was applying for COA for the 1st aircraft as per letter dated 5 April 2006 [Exhibit 9], "we are still awaiting a COA for WBI but this should happen in the next couple of weeks".

(vii) Assuring Ryan that Aerolink's "two aircrafts" were part of the sale of business deal with Air Pacific when he was in no position to give that assurance.

[28] There had been no agreement or understanding between the parties that the defendant would by the second aircraft as claimed by the plaintiff. Paragraph 1 of the Memorandum of understanding reads as follows:

> The lease of the first aircraft shall be for 12 months, with a month to month option after that period @ $15,000.00 AUD per month. The second aircraft when required will be @ $10,000.00AUD per month under the same lease agreement as the first aircraft.

[29] Understanding between the parties had therefor been absolutely clear, in that they intended to enter into an agreement and the 2nd aircraft was to be obtained when required.

[30] Accepting the aircraft and taking it into the Sun Air hanger and changing the logo could not have misled the plaintiff because the understanding was to operate the aircraft by the defendant. None of the grounds alluded to by the plaintiff's counsel, can be construed as acts of misleading by the defendant.

[31] The defendant has also claimed at least $100,000.00 as general damages. If the damages claimed are quantified it cannot be general damages but special damages which have to be specifically pleaded and proved. The defendants have failed to adduce any evidence on their claim for $100,000.00.

[32] It is clear from the evidence of both parties if the plaintiff provided the defendant an aircraft without defects none of these disputed would have arisen. The plaintiff cannot place its faults on the defendant and blame the defendant for the plaintiff's own faults.

ORDERS

1. The plaintiff's action is dismissed and struck out.
2. The plaintiffs are ordered to pay the defendant $87,566.16 with pre-judgment interest at the rate of 4% per annum and post judgment interest pursuant to Law Reforms (Miscellaneous Provisions) (Death and Interest) Act.

Lyone Seneviratne

JUDGE

28th September 2023