IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 17 of 2015

BETWEEN : **AIRPORTS FIJI LIMITED** a Government commercial company established pursuant to the Public Enterprises Act, 1996 and duly incorporated under the Companies Act, Cap 247 and having its registered office at Airports Fiji Limited Headquarters, AFL Estate, Namaka, Nadi in the Republic of Fiji.

PLAINTIFF

AND : **AEROLINK AIR SERVICES PTY LTD** a limited liability company having its registered address at Hangar 410, Drover Rd, Bankstown Airport NSW 2200, Australia.

DEFENDANT

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Mr. Haniff F. for the Plaintiff
Mr. Young C. B. for the Defendant

Date of Ruling : 15th September 2016

RULING

[On Selling of an Aircraft]

1. The Plaintiff is a government commercial company registered with the Registrar of Companies, and is responsible registered with the *inter-alia* for air navigation and air traffic services in the Republic of Fiji under section 6 of the Civil Aviation Reform Act 1999.

2. Plaintiff is the airport operator for the Nadi International Airport and other Airports in Fiji and pursuant to section 13 of the Aviation Act, is authorized to

detain and sell any aircraft in default of payment of any charges levied against the owner/operator of any aircraft.

3. The Plaintiff's originating summons dated 03 February, 2015 seeking leave of this Court for the selling of the Defendant's Aircraft which is more fully described in the said summons (the Aircraft) , is made pursuant to section 13 (3) of the Civil Aviation Reform Act 1999 (the CARA 1999)and under the inherent jurisdiction of the High Court.

4. It should be noted that the courts disregard the power vested with it by an act of parliament to deal with a specific matter or matters and opt to exercise the inherent jurisdiction by turning a blind eye of that written law.

5. The basis for Plaintiff's claim against the Defendant is on an alleged default of parking fees which are as invoiced by the plaintiff is as follows:

   (a) January 2007 – September 2012, Invoice Number MINVO23 FJD$57,960.00

   (b) October 2012 – January 2014, Invoice Number MINV001 FJD$13,468.80

   (c) February 2014 – August 2014, Invoice Number MINV014 FJD$5851.20

   The copies of the invoices are in the annexure MM 5 in the affidavit of Molly Murphy filed on 3 February 2015.

6. In this case, the plaintiff's application to sell the disputed aircraft of the Defendant is made under a specific law as it reflects in the originating summons and that is under section 13 (3) of the CARA 1999.

7. Therefore, at the very outset I state here that the Court cannot exercise its inherent jurisdiction to determine the matter at issue in this application but the due regard should be given to the duly written law and procedure laid down under the statutes relevant to the matter.

8. Section 13 (1) and (2) of the CARA 1999 provides:

   13(1) – If default is made in the payment of charges determined under section 12 in respect of any aircraft, the airport operator may, subject to this section-

      (a) Detain, pending payment, either –
         (i) The aircraft in respect of which the charges were incurred (whether or not they were incurred by the person who is the operator of the aircraft at the time the detention begins); or

(ii) Any aircraft of which the person in default is the operator at the time the detention begins; and

(b) If the charges are not paid within 56 days of the date when the detention begins, sell the aircraft in order to satisfy the charges.

(2) An airport operator must not detain, or continue to detain an aircraft under this section by reason of default in die payment of charges if the operator of the aircraft or any person claiming an interest in it –,

(a) disputes that the charges, or any of them, are due or, if the aircraft is detained under paragraph (a) (i) of subsection (1) that the charges in question were incurred in respect of that aircraft; and

(b) gives to the airport operator, pending the determination of the dispute, sufficient security for the payment of the charges that are alleged to be due.

9. The section 13 (3) of the CARA 1999 states:

Section 13(3);

"An airport operator must not sell an aircraft under this section without the leave of the High Court, and the court must not give leave on proof that-

(a) A sum is due to the airport operator for charges under section 12;

(b) Default has been in the payment of charges; and

(c) The aircraft that the airport operator seeks leave to sell is liable to sale under this section by reason of the default.

