IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 001 of 2019

[High Court Civil Case No. HBC 17 of 2015]

BETWEEN : AEROLINK AIR SERVICES PTY LTD

Appelant

AND : AIRPORTS FIJI LTD

Respondent

Coram : Dr. Almeida Guneratne, P.
: Jitoko, VP
: Basnayake, JA

Counsel : Mr C. B. Young for the Appellant
: Mr F. Haniff for the Respondent

Date of Hearing : 5 May 2023

Date of Judgment : 26 May 2023

JUDGMENT

Almeida Guneratne, P

[1] Having read my brother, Justice Jitoko's judgment in draft, I have nothing to add to it and agree in its entirety.

Jitoko, VP

Factual Background

[2] Airports Fiji Limited, the Respondent, is a Fiji Government commercial company established under the Public Enterprises Act 1996, and is duly incorporated under the Companies Act Cap. 247. Its registered office is at Namaka, Nadi. It is the Respondent in these proceedings.

[3] Aerolink Air Services Pty Limited, is a foreign-owned limited liability company, specialising in Charter aircraft services and operates out of Bankstown airport, Australia 2200. It is the Appellant in these proceedings.

[4] By Originating Summons dated 3 February, 2015, filed in the Lautoka High Court, the Respondent sought an order of the Court to sell an aircraft, an Embraer Bandeirante EMB110, owned by the Appellant, to recover outstanding parking fees allegedly owed by the Appellant for the aircraft parked at specific locations at the airport in Nadi, since 1 January 2007. The reliefs sought by the Respondent, included:

> *(i) "outstanding parking fees amounting to FJD$77,280.00 incurred from 1 January 2007 to 31 August 2014;*
>
> *(ii) parking fees currently accruing from 1 September, 2014;*
>
> *(iii) any tax or duty owing to the Government of Fiji…."*

[5] Such costs, including legal fees and court costs, were to be deducted from the sale price of the aircraft.

[6] As the Appellant was a foreign-owned company with office in Australia, application for leave and service of the court documents out of jurisdiction were made and obtained on 13 March 2015.

[7] On 23 September, 2015, the Appellant pursuant to Order 28 R 8 of the High Court Rules, filed Notice of Counterclaim alleging negligence by the Respondent in relocating and re-parking the aircraft at its premises, without due care and in any case, the Respondent did not having any legal authority to detain the aircraft because it did not have the powers to levy parking charges.

[8] The special damages suffered by the Appellant for the breach of duty and negligent actions through its servants and/or agents are:

> *"(i) US$100,000.00 for each engine and US$70,000.00 for airframe damage.*
>
> *(ii) US$60,000.00 for nose gear assembly.*
>
> *(iii) US$10,000.00 for labour and transport cost for disassembling the Aircraft engine parts for repairs to Australia.*
>
> *(iv) US$50,000.00 for new radar.*
>
> *(v) US$10,000.00 for sending the parts back after its repairs and installation.*
>
> *(vi) US$5,000.00 for hiring a hangar to house the Aircraft until the reinstallation and other incidentals."*

[9] The Appellant in addition claimed:

- *Loss and Damages including loss of chance*
- *Exemplary Damages*
- *Cost*

[10] The Respondent in its Defence to the Notice of Counter-Claim, refuted each and every allegation of fact made by the Appellant.

[11] On 25 January 2016, at the Summons for Direction hearing, the Court ordered the Respondent to file its Statement of Defence to the Notice to Counter-Claim and each party simultaneously, serve each other their list of documents and Affidavit Verifying.

[12] On 15 September, 2016, the High Court per R S S Sapuvida J heard the Respondent's specific application to sell the Appellant's aircraft. The Court declined the application understandably given that there were disputes on the facts that would have justified the seizure and sale of the aircraft.

[13] The hearing of the substantive matter was heard before Nanayakkara J on January 24th and 25th July 2018. In his judgment handed down on 30 November 2018, His Lordship dismissed the Respondent/Plaintiff's claim and further:

> *"(ii) The Plaintiff is ordered to release the aircraft, 'Embraer Bandeiratne EMB110' to the defendant within 07 days from the dated of this Judgment.*
>
> *(iii) The defendant's counter-claim for damages is dismissed…*
>
> *(iv) As claim and counter-claim have both failed, each party will bear in own costs."*

Grounds of Appeal by the Appellant

[14] The Appellant is seeking that the Orders (iii) and (iv) above be set aside and instead judgment in its favour be entered against the Respondent for:

> *(i) special damages,*
>
> *(ii) loss and damages including loss of chance,*
>
> *(iii) costs and specifically, for:*
>
> *(a) assess special damages, loss and damages including lost of chance and cost based on the evidence and oral submission recorded in the transcript of evidence and the written submissions filed by the parties in the High Court, or*
>
> *(b) alternatively refer the case back to the High Court to make such assessment on the evidence aforesaid."*

[15] The specific grounds of appeal are as follows:

> *"1. The learned Judge erred in law in not awarding any special damages, loss and damages including loss of chance and cost of the action when his Lordship held that the Appellant's aircraft was unlawfully detained by the Respondent.*
>
> *2. The learned Judge erred in law in concluding (at paragraph 9(iv) and (v) of his judgment) that the Appellant had not pleaded a cause of action in the tort of conversion when sufficient the facts to support such a cause was pleaded in the Appellant's Notice of Counter-Claim and was proved by the evidence at trial.*
>
> *3. The learned Judge erred in law in concluding (at paragraph 9(vi) of his judgment) that "an essential requirement of an action in detention" was not satisfied as there was no formal demand for the return of the aircraft when there was sufficient evidence at trial that the Respondent was not releasing the aircraft unless the Appellant paid fees unlawfully imposed and indicated by its conduct that it would not release the aircraft to the Appellant unless the Appellant paid the Respondent the fees it had unlawfully imposed on the Appellant.*
>
> *4. The learned Judge erred in law in concluding that the Appellant was obligated to and had failed to cross-examine the Respondent's witness Mr. Anu Patel (as per para.14(iv)-(vii); para. 15(iii)-(vii) and para. 16(iii) and (iv) of the judgment) when there was no such obligation. The learned judge failed to appreciate that the Appellant was to be treated as a Plaintiff for the purpose of its notice of Counter-Claim had called evidence in support of the same and the Respondent as Defendant pursuant to the notice of Counter-Claim having reserved its right to call rebuttal (see page 6 of Transcript) evidence elected not to do so and was in any event bound to do so as a Defendant would have been.*
>
> *5. The learned Judge erred in law in rejecting Mr. Miller's evidence on the grounds that he was "a non-expert witness expressing "an oral expert opinion"(as per paragraph 17 of the judgement) when in fact Mr Miller was entitled to express his opinion based on his qualification and experience even though he was not called as an expert witness.*
>
> *6. The learned Judge erred in law and in fact in refusing to hold that the Respondent had left the aircraft exposed to adverse weather conditions (as per paragraph 18 of the judgment) when the evidence established that Cyclone Evan struck Nadi Airport from on or about 16 December 2012 and the Respondent's own witness Mr. Anu Patel (see pages 41, 42, 58 and 59 of the Transcript) stated (inter-alia) that it would have been reasonable for the Respondent to have tied down the propeller and cover the aircraft with a tarpaulin and also when there was the unchallenged evidence of Mr.*

Miller (see pages 99 to 101 of the Transcript) on the type of care that ought to have been reasonably undertaken of the aircraft, which the Respondent had failed to take, resulting in the Respondent's negligence.

