

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 0108 of 2023**  
**[High Court at Lautoka Case No. HBC 13 of 2011]**

**BETWEEN** : **AEROLINK AIR SERVICES PTY LIMITED**

**1<sup>st</sup> Appellant**

**DANIEL PATRICK RYAN**

**2<sup>nd</sup> Appellant**

**AND** : **SUNFLOWER AVIATION LIMITED**

**1<sup>st</sup> Respondent**

**ROSHAN ALI AND SYLVIA GUKULA BALE**

**2<sup>nd</sup> Respondent**

**Coram** : **Prematilaka, RJA**  
**Morgan, JA**  
**Andrews, JA**

**Counsel** : **Mr. C. B. Young for Appellants**  
: **Mr. K. Siwan and Ms. S. Lata for Respondents**

**Date of Hearing** : **04 November 2025**

**Date of Judgment** : **28 November 2025**

**JUDGMENT**

**Prematilaka, RJA**

[1] On 31 January 2005 the first appellant “Aerolink”) and the first respondent (“Sunflower” – which was known as “Sun Air” at the time of the relevant events) entered into a Memorandum of Understanding (“MOU”) for the lease of two Embraer

Bandeirante aircraft (which will be referred to hereafter as “the 01<sup>st</sup>” and “the 02<sup>nd</sup>” aircraft). Aerolink subsequently issued proceedings against Sunflower. This appeal is against the judgment delivered on 28 September 2023<sup>1</sup> by the High Court at Lautoka. The appellants were the plaintiffs and the respondents were the defendants in the original action. The High Court dismissed and struck out the appellants’ action and pursuant to the counter claim they were ordered to pay the respondents \$87,566.16 with pre-judgment interest at the rate of 4% per annum and post judgment interest pursuant to Law Reforms (Miscellaneous Provisions) (Death and Interest) Act.

- [2] In the High Court, the appellants had claimed damages and/or equitable damages or compensation, interest and costs based on causes of action arising from (i) the alleged breaches of the agreement/contract comprising of the Memorandum of Understanding (MOU) dated 31 January 2005 between the parties and related oral conversations (ii) estoppel in the form of oral conversations, the MOU and the conduct of the respondents (iii) conduct in contravention of sections 75 and 77(1)(d) and 77(1)(j) of the Fijian Competition and Consumer Commission Act 2010 (FCCC) (iv) Intention Representation in the form of oral conversations, the MOU and the conduct of the respondents and misleading and deceptive conduct coming within sections 75 and 77(1)(d) and 77(1)(j) of FCCC. The (ii) – (iv) causes of action have been pleaded further or alternatively.
- [3] Accordingly, the appellants claimed unpaid lease payments in the sum of AUD 180,000.00 for the 01<sup>st</sup> aircraft (DQ-WBI) for the first twelve months, and ongoing monthly payments of AUD 15,000.00 until the 01<sup>st</sup> aircraft is returned (ii) unpaid lease payments in the sum of AUD 120,000.00 for the 02<sup>nd</sup> aircraft (VH-OZF) (iii) expenses associated with mechanical work undertaken in relation to the 01<sup>st</sup> and 02<sup>nd</sup> aircrafts.
- [4] The respondents averred that there was to be executed an operating lease between the 01<sup>st</sup> plaintiff and the 02<sup>nd</sup> defendant but it did not materialize as the appellants were not able to provide the aircraft bearing registration No. DQ-WBI (01<sup>st</sup> aircraft) in operational condition and it did not have a Certificate of Airworthiness (C of A) which the appellants were obliged to provide before the aircraft could be used. They counter-

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<sup>1</sup> **Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd** [2023] FJHC 718; HBC13.2011 (28 September 2023)

claimed \$36,000.00 due to the appellants' failure to remove the said aircraft from the respondents' hanger despite being requested to do so and for the continued occupation of the space in the hanger and the respondents also counter-claimed from the appellants \$50,966 being expenses related to the maintenance and other expenses incurred by them on the said aircraft.

[5] The issues raised at the trial for determination reflected the said respective positions of the appellants and respondents.

[6] The appellants called one witness, Daniel Patrick Ryan and produced PE1 to PE12 as exhibits while the respondents called one witness, Roshan Ali. He did not tender any documents as exhibits.

[7] The appellants have raised several grounds of appeal. They are as follows:

1. *That there was a breach of natural justice when His Lordship ignored the submission of the Appellants filed in Court and proceeded to pronounce judgment as it did without considering the same.*
2. *That there was a breach of natural justice when His Lordship failed to perform the function of rendering a fair and impartial judgment by not demonstrating an appropriate degree of detachment as a judicial officer.*
3. *The Judge erred in law in not delivering a fair and impartial judgment when His Lordship entered into the arena by putting forward propositions in his judgement which were not put forward by Respondents' counsel either at trial or in any oral or written submissions filed by the Respondents in breach of the rules of fairness and natural justice.*
4. *The Judge erred in law in entering judgment against both the Appellants in favour of the Respondents when no invoices were produced or discovered by the Respondents as evidence to identify who the invoices were addressed to in evidence or in any oral or written submissions filed by the Respondents.*
5. *The reasonings in the judgment and the orders made pursuant to the judgment are illogical and/or irrational.*
6. *The judgment delivered on 28th September 2023 cannot be supported by the evidence and law presented before His Lordship."*

[8] As both counsel emphasised at the hearing, at the heart of the dispute is the question whether the MOU constituted a binding contract as Mr. Young correctly put to the trial judge at the beginning of the trial. Therefore, I shall deal with that matter first, for if this court were to hold that the MOU was not binding on the parties, then the appellants' causes of action would by and large fail and they would have to fall back on the cause of action based on misleading and deceptive conduct under FCCC. As Mr. Young had put it, simply the question is whether the appellants' claim was one based on a contract or under FCCC on the alleged misleading and deceptive conduct by Mr. Don Collingwood, the Managing Director of Sun Air (predecessor of the 01<sup>st</sup> respondent).

[9] I will start the discussion by asking whether the MOU between Aerolink Air Services Pty Ltd (Aerolink) and Sun Air constitutes a legally binding agreement, or whether it is a non-binding expression of intention, given that it includes substantive commercial terms but also anticipates execution of a future "operating lease". The core question is "would a reasonable person, viewing the document objectively, believe that the parties intended to be immediately bound by its terms?" The test is objective.

[10] I shall reproduce the MOU. It reads as follows:

Memorandum of Understanding Between Aerolink Air Services Pty Ltd and Sun Air

1. The lease of the first aircraft shall be for 12 months with a month-to-month option after that period @ \$15,000AUD per month. The second aircraft when required will be @ \$10,000AUD per month under the same lease agreement as the first aircraft
2. The prop and engine reserves @ \$78USD per engine per hour.
3. An hourly operation fund of \$28AUD per hour to cover the overhaul costs of the landing gear.
4. Aircraft to be fully insured prior to ferrying.
5. Comprehensive hull insurance to be maintained at \$860,000AUD.
6. Throughout the term of the lease the responsibility for the day to day schedule maintenance of the aircraft, parts and labour, is the responsibility of the hirer.
7. Aerolink Air Services Pty Ltd will be responsible and pay all costs relating to the overhaul of engines, propellers, and landing gear.
8. An operating lease between Aerolink Air Services Pty Ltd and Sun Air for a period of 12 months would be signed by both parties.
9. On completion of the lease, the aircraft are to be returned to Aerolink Air Services Pty Ltd with a C2 check and the Fijian equivalent of an Export C of A.

Regards  
Danny Ryan Owner/Manager  
Agreed in Principal on behalf of D.I. Collingwood/Sgd: Ganga Gounder.

