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

Civil Appeal
Case No. 18/2371 CoA/CIVA

BETWEEN: AIR VANUATU (OPERATIONS) LIMITED
Appellant

AND: ISLENO LEASING COMPANY LIMITED
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Ronald Young
Hon. Justice Richard White
Hon. Justice Oliver A. Saksak
Hon. Justice Viran M. Trief
Hon. Justice William Hastings

Counsel: *Mr G. M. Blake for the Appellant*
Mr R. E. Sugden for the Respondent

MINUTE

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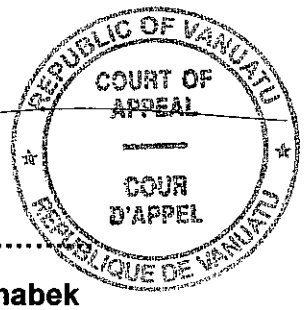
1. On 8 November 2018 this Court heard this appeal. Before the Court released its judgment, the Court received submissions that we should delay the release of our judgment until such time as an associated criminal case was heard.

2. That criminal case has now been heard and judgment given.

3. We therefore now release this Court's judgment.

DATED at Port Vila this 16th day of February, 2024.

FOR THE COURT



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Hon. Chief Justice Vincent Lunabek

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(Civil Appellate Jurisdiction)

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BETWEEN: AIR VANUATU (OPERATIONS) LIMITED
Appellant

AND: ISLENO LEASING COMPANY LIMITED
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru***
Counsel:	*Mr G. M. Blake for the Appellant* *Mr R. E. Sugden for the Respondent*
Date of Hearing:	*Thursday 8th November 2018*
Date of Judgment:	*Monday 29th April 2019*

JUDGMENT

1. The parties have been in litigation since late 2009 over the lease of an aircraft by Air Vanuatu (Operations) Limited (AVL) from Isleno Leasing Company Limited (Isleno). The matter is now before the Court of Appeal for the second time. AVL is seeking to set aside the judgment given in the Supreme Court in favour of Isleno which awarded damages in the order of VT150 million on an interim basis with the prospect of further damages once the aircraft has been inspected.

2. The challenge to the judgment is primarily directed to the way the trial was conducted in the Supreme Court, which AVL contends was unfair and failed to allow it to have the merits of its case fully exposed and explored.

Background

3. The brief background is that on 30th September 2009 AVL entered into a lease agreement with Isleno for the aircraft. Almost immediately AVL disputed the legality and validity of the lease. Isleno sued AVL seeking to enforce the lease.

4. On 17th October 2011 a Deed of Settlement was signed on behalf of AVL and Isleno to resolve those proceedings. Almost immediately AVL asserted that the Deed was not enforceable against it as it had not been authorized by AVL, and was a document "*fabricated*" by people who had conspired to commit AVL to pay money to Isleno.

5. Isleno sued AVL to enforce the Deed. The proceedings came on for trial in April 2016 before Judge Chetwynd resulting in a verdict in favour of AVL dismissing the claim: Isleno Leasing Co. Ltd. v. Air Vanuatu (Operations) Limited [2016] VUSC 75; CC212 of 2011. That judgment was overturned on appeal and the matter returned to the Supreme Court for re-trial: Isleno Leasing Co. Ltd. v Air Vanuatu (Operations) Limited [2016] VUCA 43; Civil Appeal Case 2215 of 2016.

The Retrial

6. At the retrial the court accepted the submission of counsel for Isleno that the issues in the case had become refined by various concessions and by the pleadings, such that there remained only one narrow issue. That issue was raised by the defence namely whether Ms Ngwele, the director of Isleno, knew or ought to have known that the person who signed the Deed on behalf of AVL as "*Acting CEO*" lacked the authority of AVL to do so. The trial judge held that much of the sworn statements placed on file by AVL were no longer relevant and struck them out. The remaining issue was one on which AVL had the onus of proof. Counsel for AVL was invited to go first and presented its case on that issue. No witnesses were called by AVL which relied only on those parts of the sworn statements that remained. Counsel for Isleno said he would call no further evidence. The judge then announced that as AVL had presented no evidence to demonstrate that Ms Ngwele knew or ought to have known that the Deed was not authorized by AVL, judgment would be given in favour of Isleno. That occurred the following day after further particulars of Isleno's loss were provided.

