

BETWEEN: Isleno Leasing Company Limited
Claimant

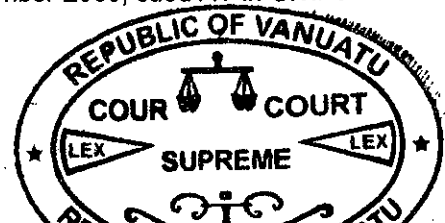
AND: Air Vanuatu (Operations) Limited
Defendant

Date: Thursday, 17 May 2018
By: Justice G.A. Andrée Wiltens
Counsel: Mr R. Sugden for the Claimant
Mr E. Nalyal for the Defendant

JUDGMENT

A. INTRODUCTION

1. This case has an unfortunately lengthy history dating back to 2009. It was finally heard in April 2016, but that judgment was successfully appealed in November 2016, and a re-trial ordered. For reasons I cannot explain, numerous items of correspondence by counsel for the claimant to the Supreme Court asking to progress the matter went unanswered, and as a result nothing was done regarding setting the cases down for re-trial until May 2018. The 18 months delay is inexcusable and unacceptable, and the reasons for the delay lie squarely with the Supreme Court.
2. In late 2009 the General Manager of Air Vanuatu (Operations) Limited ("AV") Mr Laloyer pointed out that the airline needed greater capacity. As a result, a lease agreement was entered with Isleno Leasing Company Limited ("Isleno") on 30 September 2009 for the lease of an additional aircraft.
3. AV repudiated that lease agreement almost immediately on 12 November 2009, which repudiation was accepted by Isleno. Isleno then, on 14 December 2009, sued AV in Civil Case

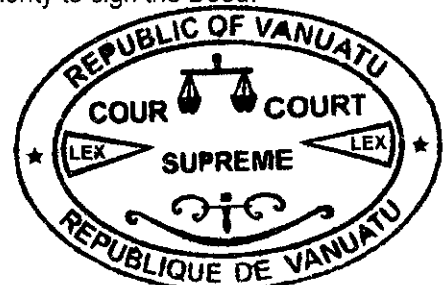


No. 189 of 2009. That case made very slow progress, primarily due to Isleno seeking to enforce the lease contract by means of political influence, rather than through the Court.

4. On 17 October 2011, a Deed of Settlement was signed by AV and Isleno to resolve Civil Case No. 189 of 2009.
5. Almost immediately, AV again, on 17 October 2011, sought to repudiate the Deed. As a result Civil Case No. 11/212 was commenced on 10 November 2011. In the meantime, Civil Case No. 189 of 2009 was struck out without opposition in November 2012.
6. As mentioned earlier this case was heard in April 2016, decided in September 2016 and appealed in November 2016.

B. THE CLAIM AND DEFENCE

7. Isleno's claim is very simple. It says the Deed of Settlement is binding on AV, and it seeks to enforce the terms of the Deed.
8. AV accept the Deed was validly entered into. However, without pleading these facts, wishes to set aside the Deed on the basis of fraud. Effectively what AV suggest is that Isleno somehow arranged for AV to sign the Deed by skulduggery.
9. What occurred is this. There was a AV Board Meeting at 4:30 pm to about 7:30 am on Friday 14 October 2011. Mr Mariasua, was Chair of the meeting. The Board resolved, at Mr Mariasua's urging, to dismiss the AV CEO Mr Laloyer. It was further resolved that Mr Fogarty replace him as CEO. Lastly, of significance, a resolution was passed relating to Isleno's claim against AV.
10. Although there as 2 versions of the Minutes of that Board Meeting, it is plain that the Board was encouraging the CEO to settle Isleno's claim without resorting to further court action.
11. At 8 am on Monday 17 October 2011 Mr Fogarty signed the Deed of Settlement on behalf of AV, witnessed by the Chairman Mr Mariasua. It was counter-signed by Ms Ngwele as Director of Isleno, and witnessed by a Mr Mata.
12. AV's defence to the claim enforcing the Deed was that Mr Fogarty was not authorised to sign the Deed, partly because of the dubious manner of his appointment and also because the Board had not authorised him to do so. This position was given further traction due to the removal of the Board's Chairman and other Board members at the meeting of 14 October 2011, and the declaration of Mr Fogarty's appointment as CEO as null and void by the Prime Minister of Vanuatu. The PM appointed a new Board who immediately re-instated Mr Laloyer as the CEO of AV.
13. Isleno countered that argument by relying on Section 193 of the Companies Act [Cap 191] and the "indoor management rule". The critical issue at trial therefore became whether Ms Ngwele knew or ought to have known that Mr Fogarty did not have authority to sign the Deed.