[11] A Memorandum of Understanding (MOU) and a binding agreement (contract) serve different purposes, though in some circumstances an MOU can be legally binding. The key is the intention of the parties, the language used, and whether the document satisfies the elements of a contract. The default position is that an MOU is usually not intended to create legally binding obligations but this is only a presumption, not a rule. MOUs are common in government, international relations, commercial negotiations, and institutional partnerships. A MOU is generally:

- A preliminary document,
- Setting out broad terms of cooperation, principles, or future intentions,
- Often used where parties do not yet intend to be legally bound,
- Less formal than a contract.

[12] On the other hand, a binding agreement:

- Intends to create enforceable legal obligations
- Has specific terms (duties, rights, timelines, consideration),
- Satisfies standard contract elements:
- Offer and acceptance
- Consideration
- Intention to create legal relations
- Certainty of terms

If these are present, courts will treat the document as a binding contract regardless of its title.

[13] A MOU can be legally binding but only if the parties intend it to be. (i) language like “shall,” “must,” “legally binding,” or “the parties agree”, (ii) clear obligations (e.g., payment terms, timelines), (iii) clauses about dispute resolution, governing law, confidentiality and (iv) conduct of parties showing intent to act immediately are indicators that the MOU is binding. On the other hand, (i) words like “non-binding,” “subject to execution of a formal agreement,” or “this MOU does not create legal obligations.”, (ii) vague or aspirational terms (“the parties will work together to explore...”), (iii) absence of consideration and (iv) a clear expectation of a future formal agreement are indicators that the MOU is not binding. However, courts emphasize

substance over form and even a document called an MOU can be held binding if it contains all elements of a contract.

- [14] A MOU can be binding without a formal follow-up agreement if the MOU is intended to be final and binding on its own terms. If the parties use contractual language, all essential terms are agreed and the MOU states “This MOU is binding on the parties”, a MOU can be binding even without another agreement. However, if the MOU states that parties will later negotiate a formal contract, essential terms are missing and it states “This is not legally binding”, the MOU may not be binding. Courts consistently apply the intention to create legal relations test and the label “MOU” is not decisive. Courts assess objectively what the parties intended. A court will enforce an MOU if it has all elements of contract (e.g., *Air Great Lakes v KS Easter*, *RTS v Müller*, *Masters v Cameron* quoted below).
- [15] The appellants have cited *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd*<sup>2</sup>, *Empirnall Holdings v Machon Paull Partners Pty Limited*<sup>3</sup>, *Nicolene Ltd v Simmonds*<sup>4</sup> and *Michael Richards Properties Ltd v Corporation of Warden of St Saviour's Parish, Southwark*<sup>5</sup> in support of their contention that the MOU is a binding and legally enforceable on both parties.
- [16] The decision in *Masters v Cameron*<sup>6</sup> is treated as authoritative in Fiji and throughout the Commonwealth. It identifies three classic categories (with a fourth added later in case law<sup>7</sup>). This decision is most relevant to deal with this issue:

*Category 1- Parties intend to be **immediately bound**, even though they plan to formalise the agreement later.*

*Category 2 - Parties agree on terms but intend **no binding obligations** until a formal contract is executed.*

*Category 3 - Parties do not intend to make a concluded bargain unless and until a formal contract is executed, **even though they have agreed on all terms.***

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<sup>2</sup> [1978] QB 574

<sup>3</sup> 1988) 14 NSWLR 523

<sup>4</sup> [1953] 1 AllER 822 at 824

<sup>5</sup> [1975] 3 AllER 416 at 417

<sup>6</sup> (1954) 91 CLR 353

<sup>7</sup> *Baulkham Hills Private Hospital Pty Ltd v GR Securities* (1986) 40 NSWLR 622

*Category 4 (see **Baulkham Hills**) - Parties intend to be **bound now**, but expect further terms to be settled in a later contract.*

[17] The courts look to language, conduct, and context of the document but the label applied to a document is not determinative; the question is whether the parties intended to be bound. Agreements contemplating execution of a later formal document are not binding unless intention to bind immediately is very clearly expressed. However, a later formal document is strong evidence of Category 2 or 3. Certainty and completeness of terms plus intention leads to a binding contract, but absence of intention prevents enforceability even if terms are detailed.

[18] I have examined some relevant decisions including the ones cited by the appellants to understand how courts have looked at as to how this objective test has worked. In **RTS Flexible Systems Ltd v Molkerei Müller** (2010) UKSC 14, C supplied packing machines for food to D's factory. D sent C a letter of intent setting out a draft contract with industry standard terms, clause 48 providing that the terms are subject to contract. Following completion of the work, with C receiving 70% of price, a dispute arose as to whether the equipment supplied met agreed specifications and D refused to make further payments. C claimed for the balance of price on the basis that there was a contract on the terms of the letter of intent, a new contract incorporating the standard terms or no contract but a right to quantum meruit. D counterclaimed for damages arising out of performance of the equipment, based on a simple contract with no limitations on liability. The Supreme Court allowed C's claim and held that the standard terms were binding and the 'subject to contract' clause was waived. According to Lord Clarke:

- *Whether the parties had an intention to create legal relations and agreed on all the essential terms depends on an assessment of communication by words and conduct between the parties[45]*
- *Where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract, all will depend on the circumstances: [47], [56]*
- *Any waiver of a subject to contract clause need not be express but can be inferred from communications and conduct [67]*
- *A reasonable honest businessman would conclude that there was a binding contract created after expiry of the letter of intent to proceed on the standard terms and agreement to waive the "subject to contract" clause: [86]*

- *Relevant circumstances: [61]*
  - *Substantial performance had already occurred.*
  - *Essential terms such as price were agreed upon and negotiations were in an advanced stage.*
  
- *Other possibilities were rejected:*
  - *There could not have been no contract/intention to create legal relations as the parties had agreed on the price: [58]*
  - *There could not have been a limited contract with only some terms incorporated as it is contrary to commercial sense: [61]*

[19] In **Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd**<sup>8</sup>, the court posed three questions when considering the existence of a binding contract. Firstly, did the parties arrive at a consensus? If they did, was it such a consensus as capable of forming a binding contract? If it was, did the parties intend that the consensus at which they arrived should constitute a binding contract? The court held the use of and reference to terms in a preliminary document such as “further agreement” and “proposed agreement” did not prevent the finding of an intention to be bound until a formal contract came into existence. It was said that the use of these terms evidenced only an intention that a formal document should be drawn up and did not evince an intention that the parties would not be bound until this document was executed.

[20] In **Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd**<sup>9</sup>, the parties were in negotiations with a view to entering a formal contract in respect of television broadcasting rights. Both contemplated that the detailed terms of their agreement would be contained in a formal document signed by the parties. The parties exchanged drafts of the contract over a period of about 18 months, before one decided to take up another deal. The other party contended that although it was contemplated that a more formal contract would come into existence, a binding agreement existed at the point in time when the parties had agreed the price of the contract and it had paid half of the money under it. The court however found there was no intention to be bound, as despite the parties coming to an agreement on price, they contemplated that

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<sup>8</sup> (1985) 2 NSWLR 309.

<sup>9</sup> (1988) 18 NSWLR 540

there would be express agreement on a number of important matters that they had not yet got around to discussing, or any discussions about those matters were at an incomplete stage.

- [21] In **Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd**<sup>10</sup>, the court stated that if after an informal agreement the parties' correspondence refers to important terms and conditions that were not addressed in the negotiation, it may be more readily inferred that those negotiations do not give rise to a binding agreement, and that earlier discussions amount merely to preliminary negotiations. It was also stated that where the parties have not used solicitors but intended to do so for the drawing up of a formal agreement, that may be a factor pointing toward the non-existence of a binding agreement until the formalities have been agreed and completed.