Pre-trial Procedures and Pleadings

7. The progress of the proceedings had been delayed by many conference hearings when pleading issues were discussed, and by amendment of the pleadings. AVL's first defence pleaded that at a board meeting of AVL on 14th October 2011 a few days before the deed was signed the directors resolved that Mr Laloyer, then the CEO, should write to the lawyers for both parties in the civil proceedings then on foot "*to make a deal for settlement out of court with the both parties' interest for the board's consideration*". The directors did not resolve to authorize the Deed which was signed on 17th October 2011 and did not authorize

Mr Fogarty to execute the Deed on behalf of AVL. Before Mr Laloyer could write to the parties, in fact later in the same Board meeting, Mr Laloyer was suspended by the directors as CEO, and the meeting resolved to appoint Mr Fogarty as Acting CEO. AVL pleaded that Mr Fogarty had not been properly appointed to that office, and that later the same day, after the Board meeting was concluded, the shareholders removed the Board of AVL and replaced it with a new board of directors. It was pleaded that Mr Fogarty had no authority to enter into the Deed, and the Deed was therefore null and void and of no effect. Importantly, the defence went on to plead:

"*That Mr Fogarty, Mr Yoan Mariasua, the chairman of the Defendant's Board, the claimant and its agents have and continue to work in concert to take control of the defendant to enable a Deed of Release to be signed enabling the huge payment to be made to the claimant to benefit them to the detriment and the loss of the defendant*".

8. It is convenient to refer to this plea as the conspiracy plea. It is to be noted that the conspiracy was not said to expressly include Ms Ngwele as one of the conspirators, but as the purpose was "*to benefit them*" that is implicit.

9. Isleno sought particulars of the conspiracy plea but none were forthcoming. At a conference hearing following the failure of AVL to give particulars, the court informed AVL that the plea could not remain without particulars, and gave leave to AVL to amend its defence.

10. The defence was ultimately amended to deal with this issue (in the Second Amended Defence). The conspiracy plea was entirely removed. The amended defence then read:

"*3(a)(iv) At no time did AVOL represent that Mr Peter Fogarty had actual authority to sign the Deed of Release and, to the contrary, the majority of the shareholders resolved to remove the Board chaired by Yoan Mariasua (including Mr Fogarty) and replaced 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 claimant knew, or ought to have known that Mr Peter Fogarty did not have the authority of the defendant to execute the Deed.

11. This was the defence on which both trials occurred. In so far as AVL was intending to assert that Mr Fogarty, Mr Mariasua and Ms Ngwele were part of an improper scheme the new paragraph 3(b) must have been intended to embrace that allegation. It was not raised anywhere else in the pleadings.

12. We note that in the first trial there was reference to a "Travelling Minute" dated 14 October 2011 from the Prime Minister recording that the shareholders (being ministers of the government) had resolved to remove four directors of AVL with immediate effect, and had appointed two new directors. The four board members removed were advised of their removal by email from the Prime Minister on the morning of Monday 17 October 2011, and on 18 October 2011 a press release was issued by the new chairman of the board announcing that changes to the board had occurred. It has never been part of AVL's case that the steps taken by the Prime Minister and the shareholders had the effect of removing Mr Fogarty from his appointment as acting CEO before the Deed was signed. The changes in the composition of the board would not remove a CEO from office, and it would have been necessary for the new board to take action to dismiss Mr Fogarty. Mr Fogarty was apparently removed from the CEO position soon thereafter but at best on the evidence before the Court this was after the Deed was signed by him.

