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

**Civil Appeal**
**Case No. 16/2215 CoA/CIVA**

**BETWEEN: ISLENO LEASING COMPANY LIMITED**
Appellant

**AND: AIR VANUATU (OPERATIONS) LIMITED**
Respondent

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| ***Coram:*** | ***Hon. Justice John William von Doussa***<br>***Hon. Justice John Mansfield***<br>***Hon. Justice Oliver Saksak***<br>***Hon. Justice Paul Geoghegan*** |
| ***Counsel:*** | *Robert E. Sugden for the Appellant*<br>*Edward Nalyal for the Respondent* |
| ***Date of Hearing:*** | *11th and 16th day of November, 2016* |
| ***Date of Judgment:*** | *18th day of November, 2016* |

## JUDGMENT

1. This is an appeal from the dismissal of the claim of the appellant (Isleno) against the respondent (AVOL) for VT51,809,325 and for the enforcement of other terms of a Deed of Release (the Deed) signed on 17th October 2011 by persons who purported to be acting for and with the authority of the parties to these proceedings. The Deed was intended to settle a long standing dispute and litigation between the parties over the lease of an aircraft by AVOL from Isleno entered into on 30th September 2009.

2. The dismissal of the claim in the Supreme Court on 7th June 2016 followed a three day trial and was supported by lengthy reasons for judgment delivered by the trial judge. When the appeal came on for hearing the grounds of appeal raised many complaints alleging pleading and procedural errors (including as to the admission of certain evidence) both before and during the trial. The thrust of these complaints is that AVOL was ambushed at trial with issues that were not in the pleadings and that the dismissal of the claim was based on conclusions about issues that were not open.

3. On consideration of these grounds of appeal and the written submissions of the parties it seemed to this Court that Isleno was seeking to rely on fine technicalities that had faded from importance once the trial got underway. The central issue in the case, admittedly differently pleaded from time to time in the course of conference hearings, has always been whether the Deed was

executed by an agent with real or ostensible authority from AVOL and whether Isleno knew or had reason to suspect that AVOL had not authorized the Deed. The fascination of Isleno's counsel with technicalities at conference hearings, and maintained at trial and in the grounds of appeal, seemed to the Court to be diverting attention from the real issue which was whether ultimate conclusions of fact expressed by the trial judge leading to the dismissal of the claim could be supported by the evidence. To assist this Court to understand this issue and to consider the substantial merits of the appeal the Court adjourned the hearing and directed Isleno to file an amended notice of appeal identifying each and every fact and conclusion of fact made by the trial judge which Isleno challenges as being unsupported by the evidence, and AVOL was directed to respond.

4. The amended notice of appeal and AVOL's response have demonstrated, in our opinion, that critical conclusions expressed by the trial judge cannot be upheld. The appeal must therefore be allowed, and regrettably the only outcome open is to direct the re-trial of the claim by another judge in the Supreme Court. As will appear from the reasons we now give for that conclusion it is not possible for this Court to make factual findings that can resolve Isleno's claim.

5. As there must be a re-trial we shall not discuss the evidence on many peripheral issues that might assist at the next trial in determining important questions of fact and credibility. The following very brief outline of the evidence of events leading up to the Deed will be sufficient to explain why the ultimate conclusions of the trial judge cannot stand.

6. There had been ongoing discussions between the parties and the principal shareholders and directors of AVOL about a claim by Isleno for damages arising from the lease of the aircraft. The shareholders of AVOL are representatives of the Government who hold the shares in that capacity. Both sides were expressing a desire to settle the claim. On Friday 14th October 2011 there was a board meeting of AVOL. The trial judge has commented that this is the only event about which there was agreement between the parties at trial. Everything else appeared to be contentious. The trial judge was unnecessarily hampered at trial by the parties not providing a bundle of agreed documents and a chronology, at least in so far as it could be agreed.