(d) Reasonable steps have been taken to bring the application to the notice of all persons whose interests may be affected by a sale; and

(e) Reasonable opportunity has been given to all such persons to become a party to the proceedings on the application."

10. In addition to the guidelines given under section 13 (1) above, the plaintiff in order to succeed in the outcome, must satisfy the criteria set out in section 12(1), (2) and (3) of the CARA 1999 which states:

(1) The operator of an airport may from time to time determine charges for services performed and facilities provided at the airport in connection with aircraft.

(2) Charges under subsection (1) may be set by –

a. Fixing amounts;
b. Fixing maximum amounts; or
c. Setting a method of calculation.

(3) Notice of a determination under subsection (1) must be given to the Authority and must be published in the Gazette."

11. In the Plaintiff's affidavit in support sworn by Molly Murphy filed on 3rd February 2015 the Plaintiff refers to annexure "MM1" being Commerce Act 1998 – Commerce (Control of Prices for Aeronautical Services) Order 2009; annexure 'MM2' being Legal Notice No. 41 – Commerce Commission Decree 2010, Commerce (Control of Prices for Aeronautical Services (Amendment) Order 2013 and annexure 'MM3' being Final Determination Aeronautical Fees and Charges Airports Fiji Ltd by the Fiji Commerce Commission with date of issue of 12th December 2013.

12. It is important to note that the proceedings was filed on 3rd February 2015 and seeks the Order of this Court to sell the Defendant's aircraft for parking fees accrued by the Defendant for the periods:

(a) **January 2007 – September 2012,** Invoice Number MINVO23 – FJ$57,960.00

(b) **October 2012 – January 2014,** Invoice Number MINVO14 – FJ5,851.20

(As per paragraph 13 of Murphy's affidavit)

13. Since the action was instituted on 3rd February 2015 the Plaintiff can only claim 6 years of parking fees in view of Section 4(1) (d) of the Limitation Act (Cap. 35).

S. 4(1) (d);
"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(d) Actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that –

(i) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) Nothing in this subsection shall be taken to refer to any action to which section 6 applies".

14. In State (Crown previously) Lease No. 3469 (exhibit 'DR-2') in the affidavit of Daniel Patrick Ryan) the Plaintiff was registered as the lessee on 8th January 2010. So, as a starting point the Plaintiff could not have been an airport operator of an airport in terms of section 12(1) of the Civil Aviation Reform Act 1999 until 8th January 2010. Furthermore, by the Plaintiff's letter dated 10th May 2012 (exhibit 'MM6') it states that since January *2012*, the Plaintiff has the mandate to charge parking fees on the aerodrome"

15. It is obvious from Murphy's first Affidavit that the Plaintiff is relying on the Commerce Act 1988 and the Commerce Commission Decree 2010 to justify the charging of the parking fees. The reference by the Plaintiff to the Commerce Commission Decree obviously means that the Plaintiff accepts that the charging of fees are controlled by the Commerce Commission Decree (as "controlled services") and failure to obtain authorization of the Commission renders the parking charges unenforceable. The Plaintiff's counsel submits.

16. Section 31 and 34(1) and (2) of the Commerce Act 1998 states:

"S. 31;

In this part, unless the contrary intentions appears –
"controlled goods are services" means goods or services in respect of which an Order is for the time being force;

"order" means an order made under section 32.

34(1) A person must not supply any controlled goods or services unless a price for those goods or services has been authorised by the Commission and the goods or services are supplied in accordance with the authorisation. Penalty: $50,000.

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

17. The Commence Act 1998 was replaced by the Commerce Commission Decree 2010. Section 31 of the 1998 Act is reproduced in section 39(1) of the 2010 Decree. Section 34 of the 1998 Act is reproduced in section 41. However, section 44(1) of the 2010 Decree States:

> "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 any specified part of or place in Fiji."

18. The Plaintiff being a company established by statute (under the Public Enterprises Act) carries the onus of proving to this Court that the parking fees it is charging is legitimate when that legitimacy is called into question. Obviously, it has tried to do that by making reference to the two exhibits 'MM2' and 'MM3' being Legal Notices issued as a result of the Commerce Commission Decree 2010.