13. At the first trial the court held that Ms Ngwele had seen the Minutes of the Board meeting held on 14th October 2011 before the Deed was signed and ought to have known that Mr Fogarty lacked authority to execute it. If she had this knowledge she could not rely on Section 193 of the Companies Act [CAP. 191] which was then in force, or on the "indoor management rule" which is much to the same effect. 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. On appeal, the Court of Appeal held that the finding Ms Ngwele had received the Minutes before the Deed was signed was contrary to the evidence, and the finding that Ms Ngwele knew or ought to have known could not be sustained. Hence the appeal was allowed.

15. Both before and after the first trial Isleno was pressing for particulars of the allegation in the amended defence that Ms Ngwele knew or ought to have known of Mr Fogarty's lack of authority. Several times a judge in conference stressed that AVL was required to give particulars but none were forthcoming. By the time of the second trial the plea that Ms Ngwele knew or ought to have known had been identified by the parties and the court as the only outstanding issue that required resolution by the court. It was not in dispute that the Deed had been signed by Mr Fogarty as acting CEO on behalf of AVL and Isleno had formerly admitted that the AVL Board of Directors did not pass any resolution authorizing Mr Fogarty to sign the Deed.

16. The retrial took place on 31st July 2018. At a conference hearing on 30th June 2018 the lack of particulars was again raised, and the judge pointed out that this was a long outstanding matter. Counsel for Isleno contended that as AVL was making a positive assertion in its plea it had the onus of proving Ms Ngwele's state of knowledge. In his reasons for judgment the judge has noted that it was agreed that as AVL was advancing a positive defence it should present its case first at trial. The notes of counsel for Isleno also record that counsel for AVL accepted that AVL would presents its case first.

17. Immediately prior to the trial, AVL applied to have the claim struck out on the basis that in other unrelated proceedings the Court of Appeal had recently held that Mr Fogarty's employment was null and void as he did not hold a permit to work in Vanuatu. AVL argued that it was therefore immaterial whether Ms Ngwele knew Mr Fogarty had no authority to sign the Deed.

18. The application was dismissed by the trial judge. The judge considered that AVL's submissions overlooked the analysis by the Court of Appeal to the effect that AVL had to establish Mrs Ngwele's state of knowledge to relieve it from the operation of s.193 of the Companies Act and the "indoor management rule". There is no appeal from that decision.

The Trial

19. When the trial commenced AVL sought an adjournment as senior staff of AVL were required elsewhere to attend to an accident investigation. An adjournment was refused as the staff were not intended to be called as witnesses, and in so far as instructions needed to be obtained from them, time would be allowed for this to happen.

20. Counsel for Isleno then made its application to strike out parts of the sworn statements filed by AVL. The judge accepted that the passages in question were not relevant to the state of knowledge of Ms Ngwele. The passages were struck out.

21. AVL was then invited to present its case which it did by presenting the written opening given at the first trial which included the allegation that "*there is a plot, plan or conspiracy by Isleno and its supporters to try and get payment from the defendant ...*". The trial judge disallowed counsel from developing this allegation because it had not been pleaded. Counsel for AVL then said no witnesses would be called and AVL would rely only on the sworn statements on file to the extent that they continued to exist after passages had been struck out. This closed AVL's case.

22. Counsel for Isleno submitted that there was no evidence before the Court to establish that Ms Ngwele knew or should have known of Mr Fogarty's lack of authority, and elected to call no evidence.

23. The trial judge indicated that on this state of the evidence he would give judgment for Isleno. The case was adjourned to the following day to enable a calculation of the quantum of Isleno's claim to be completed and to be considered by AVL. The calculation was presented the next day and agreed to by memorandum. Judgment in favour of Isleno followed.