*Application to the Aerolink – Sunflower MOU*

- [22] **Textual indicators** against binding intention:

- (a) The title “Memorandum of Understanding”. This label is not conclusive, but signals a preliminary document rather than an enforceable contract.
- (b) The MOU says it is “Agreed in Principal (in principle)”. This phrase is fundamentally inconsistent with immediate legal enforceability and courts treat “in principle” as clear evidence of non-binding intention.
- (c) Clause 8 of MOU. “An operating lease ... would be signed by both parties.”. This is the most critical clause. It places the MOU squarely within Category 2 or Category 3 of *Masters v Cameron*, namely:
  - The parties do not intend the MOU itself to bind them;
  - They intend a future formal operating lease to be the binding instrument.

Courts routinely treat such clauses as negating present intention to create legal relations.

- (d) “The second aircraft when required” shows a commitment on the part of both parties in the future and not at the time of signing the MOU. “On completion of the lease” would suggest a future formal lease.

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<sup>10</sup> (1995) 7 BPR, 14,551

- (e) Clause 9 lacks precision and care that a formal contract requires, as shown by ‘the aircraft are to returned’ making it unclear whether it refers to an aircraft or more than one aircraft.
- (f) Absence of contractual language of immediate commitment. There is no language such as:
  - “The parties agree,”
  - “This document is binding,” or
  - “This MOU constitutes the agreement between the parties.”

***Other relevant matters pointing towards a non-binding understanding.***

[23] Crucially, no consideration passed from Sun Air to Aerolink upon the exchange of the MOU or thereafter. The first reference to any payment appears for the first time in Danny Ryan’s (of Aerolink) letter dated 05 October 2005 where he had also said that the lease should commence on 12 September 2005 and payments for the 01<sup>st</sup> aircraft should begin from 01 October 2005. D. I. Collingwood of Sun Air totally disagreed with that proposition and said in his reply dated 17 October 2005 that lease would commence when a fresh C check<sup>11</sup> and C of A (Certificate of Airworthiness) is available. Clauses 01, 08 and 09 read together and sequentially reveal on any reasonable construction that the lease period of 12 months of the 01<sup>st</sup> aircraft referred to in clause 01 is the future lease the parties intended to sign for 12 months referred to in clause 08. It is on the completion of this future lease that would require Sun Air to return to Aerolink the aircraft.

[24] Additionally, there is no mention in the MOU as to which party is responsible to obtain C of A and the parties are at complete variance and dispute over this. Section 13 of the Air Navigation Regulations 1981 states that the registered owner (Aerolink) or operator (Sun Air) may apply for a C of A. However, both parties admit that C of A is absolutely essential for an aircraft to fly. It is common ground that the 01<sup>st</sup> aircraft was not used at all by Sun Air after delivery for passenger transport.

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<sup>11</sup> A **C check** is understood to be a comprehensive, heavy maintenance inspection performed on an aircraft roughly every 20–24 months, involving extensive checks of most systems and components. A **C2 check** is a specific, lighter-weight type of C check task, often part of a larger "Progressive" or "E check" maintenance strategy where heavy maintenance is distributed across multiple C checks (like C1, C2, C3, etc.) to reduce downtime.

[25] Factors supporting apparent binding intention (but insufficient). Despite what is stated above, the MOU contains substantial commercial detail:

- Lease durations
- Monthly payments
- Insurance obligations
- Overhaul responsibilities
- Return conditions (C2 check, Export C of A)
- Aircraft delivery

Courts have held in cases like *RTS v Müller* and *Air Great Lakes* that detailed commercial terms can imply a concluded bargain. However, this only applies where the document does NOT expressly contemplate a future contract, or where the parties' conduct shows they acted as though bound. Here, the MOU expressly contemplates a future contract, which overrides the detailed terms and the parties to the MOU have not acted as if they were legally bound.

[26] Therefore, in my view the likely Category under *Masters v Cameron* this MOU fits either:

Category 2 - Parties intend not to be legally bound until the later operating lease is executed.

OR

Category 3 - Parties intend no binding obligations, and the future contract will be the final expression of their agreement.

Both categories are non-binding.

[27] Thus, my overall conclusion is that the MOU is NOT legally binding. The MOU is a non-binding agreement to negotiate or formalise a later contract or operating lease. It does not constitute an enforceable operating lease. To highlight again, the decisive points are:

1. The document uses preliminary language (“MOU,” “agreed in principle”).
2. It expressly states that the binding contract (the “operating lease”) will be signed later.
3. This places the MOU squarely in Category 2 or 3 of *Masters v Cameron*, meaning there is no immediate intention to create legal relations.
4. Detailed commercial terms do not overcome the explicit contemplation of a later binding contract.
5. No conduct is indicated (e.g., payments) that would elevate the MOU into a binding contract under *RTS v Müller principles*.

[28] In coming to the above conclusion, I have also considered the absence of (i) contractual language, (ii) separation of specific obligations of each party, and (iii) provisions on legal enforceability, agreement on essential terms such as who should obtain the C of A and (iv) overall conduct of parties as well as the clear expectation or intention of the parties to sign an operating lease within an unspecified time frame in the future and absence of consideration and lack of all elements of a binding contract (v) not taking into account the technical staff/capacity of or approval for Sun Air to operate this type of aircrafts, availability of spare parts, in determining that the MOU is not binding. The MOU is not final and binding on its own terms either. I do not detect a clear intention to create legal obligations by the parties by signing the MOU.

***Certificate of Airworthiness & lease payments***

[29] As the parties were at variance in this issue and both counsel have made extensive submissions, I shall discuss the question of C of A also as it has been at the centre of disagreement as to why the 01<sup>st</sup> aircraft could not fly carrying passengers. Section 12 (1) of Air Navigation Regulations 1981 categorically states that an aircraft shall not be flown unless there is in force in respect thereof a certificate of airworthiness. I also find from the evidence of Ryan that if the Civil Aviation Authority of Fiji (CAAFI) would not grant Sun Air authority to operate the aircraft, it could not be flown and carry passengers.

[30] Mr. Ryan's evidence is that the 01<sup>st</sup> aircraft was operated by Air Fiji before. Upon signing the MOU with Sun Air, it was flown from Nausori to Nadi straight to Sun Air's hangar (according to Roshan Ali of Sun Air) for maintenance by the staff of Air Fiji hired by Aerolink. Air Fiji had done C2 check on the aircraft before the journey. At Nadi, in place of Air Fiji, Sun Air loge was put on the aircraft. Although, Mr. Ryan said in examination-in-chief that the aircraft was functional and operational, he said under cross-examination as follows:

*“Q: ...until there is an approval the aircraft cannot make it runs or cannot be operational, is that correct?”*