7. *The learned Judge erred in law (at paragraph 19(xiii) of the judgment) in holding that "There was no notice in para 6 of the 'Notice of Counter-Claim alleging that: (i) the plaintiff negligently allowed the ailerons and the rudder to slam back and forth in the high wind by not restraining the control locks (ii) the plaintiff negligently allowed the engine to rotate at high wind (affecting the integrity of the oil and fuel lubricated components of the engine) by not restraining the propeller." When the particulars of negligence pleaded in the Appellant's Notice of Counter-Claim stated:*

   (i) *The Plaintiff servant or agent who towed and parked the Aircraft was not experienced or trained or qualified to do so.*

   (ii) *The Plaintiff's servants or agents failed or neglected to properly secure and restrain the propellers of the Aircraft after it was towed and parked.*

8. *That the Orders of the learned Judge in paragraph (E) (iii) and (iv) of the judgment are not supported by the facts or the law.*

Respondent's Counter-Appeal

[16] For its part, the Respondent filed, in its Respondent's Notice to the Appellant's appeal, an application to vary Nanayakkara J's judgment on the grounds that:

"1. The Learned Judge erred in law in holding that the Appellant had no mandate to charge parking fees prior to 8 January 2010 by failing to apply the transitional provisions of the Public Enterprise Act, 1996 and the Civil Aviation Reform Act, 1999.

2. The Learned Judge erred in law in holding that the Civil Aviation of Fiji Act 1979 Airport (Fees) (Amendment) Regulations, 1993 was repealed after the passing into law of the Civil Aviation Reform Act, 1999.

3. The Learned Judge erred in law in holding that Section 29 of the Civil Aviation Authority of Fiji Act, 1979 – which conferred on the Authority a regulation making power to prescribe fees for airport services – had been repealed.

4. The Learned Judge erred by not reading into Section 13 (1) of the Civil Aviation Reform Act, 1999 the words or in respect of which a default has

occurred in payment of any fees levied under Section 29 of the Civil Aviation Authority of Fiji Act 1979" and into Section 13(3), "(a) or for unpaid levies under Section 29 of the Civil Aviation of Fiji Act, 1999"to make the detention and sale of any aircraft provisions of the Civil Aviation Reform Act, 1999 work as Parliament had intended.

5. *The Learned Judge erred in law by holding that the Respondent was not required to pay airport parking charges despite parking its aircraft at the Nadi International Airport since 2007 and continuing to park its aircraft at the airport without paying airport charges.*

6. *The Learned Judge erred in law in holding that the Appellant as the operator of the airport had a general duty of care for aircrafts parked at the airport on the basis that the aircraft was in actual possession of the Appellant despite the evidence being that the Respondent had parked its aircraft at the airport since 2007.*

7. *The Respondent reserves the right to amend/add new grounds to the Respondent's Notice."*

[17] In addition, the Respondent sought to set aside the Court's Orders to dismiss the Respondent's Claim and in its place Order:

"1. That the aircraft Embraer Bandeirante EMB110 be sold by Respondent to recover the outstanding parking fees owed by the Appellant amounting to FJD $77,280.00 and further accrued parking fees, without any reserve price:

2. *That all costs including:*
   - *(i) outstanding parking fees amounting to FJD$77,280.00 incurred from 1 January 2007 to 31 August 2014;*
   - *(ii) parking fees currently accruing from 1 September 2014;*
   - *(iii) any tax or duty owing to the Government of Fiji;*

   be deducted from the sale price of the Aircraft Embraer Bandeirante EMB110; and or alternatively;

3. *The Appellant pay outstanding parking fees amounting to FJD$77,280.00 incurred from 1 January 2007 to 31 August 2014 and parking fees currently accruing from 1 September 2014;*

4. *Such further and/or other relief as to this Honourable Court may deem just."*

Crown Lease 3469

[18] It is important that the Court firstly, clarify the nature and purpose of the lease in question.

[19] Nadi Airport is comprised in Crown Lease 3469 (CL 3469), all that piece of land being described as Lots 1, 2, 3, and 4 or land known as ND4444 in the Tikina of Nadi, Province of Ba, with a total area of 1197 acres Or. 02 perches.

[20] CL 3469 was initially issued for a term of 99 years commencing on 1st April 1961 to the New Zealand Government Property Corporation as the administering authority for the South Pacific Air Transport Council (SPATC), a regional body established in 1946 to provide air traffic control, communications and meteorological services with the South West Pacific area.

[21] On 8 January, 2010 the balance of the lease was transferred to Airports Fiji Limited, subject to some sixteen (16) sub-leases, granted by the previous lessee.

[22] The lease is subject to covenants and conditions inter alia, the following relevant to these proceedings:

> *"1. The lessee shall not transfer, sublet mortgage, assign or part with the possession of the demised land of any part thereof without the written consent of the lessor first had and obtained, provided that such consent shall not be unreasonably withheld.*
>
> *2. The lessee shall maintain and operate on the land on aerodrome for international, regional and internal air services.*
>
> *3. The lessee shall not without the consent in writing of the lessor use the land for any purpose other than –*
>
> *(a) The construction, maintenance, and operation of an aerodrome; and any purpose directly connected with the efficient operation, management and maintenance of the aerodrome;*
> *(b) ……."*
>
> *4. The lessee shall not without the consent in writing of the lessor erect, use or occupy or suffer to be erected, used or occupied any building or structure other than a building, or structure required for the efficient operation and maintenance of an international airport or for auxiliary and ancillary service connected with the airport and aircraft passengers."*

[23] On or around the beginning of 2007, the subject-matter of these proceedings, the Embraer Bandeirante aircraft belonging to the Appellant, stopped being used by a local airline, Sun Air and came to be parked at a locality within the aerodrome, whilst a court action, presumably over it, was being heard between the Appellant and Sun Air.