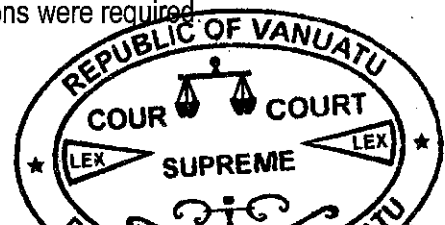
14. In the first trial, the learned Judge concluded that Ms Ngwele knew or should have known. However, the Court of Appeal held there was no proper basis, on the evidence, for such a finding. Hence the matter was sent for re-trial on this key point.
15. AV also suggested that there must have been a scheme involving Ms Ngwele, Mr Mariasua and Mr Fogarty to impose the settlement on AV.

C. PLEADINGS

16. While the Court of Appeal was critical of the conduct by counsel for Isleno, it should not be ignored that AV's counsel has failed, again and again, to abide by court directions.
17. The looseness with which the defence was pleaded has attracted directions by no less than 3 different Judges over many years to the effect that only what is pleaded can be the subject of evidence. Further and better particulars of the defence case was directed, again and again. For reasons known only to counsel for AV those directions fell on deaf ears. The result is that the defences which ought perhaps to have been pleaded relating to the manner in which the Deed was entered into are general and unspecific. The scheme, involving Mrs Ngwele, Mr Mariasua and Mr Fogarty (and possibly also Mr Mata) has not been properly articulated as being either fraudulent or ultra vires to the best interests of AV, or even as a criminal conspiracy, has been pleaded as a lack of authority by Mr Fogarty coupled with Ms Ngwele's actual or imputed knowledge of such lack of authority.
18. In the course of pre-trial conferences it was agreed that as AV was advancing a positive defence, it should present it's case first at trial. Further, time was endorsed again and again for better pleadings to be filed. In the end, there were none presented.

D. HEARING

19. Immediately prior to trial Mr Nalyal filed an application to strike out the claim. This was on the basis of the decisions of the Court of Appeal confirming that Mr Fogarty's employment as CEO of AV was null and void on a number of bases and secondly that it was therefore immaterial whether Ms Ngwele either knew or ought to have known that Mr Fogarty lacked authority to sign the Deed.
20. That submission completely ignored the analysis by the Court of Appeal to the effect that AV had to establish Ms Ngwele's knowledge at the time by evidence. I accordingly declined the application to strike out.
21. On the morning of the hearing Mr Nalyal made yet another request for more time. He sought an adjournment on the basis that senior staff of AV were involved in an international investigation as to the cause of the aeroplane crash over the weekend, and they were therefore unavailable to give evidence and/or instructions.
22. It transpires that those staff were not actually giving evidence. I was also confident that if further instructions were required, that that could be adequately dealt with by means of a short adjournment from time to time. In the event, no further instructions were required.



23. Mr Nalyal's attempted stalling of the proceedings was declined. There was no genuine basis for the application, and I was very conscious just how old this case is.

24. I declined his application; it had no merit.

25. Mr Sugden also had a preliminary argument he sought to strike out various parts of the sworn statements of Mr Laloyer (x2), Ms Roy, Ms Barthelemy and Mr Mata. The basis for his application was simple. He wanted the Court to only consider evidence relevant to the one remaining issue in contention between the parties, namely, whether Ms Ngwele knew or ought to have known that Mr Fogarty did not have authority to sign the Deed.

