

BETWEEN: ISLAND AIR LIMITED TRADING AS AIR SAFARIS
First Appellant

AND: MATTHEW ERCEG
Second Appellant

AND: SARATOGA LTD
First Respondent

AND: CHRISTINE BOLAND
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice John Hansen
Hon. Justice Oliver Saksak
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: *Mr. Edward Nalyal for the Appellants*
Mr. Mark Hurley for the Respondents

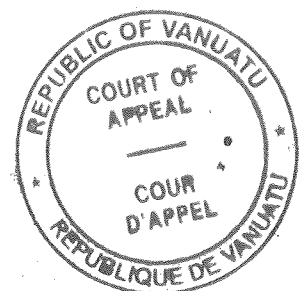
Date of Hearing: *7th November 2019*

Date of Judgment: *15th November 2019*

JUDGMENT

Introduction

- 1) This is an appeal against the assessment of damages awarded in favour of Saratoga in the Supreme Court on 7th August 2019 against Island Air Limited trading as Air Safaris (first appellant) and Matthew Erceg (second appellant).

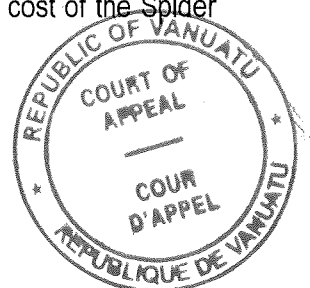


The appeal

- 2) The first and second appellants say that the primary judge made errors in his assessments and seek orders that the judgment entered on 7th August 2019 be set aside and that a rehearing be ordered.
- 3) The appellants contend that (a) damages should not have been awarded jointly and severally, (b) the judge was not entitled to conclude that the losses claimed by Saratoga were established, (c) it was wrong to have awarded damages on a 1 percent base point on the Bred Bank Loan, (d) the judge incorrectly allowed damages for the flying hours not flown or fulfilled, (e) the first appellant paid for the engine overhaul, (f) the judge should not have awarded any damages for safety equipment, cargo pod and their costs and engine fee and (g) the appellants played no part of the delay in the sale of the aircraft and its devaluation.

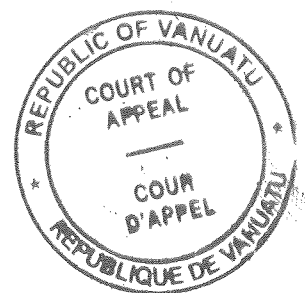
Background Facts

- 4) Saratoga Limited was a company registered under the Marshall Islands Business Corporation Act whose sole director is Christine Boland. Island Air Limited is a local company incorporated under the Companies Act registered and trading as Air Safaris. Mathew Erceg is a pilot and is the sole director of Island Air Limited. A personal relationship started between Ms Boland and Mr Erceg. They had a common intention of buying an aircraft. Mr Erceg was to fly the aircraft and Ms Boland arranged payment for the aircraft through a bank loan from the Bred Bank to her company Saratoga. Island Air and Saratoga executed a Hiring Agreement on 30th June 2010 for a period of 5 years. In 2015 there was a falling out and their personal relationship ended with it.
- 5) In the assessment hearing the primary judge heard evidence from Mr James Garae, a bank officer from the Bred Bank, and Ms Boland in support of the claimant's (now respondents) claims. Mr Erceg gave evidence on behalf of the defendants (now appellants). The judge preferred the evidence of the claimants and rejected Mr Erceg's evidence as unreliable. The judge held the first and second appellants jointly and severally liable and rejected an alleged set off.
- 6) Secondly the judge accepted the claimants' summary of Saratoga Limited's damages and losses and awarded a total of USD\$ 207,766.04 plus NZ\$ 2,800, being the cost of the Spider Tracker.