19. However, it is submitted by the Counsel for Defendant that the statutory right of the Plaintiff to charge parking fees does not stop at the door of the Commerce Act 1998 and/or the Commerce Commission Decree 2010. It is only the first step because the parking fees being a Civil Aviation service must have approval under the Commerce Act 1998 or the Commerce Commission Decree 2010 before those prices can be implemented. Failing to do this renders a claim in contravention of those two legislations unenforceable.

20. Furthermore, the Defendant's Counsel states that a Court of law cannot lend support to the Plaintiff who has contravened a law or have committed an offence which has happened because it sought to charge for parking charges that predate 12th December 2013 where the Commerce Commission had not given approval for those charges as it clearly reflects in annexure 'MM3' of Murphy's first affidavit)

21. Hence, a summary of the following inescapable consequences have to be considered:

(a) The action being instituted on 3rd February 2015, the Limitation Act only permits 6 years of parking fees to be claimed, hence form 3rd February 2009.

(b) However, the Plaintiff did not become registered lessee of State Lease No. 3469 until 8th January 2010, so the Plaintiff cannot claim any parking fees that predates 8th January 2010.

(c) Plaintiff's own letter of 10th May 2012, (exhibit 'MM6') says ".... Since January 2012, AFL has the mandate to charge parking fees on the aerodrome." So parking fees can only be charged from January 2012.

(d) Section 34(2) of the Commerce Commission Act 2010 makes any claim for parking fees unenforceable unless the Commerce Commission approves it and according to the Plaintiff's own evidence this did not happen (at the earliest) until June 2013 or if not December 2013.

22. Once the Plaintiff satisfy the 1998 Act and the 2010 Decree it must then proceed to satisfy section 12(3) of the Civil Aviation Reform Act 1999 in that as an operator of an airport, the Plaintiff must give a notice of a determination under section (1) of the Civil Aviation Reform Act and then publish that determination in the Gazette.

23. It is clear from section 13(3) of the Civil Aviation Reform Act 1999 that:

(i) ".... The Court must not give leave except on proof that – (a) a sum is due to the airport operator for charges under section 12" and part of that proof must mean that the onus is on the Plaintiff to prove that (as wee alluded to earlier) that it has determined the charges for parking fees then;

(ii) Gave notice of such determination to the Civil Aviation Authority of Fiji; and

(iii) Which notice of determination must be published in the Gazette.

24. As points out by the Counsel for the Defendant in his submissions, earlier 'MM2', 'MM3' and 'MM4' of Murphy's first Affidavit are the only evidence (if at all) of the Commerce Commission's determination under the Commerce Commission Decree 2010. Even if one was to accept, for the moment, that Plaintiff had made a determination (and there is no evidence of this) under section 12(2) of the Civil Aviation Reform Act 1999, the Plaintiff has failed to prove that it has given such notice of determination to the Civil Aviation Authority of Fiji and have published it in the Gazette.

25. There is no evidence that this essential requirement had been complied with. It is to be highlighted that section 12(3) uses the word "must be given to the Authority" and "must" be published in the Gazette".("Authority" in the Act is defined as the Civil Aviation Authority of Fiji). The reason why the legislation

uses the word "must" is obvious because the consequences that flow from the non-payment of any parking fees are very serious, resulting in the ability of Plaintiff to detain and then apply for leave to sell the aircraft.

26. It is also to be noted that the Plaintiff has not exhibited any evidence that it gave notice to the Civil Aviation Authority of Fiji. It is also points out by the Defendant's Counsel that the requirement in section 12(3) is clear and leaves no room for ambiguity. Therefore, failure to comply by the AFL is fatal to the present claim for parking fees.

27. Counsel for Defendant submits the case of **Hawkes Bay Hide Processors of Hastings v CIR** (1990) 3 NZLR 313 at 314 where Justice Cooke said:

"The statute is unambiguous as to the time requirement. I can see o basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."