Grounds of Appeal

24. In this court AVL was represented by counsel who had not previously appeared for it in these proceedings.

25. In the Notice of Appeal many criticisms are made about the legal characterization attributed by the trial judge to events that occurred in the long history of the matter, but none of these criticisms go to undermine the reasoning that led to the judgment against AVL.

26. Attention was drawn to an observation by the trial judge in his reasons that "*there is no evidence at all, apart from suspicion from surrounding circumstances, that Ms Ngwele knew or ought to have known that AVL did not properly execute the Deed*". Counsel argued that there was not only suspicion from the surrounding circumstances, presumably the events which had occurred at the Board meeting on 14th October 2011, but also because the Deed was in no sense a compromise of the earlier civil proceedings. The terms of the Deed reinstated the terms of the original contract of lease for the airplane which AVL had been disputing as wholly unreasonable. The commercial unreality of the lease and then the Deed reinstating it should, at the least, have put Ms Ngwele on notice. The difficulty with this argument is the very difficulty which the whole presentation of AVL case faces, namely that this proposition was not raised in the pleadings and therefore was not an issue before the trial court.

27. The real thrust of the appeal is set out in ground 18 of the Notice of Appeal which reads:

> "*18. Generally, the Appellant also contends that the Honourable Judge conducted the trial in a manner that was unfair and oppressive to the Appellant and its counsel and demonstrated a degree of partiality and predetermination of the issues without a detailed consideration of the evidence before the Court: -*
>
> *a) What had proceeded as a three-day trial before Judge Chetwynd was reduced to one hour 20 minutes coupled with a sense of undue haste to conclude the trial and*

shortly after the closing of the Appellant's case announcing that judgment was being granted to the Respondent on its claim without hearing from counsel for the respondent;

b) *Proceeding on the basis that the appellant's counsel had purportedly agreed in conference that the appellant should present its case first at trial, when that had not been agreed by the appellant's counsel;*

c) *Not giving due consideration to the implications of striking out large parts of the appellant's evidence without the consideration of the relevance of that evidence to the issues before the court and the absence of affected witnesses such as Mr Mata;*

d) *Denying counsel for the appellant the opportunity to cross examine the respondent's witnesses relied upon by the respondent;*

e) *Not having before the court at trial all of the statement evidence in the case or copies of applications filed and pressed;*

f) *Considering the evidence before the court in a selective manner without due consideration of the whole;*

g) *Stating to counsel for the appellant that "you do not have a case";*

h) *Conducting the trial in a manner which required the appellant to go first with its evidence and then denying the appellant the opportunity to cross examine the respondent's witnesses;*

i) *Treating counsel for the appellant in a manner which to his mind bullied him into silence and left him intimidated by what counsel perceived was a predetermination by the Honourable Judge of the case coupled with his unwillingness to hear and consider what the appellant's counsel had to say*".

28. Counsel argued that for these reasons the manner in which the trial was conducted was unfair, was highly prejudicial to the interests of AVL, and has led to a miscarriage of justice. AVL seeks to have the judgment set aside and the matter remitted to the Supreme Court for yet another trial.

29. We shall deal with each of the paragraphs set out above in ground 18.

30. Paragraph (a): It is true that the second trial was completed in a short time, but that does not indicate unfairness, oppression, or partiality. What occurred reflected no more than an assessment of the merits of each point as it arose in the logical presentation of the proceedings before the Court. The question of relevance of parts of the sworn statements had been foreshadowed before trial so that both the court and counsel had time to consider how an application to strike out those parts of the evidence should be dealt with. The first trial had been a long one in large part because the real issues that needed to be determined had not been refined. Much of the evidence led had gone to the events

surrounding the Board meeting on 14th October 2011, to the preparation and accuracy of the minutes, and to the lack of authority for Mr Fogarty to enter into the Deed. None of these matters were in issue at the retrial. Mr Fogarty's absence of authority was now formally admitted.