*A: That's correct.”*

- [31] I think the aircraft may have been mechanically operational but not in terms of legal requirements or approvals for Sun Air to fly it carrying passengers. Mr. Ryan also says that the aircraft had a C of A (though not produced by Mr. Ryan) when it was operated by Air Fiji. Even assuming that Air Fiji had a C of A, the fact remains that Sun Air could not fly the aircraft with that C of A. Roshan Ali (of Sun Air) says that it was flown to Nadi from Nausori on an approval granted by CAAF to ferry the aircraft without passengers but after a C2 check at Nausori. If so, it may not have been a full-fledged C of A. In any event, if Sun Air could fly the aircraft with the C of A supposedly obtained by Air Fiji, both parties need not have troubled themselves so much in pursuing a fresh C of A. It is clear from section 13(1) of the Air Navigation Regulations 1981 that since Aerolink as the owner admittedly did not have a C of A, Sun Air as the operator had to have a C of A in order to fly the aircraft. Ryan knew or would obviously have known that the aircraft could not fly commercially until a fresh C of A was obtained. However, there is no mention of C of A in the MOU making it an incomplete and tentative document.
- [32] This explains why he decided, arbitrarily though, the date of commencement of monthly lease rentals as 01 October 2005 as opposed to 31 January 2005. On the other hand Collingwood's position – Collingwood was not a witness but he had signed all fax messages as the Managing Director of Sun Air - seems to be that lease payments would be from the commencement of the operating lease. Undoubtedly, the parties had not agreed and the MOU is silent on this vital aspect of their business transaction.
- [33] Thus, the fact remains that the MOU is silent as to who should obtain the C of A, the non-availability of which has caused the aircraft idling and not flying as expected. Equally, the MOU is silent as to when the payments should begin.
- [34] The overall picture that emerges from the exhibits on the question of C of A is not unequivocal either. The fax message on 2005/10/05 by Ryan casts the responsibility of satisfying CAAFI on Sun Air, presumably of C of A but offered to help Sun Air in that endeavor. The same letter speaks of the necessity of an agreement between the parties regarding the supply of spares as advised by CAAFI, perhaps as a precondition to the grant of C of A to Sun Air. This is another aspect the parties have not agreed in the MOU. Aerolink has supplied spares but no agreement seems to have been put in place.

Collingwood in his fax dated 2005/10/17 insisted that the delay in applying for the C of A was due to the vast repairs that had to be done on the aircraft by a team hired by Aerolink at Sun Air facility at Nadi and on the completion of the repairs an application for C of A would be lodged on instructions of Aerolink. Ryan in his fax dated 26 October 2005 admitted that both parties were frustrated with trying to get the aircraft flying and that neither of them knew *'what we were in for when the aircraft was picked from Air Fiji'*. This clearly shows that the parties had not taken into account all relevant matters essential in an operation such as this in signing the MOU.

[35] The report on CCCP compliance (Corrosion Prevention and Control Program) attached to Ryan's fax on 11 November 2005 by the manufacturer of the 01<sup>st</sup> aircraft shows that extensive maintenance had been carried out in Fiji during July, August and September 2005 for section 6 MPG (miles per gallon efficiency of an aircraft) corrosion control requirements plus all C checks (it appears that a "C check" in aviation is a comprehensive, heavy maintenance inspection that involves a deep, detailed inspection of the aircraft's major systems and structures). The report speaks of the necessity of revisiting the task for the aircraft to operate pending the final analysis of the issue. During the CCCP inspection wing bolts had been removed and one of them replaced. The report recommends that the aircraft can wait till March 2026 for tasks needing wing removal for corrosion inspection provided it is maintained as per Maintenance Planning Guide. This report shows that substantial maintenance had to be carried out for the aircraft after it was delivered to Sun Air. This is confirmed by Collingwood in his fax dated 05 April 2006 who said *'.. if you consider the state it was in when delivered and the condition it now is, I am sure you will agree it is a different aircraft.'* The MOU is completely silent on these matters too.

[36] Collingwood in his fax dated 05 April 2006 hopes for the C of A to come in a week. He has cited late arrival of flight manual and auto tether switches from Aerolink as the principal reason for the delay. At the same time he speaks of reapplying for the C of A as paperwork, inspections have been done. Earlier he has said (vide 17/10/25 fax) that they were awaiting signatories from Aerolink regarding weighing and some defect rectification. On his part Ryan has in his fax dated 30 May 2006 said that they had already written to CAFFI regarding the C of A but not received a reply. He has also expressed some frustration and fear that Aerolink would be left out of the deal between

Sun Air and Air Pacific. Ryan once again says in his fax dated 13 June 2006, that they will be writing to CAFFI again asking for a progress report on the C of A. Thus, unfortunately for both parties, they have started to deliberate on so many crucial issues affecting the business transaction they intended to have only at the implementation of the project. Thus, the MOU is not a well-thought out fully fledged contract but a preliminary document setting out the initial understanding between the parties.

[37] Roshan Ali (of Sun Air) puts the responsibility of obtaining the C of A fairly and squarely on Aerolink as the owner of the aircraft. According to him, no agreement was entered into by the parties. When the aircraft arrived consequent to the MOU it came with a lot of defects. His evidence of the report by the manufacturer of the aircraft suggests that the manufacturer had to send a person to inspect the wings and bolts of the aircraft while it was in the hanger and Aerolink by its fax dated 11 November 2005 had informed Sun Air that the aircraft could operate till 30 March 2006 and corrosion inspection could be completed by then. He also said that before the arrival of the aircraft Air Fiji and Aerolink were in a legal battle and the aircraft was grounded for some time. He was questioned on behalf of Aerolink whether both parties wanted to do an inspection on the aircraft and he answered in the affirmative. Though, he was not cross-examined on 145 approval, Roshan Ali said that Sun Air pilots did not have the rating to fly the 01<sup>st</sup> aircraft and that is why it was flown by Air Fiji pilots. Perhaps, as Ryan said Sun Air may very well not have had 145 approval as well. Roshan Ali's evidence also shows the great divide between the parties on vital aspect of the transaction and this is primarily because they failed to draw up concrete terms and conditions of a proper binding agreement. Instead, they signed a MOU containing some basic understanding with a lot of gray areas for disagreements.

[38] Mr. Ryan in his evidence (referred to in 2005/10/05 letter as well) attributed the no-availability of 145 approval to Sun Air to operate the 01<sup>st</sup> aircraft also as a reason why the aircraft could not be flown. He had assumed that Sun Air had one. He suggested that Sun Air should have got it prior to entering in to the MOU. 145 approval, different from C of A, seems to be a certificate for a maintenance organization, certifying it meets the rigorous standards required for aircraft maintenance, repair, and overhaul (MRO) issued by the regulatory body. This again shows that Aerolink and Sun Air had not thought through these vital aspects adequately before signing the MOU indicating lack

of attention to detail expected of a binding contract intended to create legal obligations. The MOU is silent on 145 approval as well.

[39] Even if Sun Air eventually took it upon itself the responsibility of obtaining the C of A but the prerequisites for that exercise had been hampered by maintenance and other issues including other related regulatory approvals. Some of the issues were of highly technical nature but were inherent when the aircraft arrived from Air Fiji. Aerolink attempted to sort out them for months. That is why both parties for a considerable time since the MOU coordinated with each other in order to obtain the C of A, for both parties knew that without the C of A the aircraft could not fly. Thus, I cannot determine that there was a binding contract given the documents/conversations produced and the conduct of parties either independently or in conjunction with the MOU. The conduct demonstrated by the documents only highlight the fact that the MOU cannot be treated as an agreement or a contract which the parties intended to be legally bound.

[40] With regard to the second aircraft, all what the MOU says it that *“the second aircraft when required will be @\$10,000AUD per month under the same lease agreement as the first aircraft”*. This shows clearly, that parties were contemplating the second aircraft **only when required** but not under the MOU but under the same lease agreement as the first aircraft. There was never such a lease agreement entered into between the parties. The reference to the *‘same lease agreement’*, in my view, is a reference to the operating lease the parties contemplated to be signed in the future. No such operating lease was ever drawn up for the first aircraft and by extension for the second aircraft. Nor did Sun Air at any stage require the second aircraft. Thus, there was no operating lease nor was there any request for the second aircraft by Sun Air. Their position is that when the first aircraft could not be flown, there was no question of requiring a second aircraft. Ryan did not raise the question of a second aircraft in any manner (other than submitting to court a Guarantee and Indemnity Agreement/Term Purchase Agreement dated 07 February 2005 to show how the second aircraft was financed through Capital Finance and *‘additional aircraft further down the track’* remark in his fax dated 30/05/2006) in his fax messages to Collingwood. Ryan did not mention in any of his fax messages that he informed Collingwood that he had leased another aircraft as the second aircraft and the terms thereof, though he gave evidence to that effect. Aerolink has admittedly sold it to another party later on.