In **Scurr v Brisbane City Council** *[1973] 133 CLR 242* Stephen J at p. 256 of the judgment said:

"When the requirement is that 'particulars of the application' should be given by public advertisement and when once it is accepted that there must be an advertisement which gives some such particulars, it is difficult to discern any distinction between a strict observance of this requirement, such as a mandatory interpretation would call for, and the substantial observance of it, as called for, by a directory observation.... That which statute calls for is not compliance with precise and detailed formalities, some of which might be omitted without affecting substantial compliance; can in this case only be achieved by giving' adequate particulars and strict compliance calls for no more than the giving of those same adequate particulars. The particulars of the advertisement will either be sufficient to effect the legislative purpose of giving notice to the public of the application or it not will not amount even to a substantial compliance with the statute.

28. The Defendant further submits that even if the Plaintiff had complied with section 12(3) it cannot claim parking fees because when the Plaintiff permitted the Defendant to park its aircraft and it tantamount to a dealing in land in terms of the State Lands Act (Cap 132) section 13 which states that any *'dealing affected without such consent shall be null and void"*. Daniel Ryan's Affidavit at paragraph 8 states that enquires have been made with the Divisional Surveyor Western at Lautoka who states at paragraph 8 Í have been informed by Young & Associates that they have made enquiries with the Divisional Surveyor Western at Lautoka *(who is in control of consents to dealing with State land situated in the Western Division of Fiji) and were advised that no consent of the Director of Lands have been obtained by the Plaintiff to this"* State Lease No. 3469 is a "protected

lease" in terms of section 13 of the State Lands Act. Since the Plaintiff has not denied this when Molly Murphy filed second Affidavit (filed on 13th October 2015) in reply to Daniel Ryan's Affidavit (filed on 8th September 2015) the Plaintiff accepts that no such consent of the Director of Lands has been obtained.

29. The Privy Council in **Chalmers v Pardoe** [1963] 3 ALL ER 552 recognized that a dealing in land included a license to occupy coupled with possession. Here, the Defendant was allowed to occupy and possess the parking space allocate to it for its aircraft and no third party could divest it of that right.

30. In **Ramdin v Pyara Singh** [1977] 23 FLR 127 the Court of Appeal held that:

> *"Delivery of possession of land without the consent of the Director of Lands rendered the agreement for sale null and void, and the purchase null and void illegal. A loan transaction supporting such delivery was tainted with illegality and could not, therefore, be enforced."*

31. However, I do not say that the Plaintiff is not entitled to charge parking fees from the Defendant, and that the Defendant need not pay the same in return, but the exact total amount of the sum due from the Defendant should be calculated and determined on oral testimony of the witnesses supported with the documentary evidence of both the parties and for that the matter has already been fixed for trial.

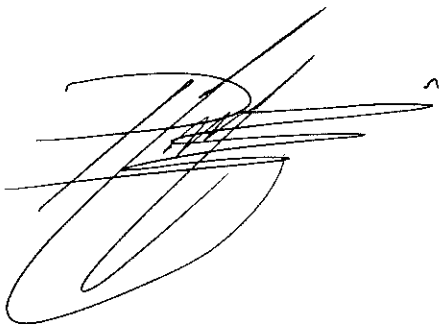
32. All in all, what has become the outcome of these legal submissions is that certain facts are in dispute need further investigation without which the court cannot rule on the matters on affidavit evidence alone, but need to adjourn the issue to be dealt with by oral evidence to be tested as it is already listed for trial on 17th to 21st October 2016.

33. Therefore, the decision of this Court on the Plaintiff's application by way of its originating summons dated 03 February, 2015 made pursuant to section 13 (3) of the Civil Aviation Reform Act 1999, and under the inherent jurisdiction of the High Court seeking leave of this Court for the selling of the Defendant's Aircraft is hereby deferred to be decided along with the substantive matter between the parties as already listed for trial.

34. Hence, mainly in view of the legal submissions made by the Defendant, the Court cannot at this stage of the case make an order for selling of the disputed aircraft.

35. The result being, the application made by the Plaintiff for immediate sale of the aircraft in question is refused subject to the forgoing findings of the Court.

36. The costs of this application shall be costs in the cause.



R. S. S. Sapuvida

[JUDGE]
High Court of Fiji

On the 15th day of September 2016
At Lautoka.