7. At that meeting two things happened that were central to the issues canvassed at trial. First, a resolution was passed concerning Isleno's claim. Secondly, the CEO, Mr. Laloyer, who was present at the meeting when it started and when the Isleno resolution was passed was suspended and Mr. Fogarty was appointed as the new CEO. A possible reason for this was discussed in evidence. It was suggested that it related to an Enquiry into an unrelated aircraft incident.

8. Two versions of the minutes of the meeting were tendered in evidence. Whilst the text concerning the discussion and resolution on the Isleno's claim differ neither expressly authorized settlement of the claim on particular terms or the execution of a deed of release. One version of the minutes is unsigned, and another is signed by the chairman of the meeting, Mr. Mariasua. It seems he was removed from that office by the government shareholders of AVOL very soon after the meeting but for present purposes that event need not be explored.

9. The unsigned version of the minutes recorded that:

*"C2. Isleno*
*A brief was given by Mr Laloyer on ISLENO form (sic) the beginning and that ISLENO put a court case to court against Air Vanuatu for a three years contracts been signed.*

*Again this was discussed at length where issues were raised and that different legal firms give their opinions to whether "to win or lose" the cases.*

*This was a resolution being passed in previous minutes and a reminder to Mr Laloyer to write to the two Lawyers of both parties to make a deal for Settlement out of Court" with both parties interest for Board's consideration.*

*Moved by Member Rasu and seconded by Member Arnhambat. Carried."*

The signed version recorded:

*C2. Isleno*
*A brief was given by Mr Laloyer on ISLENO. Isleno has a case against Air Vanuatu in court in regards to a three year contract that was signed by Mr Joseph Laloyer.*

*Again this was discussed at length where the meeting agrees that a resolution has been done in a previous meeting that due to the advise (sic) from State law, the Isleno contract need to be settled out of court in the best interest of Air Vanuatu which was seconded by Pacific lawyers.*

*The meeting resolved that the chief executive officer writes to Lawyers of both parties to agree on a deed of release that will be beneficial to both parties.*

*Moved by Member Rasu and seconded by Member (sic) seconded by Member Arnhambat. Carried unanimously."*

10. Mrs. Barthelemy, the secretary to the board, was present at the meeting. She kept notes as the meeting progressed, and later typed up the minutes. The unsigned copy, it seems clear, was her first draft later given to Mr. Mariasua and that the signed copy is an edited version approved and signed by him.

11. Then followed the execution of the Deed. It bears a type-written date 17th October 2011 (the following Monday). It has been signed by Mr. Fogarty on behalf of AVOL and his signature has been witnessed by Mr. Mariasua. On behalf of Isleno it has been signed by its director Ms. Ngwele and her signature

has been witnessed by Mr. Mata. Her authority to enter the Deed on behalf of Isleno is not in issue.

12. AVOL in its defence pleaded:

*(a) The Deed (as alleged and defined in the claim) was not executed on behalf of AVOL by any person acting with its actual or apparent authority in that:*

*(i) On 14 October 2011 the Board of Directors of the Defendant met and resolved that Mr. Joseph Laloyer, the CEO of the Defendant, write to lawyers for both parties (in Civil Case No. 189 of 2009) to explore settlement;*

*(ii) At no time did the Board of Directors of the Defendant resolve that the Deed be entered into or authorize any person to do so on its behalf;*

*(iii) At no time did the Board of Directors of the Defendant resolve that the Deed be entered into or authorize any person to do so on its behalf;*

*(iv) Before Mr. Laloyer could carry out the task pleaded at paragraph 3(1)(i) above the Board of Air Vanuatu suspended him at the same meeting on 14 October 2011; and*

*(v) At no time did AVOL represent that Mr Peter Fogarty had its actual authority to sign the deed of release and, to the contrary, the majority of the shareholders resolved to move* (sic, remove) *the board chaired by Mr. Yoan Mariasua (including Mr. Fogarty) and replace it with a new board of directors of the defendant and the new board declared that the appointment of Mr. Fogarty as acting CEO of the defendant was null and void and that any decisions of the previous board, including any of Mr. Fogarty, were null and void;*

