IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 314/93

BETWEEN: ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PROPRIETARY LIMITED "A.C.N. No. 004 209 410" a company duly incorporated under the laws of Australia, having its registered office at 501 Swanston Road, Melbourne, Victoria 3,000, Australia:

Plaintiff

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

Defendant

Counsel: R. Drake for plaintiff
L.S. Kamu for defendant

Hearing: 24 February, 6 & 22 March 1995

Judgment: 5 April 1995

JUDGMENT OF SAPOLU, CJ

The present proceedings is the latest in a serious of preliminary proceedings to deal with preliminary issues arising out of a claim by the plaintiff and a counterclaim by the defendant.

The plaintiff filed a motion to strike out the defendant's counterclaim. When that motion was argued on 24 February, the plaintiff submitted that a decision delivered by this Court on 17 August 1994 meant that the matters raised by the defendant in its counterclaim should be dealt with by arbitration pursuant to arbitration clauses contained in the six management and operations between the parties and not by Court action as the defendant has sought to do by filing a counterclaim. It must be said that in the judgment delivered by this Court on 17 August 1994, the Court was not dealing with the question whether the matters raised in the defendant's counterclaim should be dealt with by arbitration and cannot be dealt with by Court proceedings. In fact what the Court was dealing with in the proceedings leading up to the aforesaid judgment, was a motion by the defendant to strike out the plaintiff's statement of claim on certain specified grounds. And the Court made no decision or order that the matters raised in the defendant's counterclaim should be referred to and determined by arbitration, because that issue was not raised for decision.

In the present preliminary proceedings, the plaintiff has filed a motion to strike out the defendant's counterclaim. Subsequent to the hearing of legal arguments on that motion on 24 February, counsel were given the opportunity to make further legal arguments. When those further legal arguments were heard on 22 March, counsel for the plaintiff verbally asked the Court to

stay proceedings in respect of the defendant's counterclaim on the ground that the matters raised in the counterclaim should be referred to arbitration pursuant to arbitration clauses contained in the six management and operations agreements concluded by the parties. It should be mentioned that only five of the six management and operations agreements contain arbitration clauses whereas one of them does not. All of these agreements were dated the 13th day of April 1987.

The first of those agreements is entitled "**Agreement for the Development of the National Airline of Western Samoa**" and it contains the following arbitration clause :

> "24. All disputes arising in connection with this Agreement "shall be determined finally under the Rules of Conciliation "and Arbitration of the International Chamber of Commerce, "by a sole arbitrator if the parties can agree on one other- "wise by three arbitrators appointed in accordance with the "said Rules. Any award shall be final and conclusive and "enforceable in any Court of competent jurisdiction".

Then the "**Capacity Lease Agreement**" contains its own very similar arbitration clause which provides :

> "20. All disputes arising in connection with this Agreement "shall be determined finally under the Rules of Conciliation "and Arbitration of the International Chamber of Commerce, "by one arbitrator agreed by the parties or in the absence "of agreement by three arbitrators appointed in accordance "with such Rules".

The "Management and Technical Assistance Agreement" contains in clause 21 an identical arbitration clause as that contained in the Capacity Lease Agreement. Then the "International Interline Traffic Agreement - Passenger" and the "International Interline Traffic Agreement - Cargo" contain their own arbitration clauses which are somewhat different from the arbitration clauses in the other Agreements. The sixth agreement which is the "Authorisation Agreement" does not contain an arbitration clause but provides that the governing law for that agreement is the law of Western Samoa.

It is not uncommon to find in a contract an arbitration clause which requires that any dispute under or in connection with the contract should be referred to arbitration for determination. However this must be the first time that a Western Samoan Court has been called upon to deal with such a clause in a contract and the kind of question raised in this case, that is, whether given the existence of the arbitration clauses in this case, all disputes arising out of the relevant five management and operations agreements should be referred for determination to arbitration pursuant to the arbitration clauses, and not by way of legal proceedings to the Court for determination.