[41] Therefore, Aerolink’s claim for damages in relation to the first aircraft and the second aircraft must fail as Sun Air was not contractually bound to make such payments by the MOU which was only a preliminary understanding between the parties as what their future relationship would look like upon entering into the lease proper or operating lease in the future. This lease or the operating lease expected to be signed by the parties never materialized, the primary reason being that the 01<sup>st</sup> aircraft never took off from the ground due to maintenance issues (though seems to have been resolved several months later) and non-availability of regulatory approvals despite substantial efforts by both parties. The first claim @AUDF15,000.00 per month thus fails. The claim for damages in respect of the 02<sup>nd</sup> aircraft @AUD 10,000.00 per month also fails as Sun Air never requested a second aircraft from Aerolink as the 01<sup>st</sup> aircraft itself remained grounded and accordingly the 02<sup>nd</sup> aircraft never arrived in Fiji. Under the MOU Sun Air was not bound to require the second aircraft from Aerolink within a prescribed time period. Sun Air would do it only when required under the MOU even if it was obliged to do so. One can understand why Sun Air did not require the second aircraft as both parties were battling to get the first aircraft flying. However, the fact remains that neither party offered themselves to be legally or contractually bound by the MOU. Even Ryan did not say so unequivocally. The same position would apply to the rest of the claims made by Aerolink as given in the document called ‘Calculation of Damages’.

[42] I have fulfilled the first task which according to Mr. Young is “ .... *to decide whether the MOU is a contract containing all the necessary terms to make it a binding contract*”. Having dealt with this issue *in extenso*, I have concluded that the MOU is not a legally binding contract. The rest of the discussion on C of A etc. is incidental thereto but relevant to the issues raised by both parties strongly at the trial and the hearing of this appeal.

### ***Question of estoppel***

[43] I shall now proceed to the second task, which Mr. Young has said, is to decide whether there has been a cause of action based on estoppel in the form of oral conversations, the MOU and the conduct of parties.

[44] Estoppel is an equitable doctrine used to prevent a person from going back on their word when someone else has relied on that word to their detriment. In contract law, it protects fairness by ensuring that parties behave consistently and do not exploit technicalities to escape their obligations. Estoppel arises when:

1. One party makes a representation (statement or conduct that suggests a fact).
2. The other party relies on that representation.
3. The relying party would suffer detriment (loss or damage) if the first party were allowed to deny it.

When these conditions are met, the law prevents (estops) the first party from denying what was represented.

[45] Types of estoppel relevant to contract law:

<b><i>Type of Estoppel</i></b>	<b><i>Meaning</i></b>	<b><i>Example</i></b>
<i>Promissory Estoppel</i>	<i>Prevents a party from reneging on a promise, even when there is no formal contract</i>	<i>A landlord promises to reduce rent; cannot later demand the full amount for that period</i>
<i>Estoppel by Representation</i>	<i>Stops a party from denying a fact they previously asserted</i>	<i>A seller states a car has new brakes; they cannot later deny responsibility</i>
<i>Proprietary Estoppel</i>	<i>Prevents denying informal promises about property when another relied on it</i>	<i>Someone builds a house on land based on an owner's promise to transfer it</i>
<i>Estoppel by Conduct</i>	<i>Arises when behavior leads another to infer a position</i>	<i>A shop allows customers to return goods; it cannot suddenly refuse without notice</i>

[46] It appears that what Aerolink has pleaded is by and large estoppel by representation, for Aerolink has stated that Sun Air and Roshan Ali represented that a binding agreement had been reached between Sun Air and Aerolink in accordance with the term of the MOU.

[47] Role of estoppel in contract law could be identified as follows:

1. Supplements contract formation:
  - Estoppel may enforce promises that lack consideration (e.g., in promissory estoppel).

- It protects reliance rather than bargain.
2. Ensures fairness:
    - Prevents parties from acting inconsistently to gain unfair advantage.
  3. Limits strict legal rights:
    - A party may be prevented from enforcing contractual rights if that contradicts what they represented (e.g., accepting late payments and then suddenly terminating).
  4. Encourages trust and reliance:
    - It promotes honest dealings and prevents misleading conduct.

[48] However, there are limitations of estoppel. They are:

- It is typically used as a shield, not a sword (i.e., it defends against unfair claims but does not usually create new rights on its own).
- It cannot be used to enforce illegal or void agreements.
- It does not replace normal contract requirements like intention and capacity.

[49] Estoppel plays a crucial role in contract law by ensuring fairness, consistency, and reliance protection. It prevents parties from using the strict wording of contract rules to act dishonestly after causing another to rely on their words or behavior. Ultimately, estoppel balances the rigidity of contract principles with the demands of equity.

[50] The essentially defensive nature of the equitable doctrine is sometimes expressed by saying that it operates as a shield and not as a sword<sup>12</sup>. In the case of a promissory estoppel Lord Denning said in **Combe v Combe**<sup>13</sup>:

*‘Much as I am inclined to favour the principles stated in the High Trees case, it is important that it should not be stretched too far lest it should be endangered. That principle does not create new causes of action when none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place’*: p. 219

*“Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential*

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<sup>12</sup> **Lark v. Outhwaite** [1991] 2 Lloyd’s Report.132; **Hiscox v. Outhwaite** (No.3) [1991] 2 Lloyd’s Rep. 524 at 535

<sup>13</sup> [1951] 2 KB 215 (CA) followed in many later cases.

*part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.*“: p. 220

[51] **Combe v Combe** still stands as the leading English authority for the proposition that doctrine of equitable or promissory estoppel does not create new legal rights. Similar rule applies to the cases of estoppel by representation. In other words, the doctrine does not give rise to a cause of action<sup>14</sup> but only to a defence. Under the doctrine of estoppel by representation, a person who makes precise and unambiguous<sup>15</sup> representation<sup>16</sup> of fact<sup>17</sup> may be prevented from denying the truth of the statement if the person to whom it was made intended to act on it, and did act on it to his detriment.<sup>18</sup> However, it may help a claimant no less than a defendant because estoppel may remove a defense that would otherwise be available to the representor in as much it provides a defense to the representee.

[52] While equitable doctrine has certain features in common with the doctrine of estoppel by representation (such as representation followed by reliance by the representee and each is defensive in nature and does not give rise to new rights), nevertheless, there are many differences between estoppel by representation and equitable doctrine. A representation of intention or a promise suffices for the purpose of the equitable doctrine, while true estoppel by representation, on the other hand, cannot be based on a representation of intention, but only on one of existing fact<sup>19</sup>. There are other significant differences also between the two concepts.