*(b) The defendant (sic, the claimant) knew, or ought to have known, that Mr. Peter Fogarty did not have the authority of the defendant to execute the deed."*

13. Because of the sudden removal of Mr. Laloyer and the appointment of Mr. Fogarty as CEO AVOL's case put in issue whether Mr. Fogarty was duly appointed to the office of CEO. This issue led to reliance at trial being placed by Isleno on s. 193 of the Companies Act [CAP. 191] in force at the relevant time. The so-called "*in-door management rule*" was also relied upon. Section 193 provided:

*"193. Validity of acts of directors*

*The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."*

14. In our view it should have been plain to counsel for Isleno at the trial that a critical issue was whether Ms. Ngwele knew or ought to have known that Mr. Fogarty did not have the authority of AVOL to execute the Deed. If that state of mind by Ms. Ngwele was established Isleno could not rely on s. 193, the indoor management rule, or on an ostensible authority of Mr. Fogarty.

15. At trial Mr. Fogarty, Ms. Ngwele, Mr. Mariasua, Mr. Laloyer, Mrs. Barthelemy, and Mr. Mata gave evidence (in that order, and Mr. Athy also gave evidence after Mrs. Barthelemy but there is no need for present purposes to refer to his evidence).

16. Mr. Fogarty said he signed the Deed on Monday 17th October 2011 before 8am at the office of Mr. Mariasua. He took advice from Mr. Mariasua about the Deed. He had not seen a copy of the minutes before he signed the Deed. Ms. Ngwele was there. Mr. Fogarty had also signed an employment contract with AVOL at 7.30pm on 14th October 2011 after the board meeting concluded. In cross-examination he agreed he knew Ms. Ngwele's partner very well. The trial judge variously said that he did not find Mr. Fogarty's oral evidence entirely convincing, that he found it very difficult to accept his evidence at face value, and that there was very little about his evidence which is credible.

17. Ms. Ngwele was a director of Isleno. She agreed Mr. Fogarty was a friend of hers and her partner. She was asked how she had come to have confidential AVOL documents including a copy of the signed minutes and a copy of Mr. Forgarty's employment contract. The judgment records:

> "*She told the court she had acquired them from the chairman of the board (Mr. Mariasua). She had seen his letter(s) and she wanted to see 'proof' in the minutes. Her evidence then became somewhat contradictory when she said she could not recall when she was given a copy of the minutes*".

Ms. Ngwele said that the Deed was signed in Mr. Mariasua's office on Monday morning, 17th October 2011. She said she had prepared the Deed with the assistance of two lawyers (and a sworn statement from her supports that this occurred over the weekend of 15th – 16th October although this sworn statement is not referred to in the judgment). The judge said her evidence about her dealings with Mr. Mariasua established that there had been extensive contact between her and Mr. Mariasua over a considerable period prior to the events of 14th to 17th October 2011. He had even sent her confidential company documents dealing with her claim. To this extent the judge says he accepts her evidence but otherwise it is unclear whether the judge accepted her evidence or parts of it after it "*became somewhat contradictory*".

18. The judge starts his discussion of the evidence of Mr. Mariasua by saying he found him to be a most unsatisfactory witness and much of what he said in cross-examination lacked any credibility. Mr. Mariasua in his sworn statement (his evidence in chief) said he chaired the meeting on 14th October 2011, he signed the minutes, and gave a copy to Ms. Ngwele "*... as I was anxious that she be aware that the Board had approved the settling of her case against us*". Much of his cross-examination concerned why Mr. Laloyer had been suspended and replaced by Mr. Fogarty. He also said that he only learned of

the Isleno case at the board meeting which the judge said he found hard to accept as there were various documents that suggested otherwise. He said the Deed was signed in his office, and he directed Mr. Fogarty to do so "*in accordance with the minutes*". He did not consult other directors at the time of signing because there was agreement at the board of directors meeting on 14th October 2011. The judge observed that is completely contrary to what is said in the minutes. The judge considered his evidence to be extremely damaging to Isleno's case.