[24] It is not disputed that the aircraft, since it was parked at the beginning of 2005, when a particular locality of the airport, had not been moved.

[25] From the evidence produced before the court, there were no immediate action or actions on the part of the Respondent to at least notify the Appellant of the possible parking fees that will accrue should the aircraft continue to remain parked on the airport for any period of time. In any case, it was not the responsibility of the Respondent, or any airport operator for that matter, to inform the user of the facilities that it was liable to pay fees, as it is presumed that any or all users of the services provided by the airport operator, are expected to pay for them.

[26] In a demand letter dated 10 May 2012 sent to David Patrick Ryan, the Appellant Company Director, the General Manager of the Respondent, Lawrence Liew, informed the Appellant that firstly, there was an increase in the volume of aircraft activities at Nadi Airport, and the Appellant's parked aircraft was *"an obstruction"* and it requested David Patrick Ryan *"as the owner and/or person responsible for the aircraft to make arrangements to have the aircraft removed."* The Appellant was given 10 working days to advise the Respondent how it intended to remove the aircraft and failure to do so by 25 May 2012, would result in the aircraft being towed away.

[27] Secondly, the Respondent informed the Appellant, that "since January 2012, AFL has the mandate to charge parking fees on the aerodrome, *"informing the latter that the outstanding parking fees owed to the Respondent stood at $42,048.00 and growing."*

[28] In a facsimile letter dated 15 September 2014, addressed to Mr Faiz Khan, Chairman of the Respondent, Mr Danny Ryan referred to one earlier discussion of May 2012 he had with Lawrence Liew, in which he was first made aware of parking charges. He also

informed Mr Liew that the aircraft was under control of Mr. Don Collingwood of Sun Air and that any invoice on parking charges were to be given to Mr Collingwood.

[29] In his affidavit dated 1 September 2015, David Patrick Ryan stated that the Appellant had not received any invoice for the parking fees incurred by the aircraft, although in the same affidavit, alluded to a letter sent to the Respondent by his solicitor dated 12 December 2014. The content of this letter is unknown to the Court.

[30] It was also in the same affidavit that the Appellant, raised the issue of parking fees even although he had been made aware of it a year earlier in his letter at paragraph 29 above. He added that, that according to information he had gathered from reliable sources, the Respondent did not charge for parking fees for aircraft under 10 tonne. At the same time, Mr Ryan questioned the Respondent's legal authority in charging for aircraft parking fees, firstly under the terms of the lease agreement with the Government of Fiji, and second, whether the relevant laws and regulations did allow the Respondent to levy such charges or fees.

[31] The Court will address each of these issues in turn.

Was The Respondent Legally Entitled to Charge For Parking Fees

[32] This is at the heart of the issue of the liability or otherwise of the Respondent for some heads of damages claimed by the Appellant. Was it permissible under the lease for the Respondent to charge parking fees for airplanes using the airfield?

[33] In the Court below, the Appellant submitted that the Respondent was in breach of the State Lands Act 1945 and specifically Section 13 (1) thereof, that it being a protected lease,

> *"….it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof whether by sale, transfer or sublease or in any other manner whatsoever, without the written consent of the Director of Lands.*
> *Any sale transfer, sublease, assignment, or other alienation or dealing effected without such consent shall be null and void."*

[34] This prohibition is reflected in clause 1 of CL 3469 and detailed in Clauses 3 and 4 following.

[35] The Appellant's contention before the High Court was that the imposition of the parking charges on the aircraft, is tantamount to a *"dealing"* in the land to which the consent of the Director of Lands was required. Since it had not been obtained, then the dealing is null and void as provided under the provision of Section 13 of the Act.

[36] Counsel for the Respondent argued that the lease was for a specific purpose that is, for the maintenance of an airport to serve the country, the region and the international community and that the levy of parking charges on airplane, was part and parcel of *"auxiliary and ancillary services connected with the airport and aircraft passengers"* (Clause 4 of CL 3469)

[37] The case of **Singh's Shopping Ltd v Labasa Town Council** [2013] FJHC 586 cited in support of the application of the blanket consent for land use which are directly connected to the primary purpose of the lease is only helpful to that extent, given that the relevant clause of the lease in the case, did specifically provide for other permissible uses of the land.

[38] The High Court per Nanayakkara J, in this case had carefully examined, what in his Lordship's view, is the proper interpretation to be accorded to Section 13 of the State Lands Act as reflected in Clauses 1, 3 and 4 of CL3469. At paragraph (3) (ix) of his judgment he concluded:

> *"(ix) Therefore, I do not agree with the defendants' ground that "any demand for payment by the plaintiff for the parking charges is illegal, void and unenforceable." The argument of the defendant in that respect appears to be manifestly groundless."*

[39] I have no hesitation in arriving at the same conclusion reached by Nanayakkara J, that the Respondent as lessee of CL 3469, is perfectly entitled to levy parking charges or fees on aircrafts that are on the ground at the Nadi Airport. Such action is, in my view, in

furtherance of the primary purpose of the lease for the provision and maintenance of *"an aerodrome for international, regional and internal air services."*

[40] The levying of fees or charges on parked aeroplanes at the airport, are activities that are appurtenant to the provision for the *"efficient operation and maintenance of an international airport."*

The Legislative and/or Regulatory Basis for Charging Parking Fees

[41] The Appellant submits that even if the Respondent was allowed to charge parking fees under the lease, it could not do so without first obtaining the approval of the Commerce Commission under the Commerce Commission Decree 2010.

[42] The law in this area prior to the 2010 Decree, was governed by the Commerce Act 1998 whose objective was to Promote Competition in Markets, *"while exercising price control under the Commerce Commission."*

[43] Part 5 of the Act and specifically Section 31 of the Act, on the interpretation states:

> *"31. In this Part, unless the contrary intention appears……*
>
> *"controlled goods or services "means goods or services in respect of which an order is for the time being in force;*
>
> *"order" means an order made under Section 32"*

[44] Section 32 allows the Minister to impose price control in circumstances of restricted competition as follows:

> *"32 – (1) The Minister may, on a recommendation of the Commission, by Order declare that the prices for goods or services specified in the order are controlled in accordance with this part."*

[45] Section 34 is the penal provision for a person supplying goods and services that are not in accordance with the authorised price:

"34 – (1) A person must not supply any controlled goods or services unless a price for those goods and services have been authorised by the Commission and the goods or services are supplied in accordance with the authorisation.

Penalty: $50,000.00

(2) Any provision of a contract, and any covenant, in contravention of subsection (1) is unenforceable."

