

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAC.P. 314/93

BETWEEN: ANSETT TRANSPORT INDUSTRIES
(OPERATIONS) PROPRIETARY
LIMITED "A.C.N. NO.004 209
410", a company duly incor-
 porated under the laws of
 Australia, having its
 registered office at 501
 Swanston Road, Melbourne,
 Victoria 3,000.00, Australia:

Plaintiff

A N D: POLYNESIAN AIRLINES (HOLDINGS)
LIMITED, a duly incorporated
 company having its registered
 office at Apia:

Defendant

Counsel: R. Drake for applicant
 L.S. Kamu for respondent

Hearing: 15th August 1994

Judgment: 17th August 1994

JUDGMENT OF SAPOLU, CJ

Initially the present applicant moved to strike out certain paragraphs of the present respondent's statement of defence on certain specified grounds. The Court made a judgment on that motion on 22 July 1994. In that judgment the Court ordered, inter alia, that the respondent file further and better particulars to show the relevance of paragraphs 29 to 35 and 39 of the statement of defence. Counsel were also allowed to make submissions as to the propriety of raising in these proceedings the matters pleaded in paragraphs 29 to 33 of the statement of defence.

Counsel for the respondent has filed a memorandum pursuant to the judgment of Court of 22 July 1994. I will now deal with the points raised in that memorandum. The first point is that the dispute or disputes which are the subject of the present proceedings must be dealt with under the Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided under the six management and operational agreements entered into between the applicant and respondent. I must say that I do not agree with this point raised by the respondent. The issue here had already been dealt with by the Court when dealing with the respondent's earlier motion to strike out the statement of claim. In the judgment delivered by the Court on 17 February 1994 on the respondent's motion to strike out the statement of claim, it was pointed out that the lease of the twin otter aircraft was the subject of a lease agreement separate from the six management and operational agreements alleged by the respondent. It is on that separate lease agreement that the applicant's action for unpaid rent and so on is based. The lease agreement also contemplates court action being taken for non-observance or non-performance of any condition or covenant in the lease agreement. For these same reasons, I do not accept the second point raised in counsel's memorandum that the use of the twin otter aircraft which is the subject of the applicant's action must be governed under the six management and operational agreements. I must reiterate here what was in effect said in my judgment delivered on 17 February 1994 that the six management and operations agreement do not govern the lease of the twin otter aircraft which was the subject of a separate lease agreement.

As to the next question raised in counsel's memorandum, that the six management and operations agreement take precedence over the twin otter lease agreement, I see no substance in this. I must also point out that not only is the lease agreement subsequent in time to the six management and operations agreement and deal with a separate matter, there is also no provision in the

lease agreement that it is to be subject to the six management and operations agreement. Likewise, there is no provision in the six management and operations agreements that they are to prevail or take precedence over the lease agreement for the twin otter aircraft in any particular set of circumstances.

The final point raised by the respondent in counsel's memorandum is this. If the lease agreement is held to be valid, then the respondent has every right to raise a counterclaim. However the issues which will be raised in that counterclaim are all governed by the six management and operations agreements and therefore must themselves be determined under the Rules of Conciliation and Arbitration of the International Chamber of Commerce as provided under the six agreements. I cannot accept that the respondent is under obligation to file a counterclaim on issues arising under the six management and operations agreements to the applicant's action under the lease agreement. If the real situation is as portrayed by the respondent, then the applicant may proceed with its present action by way of Court action and the respondent to proceed with its "counterclaim" by way of arbitration. But I do not think the proposed counterclaim should prevent the applicant from proceeding with its action under the lease agreement.

In all then, I find paragraphs 29 to 35 of the statement of defence as having no relevance to the present proceedings and they are therefore struck out. In the circumstances of this case, I leave paragraph 39 alone in case the defendant may have other matters with which to support a defence of estoppel.

T. F. M. J. J. J.
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CHIEF JUSTICE