

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 22/1270 COA/CIVA

IN THE MATTER OF: AN APPEAL BY AIRPORTS VANUATU LIMITED
(AVL) IN THE SUPREME COURT OF THE
REPUBLIC OF VANUATU

BETWEEN: AIRPORTS VANUATU LIMITED (AVL)
Appellant

AND: BELAIR AIRWAYS VANUATU LIMITED
Respondent

Date of hearing: 10 May 2023

Coram: *Hon Chief Justice Lunabek*
Hon Justice J Mansfield
Hon Justice R Young
Hon Justice D Aru
Hon Justice V Trief
Hon Justice E Goldsbrough

Counsel: *N Morrison for the Appellant*
B Bani the Respondent

Date of Decision: 19 May 2023

JUDGMENT OF THE COURT

Introduction

1. Airports Vanuatu Ltd (AVL) commenced proceedings against Belair Airways Vanuatu Ltd (BAV) seeking VT10,819,874, being money owing for services provided. BAV did not oppose Judgement for this amount. The Judge offset this sum against counter claim damages he ordered of VT96,605,333, arising from his view that AVL had breached a contract with BAV to provide it with a hanger for its aircraft.
2. AVL in this appeal say that the Judge wrongly concluded there was a contract requiring AVL to supply a hanger for BAV's use. It says the essentials of a contract, were not present; there was no consideration and no intention to create legal relations with respect to the provision of a hanger.
3. In the Supreme Court the Judge concluded that there was an agreement made in November 2012



between AVL and BAV, requiring AVL to provide BAV with a hanger to use for its aircraft by March 2013 and thereafter. The Judge said that because of AVL's failure to provide the hangar, BAV aircraft maintenance could not be carried out on a regular pattern. As a result, BAV's aircraft could not fly from time to time and BAV lost revenue. The Judge concluded that the revenue loss was VT96,605,330, which was awarded to compensate BAV for their loss.

Background facts

4. The only evidence before the Supreme Court Judge, was a statement by Mr Toara Karie, the Operations Manager of BAV and his cross-examination. Mr Karie, who was also a shareholder in BAV. He said that access to a hanger was an important part of running an airline so that repairs and maintenance could be done in an efficient manner.
5. In June 2012, the four shareholders of BAV decided to start an airline. In his sworn statement of June 2022, Mr Karie said:

"9. I confirm that I had several meetings with Airports Vanuatu Ltd (AVL) and particularly met with the acting CEO Mr John Lewin. In those meetings, I specifically raised the requirement that my airline operation have its own Hangar facility and requested AVL's consensus in this regard.

10. As a consequence of my negotiation with AVL regarding the hangar facility, AVL issued a letter dated 23 November 2012, annexed hereto and marked with the letter D, is a true copy of that letter from Mr John Lewin.

11. Despite the clear terms of the letter from AVL dated 23 November 2012, AVL failed, refused and neglected to provide my airline operation with the necessary hangar facility as I had specifically requested".

6. The letter dated 23 November 2012, was from Mr Harrison Luen, acting Chief Executive Officer of Airports Vanuatu Ltd. The letter said:

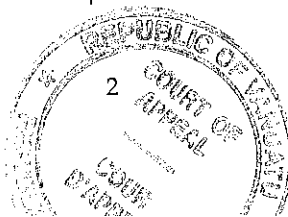
"Dear Mr Carter,

Re: Confirmation of hangar facility with Barfield airport

Further to discussions between Belair Airways and Airports Vanuatu Ltd, and as per agreement established between both parties, AVL hereby confirms that a hangar facility will be available for utilisation by Belair Airways Ltd in March 2013.

AVL appreciates the patience expressed by the management of Belair Airways toward AVL's pursuit in progressively upgrading its facilities to ensure that it operations are in compliance with all international safety and security standards and practices, as it is obliged to do."

7. AVL did not provide a hangar for BAV. BAV purchased its first plane in 2014 and its second plane in



2015. Subsequently BAV entered into an agreement with Air Vanuatu, for Air Vanuatu to provide engineering services at their hangar for BAV's aircraft. That agreement provided that Air Vanuatu had priority access to the hangar for its own planes. And so BAV's use of the hangar and the engineering facilities was subject to Air Vanuatu's use.

8. Mr Karie detailed in his evidence the hours the two planes could not fly because BAV did not have immediate access to a hangar for engineering services. He said that the loss arising from that lack of access, and so an inability of the two aircraft to fly and consequently earn revenue, was VT766,475,600.
9. In 2015, BAV wrote to AVL advising that it had decided to build its own hangar and sought permission from AVL regarding access to the airport. Permission was given. However, the hangar was not built immediately but was completed in June 2022.

The Judgment

10. The Judge in the Supreme Court concluded that there was a contract between the parties, requiring AVL to provide a hangar for BAV.
11. In particular he said when referring to the letter of 23 November 2012:

"25. Paragraph 1 of the letter, as indeed the heading, is a clear and unequivocal confirmation that AVL would provide a hangar facility to Belair Airways in March 2013. The letter makes reference to an agreement established between both parties re the hangar.

26. The letter was "furtherance" to previous "discussions" they had between themselves and was a "confirmation". AVL did not produce any evidence to the contrary. Belair Airways Ltd had proved on the balance of probabilities, that an agreement was "established" between them. Those are the words used in the letter by the acting Chief Executive of AVL.