26. Mr Nalyal argued against the application, but without conviction or legal justification.

27. I acceded to Mr Sugden's application in terms.

28. I then invited Mr Nalyal to open his case, which he did by relying on the Defendant's written opening from the previous trial. In so far as he sought to go further and allege 'a plot, plan or conspiracy', I disallowed him to develop that point as it had not been pleaded, despite innumerable opportunities, and it was therefore not part of the case before me. The closest thing to that was contained in paragraph 3 (b) of the Second Amended Statement of Defence and that was all I was prepared to deal with.

29. Mr Nalyal then advised that he was calling no witnesses and was relying on the sworn statements filed to the extent that they continued to exist after various parts had been struck out.

30. Mr Nalyal then closed his case. He had failed to demonstrate that Ms Ngwele either knew or ought to have known that Mr Fogarty had no authority to sign the Deed of AV.

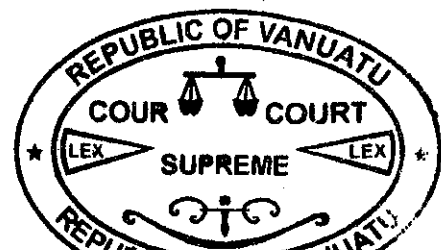
31. Mr Sugden relied on the sworn statements he had filed, and the many concessions made which effectively proved his case, and he sought liquidated damages in the sum of Vt 151, 142, 298, with continuing interest running at Vt 31, 200.18 per day. He presented a memorandum to that effect. I allowed Mr Nalyal till 9 am the following day to check the calculations; he eventually agreed by memorandum of 2 pm the next day.

32. In that memorandum Mr Nalyal indicated AV would appeal and sought a stay of 30 days in order to file the same.

33. Counsel really should know better. Any judicial decision is capable of being challenged, and it is part of the process. However Mr Nalyal should not attempt to bully the Court by threats of appeal. If he wishes to appeal, he is at liberty to do so. He should not however, repeatedly "warn" the presiding judicial officer of his intent.

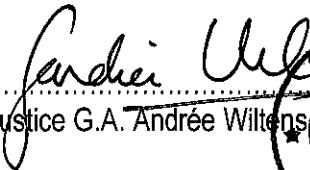
E. DECISION

34. There is clear evidence that AV leased an aircraft from Isleno and almost immediately repudiated the contract. A Court case followed, and in settlement of that case, a Deed of Settlement was entered into on 17 October 2011.



35. The Deed was properly executed by Isleno through its Director Ms Ngwele. On the face of it, the Deed was also properly executed by AV, through its then CEO Mr Fogarty, witnessed by the Chair of the Board Mr Mariasua.
36. Unless the Deed could be set aside in some manner it committed AV to pay within 7 days of signing Vt 51, 809, 325, and to immediately commence operating the aircraft in accordance with the original lease contract. The lease provided for termination costs of Vt 2, 100,000 per month for the remainder of the lease term. The Deed also provided for interest to run at 15% per annum on the sum of VT 51, 809, 325 from 24 October 2011 and on the termination sums of Vt 25, 200, 000 from 31 October 2011.
37. There is no dispute as to these provisions.
38. The Deed cannot be set aside by AV. They are caught by the indoor management rule and section 193 of the Companies Act. There is no evidence at all, apart from suspicion from the surrounding circumstances, that Ms Ngwele either knew or ought to have known that AV did not properly execute the Deed. The only finding I can make, on the evidence, is that Ms Ngwele signed the Deed in the expectation that AV would validly enter into the settlement agreement with Isleno. It follows that the terms of the Deed are binding on AV.
39. I therefore grant judgment to Isleno in terms of the particulars set out in paragraph 36.
40. Isleno, is also entitled to the costs involved in this part of the claim.
41. The unliquidated parts of Isleno's claim are now to be addressed. Mr Sugden seeks time for proper inspections of the plane and calculations to be prepared. That is appropriate.
42. A further conference is to be convened at 8 am on 10 December 2018 to ascertain progress.

Dated at Port Vila this 20th day of August 2018
BY THE COURT


Justice G.A. Andrée Wiltens

