IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 17 OF 2015

BETWEEN	:	**AIRPORTS FIJI LTD**
		Plaintiff
AND	:	**AEROLINK AIR SERVICES PTY LTD**
		Defendant
Counsel	:	Mr. F. Haniff for the Plaintiff.
	:	Mr. C. B. Young for the Defendant.
Date of Brief Hearing	:	19th September, 2017.
Date of Ruling:	:	11th October, 2017.
Ruling by	:	Justice Mr. Mohamed Mackie

R U L I N G

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[1] The trial in this case has been held from **17th to 19th October, 2016**, before my predecessor Judge, but no judgment has so far been pronounced.

[2] On perusal of the record it transpires that when the matter was, subsequently, mentioned before the same Judge on 9th November, 2016, both the parties have been directed to file written submissions simultaneously within 28 days and reply thereto by 31st January, 2017. The judgment has been fixed to be delivered on notice.

[3] It is also on record that the matter again being mentioned before the same judge on 26th January, 2017, & 10th April, 2017, on some issues pertaining to certain documents and same being resolved, the date for filing written submissions has been extended till 9th of June, 2017 . Yet, no written submissions were filed and

the judgment remains un-delivered. In the meantime the trial judge has left the Bench by the end of June,2017.

[4] Thereafter, this matter, being allocated to me by the Registry, was called before me on 12th September, 2017, to see the possibility of adopting the evidence led before the former Judge, before me, in order to have the Judgment delivered by me. Accordingly, when the Court inquired about the consent of the parties, the learned Junior Counsel for the Plaintiff expressed the unwillingness and moved for De Novo trial, while Mr. Young, the learned Counsel for the Defendant, stated that he is prepared to accept, if the judgment is delivered by this Court on the evidence led before the former Judge.

[5] However, Mr. Young indicated that since all the Defence witnesses were from Australia, the Plaintiff will have to bear all the costs already incurred by the Defendant, in case the matter is fixed for De Novo trial. Accordingly, the Plaintiff's junior Counsel was directed to get instructions from the senior Counsel and the matter was fixed to be mentioned on 19th September, 2017.

[6] When the matter was mentioned before me on 19th, September, 2017, Mr. Feizal Haniff, the learned Senior Counsel for the Plaintiff, made submissions and insisted that the matter should be fixed for De Novo trial. On the question of Defendant's claim for incurred costs Mr. Haniff's response was, that the Plaintiff had nothing to do with or cannot be blamed for the non-delivery of the Judgment by the former Judge, for the Plaintiff to pay the costs of the Defendant, for which Mr. young responded by saying that the Court can make a ruling whether to go for De Novo or not. Mr. Young, however, has not seriously disputed the stance taken by Plaintiff's Counsel in asking for De Novo trial.

[7] The three (3) days long trial in this case has ended on 21st October, 2016, nearly 1 year ago. Though, the written submissions were to be filed before 9th June, 2017, same have not so far been filed. I do not find any of Judge's trial notes in the record except for the journal entries. The transcript of the evidence led at the trial, which runs to 208 pages, is also before me.

[8] This action being filed on 3rd February, 2015, is pending for last 2 ½ years. On perusal of the case record it is clear that there has not been any notable delay committed by either party during the proceedings, except for not filing the written submissions on the due date granted for same. Had it been filed learned trial judge would, probably, have delivered the judgment before his departure.

[9] The substantial matter is for the recovery of **FJD $77, 280.00,** being the alleged arrears of parking fees for one of the Defendant's Air Craft, within the premises of

the Plaintiff and for the ancillary reliefs, by selling the Air Craft which is the subject matter of the action.

[10] The Defendant while refuting the Plaintiff's claim makes a counter claim of US$ 305,000.00 as per paragraph 7 of the Notice of Counter Claim and paragraph 16 of the affidavit of DANIAL PATRICK RYAN, the Director of the Defendant Company.

[11] The veracity of the conflicting claims, such as the one in the current case, are primarily ascertained from what is unfolded in the Court by way of evidence in chief, cross examination and re-examination. The way witnesses present their evidence, their demeanour and conduct in the Court play an important role in the adjudication process. Undoubtedly, the observations made by the sitting judge during the process of trial and the trial notes taken by the Judge are of great assistance for him or her in arriving at the most justifiable decision at the end.