Discussion

- 7) At the hearing of the appeal Mr Hurley conceded first that Ms Boland was not a party to the original proceeding. Further Mr Hurley conceded that during the currency of the Hiring Agreement only Island Air was liable. However he submitted that after the Hiring Agreement ended in June 2015 it was proper that both the first and second appellants be jointly and severally liable for the damages and losses of Saratoga Limited.
- 8) From the facts Ms Boland was and is the sole director of Saratoga Limited. It is inevitable to accept service on behalf of Saratoga as such and to give evidence in support of Saratoga's claims. In her evidence which was unchallenged the damages claimed as set out in paragraph 18 of the judge's decision are fully established. They were also supported in the documents exhibited to her affidavit.
- 9) In the course of the hearing the point was quickly reached and discussions took place regarding the actual figures. To some extent these became confused because this Court used the Bred Bank loan base rate to Saratoga Limited as the starting point. That led to a number of concessions by Mr Hurley and he was invited to file a further memorandum by 11th November setting out the amended figures.
- 10) Following the hearing it became apparent that the Bred Bank loan base rate was not the appropriate starting point as no claim as pleaded related to it. The claim seeks only damages for breaches of the Hire Agreement. This is recognized in the memorandum. There has been no response from the appellants in relation to that. Clearly the figures set out in the memorandum were established by the evidence of Ms Boland and accepted by the Judge.
- 11) Mr Hurley also accepted that the award of joint and several liabilities was only for part of the damages claimed.
- 12) The respondent established loss from the breach of clause 4.5 of the Hire Agreement for the loss of 200 flying hours in the sum of USD 43,290. It also established loss for the replacement of safety items, a cargo pod and the value of the second hand engine not returned in the sum



of USD 29,795. In total the respondent is awarded damages against Island Air in the sum of USD 73,085.00.

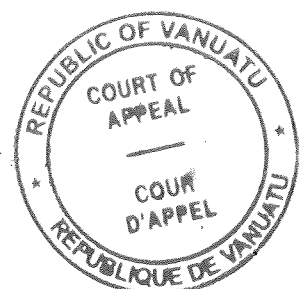
13) Next the appellants contended that neither of them are responsible for the delay of the sale of the aircraft and its consequent devaluation. This is nonsensical. By their defence and counter-claim, until they were struck out, the appellants asserted a lien over the engine fitted into the aircraft. The appellants went further on 18th August 2015 and obtained an order from the Supreme Court to restrain Saratoga from removing the aircraft from Vanuatu and from dealing with it in anyway. It is clear that the delay in the sale of the aircraft and its devaluation was occasioned by these actions of the appellants.

14) Based on the accepted evidence relating to the delay in the sale of the aircraft, lost opportunity costs, additional interests and corporate costs, necessary repairs and maintenance, Saratoga suffered additional loss of USD 49,181.04. To this figure must be added the loss of value of the aircraft during the period of delay. From Mr Erceg's evidence in July 2015 the aircraft was valued at USD 150,000.00. In May 2018 when it was sold it was valued at \$65,000.00. Accordingly the loss on sale was USD 85,000.00 giving the total damages for which the First and Second appellants are jointly and severally liable to be USD 134,181.04.

The Result

15) Accordingly we allow the appeal to this extent:

- I. There will be judgment in favour of Saratoga Limited against Island Air Limited in the sum of USD 73,085.00.
- II. Judgment is entered also in favour of Saratoga Limited against Island Air Limited and Matthew Erceg jointly and severally in the sum of USD 134,181,04.

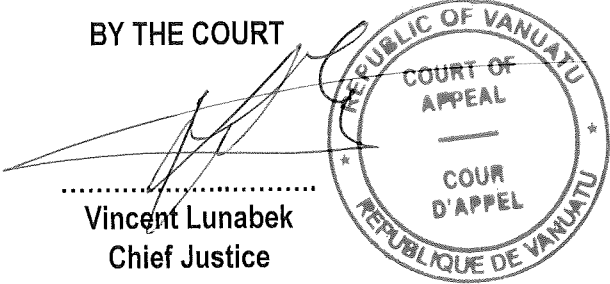


Costs

16) Costs to the respondent to be taxed on the standard basis failing agreement.

DATED at Port Vila this 15th day of November, 2019

BY THE COURT



Vincent Lunabek
Chief Justice