31. The reasons for judgment in the first trial indicate that the importance of the question whether Ms Ngwele knew or ought to have known of Mr Fogarty's lack of authority had not at first been fully understood, and the difficulties caused by the lack of particulars to that plea in the defence were not sufficiently appreciated. Evidence was led that ranged widely over many matters not all of which were directly relevant. By the time of the retrial, matters had been clarified partly by the reasons of the Court of Appeal and partly by further discussions with the parties in conference. At the retrial the judge did no more than keep the parties focused on the one issue that had to be decided.

32. The ruling made to disallow development of the allegation of "*plot, plan or conspiracy*" was entirely predictable and correct. That allegation had been made in the first defence filed as long ago as 25th November 2011. It was removed as a ground of defence on 11th May 2015 after repeated failures by AVL to give any particulars of the conspiracy plea. The requirement that particulars be given when a serious allegation such as fraud or conspiracy is made is essential to avoid unfairness and prejudice to the party who is called upon to answer the allegation. Not only had AVL not given particulars of a "*plot, plan or conspiracy*", it had actually withdrawn that very allegation from the proceedings years before. It would have been extremely unfair and oppressive to Isleno had the judge allowed the development of the allegation put forward in the written opening.

33. The procedure adopted by the judge had the effect, no doubt intended, of confining AVL's case to the only issue which the court was required by the pleadings to decide.

34. Paragraph (b) challenges the procedure adopted which required AVL's counsel to go first in presenting evidence. As the only issue for determination was AVL's assertion that Ms Ngwele knew or ought to have known of Mr Fogarty's lack of authority, AVL plainly had the onus of proof on that question. Unless and until evidence was led by AVL, Isleno could not in fairness, be expected to lead any evidence in answer. Moreover, the procedure adopted seems to have been agreed by AVL's counsel at a conference hearing on 13th June 2018. That this course would be followed was therefore forewarned.

35. Paragraph (c) alleges that the judge did not give due consideration to the implications of striking out large parts of AVL's sworn statements. That allegation cannot be sustained and reflects a misunderstanding by AVL of the court process. Pleadings are required to identify issues which the court must decide.

and the identification of those issues determines what evidence is relevant and therefore admissible at trial. If evidence is inadmissible it should not be received. Here the parts of sworn statements that were struck out did not go to the state of Ms Ngwele's knowledge.

36. It is difficult to understand how any of the evidence that was struck out could have established a plot, plan or conspiracy even if it had not been struck out. Possibly it could have become relevant to such a plea if supported by much more evidence from other sources which, when taken with it, could give rise to such an inference. But there was no other evidence to give that colour to that which was struck out. Also it could be possible that proof of such a plot, plan or conspiracy could demonstrate the state of Ms Ngwele's knowledge. But if that was the circuitous chain of proof that AVL wanted to pursue, it already had the benefit of a wide ranging, largely uncontrolled, opportunity to explore the so-called plot, plan or conspiracy at the first trial, and presumably had done so. If there was credible evidence supportive of a plot, plan or conspiracy, by the time of the retrial particulars showing how the many strands of the proposed evidence could together lead to prove it could and should have been given. Absent any plea of a plot, plan or conspiracy, and absent any particulars at all of the pleading in the defence, the judge was entirely correct to rule that the evidence was irrelevant and should be struck out. The judge would have been entitled by the time of the retrial to have ordered that the plea about Ms Ngwele's knowledge be struck out in its entirety because no particulars had been given but he did not go that further step.

37. Paragraphs (d) and (h) complain that the procedure adopted unfairly denied AVL the opportunity to cross-examine Isleno's witnesses. Again this allegation misunderstands the trial process. Cross-examination is allowed of witnesses who are called to give evidence. In this case, there was no need for Isleno to call any witnesses on this sole topic for decision as AVL had led no evidence to suggest that Ms Ngwele knew or ought to have known of Mr Fogarty's lack of authority. In so far as AVL was seeking to cross-examine Isleno's witnesses hoping to gain something to support its case that would have been a blatant "fishing expedition" which should not be allowed as it is unfair. Moreover in this case there could be no point to a fishing expedition as AVL had the opportunity to cross-examine Isleno's witnesses at the first trial and could draw on that evidence to frame particulars if information elicited from the witnesses could support a defence.