[46] The 1998 Act was succeeded by the Commerce Commission Decree 2010. As correctly noted by the Court, both Sections 31 and 34 are reproduced in the 2010 Decree under Section 39 and 41 respectively. In addition, Section 44 (1) of the Decree provides that:

"44 – (1) The Commission may, with the approval of the Minister, by order, fix and declare the maximum price or charges by any person (including the State) in the course of business for the sale of goods or the performance of services either generally or in specified part of or place in Fiji."

[47] The High Court accepted the Appellant's submission that the authority of the Respondent to impose parking fees as permitted under the Airport (Fees) (Amendment) Regulation 1993 and authorised under Section 29 (a) (b) and (d) of the Civil Aviation Act 1979 had been superseded and/or repealed by Section 33 of the Civil Aviation Reform Act 1999.

[48] Furthermore, the Respondent had failed to satisfy Section 12 of the 1999 Act, in not determining the parking fees to be imposed. Under it, the Respondent is required to, after determining the parking fees, publish it in the Gazette. This has never been done.

[49] With respect, this Court is of the view that the conclusions reached by the High Court is a mistaken application of the relevant provisions of the Regulations.

[50] The enabling provisions for the exercise of the powers to prescribe parking fees is found in Section 29 (a) of the Civil Aviation Authority of Fiji Act 1979 that states:

"29. The Authority may, with the approval of the Minister, by regulation prescribe-

(a) the fees payable in connection with the issue validation, renewal, extension or variation of any certificate, licence or other document (including the issue of a copy thereof) or the undergoing of any examination, test inspection or investigation or the grant of any permission or approval for

which the Authority has been made responsible under this Act or any other written law"

[51] The applicable Regulations promulgated under Section 29 (a) setting out the *"Period of parking and rate"* appears under the Airport (Fees) (Amendment) Regulations 1993 (Legal Notice No. 53)

[52] It is the submission of the Appellant which found favour in the High Court, that the enabling provisions to prescribe fees under Section 29 (a) of the Civil Aviation Authority of Fiji Act 1979 having being repealed by Section 33 of the Civil Aviation Reform Act 1999, the Respondent no longer had any powers to impose any fees under the Airport (Fees) (Amendment) Regulations 1993.

[53] On the contrary, as submitted by Counsel for the Respondent, Section 29 of the Act has only been amended, and not as the High Court assumed, repealed. The regulatory making powers of the Respondent therefore remains as applicable law. In particular under Section 33 of the Civil Aviation Reform Act 1999 (No. 16 of 1999) the amendment reads:

"[29] The Authority may, with the approval of the Minister, by regulation prescribe-

(a) [repealed]

(b) [repealed]

(c) the fees payable in connection with the issue, validation, renewal, extension or variation of any certificate, licence or other document (including the issue of a Copy thereof) or the undergoing of any examination, test inspection or investigation or the grant of any permission or approval for which the Authority has been made responsible under this Act or any written law;

(d) [repealed]

(e) the fees payable to the Authority for any other service provided in the discharge of its functions under this Act."

[54] Section 29 was further amended by the Civil Aviation Authority (Amendment) Promulgation 2008 (No. 6 of 2008) that came into force on 1 October, 2008 to date that reads;

> *"Fees and charges payable*
>
> *[29] The Authority may with the approval of the Minister, by regulation prescribe –*
> *(a) the fees payable in connection with the issue, validation, renewal, extension and variation of any certificate, licence or other document (including the issue of a copy thereof) or the undergoing of any examination, test inspection or investigation or the grant of any permission or approval for which the Authority has been made responsible under the Act or any written law;*
>
> *(b) the regulatory fee for oversight of safety and security payable to the Authority; and*
>
> *(c) the fees payable for any other service provided in the discharge of its functions under the Act."*

[55] It is quite clear to this Court, that contrary to the finding of the High Court, the regulatory making powers of the Respondent under Section 29 of the Civil Aviation Authority Act 1979 subsists. It is upon this authority that the Respondent did then, and continue to the present, levy parking fees on aircrafts at Nadi International airport.

[56] In all the circumstances, the Appellant's arguments that the Respondent did not have the legal authority to charge parking fees cannot be sustained. This Court, therefore does not agree with the High Court, finding that the Respondent was not authorised to claim parking fees from the Appellant.

When Did the Charge by the Respondent of the Parking Fees Begin

[57] The High Court found that as the Respondent had only succeeded to the lease on 8 January, 2010, when it was transferred to it, it could not claim parking fees since the airplane first and remained parked from January 2005. This finding is supported by the Appellant arguing, that the Respondent cannot claim any parking fees that pre-dates 8 January, 2010. Counsel also alluded to the letter dated 10 May 2012 from the Respondent, which states,

"……since January, 2012 AFL has the mandate to charge parking fees on the aerodrome" confirming, he argued, that the charge can only be made from 1 January, 2012.

[58] It is enough, in the Court's view, that when CL 3469 was transferred to the Respondent, on 8 January 2010, all the assets and liabilities of the lessor were transferred with it to the new lessee, and outstanding parking fees up to the date of transfer considered as assets would have passed on to the new lessee, subject to the Statute of Limitations.

[59] The Appellant's aircraft began incurring fees since 2005 and six years began to run from that time unless demand had been made within the six years period. In this instance, the first demand was communicated to the Appellant in 2013, so the six (6) years would extend only to include parking fees from 2007.

Was there Unlawful Detention of the Aircraft

[60] The Appellant in its counterclaim to the original action, had alleged that the Respondent in taking possession by towing the aircraft sometime in June 2012, to a new location from where it was original parked and thereafter prevented the Appellant to have access to it, has unlawfully detained the aircraft.

[61] It is clear from the evidence of the Respondent that the Appellant had been requested through a letter of 10 May 2012, to remove the aircraft, that had remained parked since 2005, as it was an obstruction and posing as a safety issue to the managing of the increased aircraft movements to the Nadi airport *"apron"*, where the aircraft was parked.

[62] In addition, the Appellant had been given sufficient time to remove or tow the aircraft away, and warned that if no action was taken, the Respondent would remove the aircraft to a designated location.

[63] That the Respondent finally towed the aircraft away was not, it would appear from the lack of communication to the Appellant to act, and its continuing efforts to resolve the matter amicably. At no time, according to the Respondent, was the Appellant or its agents denied entry to and inspection of the aircraft at its new locality, contrary to the claim by the Appellant.

[64] To succeed under this cause of action, the Appellant has to prove that the aircraft was removed illegally from its custody and that the Respondent had in turn prevented the Appellant from taking possession of it back.