That is stating the question for determination in broad terms. I agree with counsel for the plaintiff that in order to gain a proper understanding of the question before the Court, reference

should be made to the relevant provisions of the Arbitration Act 1975. Section 5(1) of the Act provides :

> "(1) A submission, unless a contrary intention is "expressed therein, shall be irrevocable, except by "leave of the Court, and shall have the same effect "in all respects as if made on order of the Court".

The word 'submission' as used in that provision has a special meaning in the context of arbitration and is defined in section 2(1) of the Act as follows :

> "'Submission' means a written agreement to submit present "or future differences to arbitration, whether an arbitrator "is named therein or not, or under which any question or "matter is to be decided by one or more persons to be "appointed by the contracting parties or by some person "named in the agreement".

So the arbitration clauses, in the five management and operations agreements between the parties, whereby they have agreed to submit their disputes under those agreements for determination by arbitration, are 'submissions' in terms of section 2(1) of the Act. Section 6 of the Act then goes on to provide :

> "A submission, unless a contrary intention is expressed "therein, shall be deemed to include the provisions "specified in the First Schedule, so far as they are "applicable to the reference under the submission".

Then section 7(1) of the Act which is the most important provision for the purpose of the present proceedings provides :

> "(1) If any party to a submission, or any person claiming "through or under him, commences any legal proceedings in "any Court against any other party to the submission, or "any person claiming through or under him, in respect of "any matter agreed to be referred, any party to those "legal proceedings may, at any time before filing a state- "ment of defence or a notice of intention to defend or taking "any other step in the proceedings, apply to the Court in "which the proceedings were commenced to stay the proceedings; "and that Court may, if satisfied that there is no sufficient "reason why the matter should not be referred in accordance "with the submission, and that the applicant was at the time "when the proceedings were commenced, and still remains, "ready and willing to do all things necessary to the proper "conduct of the arbitration, make an order staying the "proceedings".

It is clear from section 7(1) that where a party brings legal proceedings in Court in respect of a matter he has agreed by contract to refer to arbitration for determination, the other party to the contract or any person claiming through or under him, may apply to the Court where the legal proceedings have been commenced, for an order to stay those proceedings. The applicant for a stay of legal proceedings would say that the party who has commenced legal proceedings in Court has already agreed to refer the matter which is the subject of Court proceedings to arbitration for determination so that legal proceedings are contrary to that agreement. As will be seen, the Courts have generally attached much weight to the fact that there is already an agreement between the parties to refer the issue or the kind of issue before the to

arbitration for resolution or determination.

Where legal proceedings have been commenced in Court, it is usually commenced by filing a statement of claim, but sometimes by filing a motion. The person commencing the proceedings will be the plaintiff. So the party who will be in the position to apply for a stay of proceedings will be the defendant. However, it may be the defendant who commences legal proceedings by filing a counterclaim to the plaintiff's claim. That is what has happened in this case. In that situation, the plaintiff is the person who will be expected to apply for a stay of proceedings if the defendant's counterclaim is concerned with a matter that the parties have agreed should be referred to arbitration for determination. The Court in the proper exercise of its discretionary power will then decide whether to grant or refuse a stay of proceedings.

In the present case, the Court would have to be satisfied that the following conditions have been fulfilled before it decides the question whether the defendant has discharged the burden on it of persuading the Court that it is proper to refuse a stay. The first condition is that the plaintiff as the applicant for an order to stay must not have filed a statement of defence, notice of intention to defend, or taken any other step in the proceedings before it applied for a stay, because if the plaintiff has done so,

that can be fatal to its application for stay : see for instance Dawson v Bondorenko [1976] 2 NZLR 634, 637 and Chappell v North [1981] 2 QB 252. The second condition is that the plaintiff as applicant is still ready and willing to do everything necessary to the proper conduct of arbitration. The two conditions I have just referred to are provided in section 7(1) of the Act. The third condition, which is not provided in section 7(1), is that it must be shown that the counterclaim falls within the scope of the submissions, which in this case are the arbitration clauses in the five relevant management and operations agreements between the parties : see W.C. Thomas and Sons Pty Ltd v Bunge (Australia) Pty Ltd [1975] VR 801, 805 which was cited by counsel for the plaintiff.