19. Mrs. Barthelemy gave evidence about preparing the minutes. The judge makes no adverse comments about her credibility. Rather he says he had no reason to doubt her evidence and he had no doubt that the minutes signed by Mr. Mariasua are not a correct copy of what was said at the meeting, and that Mrs. Barthelemy's draft is far more likely to record the truth of what went on at the board meeting.

20. In light of the trial judge's favourable comment about her credit worthiness there is no reason not to accept as fact her account of how the minutes were prepared, although no express finding was made on this topic. Mrs. Barthelemy said she made notes as the meeting progressed. It ended about 7pm on Friday 14th October 2011. She then went home. On Monday morning she went to work after dropping her children at school and delivering a letter elsewhere. She then typed up her notes thus creating the draft minutes which went into evidence as the unsigned minutes. These were prepared for the chairman Mr. Mariasua to sign. However she said he could not sign them as he and the other directors were not in the office that Monday. She therefore emailed Mr. Mariasua a copy of the draft minutes. When she was shown the signed copy she said she did not type them (they were in a different type face and the text had been edited).

21. Mr. Laloyer's evidence concerned events at the board meeting on 14th October 2011. He was cross-examined at length about the Enquiry and his involvement in it. That evidence was directed to the reason for his suspension but for present purposes is not relevant.

22. Mr. Mata gave evidence about his part in the execution of both the Deed and Mr. Fogarty's employment contract. He said he was a witness to a signature on each document. He said he signed them both at the same time, during hours of daylight, about 8.30am on 14th October 2011. He was very definite the signing occurred on 14th October and not Monday 17th October. He said he was asked to sign a document as he was returning to his office. He signed them on the bonnet of his car. He said his signature was the only one on the documents at the time. Ms. Ngwele asked him to sign them as she said the Minister (of Public Utilities) had told her to tell Mr. Mata to do so. He was also asked about observations he made at the Ministry at about that time. The Minister of Public Utilities, was one of the major shareholders in AVOL. The judgment records:

*"He saw several of the Directors of the airline at the time go into the Minister's office. He also saw Ms Ngwele meet with the Minister and sometimes Mr Mariasua would go in with her. This was denied by Ms Ngwele but accepted by Mr Mariasua. He also had a recollection of Ms Ngwele and Mr Fogarty going in to see the Minister."*

23. The judge has not expressed his opinion about the credibility of Mr. Mata's evidence. Mr. Mata's observations about Mr. Mariasua's movements in so far as his evidence suggests the movements were on 17th October 2011 is inconsistent with Ms. Ngwele's evidence. The judge made no findings to resolve the differences between Mr. Mata's evidence and that of other witnesses about where and when the Deed was signed, and the movement of people at the Ministry at that time.

24. On balance it seems that the Deed was signed on the morning of 17th October 2011 at about 8am. When the employment contract was signed is not presently important.

25. Having summarized the evidence of these witnesses the trial judge considered whether Isleno had proved its case or whether AVOL had shown that Isleno could not rely on the ostensible authority of its company officers. The conclusions reached by the trial judge are given in the following paragraphs of the judgment:

    78. *"Having heard the evidence it is necessary to consider whether the Claimant has proved it's case, on the balance of probabilities, or whether the Defendant has shown, also on the balance of probabilities, that the Claimant cannot rely on the ostensible authority of company officers. What is clear from the evidence is that Mr Fogarty did not make any attempt to ascertain the limits of his authority. On his own evidence he says he was temporarily employed to implement the recommendations of the commission of Inquiry. Signed a Deed of Settlement was well beyond that brief. He could have asked to see the Minute but instead he says he relied on the advice of the Chairman. I find it very difficult to accept that he saw nothing wrong in being pressured into signing a legal document which would result in the airline having to pay a very large sum of money in 7 days. He did not check with other directors, he could easily have done so. He did not discuss the financial implications with those who had information about the airlines 'finances, he could easily have done so. He wants this court to accept he just signed what was put in front of him. It is impossible to say he acted in good faith in doing so.*