[65] In this instance, the aircraft has been removed to another location, the Respondent, acting in accordance with its legal responsibilities to ensure safety of the airport in full knowledge of the Appellant. At no time was the Appellant denied access to its property, and the aircraft would have been released back to it, if the outstanding parking fees, were paid.

[66] The High Court had not addressed this cause of action fully, preferring to address the Appellant's likely success under the law of conversion. In any case, this Court is of the view that there is no merit in the Appellant's submission of unlawful detention.

Is There a Case for Conversion

[67] The High Court offered the view that the Appellant's relief in this case lies in conversion rather than unlawful detention. It then proceeded to analyse the essential elements of the tort of conversion and at the end concluded that the Appellant's case based on conversion could not succeed because the essential element of demand was not met. In any case, the Court held the preliminary view that conversion was not pleaded.

[68] Before this Court, the Appellant argued, that demand was not essential in certain circumstances. He referred to John Fleming at The Law of Torts (9th Ed, 1998) which said at p.63:

> *"Anyone without lawful justification takes a chattel out of another's possession with intent to exercise dominion over it, commits conversion no less than trespass. The tort is complete without prior demand for the return of the goods."*

[69] The Appellant also cited the Canadian Supreme Court case of **Baud Corporation v Brook** [1973] 40DLR 3rd 418 to support the contention that there was no need to make a demand if it is reasonably clear of the intention:

> *"I am of the opinion where the defence of a defendant shows clearly that if a demand has been made on him for possession of the property, he would have refused delivery, then it should no longer be a defence to an action in detinue that no demand was made. To require such formality in circumstances which show it would have been futile is empty of any merit and is reminiscent of the discarded formalities of the past century. Accordingly, I would hold that here, where the defence to Action No. 3 shows clearly that Brook would not have delivered the shares if a demand has been made, the fact that a demand was not made, is not a defence."*

[70] The Appellant finally referred to **Cuff v Broadland Finance Ltd** [1978] 2NZLR 343 per Somers J, at p. 436:

> *"The present case was in our opinion one of simple conversion by taking. Exiguous though the pleadings are, that we think in their substance and its accords with the way the case was conducted in the District Court without objection. That being so, no demand for the return of the goods was ever necessary; Broadlands never had lawful possession of the goods requiring evidence of an intention, adverse to the plaintiffs' rights, arsing after it had acquired possession."*

[71] In this instance, the Appellant referred to the 1st September 2014 letter from the Respondent, which made it very clear of the threat with the detention of the aircraft if the payment of the parking fees were not made. Also in addition, the Respondent referred to its powers under Section 13 of the Civil Aviation Reform Act to sell the aircraft to satisfy the parking fees.

[72] The Appellant contended that in the circumstance where the Respondent was determined to sell the aircraft to pay for the fees, the requirement of a demand for the return of the aircraft was an exercise in futility.

[73] In reply, the Respondent submitted that right throughout the period of initial contacts with the Appellant from 2012 to 2014 to 2016, both parties had sought an *"amicable solution"* to the question of the payment of the fees. The detention of the Appellant's aircraft was not intended to deprive it permanently of possession as this would be returned upon the payment of fees. Alternatively, as provided under Section 13 (2) (b) of the 1999 Act, the Respondent may release the detained aircraft upon the offer by the Appellant of a satisfactory security.

[74] Counsel have referred to leading cases on conversion. As Dixon J stated in **Penfold Wines Pty Ltd v Elliot** (1946) 74 CLR 204 at p.229:

> *"the essence of conversion is a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who had the property or special property in the chattel. It may take the form of a disposal of the goods by way of sale or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine, or cutting the seals from a deed, or of an appropriation evidenced by refusal to deliver or other denial of title. But damage to the chattel is not conversion, nor is use, nor is a transfer of possession or otherwise than for the purpose of affecting the immediate right to possession, nor is it always conversion to lose the goods beyond hope of recovery."*

[75] Black's Law Dictionary 2nd Edition defines conversion when one:

> *"…takes away or wrongfully assumes the right to goods which belong to another, it will in general be sufficient evidence of a conversion but when the original taking was lawful as when the party found the goods, and the detention only is illegal, it is absolutely necessary to make a demand of the goods and there must be a refusal to deliver them before the conversion will be complete."*

So the essential elements, are that:

- detention must be illegal
- demand is made
- demand is refused

before conversion is claimed.

[76] In this case, the Court has already established that the aircraft was not illegally detained, but had been moved away from the apron of the airport, where it was posing some security risks to the safety of the aircraft movements.

[77] Alternatively, the plane was legally detained in accordance with Section 29 of the Civil Aviation Authority of Fiji Act as amended.

[78] In any event, Counsel for the Respondent strenuously argued that the claim of conversion was not part of the Appellant's pleadings and should not be considered by the court.

[79] The practise and the rules on pleadings are succinctly summarised by Winter J in **Ram v Taito** [2005] FJHC 248 as follows:

> *"The first object of pleadings is to define and clarify with precision the issues and questions which are in dispute between the parties that fall to be determined by the court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that opposing parties can bring evidence on the issues disclosed* ***(ESSO Petroleum Company Limited v Southport Corporation*** [1956] AC 218 at 238.
> *A further object of pleadings is to inform the court what were the precise matters in issue between the parties which the court may define. Pleadings set the limits of the action which may not be extended without due amendment properly made. Cases must be decided on the issues on the record and if it desired to raise other issues they must be placed on the record by amendment* ***(Blay v Poloard & Morris*** *[1930] 1 KB 628 at 634.It is not for the judge to speculate about the nature of a party's case. The judge and the parties are circumscribed by the pleadings on the record."*

[80] The court is referred by the Respondent to the decision in **Moti v North (Fiji) Group Ltd** [2018] FJCS 20, where the Supreme Court of Fiji said, at paragraph 31:

> *"[31] It is also axiomatic that a Court deals with the case at hand on its pleadings. The pleadings of the parties bind them and indeed the converse is also true, the courts do not stray into issues that are not pleaded or indeed have the right to decide cases other than on respective pleadings before it."*

[81] In this instance, the Appellant had relied solely on the tort of unlawful detention as its cause of action, although Counsel had argued before this court that there are sufficient facts submitted to the court to support a cause of action founded on conversion, notwithstanding the fact that it had not been specifically pleaded.

[82] The reliance by the Appellant on **Cuff v Broadlands Finance Ltd** (supra) where the court held that there was conversion, even though the word *"conversion"* was not pleaded, is qualified by the fact that there was no specific cause of action articulated by the plaintiffs but only *"seeking to recover the value together with interest of the items set out in the schedule to the statement of claim."*

[83] In the circumstances, the court does not find any merit in the Appellant's submissions that it should entertain the offence of conversion against the Respondent.