[53] Applying these principles to the facts of this case, I do not see evidence either documentary including the MOU and fax messages or oral by Sun Air or Roshan Ali of any representation made to Aerolink or Ryan that a binding agreement had been reached in accordance with the MOU (i.e. contractual representation). None of the fax messages sent to each other by Collingwood or Ryan speak of such a representation made by Sun Air to Aerolink. Such a proposition has not been even suggested to Roshan

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<sup>14</sup> **Low v. Bouverie** [1891] 3 Ch. 82

<sup>15</sup> **Low v. Bouverie** [1891] 3 Ch. 82

<sup>16</sup> **Laurie & Morewood v. Dudin & Sons** [1926] 1 K.B.223

<sup>17</sup> **Freeman v. Cooke** (1848) @ Ex.654

<sup>18</sup> **Lombard North Central plc v. Stobart** [1990] Tr.L.R. 105

<sup>19</sup> **Forden v. Money** (1854) 5 H.C.L 185

Ali whose evidence was to the contrary. He was categorical that there was no agreement (referring to the MOU) but the lease or operating lease was to be signed later.

[54] There was no consideration or part consideration passed from Sun Air to Aerolink either for receiving the 01<sup>st</sup> aircraft. The removal of Fji Air logo and replace it with Sun Air logo are not unequivocal evidence of conduct suggesting an agreement. The same goes for taking the aircraft to Sun Air hanger for maintenance done by staff hired by Aerolink and the involvement of the manufacturer by Aerolink on CPCP compliance. These are at best preparatory steps taken by both parties to have the aircraft ready for C of A in order to put it into commercial operations by Sun Air at which point the parties were to enter into an operating lease.

[55] Therefore, I am not inclined to uphold a cause of action based on estoppel as urged by Aerolink against Sun Air.

### ***Intention Representation***

[56] Mr. Young has also asked this court to address the alternative cause of action based on Intention Representation i.e. Sun Air and Roshan Ali represented that it was their intention to lease the 01<sup>st</sup> and 02<sup>nd</sup> aircrafts from Aerolink in accordance with the MOU which intention became false around May 2005. This cause of action is backed up by the same matters mentioned under the cause of action based on estoppel by representation as the particulars are exactly the same in both.

[57] “Intention representation” is a shorthand way of describing a pleaded cause of action based on a misrepresentation of intention made by one party to induce the other into a contract, or into relying on future performance. It is essentially a form of misrepresentation (fraudulent or negligent) where the representation concerns the representor’s present intention to act in a certain way in the future. When pleaded in contract disputes, it is often advanced as an alternative to estoppel by representation, because it creates a stand-alone cause of action for damages or rescission, rather than merely preventing the representor from denying the induced assumption.

[58] In contract law, a representation is normally about an existing fact. However, a statement about a future act may be treated as a representation of an existing fact, namely the state of the representor's present intention. If that intention was never genuinely held when stated, the law treats it as a false representation of fact. A false statement of one's current intention is equal to actionable misrepresentation, because the present state of mind is a factual matter.

[59] In summary, estoppel by representation is not a freestanding cause of action in most common law systems. It is primarily a defensive equity preventing departure from an induced assumption but it does not normally generate damages. So, pleading misrepresentation of intention provides a primary cause of action for damages if the induced reliance caused loss. Thus, "Intention Representation" is an actionable misrepresentation where a party falsely represents their present intention about a future act. It is often pleaded as an alternative to estoppel by representation to secure a cause of action yielding damages or rescission, rather than a purely defensive equity.

[60] A statement of future conduct becomes actionable only if:

1. It was a representation that the party presently intends to act in that manner; and
2. That intention did not actually exist at the time; and
3. It induced the claimant to act or enter a contract, and
4. Loss flowed from that inducement.

Examples include promises to supply goods, enter a future contract, renew a lease, or provide benefits where the promisor never intended to do so at the time of the statement. A mere change of mind later is not actionable unless intention was false at the time of representation.

[61] "Intention Representation" may lead to fraudulent misrepresentation (deceit), negligent misrepresentation (where the representor carelessly induced reliance), statutory misleading conduct in some jurisdictions (e.g., trade practices law) and contractual damages, if the representation becomes a contractual term. Thus, it sits at the intersection of contract, tort, and equity, but is commonly pleaded in tort.

[62] This principle was famously established across common law jurisdictions with **Edgington v Fitzmaurice**<sup>20</sup> being the leading case. In this case the directors of a company issued a prospectus offering debentures to raise capital, stating that the funds would be used for business expansion, including alterations to buildings, growth of trade, and purchase of horses and vans. In reality, the directors intended to use the funds to pay off existing debts. Mr. Edgington purchased debentures, influenced by the stated intended use of funds in the prospectus, but also mistakenly believed he was obtaining a security interest in the company's property. After the company's collapse, Mr. Edgington sued the directors for damages in deceit, alleging misrepresentation regarding the directors' true intentions for the debenture funds.

[63] The issues for determination in *Edgington v Fitzmaurice* were (i) whether a statement of intention can be considered a statement of fact for the purpose of misrepresentation in contract law (ii) whether the directors' misrepresentation about the intended use of funds was actionable, given Edgington was also influenced by his mistaken belief about a security interest (iii) whether the misrepresentation must be the sole inducement for the claimant's action, or if partial inducement is sufficient for liability in deceit.

[64] The Court of Appeal in *Edgington v Fitzmaurice* held the directors liable for deceit based on their false statement of intention. The court determined that a misrepresentation need not be the sole cause of the claimant's action; it is sufficient that it was a material inducement. The judges found that because the directors knew their declared intent was false at the time, they were liable for fraudulent misrepresentation. Thus, the legal principles established could be summarised as follows:

- A statement as to a person's present intent is a statement of fact and can amount to a misrepresentation if not true when made.
- For the tort of deceit, the misrepresentation does not need to be the sole cause; proof that it materially induced the claimant's action suffices.
- Statements of intention are actionable misrepresentations if declared falsely with actual knowledge of contrary intent.
- The remedy for fraudulent misrepresentation (deceit) is damages to compensate for loss resulting from reliance on the misrepresentation.

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<sup>20</sup> (1885) 29 Ch D 459

[65] Thus, *Edgington v Fitzmaurice* established that a false statement of intention is a misrepresentation of fact, broadening actionable misrepresentations in contract law. The decision clarified that material inducement, rather than sole causation, is sufficient for deceit, holding parties accountable for false representations of intended future actions.

[66] Aerolink does not allege fraudulent misrepresentation but false representation in that Sun Air and Roshan Ali represented that it was their intention to lease the 01<sup>st</sup> and 02<sup>nd</sup> aircrafts from Aerolink in accordance with the MOU and that intention became false around May 2005. Thus, it is not the position of Aerolink that Sun Air and Roshan Ali entertained any false intention at the time parties signed the MOU but the intention to lease the 01<sup>st</sup> and 02<sup>nd</sup> aircrafts from Aerolink in accordance with the MOU became false around May 2005. However, only if that intention was never genuinely held when stated, would the law treat it as a false representation of fact but not otherwise.

[67] In any event, there is no clear evidence that the intention to lease the 01<sup>st</sup> and 02<sup>nd</sup> aircrafts from Aerolink became false around May 2005. On the contrary, all the evidence point to the fact, that both parties made genuine attempts to have the 01<sup>st</sup> aircraft flying and concerted efforts were made continuously to obtain C of A towards achieving that objective since the arrival of the 01<sup>st</sup> aircraft in Nadi. The facsimile messages are from Oct 2005 to May 2006. The fact that such efforts were frustrated later do not mean that the original intention was false. In my view, the facts of this case unlike *Edgington v Fitzmaurice* is a far cry from being a case of actionable false misrepresentation. Therefore, this alternative cause of action too fails.

#### ***Misleading and deceptive conduct***

[68] Aerolink has also averred further or in the alternative to estoppel by representation and Intention Representation, another cause of action based on misleading and deceptive conduct as stated in sections 75, 77(1)(d) and 77 (1)(j) of the Fijian Competition and Consumer Commission Act 2010 (FCCC). Aerolink relies on **Concrete Construction (N.S.W.) Pty Ltd v Nelson**<sup>21</sup>.