38. Paragraph (e) simply refers to an administrative error that resulted in papers not being immediately available to the judge. The papers were available elsewhere and in so far as they needed to be consulted, they could be at a different time, or could have been supplied by AVL.

39. Paragraph (f) is misconceived. The judge plainly gave consideration to the whole case. He did so by considering what issues were in question and which were not, and then concentrating on those that were.

40. Paragraph (g). If the judge said to counsel for AVL that "*you do not have a case*" that comment would have been justified, and was not inappropriate as it ensured that counsel understood the state of AVL's case. Once counsel announced no further evidence will be called, the alleged comment merely reflected the situation.

41. Finally in paragraph (i) it is alleged that the judge bullied counsel. It is most regrettable if counsel considers that this was so. The course of events which occurred both in conference before trial and at the trial indicates no more than a judge firmly keeping the parties properly focused on the issue that needed attention and to ensure that the case progressed without unwarranted delay. This was a very old case that was in urgent need of tight control and an early resolution.

42. It is plain that at times things were not going AVL's way as the trial progressed, but in our view that is a reflection on the lack of merits in AVL's pleaded case, not personally on counsel.

43. We have dealt with the grounds of appeal advanced on behalf of AVL. In our opinion no basis has been shown to support the allegation that there has been a miscarriage of justice, and we consider there is no basis disclosed by the grounds of appeal that would justify interfering with the judgment in the court below.

44. In the course of argument a possible new issue in the case was suggested. It was an issue that has never been raised at any stage in the proceedings. The issue is whether, where s.109 of the former Companies Act, or the indoor management rule, is relied on, the party raising that point must also lead evidence to show that the director or manager whose conduct is in question, has been held out by the company as having the authority which he or she purported to exercise. On reflection, we do not consider that the point would have had merit had it to be raised as an issue in the proceedings, but in any event, it cannot be open to a party to raise a new issue of this kind so late in the proceedings. To allow a party to raise an issue that would require evidence at trial at such a late stage in the case would seriously undermine the whole judicial process.

45. We think the point is without substance as in this case the proceedings have been conducted throughout on the basis that on 14th October 2011 AVL had appointed Mr Fogarty to fill the office of CEO, that he had done so until his appointment was cancelled, and that it was during this time that the Deed was signed. Where a manager or director is put forward by a company as holding that

appointment, the appointment attracts the operation of s.193 of the Companies Act without more. No additional evidence that the company held that person out as authorized to act on its behalf is necessary. Evidence showing that a person who is held out as a manager or a director would be necessary only where the putative director or manager did not hold the appointment to that position at the time, and the other party would therefore have to establish that the person was being held out as having the ostensible authority to act as an agent of the company. That is not this case.

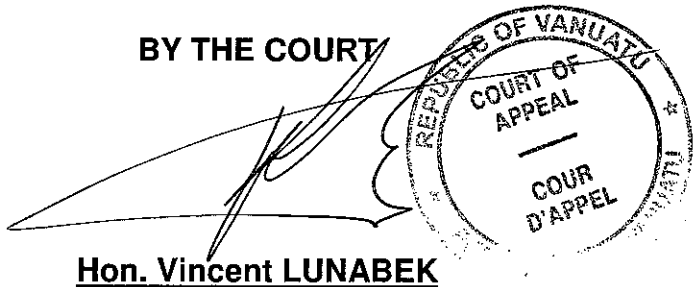
46. We consider that the appeal must be dismissed. The orders of the court are:

(a) Appeal dismissed;

(b) The appellant to pay the respondent's costs to the appeal on the standard basis;

DATED at Port Vila, this 29th day of April, 2019.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.