Appellant's Counterclaim

[84] The ground of appeal 4 and 5 are based on the Appellant's counterclaim relating to the duty of care expected of the Respondent in removing the aircraft by employing non-experienced and unqualified persons to do it and claims of negligence.

[85] In particular, the Respondent's witness, Mr Anu Patel, an experienced pilot had been called to counter the Appellant's claim that the removal of the aircraft had not been done with due care. This court agrees with the Appellant's submission that when the proceedings are on counter-claims, the roles of the parties are reversed, wherein the defendant is deemed to be the plaintiff for the purpose of the counter-claim. This implies that when the Appellant called evidence in support of its counter-claim, the Respondent as the defendant to the counter-claim, is allowed the right of rebuttal, which was reserved, as the Counsel for the Appellant, correctly pointed out. This in turn lead to the Court's erroneous conclusion that the evidence by Mr Anu Patel was unchallenged, when in fact, the Appellant was not given the opportunity to do so.

[86] Furthermore, Mr Patel was called as an experienced and qualified pilot, but not as an expert witness as the Court concluded.

[87] As it turned out, Mr Anu Patel, was not re-called but instead, Counsel for the Respondent, called Mr Isei Tudreu General Manager, Air Traffic Management and Training to elaborate on the management of the airport and Aeronautic Information Publication (AIP) that amongst other things, sets out the schedule of parking fees for all aircrafts, including those under 10 tonne, as it applied to the Embraer Bandeirante EMB110.

[88] The evidence of Mr Collin Miller on behalf of the Appellant was to inspect and *"to identify the damage to the aircraft caused by wind gusts during cyclone EVAN which occurred in Fiji on the 17th and 18th December 2012."* Counsel for the Appellant at the outset of his evidence, confirmed while Mr Miller was a licensed aircraft engineer and also held a private plane licence, he was not called as an expert witness, but only for the purpose of assessing damages to the aircraft.

[89] Notwithstanding the concession on Mr Miller's status, the High Court unfortunately concluded that he cannot express an oral expert opinion as to what caused or contributed to the damage he had identified. On the contrary, as correctly submitted by Counsel for the Appellant, Mr Miller was quite entitled to express an opinion based on his work experience, notwithstanding that he was not called upon as an expert witness.

Is there a Duty of Care Owed to the Appellant by the Respondent

[90] This issue arises from grounds 6 and 7 of the appeal where the Appellant submitted that the Respondent, had not exercised due care and attention when the aircraft came into their possession. The Appellant for example had not tied down the propellers to stop it from *"free-spinning"* as evident from Counsel for the Appellant's cross-examination of Mr Patel, at pages 1433 to 1435 (vol.5) of the transcript:

> *"Q: Mr. Patel, I'm instructed that usually in generally there is a manual that tells you how to move a stationary aircraft, isn't it?*
> *A: Yes*
>
> *Q: And you were referring to Engineers and generally if you were a Engineer and you are moving it, its good practice to refer to a manual, as for guidance?*
> *A: Not really. Manual is there is like a, if someone was training to be an Engineer that need a manual but then they probably never use it again.*
>
> *Q: Okay, but if there is a manual for moving aircrafts, would it be something that you would resort to?*
> *A: Not on a daily movement. May be the first day you start work, this is how it is done. It's basic and it just a pin and shows you how to insert the tow bar and all that, and then after that you probably never refer to it anymore.*
>
> *Q: Okay, would it be fair to say if you have never moved an aircraft that would be helpful?*
> *A: Yes.*
>
> *Q: Except for this particular aircraft how many other aircrafts have you supervised moving?*
> *A: Well we used to move our own aircraft when we use to fly the Banderantes the 'Islanders' so maybe 6.*
>
> *Q: So you were personally involved in supervising the moving of the Aircraft?*
> *A: We used to move it ourselves, yes.*

Q: No I'm not asking we, I'm asking yourself that you are personally supervising moving it?
A: Correct, correct. I was the station manager in Tonga as well for 2 years where we used to fly and I was in-charge of the whole operation there. So, we did all the daily training and for Engineers and Pilots in Tonga.

Q: Now you had mentioned that when you were being examined in chief you said after you got the aircraft to the site where you had stopped, who told you to put it there? That's my next question.
A: Mr. Laurence Lieu.

Q: He identified the area where?
A: Yeah, he said that this were..

Q: And my next question to you is that; you said after you had visually inspected the aircraft which took you about a minute and then you told me that you then left, they didn't offer you lunch and then you then told the court that there were 4, 5 individuals left behind?
A: Yeah.

Q: And I assume there were some Engineers who were left behind or do you know or you don't know?
A: No, I don't know but when we got there, there were two engineers. They actually while we were there reminded me about the pin and I said, yeah I know, that's what we are doing.

Q: Okay, and then when you left obviously, because the rest of the groups were with you obviously they didn't leave with you because there were some other works to do. They have to still tidy up something. Do you know what they were supposed to do? You don't know?
A: No

Q: And it is your evidence, isn't it that all you did was when the vehicle came to stand still after you moved it, you did the visual inspection and that was all. And then you left?
A: Yes, I put the park brake on, got out and I closed the door, put the pin in and then walked around may be 5 minutes later.

Q: Okay, and it was your clear evidence that you didn't say anything to my learned friend. You didn't get them to tied down with ropes and all and that kind of stuff, didn't you? You were not involved in any of that exercises?
A: I was strictly there for the towing part.

Q: Oh just for a towing part, yes. Now Mr. Patel, in your situation and correct me if I'm wrong. I noticed when I go on a flight, as soon as you usually land, even on your ATRs, they normally <u>once the aircraft comes to a standstill, they would</u>

usually do something to the propellers, even they would put some rope or what they called it. Can you explain in court what do they do?

A: That's the safety precaution that the engine doesn't start off again. I mean, that's what it is because the passengers get off on that side so that's the safety that your propeller is locked and passengers can safely disembarked without being starting up again. I mean

Q: By it?

A: Very rare chances start off again.

Q: Of course not. Would it also fair to say that, I'm not sure about the ATR but I'll come to the bettering half of which for the ATR, is it a needful to not let it, does it free spin, I think they use the word free spin. Is there such a word called free spin?

A: Yeah, yeah, the propellers.

Q: Yeah. May be you can just explain to his Lordship why it is called a free spin?

A: The propellers are connected with the Turbo shaft, right? And that engages when you start. And before you start the flight, you got to make sure that the propellers have been checked and the propellers that is spinning to make sure that the starter shaft is not jamming propellers, it's not. So that's all it is, it's just spinning the propellers and the … is called a free turbine shaft."