    79. *Turning to Ms Ngwele, it is clear she had been in contact with the Chairman of the Board, Mr Mariasua, over a many months. The evidence from Mr Mariasua was that he had given her a copy of the Minutes of the meeting of 14th October 2011 before any deed was signed. She ought to have known the Board had not given Mr Fogarty authority to sign any Deed of Settlement. In her own words she wanted to see proof of a decision to settle her claim in the minutes. At the same time she wants this court to accept she did not actually read the Minutes given to her. She accepts in her evidence she was put on inquiry but simply chose to believe there was nothing untoward in the airline suddenly signing a document she had produced and which the airline had declined to sign in the past. It is impossible to accept she acted in good faith. As she acknowledged, given the history of this matter she was on notice to make sure someone who said they*

*had authority to commit the airline to a settlement actually had authority. If she had read the minutes Mr Mariasua says he gave her on the Monday she would have clearly seen no one had authority to settle the case.*

80. *On looking at the evidence given by Mr Mariasua one is left with the distinct impression he had being trying to engineer the signing of the Deed of Settlement for some considerable time. He seems to have tried to do everything he could to remove Mr Laloyer from the picture. He even signed a statement in criminal proceedings saying his CEO had perjured himself and that he should be arrested. He repeatedly asserted in this court that the Board, at the meeting of 14th October 2011, had resolved that the CEO immediately sign a Deed of Settlement even though his own evidence clearly showed that to be untrue. He was evasive and I was left with the distinct impression that he had little regard for the truth. There is absolutely no doubt in my mind that he did not act in good faith. At one stage my concerns were such that I even considered passing the file to the police to ask them to investigate whether there was evidence of criminal behaviour.*

81. *In all the circumstances the Claim must fail.The Defendant airline has shown on the balance of probabilities that all three persons involved in the signing of the settlement had actual notice that what was being proposed was in excess of the powers given by the company to the officers involved.In the words of Browne-Wilkinson L.J" A third party who has notice -actual or constructive - that a transaction, although intra vires the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the company". It would be entirely wrong to allow the Claimant to rely on the indoor management rule in circumstances where, "an over extensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies." The bona fides of the three main protagonists involved in the signing of the document sought to be relied on are damaged. Mr Fogarty and Ms Ngwele were on close personal terms and knew each other well. It is difficult to accept they did not discuss the settlement before signing. Ms Ngwele would have known or ought to have known that Mr Fogarty did not have actual authority to settle her claim. Ms Ngwele had been in constant touch with Mr Mariasua for some many months. He had in the past supplied her with a number of documents about a settlement. He knew or ought to have known that there was no actual authority for a deed to be signed immediately and given the relationship between them it is hard to accept she did not know that as well. The claim is dismissed."*

26. The trial judge considered it was clear that Mr. Fogarty did not make any attempt to ascertain the limits of his authority, and given the circumstances in which he signed the deed, Mr. Fogarty did not act in good faith. The trial judge also found that Mr. Mariasua seemed to have been trying to engineer the signing of the deed for some considerable time and he had not been acting in good faith. The conclusions about the state of mind and behavior of Mr. Fogarty and Mr. Mariasua importantly mean that the officers of AVOL did not have authority to commit AVOL to the Deed. But the fundamental question on which the case turns must be the state of knowledge of Ms. Ngwele. Did she know or have reasons to suspect that Mr. Fogarty and Mr. Mariasua did not have authority to commit AVOL? It is the findings expressed in paragraph 79 of the judgment that are at the centre of Isleno's challenge made to the judgment in

the amended notice of appeal. We consider those findings sentence by sentence.

27. That there had been contact between Mr. Mariasua and Ms. Ngwele over many months was common ground but in our view is at best equivocal as the parties had good reason to be in discussion over the claim. The Prime Minister had written to Ms. Ngwele on 3 May 2011 saying the shareholders in AVOL had considered her correspondence about Isleno's claim and had instructed that AVOL settle the amount of VT41,224,450 owed to Isleno. In exchange Isleno was asked to discontinue legal proceedings against AVOL and the Government. It is not suggested that the Prime Minister was any part of an improper plan to settle Isleno's claim. Given this letter, it is only to be expected that Ms. Ngwele would be contacting officers of AVOL to reach a settlement. That there had been a change in government in the meantime cannot explain away the significance of this letter. How the settlement amount stated in the Deed was arrived at is not canvassed in the evidence, but as Isleno claimed ongoing rental payments for the aircraft it cannot be said that there is no rational basis for the amount stated in the Deed.