27. As such, AVL cannot now turn around and say there was no offer, no acceptance, no consideration and no intention to create legal relations. It was all evident in the contents of AVL's letter of 23 November 2012, that all those elements of an agreement were available, and agreed. The letter itself is a confirmation of an agreement by AVL to provide a hangar to the counterclaim for March 2013. The two cases referred to by Mr Morrison do not assist AVL's position.

12. As to damages the Judge said:

"33. His tables (Mr Karie's) showed normal hours of operation and shortfall of hours for each aircraft. His evidence does not show how many times each year, his aircrafts were required to be in a hangar undergoing repairs or checks and for how many hours. This information would have been more helpful to assist the court make a proper and fair assessment, as to how much damage should be awarded by the court.



34. *There were possibly other factors that might have contributed to the aircraft's making shortfalls in hours, for instance, bad and extreme weather conditions which are beyond everyone's control.*

35. *I am therefore assisted to a limited extent only by the figures in two tables provided, to make an assessment as to damages in the amount claimed."*

13. The Judge then considered the Air Vanuatu/BAV agreement for the provision of hangar facilities and the damage limitation provisions in that agreement to assist him in the assessment of damages.
14. He recognised there were limitation issues given the damages claims were from 2014 to 2020, and the proceedings were filed in 2021. He concluded that the claims from 2014 to 2020 were statute barred as outside the six-year limitation period for contract actions. He also took into account the COVID lockdown from 2019 to 2020 and the consequential reduction of passenger numbers.
15. Finally, the Judge, in reaching a conclusion about the damages claimed said:

"43. I am equally mindful that Air Vanuatu as well, is affected by all these within the same period. I do not think the counterclaim is about actual losses, but rather it is to compensate reasonably for damages occurred by Belair Airways as a result of Airports Vanuatu Ltd not honouring their agreement to provide a hangar facility, as agreed back in 2012."

16. The Judge said that the only damages that were payable were those relating to the losses between 2021 and 2022. He allowed one third of those losses, being a total amount of VT96,605,333.

Discussion

17. We are satisfied that there was no complete contract between AVL and BAV for the provision of a hangar.
18. The essential elements of an enforceable contract can be summarised in this way. There must be:
 - a) a clear offer;
 - b) unequivocal acceptance;
 - c) adequate consideration;
 - d) an intention by all parties to enter into legal relations; and
 - e) certain contractual terms capable of enforcement.

19. In this case at least, there were no certain contractual terms and no identification of any consideration. These inadequacies suggest that there was in fact no intention to create legal relations between parties in 2012/13, until the detail of the arrangement as to the provision of the hangar had been agreed.
20. This was an arrangement between commercial entities. If they had intended to be bound by an agreement arising from the letter of November 2012, obliging AVL to build a hangar then, as was illustrated by the extensive contract between Air Vanuatu and BAV providing for access to Air Vanuatu's hangar by BAV, a detailed set of contractual terms would have needed to be agreed upon.
21. These terms would have likely included the rental for the premises, an obligation to pay utilities, rent review arrangements, the term of the lease and rights of renewal, termination rights including a notice period, allowed and prohibited activities, rights of access to the hangar, the type of aircraft that could use the hangar and whether exclusive use was intended. These are some of the terms that would likely have been required to be agreed upon if legal relations had been intended to be created. Without specifying those terms, the parties had not negotiated sufficient detail to allow the "arrangement" to provide a hangar to function, as an enforceable contract.
22. We are satisfied therefore there was no contract between the parties for the provision of a hangar by AVL to BAV.
23. We allow the appeal and set aside the finding there was a contract. As a result, the damages claimed must fail given it was reliant on a contract between the parties.
24. Although not strictly relevant given our conclusions that there was no contract between the parties, we make some observations about the damages claims and the Judge's conclusions.
25. First, limitation. The Judge misunderstood the limitation question. If there was a limitation issue, although not apparently pleaded, then it would only have related to those claims for damages prior to 6 years before the filing of the claim in 2021 given this was a contract dispute. In other words, those claims that preceded 2015 would have likely been time barred. The Judge assumed for some reason that the claims between 2014 and 2020 were time-barred. He was mistaken in that assessment.
26. Secondly, the claim for damages appeared to be a claim for the gross amount per hour that the planes could have earned if they had been flying. That would not be the measure of loss. When flying, each plane would have incurred significant operational costs, and any damages payable would only have been the net return to BAV. They would have allowed for the rent payable to AVL.
27. Because of the inadequacy of the evidence on damages, the Judge decided to undertake his own assessment of loss. What underlay that need was BAV's failure to make a damages claim based on a lawfully claimable loss.
28. It is not generally the function of a Judge to try and assess the quantum of damages based on the Judge's own assessment rather than the litigant's evidence. An assessment of damages must be

based on evidence. There was no adequate evidence before the Judge for him to carry out that assessment. And so, the Judge made broad guesses as to loss rather than an evidence-based assessment.

29. A Judge must be satisfied on the balance of probabilities that the whole or part of the loss claimed has been established by evidence to the standard required. If he is not so satisfied then the Judge should not award damages.
30. In summary therefore, we are satisfied there was no contract between parties. In those circumstances the appeal is allowed, and the claim for damages is set aside.

Costs

31. The appellants are entitled to costs on the appeal which we fix at VT50,000.

DATED at Port Vila, this 19th day of May 2023

BY THE COURT

.....
Hon. Chief Justice V Lunabek