[91] When asked further what other precautions he would have taken to ensure that the aircraft did not deteriorate further, Mr Patel said the aircraft could have been covered by tarpaulin.

[92] The cross-examination of Mr Patel by Counsel for the appellant on the inspection and assessment report by Mr Colin Miller in September 2014 also provides some insight into the general deteriorating conditions of the aircraft. The report, it is noted, was made some one and half years after the 2012 cyclone. The exchange between the Appellant's counsel and Mr Patel is at pages 1468 - 1469 of the record (vol.5):

Q: The particular document talks about the flight controls. It says, on initial inspection, first of all he says, the purpose of the inspection was to identify and assess damage to the aircraft caused by high winds and dust. And it goes on and then it says; findings: on an initial inspection it was noted that that the Ailerons were difficult to move and that the elevator travel was limited between controls fed and full down. What do they mean by that?

A: Controls fed and full down. Ailerons what we used to turn the aircraft up in the air so it's just the edge of the wing is like a flap that goes up and down so you turn one flap goes up, the others goes down. So when you on the ground you check that, just for free movement if there's like birds maybe nested and could

have jammed the aileron or anyway lock is still in there. So this difficult to move could be the ailerons.

Q: That's what you observe and I'm just asking you to explain what you think might have happened? I will give you an opportunity to explain what might have happen. This is in 2014, the inspection.
A: After the cyclone

Q: Yes, after the cyclone. Well after the cyclone, at least 1 and a half year
A: Yes it could be that, could be part, the joints being rusted,

Q: For non-use
A: Yeah, for exposure to condition

Q: Exposure to conditions. What do you mean exposure conditions?
A: You got it right next to the sea so you got sea water coming in, you know, you got rain, then you got
Q: What is the sea water, you taking about sea air coming in?
A: Yeah, but winds and water,

Q: Salt water?
A: Salt water, sorry, all coming in. So, you know that, rust, anything. So, could be that.

Q: And will it be fair to say that because it was parked in more open place and is more susceptible to that type of wind with sea air and all that?
A: See, that is a very good point when you say more open. It was just as open as it was when I moved it from. It was just as open as where I moved it. So, I don't know what you mean by more open.

Q: Okay, then let me ask you the next question. To avoid it to be exposed, like you said, to avoid it to be exposes, you had said something that they should have covering over it and all that. You have mentioned all in your evidence. What kind of covering would have been the best?
A: Well it all depends, how long you want to leave it.

Q: Well, if you going to leave it there indefinitely what kind of covering you would use?
A: Yes, like you, like you cover your car with the full cover, you can cover your plane like that. I mean like, there is no specific covering made for the Banderante to be covered like that.

Q: But you can provide its cover?
A: You can, yeah, the turpline or whatever you want to do.

[93] Furthermore, Mr Miller, in examination by Appellant's Counsel, alluded to his report and identified all the parts of the aircraft that have deteriorated, albeit some from since 2007 and highlighted the type of care that would have been expected even from someone in temporary custody of the aircraft.

[94] The Counsel for the Respondent submitted that the Appellant as the owner of the aircraft was primarily responsible for its maintenance. It was obvious from the evidence of Mr Patel that the aircraft had not been maintained since 2005, for upon inspection on 18 June 2012, he noted, at p.1425 of Vol 5 of the Record:

> *"Okay. So we went to the aircraft and the condition was, you could tell that it hasn't flown, there was cobwebs, there was rusts around the edges of the aircraft and by the door because when I opened the door it was a struggle to open and I could tell that had not been opened for a while and the tyres were it was parked and you could tell that it had not been moved for a while. So it was not flyable obviously."*

[95] The removal by towing of the aircraft to another location was given by the Respondent to Mr Patel, as he had flown Bandeirantes before, who in turn was helped by seven (7) other employees of the respondent, including two (2) engineers.

[96] In response to the claim by the Appellant that the Respondents failed to remove all important locking pin from the nose of the aircraft to allow the wheel to freely move, Mr Patel confirmed otherwise when he was asked and responded as follows:

> *"Q: Okay, so you were asked to tow this aircraft and then so just explain to his Lordship, in preparation for the towing what did you do?*
>
> *A: The first thing you do is, because when the aircraft is under hydraulics, there is a gear-locking pin that you need to remove first and that made the wheel, is how you explain it, it's free, free of movement you know from the hydraulics. So the first thing you do is take that pin out and I remember taking the pin out because it was pretty rusted and it was not coming out, so we had CRC and I need a hammer and a chisel just a small chisel to push it up but then it came up easily."*

[97] As to the other allegations of neglects by the Respondent such as removal of control locks from the elevator and rudder and failure to replace them after towing, Mr Patel confirmed that he and his crew put everything back on the plane. The aileron locks and the rudder locks were put back in place including the locking pin on the nose of the aircraft.

[98] Each of the allegations of improper actions taken by the Respondent in the towing and the removal of the aircraft to a new location, this court finds has no basis. In my view, the Respondent, through Mr Patel and his crew had done all that was needed of them, with the due professional attention required, to relocate the aircraft on 18 June 2012.

Damages

[99] In its submissions before the High Court, the Appellant had sought judgment in damages as follows:

(i) FJ$4,071,305.00 for loss of profit earning and interests for the aircraft estimated from 1 January, 2013, and inclusive of interest thereof,

(ii) FJ$500,000.00 as exemplary damages, and furthermore:

(iii) Order for the return of the aircraft

[100] As to (i) the loss of profit earnings, the Appellant pointed to its history of previous dealings with defunct Air Fiji, and then the Appellant's Memorandum of Understanding with Sun Air of dated 31 January 2015, being illustrative of the aircrafts earning capability. That these failed to materialise was due exclusively to the Respondent's unlawful detention of the aircraft.

[101] The Appellant estimated, using the per month leasing fees as in previous agreements the loss of income from the detention of its aircraft from 1 January 2013 to September 2016 (3¾ years) amounted to F$3,497,730.00 plus interest of 8 per cent per annum or part thereof.

[102] Counsel for the Respondent in reply stated that the loss of profit was not specifically pleaded in the Appellant's counterclaim and the particulars of the loss were not given.

More importantly, the Appellant submitted that since negligence was not proved in the court below, the claim for damages cannot be justified.

[103] This Court is firmly of the view that the claim for loss of profits by the Appellant, cannot be sustained. From the evidence before this court, it is abundantly clear that the plane which had not taken to air since 2005 and had subsequently been de-registered by the Civil Aviation Authority of Fiji, and which furthermore, was grounded pending the result of litigation between the owner of the Appellant Company and the Sun Air proprietor could not possibly be expected to begin to fly any time sooner than the date of the handover of the aircraft to the Appellant from the Respondent.