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<sup>21</sup> (1990) 64 A.L.J.R. 293

[69] Section 75 of FCCC provides:

- (1) *A person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
- (2) *Nothing in this division shall be taken as limiting by implication the generality of subsection (1).*

[70] Section 77(1) of FCCC provides:

*'A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services –*

- (a) *falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use which they do not have;*
- (b) *represent that services are of a particular standard, quality or grade they do not have;*
- (c) *represent that goods are new or unused, if they are not or reconditioned or reclaim;*
- (d) *represent that a particular person has agreed to acquire goods or services when that person has not;*
- (e) *represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;*
- (f) *represent that the person has a sponsorship, approval, or affiliation that person does not have;*
- (g) *make a representation concerning that a price advantage of goods or services exist if it does not;*
- (h) *make a representation concerning the availability of facilities for the repair of goods or of spare parts for goods when they are not;*
- (i) *make false or misleading representation concerning the place of origin of goods;*
- (j) *make false or misleading representation concerning the need of any goods or services;*
- (k) *make representation concerning the need for any goods or services;*
- (l) *make representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that person does not have.'*

[71] The trial judge has highlighted the following instances urged by the appellants in support of this cause of action:

- (i) *Being aware that the MOU was signed that obligated Aerolink to provide two aircrafts.*
- (ii) *Accepting the first aircraft by taking it into Sun Air hanger.*

- (iii) *When told by Ryan that he had already entered into an agreement to require a second aircraft and not pretesting.*
- (iv) *Removing the old logo of Air Fiji from the first aircraft and then replacing (on his own initiative) with the Sun Air logo.*
- (v) *Acknowledging that Aerolink was entitled to be paid rental as per the letter of 17 October 2005 (exhibit 5) where he said "That you need to get some revenue for the aircraft id understood, it is far overdue.*
- (vi) *Informing that Sun Air was applying for COA for the 1<sup>st</sup> aircraft as per letter dated 5 April 2006 [Exhibit 9], "we are still awaiting a COA for WBI but this should happen in the next couple of weeks".*
- (vii) *Assuring Ryan that Aerolink's "two aircrafts" were part of the sale of business deal with Air Pacific when he was in no position to give that assurance.*

[72] When all the above instances are considered in the correct historical and broader context borne out by the totality of evidence, I cannot agree that they could be treated as deliberate acts of misleading or deception capable of constituting a cause of action. I cannot identify any instances on the record of Sun Air or Roshan Ali having engaged in conduct that could be truly construed as misleading or deceptive or were likely to mislead or deceive Aerolink or Ryan. Neither has Ryan alleged of any such occasions in his evidence, in fax messages or oral evidence.

[73] I don't believe that either party was trying to mislead the other in this instance. However, neither party knew what they were in for when they picked up the 01<sup>st</sup> aircraft from Air Fji as Ryan has correctly summed up the situation in his fax dated 26 October 2005. In my view, this analysis applies to section 75, 77(1)(d) and (j). Thus, the alternative cause of action based on breach of FCCC too fails.

[74] Therefore, in conclusion I hold that the MOU on its own or along with related oral conversations do not constitute a justiciable binding contract with legal consequences. Thus, the contract claim fails. Secondly, the conversations, the MOU and the conduct (as far as such conversations and conduct could be gathered from the documents produced at the trial and oral evidence) of Sunflower, Collingwood or Roshal Ali, also do not constitute a legally enforceable contract by operation of the doctrine of estoppel by representation either on its own or taken in conjunction with sections 75, 77(1)(d) and 77 (1)(j) of the FCCC. Thirdly, I have concluded that irrespective of a binding contract, the conversations, the MOU and the conduct as demonstrated documentarily or orally, no actionable/false misrepresentation (Intention Representation) on the part

of Sun Air Collingwood or Roshal Ali has given rise to a cause of action for loss and damages with or without sections 75, 77(1)(d) and 77 (1)(j) of the FCCC. The same goes for the separate cause of action based on misleading and deceptive conduct.

***01<sup>st</sup> to 03<sup>rd</sup> and 05<sup>th</sup> and 06<sup>th</sup> grounds of appeal***

[75] Before coming to the issue of counter claim, I shall consider the gist of 01<sup>st</sup> to 03<sup>rd</sup> and 05<sup>th</sup> and 06<sup>th</sup> grounds of appeal. The core of the complaints contained in these grounds of appeal is that the trial judge has not considered the submissions and/or matters urged by the appellants in their favour<sup>22</sup> regarding all causes of action pleaded and the failure of the judge's duty to give cogent reasons<sup>23</sup>. While there can be little debate about the general propositions of law established in these decisions, no hard and fast rule could be laid down as to how much of the submissions and authorities cited by parties should be specifically mentioned and dealt with in a judgment. Suffice it to say that the task of a trial judge varies from case to case. There can never be an inflexible rule of law that a trial judge must deal with every point of fact and law raised by parties or reference to every item of evidence should be found in the judgment. Judgment writing is an art and not a science.

[76] Hon Stock VP in **Hksar v Okafor Peter Eric Nwabunwanne**<sup>24</sup> speaking for the Court of Appeal (Hong Kong) held that '*....where reasons are required, how much needs to be said is as long as a piece of string; ....., sufficient for particular purpose, ..... that it depends on all the circumstances..*'.

[77] The Court of Appeal in **Professional Security Services Ltd v The Labour Officer**<sup>25</sup> and **Khan v Coca Cola Amatil (Fiji) Ltd**<sup>26</sup> dealt extensively with the duty of a judge to give reasons and allied matters which need no repetition here. In ***Professional Security Services Ltd v The Labour Officer*** the court summarized the law as follows:

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<sup>22</sup> See **Wrigley v Holland** [2002] NSWCA 109; **Airports Fiji Ltd v Permanent Secretary for Labour, Industrial Relations & Productivity** [2009] FJCA 61; ABU0070.2007; **New Zealand Pacific Training Centre Ltd v Training & Productivity Authority Fiji** [2011] FJSC3; CBV0016.2008; **Nominal Defendant v Saleh** [2011] NSWCA 16 at para. 308, 310 and 312 in support of this contention.

<sup>23</sup> **Goodrich Aerospace Pty Limited v Arsic** [2006] NSWCA 187 (18 July 2006) at para. 28 & 29

<sup>24</sup> [2012] 1 HKLRD 1041 (27 January 2012)

<sup>25</sup> [2024] FJCA 224; ABU099.2023 (28 November 2024)

<sup>26</sup> [2025] FJCA 112; ABU0127.2023 (25 July 2025)

*[38] Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. A judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial*

[78] In the matter before us, I believe that while the High Court judgment might suffer from the deficiency of inadequate reasons in some respects and detail, it does not prevent this court from scrutinizing the material and engaging in a meaningful appellate review of the correctness of the decision of the courts below. As could be seen, already I have independently engaged in that exercise on all material available and come to the conclusion that the trial judge's decision to dismiss the appellants' action is justified. However, as far as the trial judge having allowed the counter in toto, I would take a view different to that of the trial judge as dealt with below.