[12] In the High Court of Australia case of ***Derrick Alan Jones Jones v Stephen Robert Hyde (11 April 1989) McHugh J*** in delivering his ruling stated the following in paragraph 18 on the demeanour of a witness assisting a Trial Judge in determining his findings:

> ***"It is true that the learned Judge did not expressly rely on the demeanour of the Plaintiff in making his findings of primary fact. But this does not mean, as Mr Ellicott submitted, that an appellate court is in as good a position as the trial Judge to determine the primary facts of the case. When a trial Judge resolves a conflict of evidence between witnesses, the subtle influence of demeanour on his determination cannot be overlooked. It does not follow that, because the learned Judge made no express reference to demeanour and credibility, they played no part in his conclusion...."***

[13] The task of adjudication, on conflicting evidence, can most often than not be easily and successfully performed by a presiding Judge through observing the subtle influence of demeanour of the witnesses. It is an important element which the present Court or the Judge before whom the matter is now proceeding was never privy to.

[14] Mr. Haniff has drawn the attention of the Court to the decision in ***ANZ Banking Group Ltd v Vikash [2010] FJHC 3; HBC208.2004L (18 January 2010,*** a case where the matter had gone to trial on 18th August 2008 but Judgment remained undelivered. The delay was caused mainly by Counsel's failure to file their written

submissions after the trial. The situation was exacerbated by the events of 10 April 2009 and the Trial Judge not being re-appointed to the Bench.

[15] In the aforesaid matter, on 27th July 2009, the Deputy Registrar had written to the Solicitors involved seeking their views as to how the Judge was to deal with the matter. The Solicitors for the Plaintiff were happy for the Learned Judge to deliver judgment based on the trial Judge's notes and Counsel's submissions but the Defendant's Solicitors did not agree to this procedure and asked for hearing De Novo.

[16] Whilst giving his ruling on the application by the Plaintiff for the Honourable Judge to deliver judgment based on the Judge's notes and the submissions filed, **Inoke J** had correctly observed that the Court had a discretion in deciding whether a matter should be heard De Novo or not and cited ***The Queen v His Honour Stephen Olive QC [2005] eqhc 291 (Admin) Case No. CO/2602/2004***, a decision of Evans – Lombe J of the High Court of Justice, Queen's Bench Division, Administrative Court, London. The relevant passages quoted:

> *"By contrast the position at common law is not entirely clear. As a matter of practice as I myself experienced at the bar, the death or incapacity of a judge in the middle of the case will usually require the case to be re-heard before another judge....."*
>
> *"In my judgment the balance of authority leads to the conclusion that the common law position is that the death or incapacity of a judge in the middle of a case (including a Commissioner in the course of a tax appeal) does not mean that there is no jurisdiction for a second judge to take over the case in mid-trial and complete it. It will be open to him, particularly under modern rules of evidence, so to order the trial that costs thrown away are minimized. In a case not involving witnesses this will be relatively easy. However, in the majority of cases, and in particular where witnesses are involved, it will be necessary, as a matter of case management, to try the matter de novo..."*

[17] The Trial notes are not to be found in this case record. If the judgment is to be delivered by me, without a De Novo trial, I will have to completely or to a greater extent rely only on the transcript of the evidence which was not taken before me. I have not had the opportunity of seeing and hearing the witnesses of both the parties for my own benefit of grasping what actually transpired in Court.

[18] The main ground relied on by the Plaintiff in ***ANZ Banking Group Ltd v Vikash [2010] FJHC 3; HBC208.2004L (18 January 2010*** (***Supra***) moving for the judgment to be delivered on the evidence already recorded was that a retrial would give the Defendant an opportunity to correct errors made at the previous trial. No such argument comes forth from the Defence Counsel in this matter. The other ground adduced by the Plaintiff in that case was that the delivery of judgment was delayed because the Defendant did not file his written submissions until 3 months after the hearing. There is no such an allegation in this case. Both parties have failed to file their respective submissions within the given time.

[19] The amount claimed by the Plaintiff in this case is much higher when compared to the amount claimed in the case discussed above, which was only $11,074.23. Conversely, the counter claim in this case is also very much higher than the Plaintiff's claim. When the nature and the amounts of conflicting claims are considered, the application of the Plaintiff for a De Novo trial cannot be simply disregarded.

[20] There has not been a formal or lengthy hearing before me involving hair splitting arguments with regard to this application for De Novo trial. Learned Counsel for both the parties did not even choose to file written submissions fortifying respective positions.

[21] In the light of the foregoing observations, it is my considered view that in interest of justice it is prudent that this matter be fixed for trial De Novo, to be taken up at the earliest possible date/s, however, subject to the availability of the Counsel and the witnesses.

[22] Accordingly, the application by the Plaintiff's Counsel for trial De Novo is hereby allowed.

[23] Considering the circumstances no costs ordered.

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A.M.Mohammed Mackie

Judge

At Lautoka

11th October, 2017