IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0017 of 2023
Court of Appeal No. ABU 0001 of 2019

BETWEEN : **AEROLINK AIR SERVICES PTY LTD**

Petitioner

AND : **AIRPORTS FIJI LTD**

Respondent

Coram : **The Hon. Justice Lowell Goddard**
Judge of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Isikeli Mataitoga
Judge of the Supreme Court

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

Date of Hearing : **06 June, 2024**

Date of Judgment : **28 June, 2024**

JUDGMENT

Goddard, J

[1] I agree with the orders proposed by Young, J and with his reasons.

Young, J

The petition seeking leave to appeal

[2] This case concerns a dispute over an Embraer Bandeirante EMB 110 aeroplane (the aircraft) owned by Aerolink Air Services Pty Ltd (Aerolink) which has been parked at Nadi International Airport (Nadi Airport) since 2005. Nadi Airport has been operated by Airports Fiji Ltd (AFL) since 1999. In issue in the proceedings are:

(a) whether Aerolink is indebted to AFL for parking fees and, if so, for how much; and

(b) counterclaims by Aerolink against AFL in relation to (i) what it alleges was physical harm to the aircraft caused by negligence of AFL and (ii) the allegedly unlawful detention of the aircraft by AFL.

[3] In a judgment delivered in the High Court on 30 November 2018, Nanayakkara J held that Aerolink was not liable to pay parking fees but dismissed its counterclaims for damages.

[4] Aerolink appealed and AFL cross-appealed against the judgment of Nanayakkara J. In its judgment delivered on 26 May 2023, the Court of Appeal held that Aerolink was liable to pay the parking fees claimed but allowed AFL's counterclaim in relation to a failure to take proper precautions to protect the aircraft from damage, for which it awarded $40,000 damages.

[5] Aerolink now seeks leave to appeal in relation to both the parking fees issue and its only limited success on its counterclaim.

[6] Aerolink's challenge to the right of AFL to recover parking fees puts in issue the entitlement of AFL to charge for services provided to aircraft. It succeeded on this challenge in the High Court and, although it failed on the same issue in the Court of Appeal, this was for reasons that I think are erroneous. Whether AFL is entitled to be paid for services provided to aircraft is of considerable economic significance and, given that it is a public enterprise, public interest as well and accordingly satisfies the criterion for leave provided for by s 7(3)(b) of the Supreme Court Act 1998.

[7] As for Aerolink's counterclaims for damages, neither the High Court nor the Court of Appeal addressed the unlawful detention claim on its merits. This was on the basis of an unsound pleading point. For this reason, I would grant leave in relation to that aspect of the counterclaim under s 7(3)(c) of Supreme Court Act. However, for reasons that will become apparent later, I consider that leave to appeal should be refused in relation to the alleged physical harm to the aircraft.

Ownership and operation of Nadi International Airport and the associated legal framework

Preliminary comments

[8] The history of Nadi International Airport (Nadi Airport) goes back to the Second World War. But, for the purposes of this case, I can start my narrative with the Civil Aviation of Fiji Act 1979 (the 1979 Act) which established what was then known as the Civil Aviation Authority of Fiji (CAAF) and, by s 14, vested ownership of Nadi Airport in CAAF.

[9] The 1979 Act has been amended on a number of occasions, most significantly by the Civil Aviation Reform Act 1999 (the 1999 Act). Under the 1999 Act, CAAF was renamed the Civil Aviation Authority of the Fiji Islands (CAAFI) and the 1979 Act was amended in significant respects. In what follows, unqualified references to the 1979 Act are to that Act as first enacted. Where referring to it in amended form, I will make that clear. As well, when talking of the Civil Aviation Authority as it was:

(a) prior to 1999, I will use the acronym CAAF; and

(b) from 1999, I will use the acronym CAAFI.

As will become apparent, CAAF was both a regulator and commercial operator, but, as CAAFI, it is now just a regulator.

The 1979 Act

[10] Section 29 (a) of the 1979 Act provided:

[CAAF] may, with the approval of the Minister, by regulation prescribe-

…

(a) The aircraft charges to be paid to [CAAF];

(b) The charges to be made in respect of air navigation services provided by [CAAF];

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

(d) The charges to be made in respect of services to passengers; and

(e) The fees payable to [CAAF] for other service provided in the discharge of its functions under this Act.