[79] Another and perhaps a more forceful reason for that is that as opposed to a case where a right of appeal is given only in respect of a question of law, different considerations apply to a case where there is a full appeal<sup>27</sup>. In other words, as Mr. Young correctly pointed out the appeal before us is an appeal by way of rehearing<sup>28</sup>. On an appeal judgment can only be given as should have been given at the original hearing. On a rehearing, judgment may be given as ought to be given if the case came at that time before the court of first instance. However, an appeal by way of rehearing does not mean that there is to be complete rehearing as, for example, in the case of a new trial. What it means is that the appeal is to be determined by the court on issues which had to be determined at the original hearing and the effect of the evidence then heard as it

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<sup>27</sup> **Soulemezis v Dudley (Holdings) Pty Ltd** (1987) NSWLR 247, McHugh JA at 281

<sup>28</sup> Rule 15(1) of the Court of Appeal Rules.

appears in the record of the proceedings but applying the law as it is when the appeal is heard and not as it was when the trial occurred.<sup>29</sup>

[80] An appeal by way of rehearing permits reconsideration of facts and law based on the record, but is not a new trial, and factual findings based on credibility require caution before interference. On an appeal by way of rehearing, the appellate court must form its own evaluative judgment, while respecting the trial court's position to assess witness credibility. An appeal by rehearing involves review of the lower court's decision for wrongness, not mere unreasonable possibility; the appellate court may re-evaluate evidence on record, but with high respect for primary factual findings. "*The trial is not a dress rehearsal: it is the first and last night of the show.*"<sup>30</sup>

[81] Therefore, the fact the trial judge has not given reasons or adequate reasons or he has failed to consider certain submissions and authorities submitted by the parties alone would not be a ground to set aside the judgment because an appeal by way of rehearing requires a "real review"<sup>31</sup> of the evidence and reasons of the primary judge<sup>32</sup> and the appellate court may draw its own inferences from facts on record, but must show appropriate deference to the trial judge's advantage in seeing witnesses. A court on appeal by rehearing is not bound by findings of fact, especially where they depend on documentary evidence or where the trial judge's reasoning is flawed<sup>33</sup>, however, where credibility is involved, trial judge's advantage remains significant. An appellate court must reach its own view, not merely decide whether the lower court was "reasonably entitled" to its view<sup>34</sup>. An appeal is not a re-trial, but in an appeal by rehearing the appellate court must examine whether the decision was wrong, not merely unreasonable<sup>35</sup>.

[82] This is what my exercise so far is all about. I have examined all the material on record in coming to the conclusion arrived at because this is an appeal by way of rehearing. I

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<sup>29</sup> **Pritt v Wanganui Education Board** [1977] 1 NZLR 476 at paragraph 25 of page 490 per Somers J.

<sup>30</sup> **Lewisohn LJ in Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5

<sup>31</sup> **Shotover Gorge Jet Boats Ltd v Jamieson** [1987] 1 NZLR 437 (CA)

<sup>32</sup> **Coal & Allied Operations Pty Ltd v AIRC** (2000) 203 CLR 194

<sup>33</sup> **Fox v Percy** (2003) 214 CLR 118

<sup>34</sup> **Austin, Nichols & Co Inc v Stichting Lodestar** [2007] NZSC 103

<sup>35</sup> **Re B (A Child) (Care Proceedings)** [2013] UKSC 33

have been mindful of the fact that the trial judge has not referred to any credibility issues of witnesses in the judgment.

***04<sup>th</sup> ground of appeal***

[83] Now, coming back to the counter claim by the respondents, the trial judge had allowed the respondents' counter claim for continued occupation of the hanger despite being requested to remove the aircraft from the hanger (FJD 36,600.00) and expenses related to maintenance and other expenses incurred by the respondents (FJD 50,966.16) totalling FJD87,566.16. However, the total of hanger rent in the document attached to Collingwood's fax dated 17 October 2005 is FJD 54,900.00. Roshan Ali says that FJD 36,000.00 may be the correct amount.

[84] However, it appears from the evidence of Ryan and Roshan Ali that no invoices in respect of those payments had been sent to the appellants by the respondents. At least, no such invoices were produced at the trial by the respondents, if sent. Ryan denied having received any invoices. There is no admission by the appellants of the claim of 87,566.16 particularly by Ryan in his fax dated 26 October 2005 as claimed by the trial judge. What Ryan has stated is '*I have noted your claim on the current account*'. This, in my view cannot be construed as an unqualified admission of the claim.

[85] Further I do not think that there was any agreement between the parties as to the payment of hanger rent by the appellants to the respondents. There is no even a passing reference in the MOU to that effect either. Thus, I think the trial judge was wrong to have allowed the respondents' claim for hanger rent allegedly due from the appellants.

[86] Similarly, Ryan has denied having received any invoices for accommodation (FJD80.30), stores requisition (FJD16,668.33) and advances for crew (FJD440.00 plus FJD 660.00 = FJD1100.00). The total is FJD 17,848.63. Roshan Ali could not produce any invoices sent to the appellants with regard to these claims either. There is no indication at all of these expenses having to be paid by the appellants in the MOU too. In my view, the trial judge was wrong to have allowed these monies as part of the counter claim. Roshan Ali has admitted in evidence that without invoices no claims can be substantiated and he emphasised the need to have corresponding invoices.

[87] However, Ryan has not challenged the expenses for maintenance crew which the appellants have paid to the respondents. Yet, according to the document attached to Collingwood's fax dated 17 October 2005 there are some outstanding amounts due from the appellants to the respondents on account of the expenses for maintenance crew. It was suggested on behalf of the appellants that there was an agreement to pay some charges and the appellants did pay. Roshan Ali has confirmed this and said that yet there were some arrears. According to Roshan Ali, the arrangement was for the respondents to pay whatever the expenses incurred by the maintenance crew and the appellants based in Australia would reimburse the respondents. The appellants seem to have adhered to this agreement. As per the document attached to Collingwood's fax dated 17 October 2005, it appears that the total of the money in areas in respect of advances for crew is FJD 8090.59 (i.e. FJD 1105.09 + 1071.00 + 973.50 + 876.00 + 1947.00 + 2118.00). This too has not been challenged by Ryan. In my view, it is only this amount the trial judge should have allowed as part of the counter claim.

[88] Therefore, I would set aside the second order in the judgment directing the appellants to pay FJD 87,566.16 to the respondents by substituting FJD 87,566.16 with FJD 8090.59.

**Morgan, JA**

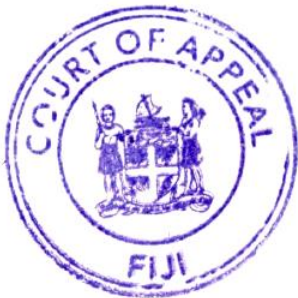
[89] I have read the judgment of Prematilaka, RJA and concur with the reasoning and conclusions in the judgment.

**Andrews, JA**

[90] I agree with the judgment of Prematilaka, RJA.

**Orders of the Court:**

1. *Appeal is partly allowed.*
2. *First order in the judgment dated 28 September 2023 dismissing the appellants' action is affirmed.*
3. *Second order directing the appellants to pay FJD 87,566.16 to the respondents in the judgment dated 28 September 2023 is set aside.*
4. *The appellants jointly and severally are directed to pay the respondents \$8,090.59 with pre- judgment (High Court) interest at the rate of 4% per annum and post judgment interest pursuant to Law Reforms (Miscellaneous Provisions) (Death and Interest) Act within 21 days hereof.*
5. *Costs lie where they fall.*



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**Hon. Mr. Justice Chandana Prematilaka**  
RESIDENT JUSTICE OF APPEAL

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**Hon. Mr. Justice Walton Morgan**  
JUSTICE OF APPEAL

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**Hon. Madam Justice Pamela Andrews**  
JUSTICE OF APPEAL

**Solicitors:**

Young & Associates for the Appellants  
Rams Law for the Respondents