When those conditions have been fulfilled, it then becomes for the defendant who has commenced legal proceedings with a counter-claim contrary to the submission, to discharge the burden on it of satisfying the Court that it is proper to refuse a stay. In other words it is for the party who is opposing a motion for stay, to persuade the Court that the legal proceedings should continue and not to be stayed despite the existence of the submissions or arbitration clauses in the agreements. And in considering all these matters the approach to be taken by the Court was stated in this way by Lord Moulton in British Corporation v John Aird & Co [1913] AC 241, 259 where His Lordship said :

"It [the Court] must consider all the circumstances of the "case, but it has to consider them with a strong bias, in "my opinion, in favour of maintaining the special bargain "between the parties....".

This statement of principle was adopted with approval in Metropolitan Tunnell and Public Works v London Electric Railway Co [1926] Ch 371 by Scruttan LJ who went on to say :

"But undoubtedly a guiding principle on one side, and a "very natural and proper one, is that parties who have "made a contract should keep it".

This English approach to the question whether a stay should be granted or refused has been followed in the Australian cases cited by counsel for the plaintiff. These cases include the judgment by Dixon J in the High Court decision in Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 502; the decision of the Full Court of Victoria in W.C. Thomas & Sons Pty Ltd v Bunge (Australia) Pty Ltd [1975] VR 801; and the decision of the Federal Court in Bond Corporation v Thiess Contractors Pty Ltd [1987] 71 ALR 125. In GWJ Blackman & Co SA V. Oliver Davey Glass Co Pty Ltd [1966] VR 570, 574, the Full Court of Victoria after referring to the relevant Victorian statutory provision which is in very similar terms to section 7(1) of our own Arbitration Act 1975, said :

"In form the section throws upon the party to a submission, "who desires that the agreement for a submission should be "enforced, the burden of satisfying the Court that there

"is no sufficient reason why the matter should not be "referred in accordance with the submission. But in apply- "ing this section the Courts have consistently acted on the "view that the parties should be kept to their bargain unless "strong reasons are shown why an action commenced in defiance "of the agreement for a submission should be allowed to "continue. In substance it is the party who is resisting the "application for a stay who has the burden of satisfying the "Court that there are strong grounds for refusing to allow the "dispute to be determined in accordance with the submission".

I respectfully adopt the formulation of principle stated in Blackman's case as more clearly expressing the correct approach to the question whether a stay should be granted or refused. This formulation really follows the statements of principle expressed by Lord Moulton in British Corporation v John Aird & Co [1913] AC 241, 259 and by Scrutton LJ in Metropolitan Tunnell and Public Works v London Electric Railway Co [1926] Ch 371, 389 in the passages already cited in this judgment from those cases.

From what has already been said, it ought to be clear that the mere existence of a submission or an arbitration clause in a contract, does not, without more, mean that any dispute arising under or in connection with the contract should be referred to arbitration for determination, even if the dispute falls with the scope of the submission. There are conditions to be fulfilled, some of them have been mentioned in this judgment; and the party opposing the application to stay must discharge the burden on it of satisfying the Court that legal proceedings should continue in Court and the matter in dispute not to be allowed to be determined

in accordance with the submission. These are matters which require careful consideration on an application to stay.

Having considered all the circumstances in this case, I have decided to further adjourn it. On the information before the Court, there is not enough to satisfy the Court of the conditions to be fulfilled or of the burden on the defendant in this case. I will adjourn these proceedings for counsel to attend to the matters raised in this judgment.

.....
CHIEF JUSTICE