[104] The applicant's expectation for the aircraft to begin to fly, straight away and earn income as soon as it could secure its release from the respondent is, in my view, most unlikely and a forlorn hope, given the aircraft's physical state and conditions.

Claims for Repair of Engines

[105] Similarly, the claim for repairs to the two engines of the aircraft, the Court finds, is without merit. The physical state of the plane had been deteriorating since 2005 and that up to June 2012 when it was towed away, no maintenance had been carried out and it was described as *"an eyesore"*. The Respondent, argued that it was not responsible for ensuring that the airplane was in an airworthy condition whilst in its care.

[106] Cyclone Evans may have accelerated the pace of deterioration but the constant exposure to the elements since 2005, would no doubt have played a significant role in its conditions when the aircraft was inspected by Mr Miller one and half year after Cyclone Evans.

Damages to the Airframe

[107] The claim for damages to the airframe of the aircraft due to its prolonged exposure to the elements, even after the Respondent had taken custody of it around June 2012, in this courts view, has some merit. Whilst the Respondent had come into possession of the aircraft after it had spent seven (7) years parked on the apron of the tarmac of Nadi airport with very little attention done to it by way of general maintenance and cleaning, the

Respondent was still obliged, as the current custodian of the aircraft, to ensure that its condition did not deteriorate any faster than it was before.

[108] The airframe of an aircraft is made up of the wings, fuselage, tail assembly, and landing gear. They represent the external features of an aircraft and are the most visible from the outside. It is also the parts of the aircraft that are fully exposed to the elements, the wind, the sun and the rain, and, at Nadi airport, being very close to the sea, also exposed to the corrosive salt air.

[109] The court recognises that the Respondent had anchored the aircraft to the ground and had also used the rope to secure the aircraft propellers. It is submitted by the Appellant that the Respondent should or could have covered by tarpaulin the plane up for further protection especially from strong wind, such as that brought in by Cyclone Evans in December 2012.

[110] The damages shown in the photograph exhibits (photographs 52, 59, 63 and 65) do lend some support to Mr Colin Millers' report after Cyclone Evans that they were or could have been brought about by strong winds of 40 knots and above.

[111] This court, while mindful of the fact emphasised by the Respondent's Counsel that much of the deterioration and damage to the aircraft, are attributable to it being parked in the open from 2005 to June 2012, its exposure to Cyclone Evans in December 2012, would call for further protection, such as towing it indoors or at the very least covering it up with tarpaulin and nailing it down. This would seem to this Court, to be a reasonable expectation of someone who deals with aircraft on a daily basis, and who is confronted with threat as that posed by Cyclone Evans. A reasonable person with special and/or expert knowledge in the field of aviation and who has a special relationship with the Appellant by virtue of the detained aircraft should have all it could have to protect the aircraft from further deterioration of its conditions. Lord Steyn in **Marc Rich & Co v Bishop Rock Marine** [1995] 3AIIER 307 at p. 326 affirms that:

"It has been settled law that the elements of foreseeability and proximity as well as considerations of fairness justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff..."

[112] It is under this premise that this court concludes that the Respondent is liable for some of the damages caused to the aircraft's airframe.

[113] Whilst $A65,084.00 had been quoted by the Appellant as the cost of repairs to the airframe, this court will allow $FJ40,000.00 as what it estimates to be the appropriate amount to be paid by Respondent under this head of claim

Exemplary Damages

[114] Exemplary damages purpose as pointed out by Lord Diplock in the leading House of Lord's case of **Broome v Cassell & Co** [1972] AC 1027, is *"to teach the wrongdoer that tort does not pay."* The Appellant also referred to 2 Australian cases: **XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd** 155 CLR 448 and **Russell Ashby Pargiter v Vincent Harley Alexander** [1995] TASSC 62 to support its submission that where there has been abuse of an official position of authority and done so with contumelious disregard of the plaintiff's rights, justify an award of exemplary damages.

[115] In this case, the Court finds no wrong-doing on the part of the Respondent to justify an award in exemplary damages against it. This claim fails

Conclusion

[116] In the end, the Court holds the view that the Respondent had done all it could to engage with the Appellant to resolve the issue of overdue parking fees amicably. The principal of the Appellant had taken a considerable time to respond to the many enquiries made, and in the end questioned the legality of the fees it owed to the Respondent.

[117] I am satisfied that there is valid and legal authority vested in the Respondent to levy parking fees on the Embraer Bandeirante EMB110 belonging to the Appellant. I am equally satisfied that the Respondent was acting within its powers to relocate the aircraft from

where it originally was, as it was posing as a hazard of safety concern to the orderly management of Nadi International airport. The claim for unlawful detention and or conversion are dismissed as without merit.

[118] Except to the extent allowed in the claim for damages to the aircraft airframe, this Court hereby dismisses all other claims in damages, including exemplary damages.

Basnayake JA

[119] I agree with the reasons and conclusions arrived at by Jitoko JA.

Orders:

1. *The High Court Orders, in respect of the appellant's claim (defendant's counter claim) is affirmed subject to the award this court makes, of FJ$40,000.00 against the respondent for special damages.*

2. *The High Court Order, dismissing the respondent's counter claim (plaintiff's claim), is hereby set aside, and the following Orders are made:*

    i. *The appellant within 21 days to pay the respondent all outstanding parking fees for its Embraer Bandeirante EMB110 in the amount of $101,333.00 from January 2007 to 31 March, 2017 and such other amount accruing to the present, less the $40,000.00 in damages owed to the appellant.*

    ii. *That upon satisfactory payment of the amount at i. above, the respondent shall release the aircraft Embraer Bandeirante EMB110 to the appellant.*

    iii. *Should the appellant fail to pay all the arrears of the parking fees on the due date, the respondent is at liberty to sell the aircraft pursuant to Section 13 of the Civil Aviation Reform Act 1999, without reserved price, to recover the accrued debt, plus costs as follows:*

(i) *any tax or duty owing to the Government of Fiji,*

(ii) *legal costs including the respondent's solicitors fees.*

iv. *In the event of the sale of the aircraft of the aircraft, and the proceeds from the sale exceeds the due amount in parking fees at i. above, the respondent is entitled to deduct the amount of $40,000.00 payable to the appellant from the proceeds of the sale.*

3. *The balance of the sale price of the aircraft to be paid to the appellant.*

4. *Costs of $2,000.00 before this court, to be paid to the respondent by the appellant.*

.....

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL

.....

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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