[11] Section 30 of the 1979 Act provided for airport operators to detain and sell aircraft to recover recover charges and fees prescribed under s 29. The s 29 regime was to the same general effect as the regime created under s 13 of the 1999 Act which I discuss in detail later in these reasons.[1]

[12] Pausing at this point, s 29(a), (b) and (e) are best seen as referable to the commercial operation of airports and thus to charges for the use of airports by aircraft. In contradiction, s 29(c) and (e) look to me to be addressed to the recovery of fees connected with CAAF's regulatory functions.

[13] Regulations fixing, inter alia, parking fees were, from time to time, promulgated. The last of these were the Airport (Fees) (Amendment) Regulations 1993 (the 1993 Regulations). The aircraft weighs less than nine tonnes. For such aircraft, the fees prescribed were $1 an hour after the first six hours. The preamble to the 1993 Regulations recorded that they were made under s 29(a) of the 1979 Act. This is consistent with my approach to the scheme of s 29 (and the division between fees and charges for (a) operational and (b) regulatory functions)

[14] The civil aviation industry was re-organised by the 1999 Act. The purpose was to provide for different entities to carry out the regulatory functions and commercial operations that had previously been vested in CAAF. To this end:

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1 See below at [16].

(a) amendments to the 1979 Act meant that CAAF, which was renamed the Civil Aviation Authority of the Fiji Islands (CAAFI) was left with only regulatory functions; and

(b) airports and associated assets were to be transferred to AFL, which, under s 6 is:

> is responsible for the provision of-
>
> (a) services and facilities for air navigation;
>
> (b) air traffic services; and
>
> (c) services associated with paragraphs (a) and (b),

[15] Section 12 of that Act provides:

> (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 the 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.

[16] Section 13 relevantly provides:

> (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);
>
> …
>
> (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 the 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.

(3) An airport operator must not sell an aircraft under this section without the leave of the High Court,

…

[17] The 1999 Act repealed s 29((a), (b), and (d). but left in place (c) and (e), of the 1979 Act This meant that, as amended by the 1999 Act, s 29 of the 1979 Act read as follows:

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

An outline of the factual background

[18] In this section of my reasons, I provide an outline of the factual background. In it I refer primarily to what are undisputed facts and identify for future discussion aspects of the facts in respect of which there is dispute.

[19] In the early years of this century, Aerolink leased the aircraft to Air Fiji which operated it out of Nausori Airport, near Suva. In early 2005, it was proposed that the aircraft be operated by Sun Air. It was flown to Nadi Airport and painted in the Sun Air livery. However, arrangements with Sun Air never came to fruition. Instead, there was a dispute which resulted in litigation. As far as I can tell the aircraft has remained parked at Nadi Airport since 2005. This was initially on a hard stand area, near facilities used by Pacific Island Seaplanes. I will discuss later the evidence as to the condition of the plane at this time and later.

[20] Up until May 2012, no attempt was made by AFL to recover parking fees. It seems to have been content for the aircraft to remain at the airport, free of charge. However, this changed when, on 10 May 2012, AFL wrote to Mr Danny Ryan of Aerolink. In this letter, the aircraft was referred to as being “an obstruction”. The letter required the removal of the aircraft and indicated that unless notified of plans for its removal, AFL would tow the aircraft to a “designated place of AFL’s choice”. The letter went on to say:

> Furthermore, since January 2012, AFL has the mandate to charge parking fees on the aerodrome. It is estimated that the outstanding charges amount to $42,048 and will increase by day until such time as when the aircraft has been removed from the apron area at Nadi Airport.

The reference to January 2012 was not explained in the evidence.

[21] AFL had not given a determination of charges to CAAFI nor gazetted such determination, as provided for by s 12(3) of the 1999 Act. As well AFL had not previously given any indication that Aerolink would be required to pay fees for leaving its aircraft at Nadi Airport. Whatever the strict legal position (which I will discuss later), the assertion that Aerolink already owed $42,048 for parking fees was not a particularly helpful way to commence discussions about what should be done about the aircraft. On the other hand, by requiring the removal of the aircraft and referring to parking fees being payable until the aircraft was removed, AFL made it clear that, for the future, parking fees would have to be paid if the aircraft remained at the airport. I will revert to the significance of this later.

[22] The letter was not addressed to Aerolink’s correct address, and it was only brought to the attention of Aerolink informally when a copy was given to Mr Ryan when he was in a plane about to fly out of Nadi Airport. No written response by Aerolink to this letter was produced in evidence, but it is clear that there were at least informal communications between Mr Ryan and people associated with AFL in which he denied liability.

[23] Sometime in June 2012, AFL moved the aircraft from the hard stand area near the Pacific Island Seaplanes facilities and left it about 150 metres away on grass. I will come back later to Aerolink’s complaints about the way that this was effected.

[24] On 20 September 2012, AFL invoiced Aerolink for $57,960 for parking fees from January 2007 to September 2012. There was no response by Aerolink.

[25] In mid-December 2012, Cyclone Evan struck Nadi. Aerolink maintains that the aircraft was damaged in the cyclone in ways that would not have happened if AFL had taken reasonable precautions to protect it. I will return to these complaints later.

[26] Mr Ryan visited Nadi in January 2013 and inspected the aircraft. He also took a number of photographs that were later produced in evidence. He arranged for the aircraft to be moved to another location at Nadi Airport. He did not, however, raise any complaint directly with AFL as to the condition in which he found the aircraft.

[27] In mid-2013 Mr Ryan removed the motors from the aircraft. This was effected in a hangar at Nadi Airport and the motors were taken to Australia. That the aircraft no longer had motors would have been apparent to AFL staff once it was removed from the hangar. Around this time, and possibly as a consequence of the removal of the motors, AFL took steps to restrict Mr Ryan's airside access. The evidence as to this was vague and there was no unequivocal assertion by AFL at this time that it had detained the aircraft.

[28] AFL subsequently rendered two further invoices for parking fees:

(a) On 11 February 2014, for $13,468.80 for parking fees from October 2012 to January 2014; and

(b) On 1 September 2014, for $5,851.20 for parking fees between February and August 2014.

[29] On 1 September 2014, AFL wrote separately to Aerolink. It described the aircraft as "abandoned". It referred to parking fees of $77,289 being owing. It then went on:

> The letter serves to advise you that under the powers of the Civil Aviation Reform Act 1999 sections 12 and 13, AFL intends to sell the aircraft to satisfy the parking charges.

I consider that this letter makes it clear that AFL had detained the aircraft. I will explain the significance of this later in these reasons.

[30] On 15 September 2014 Aerolink wrote to AFL denying liability for parking fees and putting it on notice of a claim in relation to damage that it alleged the aircraft had suffered as a result of the way in which it had been moved in June 2012 and in December 2012 as a result of the cyclone. As to the latter damage, the letter noted:

> If the aircraft had of [sic] been left on the hardstand under the supervision of Pacific Island Seaplanes with the flight controls, aileron and rudder locks still fitted the damage that this aircraft suffered in the cyclone … would probably not have been so severe.

[31] On 15 and 16 September 2014, the aircraft was inspected at Nadi Airport by Mr Colin Miller who was acting on behalf of Aerolink. He said that during this inspection he was subject to tight constraints by AFL staff as to what he could and could not do and what, if anything, he could take away (as it turned out, it was nothing). He was not permitted to move the aircraft at all. This is consistent with my view that the aircraft was already detained.

[32] The dispute not having been resolved, AFL obtained leave to issue and serve out of the jurisdiction an originating summons for leave under s 13(3) of the 1999 Act to sell the aircraft to recover outstanding parking fees and costs. These proceedings were initiated in December 2014.

The litigation to date

[33] Mr Ryan responded to AFL's originating summons with an affidavit denying liability for parking fees and signalling a claim in relation to damage to the aircraft. Aerolink was given leave to file a counterclaim which it did. The substance of its counterclaim as filed was that:

(a) AFL was responsible for damage to the aircraft caused by the way it was towed in June 2012 and its exposure in December 2012 to Cyclone Evan; and

(b) AFL had unlawfully detained the aircraft "from or about March 2013" with the result that Aerolink was "deprived of the opportunity to repair the Aircraft and then hire it out for profit".

There was also a claim for exemplary damages. The damages sought were not particularised.

[34] The application for leave to sell the aircraft was heard before Sapuvida J on 3 March 2016. But in a ruling delivered on 15 September 2016, he adjourned that issue to be determined following trial as to the liability of Aerolink to pay parking fees and Aerolink's counterclaim. This trial commenced before Sapuvida J on 17 October 2016 and the evidence concluded on 19 October. He, however, left Fiji without delivering a judgment. As a result, the case was reheard before Nanayakkara J on 24 January and 25 July 2018. This was largely on the transcript of the evidence given before Sapuvida J.

[35] As I have recorded, Nanayakkara J dismissed both the claim for parking fees and the counterclaim for damages whereas the Court of Appeal upheld the parking fees claim (along with AFL's right to detain and sell the aircraft to recover the fees and associated costs) and, to a limited extent, the counterclaim. The Court of Appeal also made a modest award of costs in favour of AFL. To the extent that it is necessary to do so, I will discuss the reasoning of Nanayakkara J and the Court of Appeal later in these reasons.

Outline of my approach

[36] In the balance of these reasons, I will deal with the case under the following headings:

(a) liability of Aerolink to AFL for parking fees;

(b) the counterclaim by Aerolink for damage to the aircraft; and

(c) the counterclaim by Aerolink for unlawful detention.

Liability for parking fees

Preliminary comments

[37] Both Nanayakkara J and the Court of Appeal approached the case on the basis that Nadi Airport was not transferred to AFL until 8 January 2010 (which is when the original Crown lease over the land Nadi Airport occupies was formally transferred to AFL) rather than in 1999 which is when AFL actually took over Nadi Airport. This misunderstanding resulted from the way in which the case had been presented to Nanayakkara J and the Court of Appeal by the parties. Indeed, the case was argued in front of us in the same way. It was only in response to a minute from this Court that the true situation was revealed.

[38] Because both judgments proceed on a misunderstanding of the facts, there is no utility in a detailed review of the reasoning. I merely note that Nanayakkara J considered that the non-compliance with s 12(3) of the 1999 Act meant that the claim for parking fees could not succeed, whereas the Court of Appeal concluded that the parking fees were authorised by the 1993 Regulations.

[39] Once the facts are correctly understood, any difficulties with the application of the legislative scheme fall away and this aspect of the case can be relatively simply resolved. This is for reasons that I will now explain under the following heading:

(a) non-applicability of the 1993 Regulations;

(b) the limited consequences of non-compliance with s 12(3) of the 1999 Act;

(c) on what basis, if any, can AFL recover for parking prior to 10 May 2012?

(d) on what basis, if any, can AFL recover for parking after 10 May 2012?

(e) calculation of what AFL is owed.

Non-applicability of 1993 Regulations

[40] The 1999 Act repealed s 29(a) of the 1976 Act, which was the provision under which the 1993 Regulations were promulgated. This repeal was consistent with the scheme of the 1999 Act under which (a) CAAFI would not be running airports and therefore had no occasion to be charging fees in relation to aircraft; and (b) AFL would be running airports and charging for services in relation to aircraft and had power to determine such charges under s 12.

[41] With the coming into effect of the 1999 Act:

(a) The repeal of s 29(a) of the 1979 Act as first enacted (the provision under which the 1993 Regulations had been promulgated) impliedly repealed the 1993 Regulations.

(b) In any event, the 1993 Regulations became redundant. This is because they had only provided for charges in relation to services provided by CAAF/CAAFI, which, with the coming into effect of the 1999 Act, were no longer being provided by it.

[42] For the reasons just given the 1993 Regulations have no application to the parking fees dispute between AFL and Aerolink. This, in short, is why I disagree with the reasoning of the Court of Appeal on this aspect of the case.

The limited consequences of non-compliance with s 12(3) of the 1999 Act

[43] There are good reasons why AFL should have complied with s 12(3) of the 1999 Act:

(a) It is arguable that the effect of s 12 is that a gazetted s12(3) notice would itself have given AFL a right to recover gazetted charges for any service provided. In any event, a gazetted determination would have served as notice to aircraft owners and operators of the charges that they would have to pay for use of AFL's airports and, for that reason, would have been an offer to them to provide those services at the charges specified. By using an AFL airport, an aircraft owner or

operator could be taken to have accepted that offer and for this reason, would be liable in contract to pay the specified charges.

(b) The powers of detention and sale under s 13 of the 1999 Act apply only in relation to non-payment of charges imposed by determination under s 12. There being no charges imposed in conformity with s 12, there was no power to detain and sell the aircraft.

(c) Had AFL complied with 12(3) in relation to parking fees, its claim against Aerolink would have been straightforward and it would have been entitled to recover unpaid parking fees by detention and sale of the aircraft.

[44] Despite what I have just said, I do not see non-compliance with s 12(3) as precluding recovery by AFL of parking fees, providing it has legal entitlement to them that does not rest on the basis outlined in [43](a). I say this for the following reasons:

(a) Section 12(3) is expressed in mandatory terms as it requires that any determination under s 12(1) "must" be both given to CAAFI and published in the Gazette. But it does not explicitly make compliance with s 12(3) a pre-requisite to recovery of aircraft charges. In other words it does not explicitly say that AFL is not able to recover or services provided to aircraft where there is not a s 12(3) compliant determination.

(b) I see no reason to read s 12 as precluding, by implication, recovery of charges where s 12(3) has not been complied with. Let us assume that an aircraft owner and AFL have agreed that AFL will provide certain "services … at the airport in connection with [that] aircraft" but, by reason of oversight or otherwise, such services and associated charges have not been referred to in determination satisfying s 12(3). Providing the charges are not inconsistent with any price control regime, I can see no policy reason for not holding the parties to their bargain.

(c) In the absence of any policy reason requiring a non-literal application of s 12, I propose to construe as meaning no more than what it says.

On what basis, if any, can AFL recover for parking prior to 10 May 2012?

[45] Aerolink had left its aircraft parked at Nadi Airport since 2005 without any demand for fees. The AFL letter of 12 May 2012 suggests that prior to January 2012 it had been of the view that it had not been entitled to claim parking fees. If so, that would explain why fees had not been earlier demanded.

[46] There was no indication from AFL prior to May 2012 of the aircraft causing any inconvenience. Assuming the aircraft was not causing inconvenience and given that it was not being flown, it is likely that AFL was content not to charge for the aircraft remaining where it was. Indeed, I can see no other reason for it not earlier seeking to recover parking fees.

[47] In those circumstances, and in the absence of any evidence indicative of an agreement by Aerolink to pay for parking, I can see no basis on which Aerolink can be held to be liable for fees for parking prior to 10 May 2012.

On what basis, if any, can AFL recover for parking after 10 May 2012?

[48] The 12 May 2012 letter made it clear that Aerolink could not continue to leave the aircraft at Nadi Airport without payment. From this point, AFL's position was that Aerolink would have to pay for parking if it left the aircraft at Nadi Airport. Aerolink had no right to require AFL to provide, free of charge, parking space for its aircraft. By not removing the aircraft, Aerolink must be taken to have agreed, by implication, to pay parking fees. When services are provided in circumstances that make it apparent that payment is required but a price has not been agreed, the law will impose an obligation to pay a reasonable sum, assessed on what is usually described as a "quantum meruit" basis.[2] This Latin phrase can be translated (extremely loosely) as "how much is it worth". On this approach, I conclude that AFL can recover, on a quantum meruit basis, an appropriate sum, to be assessed by the Court, for the parking it provided.

2 See Halsbury, *Laws of England,* 5th edit, vol 88, Restitution and Unjust Enrichment (2019) at [470].

Calculation of what is an appropriate quantum meruit award

[49] The 10 May 2012 demand for fees had been calculated on the rates provided for in the 1993 Regulations. In light of this, and given the evidence as to general practice in Fiji, the award can appropriately be based on those rates.

[50] To allow for some uncertainty as to when Mr Ryan received the letter of 10 May 2012, I would start the period for which payment is required on 1 June 2012.

[51] Aerolink's liability to pay on a quantum meruit basis seems to me to have ceased once the basis of the arrangement changed again, which I consider to be when AFL detained the aircraft. For the reasons already given, I will proceed on the basis that this was on 1 September 2014.[3]

[52] I would allow AFL to recover parking fees on a quantum meruit basis from June 2012 to August 2014, a total of 27 months. On this basis, I consider that an appropriate figure for which to enter judgment is $20,000.[4] But, because these fees were "not determined under s 12", AFL does not have, and never has had, the right to detain and sell the aircraft.

The counterclaim by Aerolink for damage to the aircraft

The complaints of Aerolink

[53] Aerolink complains that in June 2012, the aircraft was negligently towed and was then left in a place and condition that left it particularly susceptible to damage in Cyclone Evan. As to:

(a) towing, the primary complaint was that the locking pin on the nose wheel steering assembly had not been removed;

(b) the condition in which the aircraft was left between June 2012 (when it was moved) and December 2012 (when Cyclone Evan struck Nadi), the primary

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3 See [29], above.

4 The arithmetic is $1 x 24 (hours in a day) x 31 (days in a month) x 27 (for the period between (and including) June 2012 and August 2014), coming to $20,008 which I have rounded down to $20,000.

complaints were that the flight controls (rudder, elevator and ailerons) had not been locked in place and propellors had not been secured and more generally that inadequate precautions were taken to protect it from damage ahead of Cyclone Evan.

The response of AFL

[54] AFL's position was that the aircraft had been properly moved under the supervision of an experienced commercial pilot who had previously flown the aircraft. He said that he had removed the locking pin on the nose wheel steering assembly which he later replaced, he did not alter any other lock settings and the propellers were properly secured. He also said that the aircraft was properly tied down.

Physical damage

[55] The evidence of physical damage was limited. There was no concrete evidence that the nose wheel steering assembly, the elevator or ailerons had been damaged. As I have noted, the motors were taken by Mr Ryan to Australia, but no evidence was adduced as to them having suffered the sort of damage that would have been expected if a failure to secure the propellors had resulted in them "windmilling" in Cyclone Evan. The only damage to the aircraft that was confirmed by the inspection on 15-16 September 2014 was:

(a) to and around the connections between the rudder and rear stabilizer, presumably caused by movement of the rudder;

(b) impact damage to the port upper quadrant of the fuselage;

(c) damage to the inner and outer panes of one window.

The approach of the courts below

[56] Nanayakkara J accepted the evidence led by AFL and rejected the allegations of negligence in relation to the towing of the aircraft and how it had been left in its new location. The Court of Appeal broadly adopted his assessment, save as to what it regarded as a negligent failure by AFL to take more elaborate precautions when the arrival of Cyclone Evan was imminent, either by putting the aircraft in a hangar or "at

the very least covering it up with a tarpaulin nailing it down". For this negligence and what it thought was consequential damage to the airframe, it awarded Aerolink $40,000 damages, an award that is not challenged by AFL in this Court.

My approach

[57] The petitioner seeks to challenge what are now concurrent findings of fact as to how the aircraft was towed and the condition in which it was left after towing. On this aspect of the case, I see no tangible error of fact.

[58] As to the complaint that AFL took inadequate precautions to protect the aircraft ahead of Cyclone Evan, I confess to thinking that the Court of Appeal was in error in awarding Aerolink damages. In December 2012, AFL was providing a parking facility for Aerolink's aircraft. It had not, by that stage, detained the aircraft. So, it had not assumed any responsibility for its care. On the evidence I have read, I think that the relationship between AFL and aircraft owners as to parking left it to the owners to ensure that their aircraft were properly secured against adverse weather conditions. As to this, it is of interest that in the letter of 15 September 2014, there is no suggestion of an understanding on the part of Aerolink that AFL would take positive precautions to protect the aircraft against cyclone damage.[5] And I likewise see no obvious basis for concluding that AFL was obligated to provide hangar storage for the aircraft. That said, there was no cross-appeal by AFL in relation to the award of damages which therefore stands.

[59] All in all, I do not see the proposed appeal in relation to the counterclaim in relation to the alleged physical damage to the aircraft as warranting leave to appeal.

The counterclaim for wrongful detention

The approach of the courts below

[60] Aerolink's counterclaim alleged wrongful detention. Both Nanayakkara J and the Court of Appeal saw this a pleading based on the tort of detinue and that, so construed,

5 See [30], above.

Aerolink could not succeed as it had not demanded and been refused possession of aircraft.

The approach of the courts below was too technical

[61] The tort of conversion is explained in the following passage from the judgment of Somers J in *Cuff v Broadlands Finance Ltd*:[6]

> Conversion may … arise … where a defendant who innocently obtains possession of a chattel is shown to have an intention to retain it as against a plaintiff who has the immediate right to possession. In such a case a demand by the plaintiff and a failure to comply with the demand by the defendant is the usual, but not the only means, of establishing the defendant's intent and the plaintiff may sue in detinue for the return of the specific chattel, or in conversion for damages.

As Somers J recognised, a demand for, and refusal of, possession of chattel is not the only way by which the owner of the chattel can show that someone had manifested an intention to retain it, so as to commit the tort of conversion. In this case, when AFL asserted in its 1 September 2014 letter rights to sell, and thus detain, the aircraft which it did not have, it made it clear that there was no point in Aerolink asking for possession. In this way it thereby converted it. I see this as confirmed by the constraints placed on Mr Miller when he inspected the aircraft later in that month.

[62] I consider that the approach taken to the courts below was too technical. It is true that the pleading did not mention the word "conversion". But it did not refer to "detinue" either. Given this, I think it unreasonable to construe Aerolink's very general pleading as encompassing only detinue, a tort on which it could not succeed, rather than conversion, a tort which it did establish. So, I would construe the counterclaim as pleading conversion by unlawful detention and hold, on the facts, that such conversion was established.

Did Aerolink suffer any loss?

[63] Mr Ryan's evidence was that between 2005 and 2006 he had spent AUD300,0000 refurbishing the aircraft's airframe. He said that that subsequently Pacific Island Seaplanes staff looked after the aircraft "in accordance with the manuals and

6 *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343.

requirements" and that he paid for these services. No evidence was adduced in the form of invoices and banking records confirming that payment was made for the refurbishment and the work said to have been carried out on the aircraft by Pacific Island Seaplanes

[64] A very odd feature of this aspect of the case is that this apparently valuable aircraft was allowed to sit unused for eight years between 2005 and 2013 (when the motors were removed) despite, on Mr Ryan's evidence, having been refurbished and being in serviceable condition. When challenged as to this, Mr Ryan said that initially he could not obtain the logbooks back from Sun Air and that, after he got them back, they were destroyed in a hangar fire in Australia.

[65] By the time the aircraft was detained (in September 2014) it had been parked at Nadi Airport for nine years and it no longer had motors.

[66] Even after the aircraft had been detained, Aerolink could have obtained possession of it under the procedure provided for in s 13(2) of the 1999 Act. Mr Ryan gave no explanation for why that procedure was not resorted to if there were genuine opportunities for making profitable commercial use of the aircraft.

[67] Against that background, I regard the likelihood of Aerolink having put the aircraft to profitable commercial use if it had not been detained on 1 September 2014 as so slight as not to warrant an award of damages.

Orders

[68] I would:

(a) grant Aerolink leave to appeal in relation to the parking fees issue and the unlawful detention claim but refuse leave in relation to the alleged physical damage to the aircraft;

(b) allow Aerolink's appeal against the judgment in the Court of Appeal on the parking fees issue by (i) substituting $20,000 for the amount fixed by that Court (ii) declaring that AFL has not, and never had had, the right to detain and sell the aircraft and (iii) setting-aside the costs order in that Court in favour of AFL.

(c) dismiss Aerolink's appeal on counterclaim based on unlawful detention as no loss was established; and

(d) make no order for costs (reflecting Aerolink's only limited success).

Mataitoga, J

[69] I agree with the judgment of Young, J.

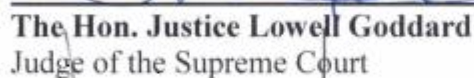
[70] **Orders of the Court**

1. *Aerolink is granted leave to appeal in relation to the parking fees issue and the unlawful detention claim but not in relation to the alleged physical damage to the aircraft.*

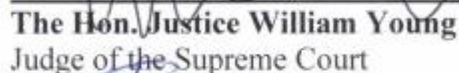
2. *Aerolink's appeal against the judgment in the Court of Appeal is allowed on the parking fees issue by (i) substituting $20,000 for the amount fixed by that Court (ii) declaring that AFL has not, and never had had, the right to detain and sell the aircraft and (iii) setting-aside the costs order in that Court in favour of AFL.*

3. *Aerolink's appeal on counterclaim based on unlawful detention is dismissed.*

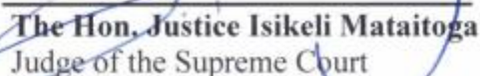
4. *There is no order for costs.*



The Hon. Justice Lowell Goddard
Judge of the Supreme Court



The Hon. Justice William Young
Judge of the Supreme Court



The Hon. Justice Isikeli Mataitoga
Judge of the Supreme Court