28. The next topic concerns Ms. Ngwele's receipt of a copy of the minutes. The finding that she was given a copy of the signed minutes before the Deed was signed is not possible on the evidence of Mrs. Barthelemy. The minutes simply had not been prepared at that stage. Apart from the finding that she had been given a copy of the minutes before the Deed was signed, there is nothing in the evidence that sufficiently supports the conclusion that she ought to have known that the board had not given Mr. Fogarty authority to sign any deed of settlement.

29. Ms. Ngwele did say that she wanted to see proof of a decision to settle her claim. There is evidence that within an extremely short time after the Deed was signed shareholders were challenging the settlement and the Deed. In those circumstances it is hardly surprising that Ms. Ngwele wanted to see evidence of the authority of Mr. Fogarty to execute the Deed. Significantly, in her evidence she said she did not recall when she received the minutes. Clearly on the evidence it must have been well after the Deed was executed.

30. The finding that Ms. Ngwele "*accepts in her evidence that she was put on inquiry*", by implication before she signed the Deed is not supported by anything we can find in her evidence. Counsel for AVOL was unable to identify any basis for this finding other than the statement by Ms. Ngwele that she had asked the chairman for a copy of the minutes as she wanted to see proof that Mr. Fogarty had the necessary authority. As we have observed it is hardly surprising that she took that step after the Deed was being questioned by AVOL shareholders. The finding that Ms. Ngwele accepted that she was put on enquiry before the Deed was signed is a critical finding leading to the dismissal of the claim. In our opinion it is not supported by the evidence.

31. It is also held that Ms. Ngwele simply chose to believe that there was nothing untoward in the airline suddenly signing a document she had produced and which the airline had declined to sign in the past. The evidence is that the document was prepared by Ms. Ngwele and her solicitors over the weekend of 15th and 16th October 2011. There is nothing in the evidence to suggest that the Deed could have been proffered to the airline for execution before 17th October 2011. Although the parties had been seeking to reach a settlement at earlier stages, there is no evidence that terms of settlement similar to those in the Deed had been put to AVOL at an earlier date.

32. The further finding at the end of paragraph 79 that Ms. Ngwele acknowledged that she was on notice to make sure someone who said they had authority to commit the airline to a settlement actually had authority is a reflection of the earlier finding that she was on notice. As we have already said, neither AVOL's counsel nor this Court can find any evidence to support the finding.

33. The ultimate conclusion that Ms. Ngwele was part of a scheme with Mr. Fogarty and Mr. Mariasua to impose the settlement on AVOL, and, by implication, that she was fully aware of the lack of authority of Mr. Fogarty, is dependent on the conclusions in paragraph 79 of the judgment. In our opinion those conclusions cannot be supported. The dismissal of the case must be set aside.

34. Given the uncertainties expressed by the trial judge about the credibility of several central witnesses it is not possible for this Court to make findings of fact on which Isleno's claim could be resolved. Accordingly the matter must be returned to the Supreme Court for re-trial. We consider Isleno must accept a measure of responsibility for the difficulties encountered by the trial judge at trial where procedural issues received undue prominence, and for the time spent on this appeal as the original notice of appeal did not properly identify the real issues. Isleno should not recover its full costs of the appeal. There will be an order that Isleno recover one half of its costs of the appeal assessed on the standard basis. The costs incurred by the parties at the unsuccessful trial will be costs in the cause, to be determined by the trial judge at the conclusion of the next trial.

**DATED at Port Vila, this 18th day of November, 2016.**

**FOR THE COURT**

**Hon. John von DOUSSA**
**Judge.**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU