IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 212 of 2011

BETWEEN: ISLENO LEASING COMPANY Ltd
Claimant

AND: AIR VANUATU (OPERATIONS) Ltd
Defendant

Hearing: *21st to 23rd April 2016*
Before: *Justice Chetwynd*
Counsel: *Mr. R. Sugden for the Claimant*
Mr E. Nalyal for the Defendant

Judgment

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1. This is a long outstanding case which has been difficult to get to trial. It was also a difficult case to deal with at trial. This was because there was no bundle of documents, no agreed facts and no helpful chronology. In fact there was nothing much to assist the court. I gained the distinct impression that Counsel were uninterested in assisting the court and all they were prepared to do was lodge their own written submissions. Bearing in mind that this is a 2011 case and that it has been managed by several judges previously, the court was entitled to expect more assistance. By the time it became apparent that I was not going to get that assistance I had no option but to proceed with the trial. There was no question of being able to adjourn the matter yet again because that would mean it most probably would not have been listed for trial until the end of the year. This state of affairs was made even less acceptable because I personally emailed both counsel 3 days before the trial started and asked them to confirm they were ready for trial.

2. Lest it be thought that I am being precious about the lack of assistance, it is noted that there have been numerous interlocutory applications with numerous sworn statements in support over the lifetime of this case. Some of those sworn statements were used as statements of evidence in the trial. There are also several "defences" on the file. The latest is dated in September 2015 and is entitled "Second Amended Statement of Defence". I was given no help as to whether this was accepted as a filed amended defence. It is possible that it was, given Harrop J's orders sometime in June or July 2015 requiring the filing of additional particulars in respect of an Amended Defence that undoubtedly had been filed earlier.

3. The background to this case involves an agreement between the Claimant ("Isleno") and the Defendant ("the airline") which was said to have been signed in September 2009. It was a lease agreement for a Britten Norman Islander aircraft for use in the airline's business. The exact details are not important at this time.

According to Isleno's evidence in this case, the airline repudiated the agreement, *"almost immediately it was made".* As a result Isleno commenced proceedings in the Supreme Court, Civil Case 189 of 2009. The exact history of the case has not been set out but quite obviously it seems to have ground to a halt because two years after proceedings had been issued there still had been no trial. There are orders made in August and September 2011 requiring Isleno to instruct a lawyer (order made 17th August 2011) and again (on 2nd September 2011) to find a lawyer, prepare for a possible striking out application and pay wasted costs. An application to strike out was heard by the Court on a 28th November 2012. It is to be noted that this was some 12 months after the order was made to find a lawyer and prepare for a strike out application. It cannot be said the Claimant in this case was rushed into that hearing. A Minute published by Her Ladyship Justice Sey in CC 189 of 2009 records, "*The Court has noted there has been no proceeding over the past year*" and she ordered the claim struck out with costs.

4. Another pleaded aspect of this case needs to be mentioned at this stage, the involvement of the shareholders in the operation of the airline. Just like any other limited liability company the airline has shareholders. At the time in question the Articles of Association ('the Articles") provided that (by Article 76) the shareholders appointed the 7 directors of the company. Article 76 (b) read:

> *"The directors shall be appointed by the Shareholders and shall comprise one director appointed by each of the Shareholders being the Minister of Finance, the Minister of Public Utilities and the Prime Minister of the Republic of Vanuatu for the time being, three directors with substantial professional expertise in business and the Managing Director of the company for the time being."*

As can be seen the shareholders were basically politicians from the Government of the day including the Prime Minister. Article 76 (b) read:

> *"The Directors shall continue to hold office until they resign or are removed by the Shareholders or become disqualified from office under these regulations."*

The removal of Directors was dealt with by Article 90 which stated the office of a director shall be vacated "*If he is removed from office under Section 196 of the Act*" [1].

5. This is a reference to Section 196 of the Companies Act [Cap 191] ("the old Act") which set out a very detailed procedure which needed to be followed. It has to be said that the situation is now different. The Companies Act No. 25 of 2012 ("the new Act") came into force in September 2015 and the old Act has been repealed. When the airline was re-registered (I understand from the online Register of the Vanuatu Financial Services Commission this was in January of this year) a new set of Articles or "Company Rules" was adopted. The point to be made is that at the time in question these provisions seem to have been ignored by the shareholders, the

[1] Article 90 (f)

politicians. They appeared to be of the view that when Ministerial posts changed or when Governments changed, the directors also had to change and the change was at the whim of the shareholders. If the politically appointed directors resigned on the change of the office holders set out in Article 76 (b) then all well and good. However the directors could not be compelled to vacate office unless the process set out in section 196 was followed. It seems that process was very rarely followed.

6. The belief of untrammelled control over the airline which appeared to have been be held by the politicians no doubt caused difficulties. Isleno, through its witness Yoan Mariasua, introduced into evidence a letter dated 9th May 2011 [2]. The letter is addressed to Mr Joseph Laloyer as CEO of the airline and was from the then Acting Prime Minister and Minister of Infrastructures and Public Utilities, Hon Joshua T Kalsakau Maau'Fatu. Basically the letter says the Shareholders have decided that the airline will "*...proceed to sign a deed of release with Isleno".* As an aside I have pointed out to both parties in this case that the final sentence of the paragraph partially quoted above may have consequences later in this case. It reads, *"Once the deed is signed ....**the Government will make payment to Isleno**"* (my emphasis). That letter was copied to Isleno. Apparently, again the details are not in evidence, not long after on 22nd July the board sought to remove Mr Laloyer as CEO and Managing Director. On 26th July 2011 that action brought a rebuke from Prime Minister the Honourable Meltek Sato Kilman Livtuvanu. It is apparent there had been a change of government between 9th May and 26th July. The Prime Minister pointed out the difficulties that the airline would face *vis* compliance requirements of the Vanuatu Civil Aviation Authority ("VCAA") if the person (Mr Peter Fogarty) appointed by the Board as CEO continued in office. This is revealed in a letter tendered by the airline (Mr Joseph Laloyer) as JL 1 on 23rd April 2016. The letter carried an instruction for the Board to meet and review its decision. It also carried the following instruction to Mr Yoan Mariasua, *"....I instruct that you refrain from signing any contract and any other documents with the acting CEO ...".* It has to be noted that this letter to Mr Mariasua was barely 3 months before the Board meeting of October 14th 2011.

7. In any event the two aspects mentioned as background came together in October 2011 to constitute the simple facts at the heart of this case. There appears to be no dispute there was a Board meeting on 14th October 2011. Unfortunately, everything else appears to be contentious. There are two versions of the minutes of the meeting. I will deal with that conflict when later considering the evidence of Yoan Mariasua. At that meeting two important (to this case) things happened. First, there was a resolution passed about settling the case with Isleno. Because there are two different versions of the Minutes there is a dispute about the exact terms of the resolution passed. Secondly, Mr Laloyer was suspended as CEO of the airline and Mr Fogarty was appointed as acting CEO. Again, because of the two different

[2] Exhibit YM2 tendered by Isleno on 22nd April

versions of the Minutes there is disagreement about the exact details of that aspect of the case. The Board meeting was held late on a Friday, ending at 7 pm. The Claim filed on 9th November avers that a deed which settled Civil Case 189 of 2009 between Isleno and the airline was executed on 17th October 2011. As to the particulars, Isleno says Clarence Ngwele as its duly authorised director signed and that Peter Fogarty the "duly authorised representative" for the airline also signed. The Particulars also set out the terms of the document signed.

8. The Claimant's case is based on the appointment of Mr Fogarty as Acting CEO. Isleno says that as Acting CEO Mr Fogarty had authority to sign agreements on behalf of the airline and that the airline is bound by arrangement.

9. The Amended Defence filed on the 22nd May 2014 recites the details of the Board meeting on 14th October and refers to the resolution passed relating to settlement and then avers that Mr Fogarty's appointment was defective which in turn meant his execution of the document was defective. There is also an allegation of bad faith on the part of Isleno, Mr Mariasua and Mr Fogarty.

10. In reply Isleno says that at all times the airline represented that Mr Fogarty did have authority to sign. The Reply to the Amended Defence (filed on 10th October 2014) seems to say that Mr Mariasua sent a copy of the Minutes of the meeting of 14th October to Isleno before the document relied on, the Deed of Settlement, was signed on 17th October.

11. The Claimant refers to statutory provisions in the old Act about defective appointments found at section 193;

> *"193. Validity of acts of directors*
>
> *The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."*

That, says the Claimant, is a complete answer to the Defence that Mr Fogarty's appointment as Acting CEO was defective. Even if the airline can show the Mr Fogarty was not validly appointed as Acting CEO the section legitimises any act he took on behalf of the airline. I agree to a limited extent that proposition is correct. The Claimant says that this is a "statutory expression" of the Indoor Management Rule. I would agree with that proposition too but again, only to a limited extent.

12. In the case of *Royal British Bank V Turquand* [3], commonly known as *Turquand's case*, the equivalent of the memorandum and articles empowered the directors to borrow on bond such sums of money as they should be authorised to borrow by ordinary resolution of the company. No such resolution was passed but

[3] *Royal British Bank v Turquand* (1856) 6 E1 & B1 327; 119 ER 886

the directors borrowed on bond, and the company's seal was affixed to the bond which was signed by two directors. It was held that the bond was binding on the company as the lenders were entitled to assume that the necessary resolution had been passed. This became known as the Indoor Management Rule and the effect of the rule was where the persons conducting the affairs of a company do so in a manner which appears to be consistent with its articles of association and other public documents including the memorandum and the list of directors, then those dealing with them are entitled to assume that all has been done regularly, and those persons are not affected by any internal irregularity.

13. In England and Wales it is now largely accepted that the Indoor Management Rule is an illustration of agency principles applied to the specific situation of limited liability companies [4]. Because a company is not a natural person it must act through its officers who are natural persons. However, in Australia the view seems to be that it is more likely to be a special rule of company law. In both England and Wales and in Australia there have been substantial legislative adaptations to the Rule just as in Vanuatu with section 193 of the old Act. It is probably right to point out that prior to the new Act coming into force the adaptations in other jurisdictions had been far more extensive than in Vanuatu. Now however just a quick glance at Part 7 Division 1 of the new Act shows the law in Vanuatu is much closer to that in, say, The UK or Australia. The legislation and the Indoor Management Rule tries to answer the question of who should run the risk of loss from unauthorised acts purporting to be done on behalf of companies. The rule seems to demonstrate that, prima facie, losses are to be borne by companies and not by outsiders.

14. Having said that the Australian Courts tend to disown the idea that *Turquand* is an example of agency it is significant that they did adopt the common law doctrine of ostensible or apparent authority in company law just as enthusiastically as did the English courts. In company law this doctrine holds that an outsider can hold the company bound by the acts of its agent within his actual authority, express or implied. As to express actual authority, a single director may be specifically authorised by the board of directors to make a particular contract on behalf of the company. This extends the Indoor Management Rule to cover agreements and contracts etc. which are not sealed by the company. Strictly speaking *Turquand* dealt with a situation where the company seal was involved. This aspect of company law has been extensively modified by legislation too, including the new Act. However, at the relevant time in this case the common law principles of ostensible authority applied.

15. What the Claimant's case is all about is ostensible authority. Isleno is not relying on the seal of the airline being affixed to the settlement deed; it is saying that

[4] Per Diplock LJ in *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 QB 480

as a person (that is a company dealing through its own director) it is entitled to rely on the representation of some person as agent of the company it was dealing with.

16. Of course there are exceptions to the Indoor Management Rule whether it is as expressed in *Turquand* or as is found the principle of ostensible authority. One of the more important exceptions was set out by Justice Wright in *B Liggett (Liverpool), Limited v Barclays Bank, Limited* [5] :-

> *"The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule."*

In the *Rolled Steel* Case [6] the English Court of Appeal has accepted the view that because a company holds out its directors as having ostensible authority to bind the company to any transaction which falls within the powers conferred by the memorandum of association, a person dealing in good faith with the company carrying on an intra vires business is entitled to assume that the directors are properly exercising such powers for the purposes of the company as set out in the memorandum, unless he is put on notice to the contrary. If the proviso applies then the outsider cannot rely on the rule.

The brief facts were Rolled Steel Products Ltd gave security to guarantee the debts of a company called SSS Ltd to British Steel. This was a purpose that did not benefit Rolled Steel Products Ltd. Moreover, Rolled Steel's director, Mr Shenkman was interested in SSS Ltd (he had personally guaranteed a debt to British Steel's subsidiary Colvilles, which SSS Ltd owed money to). The company was empowered to grant guarantees under its articles but approval of the deal was irregular because Mr Shenkman's personal interest meant his vote should not have counted for the quorum at the meeting approving the guarantee. The shareholders knew of the irregularity, and so did British Steel. Rolled Steel Products wanted to get out of the guarantee, and was arguing it was unenforceable either because it was ultra vires, or because the guarantee had been created without proper authority.

Browne-Wilkinson L.J said:-

> *"If a company enters into a transaction which is intra vires (as being within its capacity) but in excess or abuse of its powers, such transaction will be set aside at the instance of the shareholders. ... A third party who has notice - actual or constructive - that a transaction, although intra vires the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the company and will be accountable as constructive trustee for any money or property of the company received by the*

[5] *B Liggett (Liverpool), Limited v Barclays Bank, Limited*, [1928] 1 KB 48
[6] *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246

> *third party. ... The fact that a power is expressly or impliedly limited so as to be exercisable only 'for the purposes of the company's business' (or other words to that effect) does not put a third party on inquiry as to whether the power is being so exercised, i.e., such provision does not give him constructive notice of excess or abuse of such power."*

The Australian Courts have also considered this issue in the case of *Northside Developments Pty. Ltd v Registrar-General* [7]. The brief facts were Northside mortgaged its land to Barclays; the mortgage was executed under the company's common seal, signed by a director and counter-signed by a company secretary. The articles were not complied with as the company secretary had not been properly appointed. The other directors also had no knowledge of the mortgage and had not authorised the director to affix the company seal. When Barclays exercised its power of sale as mortgagee, after the mortgagor defaulted, a company unrelated to Northside, Northside argued that it did not execute the mortgage. Northside sued the Registrar-General who attempted to rely on the Indoor Management Rule to prevent Northside from denying execution of the mortgage. The High Court held that Northside was not bound by the mortgage. The bank should have been put to inquiry and that it had failed to carry out inquiries. The nature of transaction was such as to put the bank to inquiry.

Mason CJ said:-

> *"On the one hand, the rule has been developed to protect and promote business convenience which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments. On the other hand, an over extensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies."*

17. What is clear from the cases set out above is that the protection to a third party afforded by the Indoor Management Rule is only available when the third party is acting in good faith. If the third party or outsider does know or ought to know of some irregularity the rule is not applicable. This is what the defendant airline has said in its defence. There are objections from the Claimant that the airline has raised the possibility of a "plot" or "conspiracy" but has not properly pleaded it. Be that as it may what the airline has clearly pleaded is that the transaction, the signing of the settlement, was tainted. The issue is not whether Mr Fogarty had express or ostensible authority but rather whether the parties to the signing knew or ought to have known that whatever authority he had was a tainted by bad faith. If it was then

[7] *Northside Developments Pty. Ltd v Registrar-General* (1990) 170 CLR 146

court will need to decide if this an example of, as Mason CJ put it, "*an over extensive application of the rule*" ? It is necessary to consider the evidence.

18. The first witness was Mr Peter Fogarty. He filed two sworn statements, one dated 22nd August 2013 and one dated 3rd November 2015. They were read into evidence. The first says that he was appointed acting CEO and Managing Director of the airline. He goes on to say he signed the Deed of release on 17th October. In his second statement he says he signed his contract on the evening of 14th October 2011 after a telephone call from Yoan Mariasua. He was expecting the call because he had been asked to "take over" for a short time with the specific purpose of implementing the recommendations of the Commission of Inquiry". He states that the signing took place about 7:30 in the evening of 14th October at the offices of the airline. When he signed his contract there were other people there and one of them signed it as a witness. He later learnt that the witness was a Mr Mata. On the morning of Monday 17th October 2011 "before 8 am" he signed the Deed of Settlement at the offices of Mr Mariasua who witnessed his signature. Ms Ngwele was there and she signed and then went off to find someone to witness the signature. That witness turned out to be Mr Mata again. Mr Fogarty didn't know Mr Mata but shortly after the signing he received telephone calls from him asking for donations to fund his election campaign. Mr Fogarty refused to pay any money but donated 4 empty drums for a copra drying project.

19. Mr Fogarty was then cross examined. I did not find Mr Fogarty's oral evidence to be wholly convincing. He treated some of the formalities required in his purported employment with some diffidence. For example there is no doubt that as Chief Executive Officer he would have required formal certification by the Vanuatu Civil Aviation Authority as a Fit and Proper Person. This is the very point made in the Prime Minister's letter of 26th April 2011 referred to earlier in paragraph 6. It would have been unlawful for the airline to operate when Mr Fogarty was not properly certified. According to Mr Fogarty's answers to cross examination, "... it was only paperwork" and therefore it was of no consequence that he did not have the formal certification as a Fit and Proper person from the VCAA. He said he knew he would receive official certification at some time in the future so he did not believe it was a problem. It is difficult to accept that he would think that when it is clear that if the airline had operated without his having a fit and proper person certification it would have been in breach of not only domestic regulations but international ones as well. This is from a man who had a long association with the airline as a pilot and as an officer of the company including as the CEO.

20. When referring to the position he had been offered as Acting CEO he said that it was not his business to check that all the proper processes had been followed before his appointment. As far as he was concerned he, "...had been asked by a Minister of State" to take up the position and that it seems, was all he thought was necessary.

21. He agreed he knew Mr Tony Kerr the partner of Ms Ngwele very well. He had flown with him and had in fact flown the aircraft the subject of the "lease" to the island owned by Ms Ngwele. He had bought some land from her. He agreed he knew her quite well.

22. He was questioned about the circumstances in which the Deed of Settlement was signed. He said he had read the document before signing it but was not concerned that it committed the airline to make a payment of over 51 million Vatu within 7 days. When pressed he said that perhaps he was a little concerned but he had taken "advice" from the Chairman (Mr Yoan Mariasua). He said he had been "appraised" of the previous shareholders' decision and that he had read a letter from Mr Daniel Yawha and the opinion of the Attorney General. He had not done this over the weekend but it was before he signed the Deed of Settlement. He then later said that he had seen some other documentation over the weekend. In other words he may have read some documents just before signing or he may have read some over the weekend. What those documents were and from whom or where he obtained them was left unsaid. I accept Mr Fogarty was giving evidence of events nearly 4 ½ years ago but one would have thought on this important aspect of events he would have been more forthcoming.

23. He was asked in re-examination about his dealings with the Minister. He linked his appointment as Acting CEO to a Commission of Enquiry. A copy of the Commission's Report was tendered in evidence later on by Mr Mariasua but it is not dated. The copy report tendered in evidence gives the impression that the Commission's work had been completed by late July or August. In any even there is no dispute that the Commission's terms of reference required it to, "inquire and investigate into the circumstances surrounding the flights of two Air Vanuatu Y12 planes during a period in which a cyclone warning issued by the Vanuatu Meteorological Service was current on 21st February 2011". Mr Fogarty said in evidence there had been a serious breach of safety because of the flights during a cyclone. The Commission was to investigate flight operations in relation to safety. He was appointed Secretary to the Commission. He said that after the Commission he was appointed by the Minister to the post of CEO to implement the recommendations made. This evidence tended towards being confusing but what was apparent was that it concerned both Mr Fogarty's appointment in July 2011 ***and*** the later appointment in October. He confirmed that his appointment in July resulted in a backlash against him.

24. In answer to questions from the court he confirmed his appointment in July was effected in much the same way as that in October; by his being asked to take on a temporary role by the Minister. He added that he thought there was a Board resolution sometime. He was unable to produce a copy and didn't seem to believe that it was important that he did so. He accepted the Ministers request was [illegible]

defiance of the Prime Minister's reported view but as far as he was concerned he was only asked to step aside (on the first occasion) because of the minor issue of his Fit and Proper Persons certification. He confirmed that he had not seen a copy of the Minutes from the 14th October before signing the Deed of Settlement..

25. I have found it very difficult to accept Mr Fogarty's evidence at face value. It was stressed several times that he was called in on a temporary basis to carry through the recommendations made by the Commission of Inquiry on safety. He did not explain why it was that his first action was to sign a Deed of Settlement which committed the airline to paying a substantial sum of money in 7 days and which had nothing to do with safety. He claims to have done this on the "advice" of the Chairman (Mr Mariasua) and after seeing some documentation which might or might not have included a letter from lawyers who were not acting for the airline in the case. He did not bother, according to his evidence, to ask to see the Minutes from the previous Friday. I find very little about this evidence which is credible. His evidence about the witness's signature was strongly disputed later in the case.

26. The next witness was Ms Clarence Ngwele. She said she was the Director of Isleno Leasing Ltd the Claimant and had sworn 3 statements one on 10th August 2012 the second on 22nd August 2013 and the last one on 3rd November 2015. Her first statement annexed copies of various documents she was relying on in her claim. The second statement was filed in support of an application to strike out parts of the Defendant's sworn statement. Much of what is stated in it concerns the case which was struck out in November 2012. At paragraph 3 Ms Ngwele says the only defence raised in that case was that Mr Fogarty did not have authority to sign the document. She was unable to explain why it was she did not pursue that case. The situation changed with the filing of the Amended Defence on 22nd May 2014 and so in reality the 22nd August 2013 sworn statement does not assist the Claimant to any great extent. The final sworn statement relied on is that dated 3rd November 2015 and challenges the sworn evidence of Mr Jacob Mata the witness to documents being signed.

27. In cross examination she confirmed some of Mr Fogarty's evidence. She agreed he was a friend of hers and her former partner Mr Kerr. She confirmed he bought some land off her through the bank. She had flown with him in the Britten Norman Islander aircraft but it was strictly on a full charter basis. She was not able to produce any receipts for the charter because, "she hadn't been asked to".

28. She also told the Court she had worked for the airline previously. She agreed that when the lease for the aircraft was signed Mr Kerr, her former partner, was the CEO of the airline.

29. She was asked how she had acquired some of the "confidential" documents exhibited to her sworn statements. She told the Court she had acquired them from

the Chairman of the Board (Mr Mariasua). She had seen his letter(s) and she wanted to see "proof" in the Minutes. Her evidence then became somewhat contradictory when she said she could not recall when she was given a copy of the Minutes.

30. Ms Ngwele did not agree that both Mr Fogarty's contract and the Deed of Settlement were signed in Mr Mariasua's office. She said she knew the contract had been signed after the Board meeting the previous Friday but did not explain how she knew. She did not accept the evidence of Mr Jacob Mata that she and Mr Fogarty had met the Minister in his office several times. She said she could not recall any meetings. As was mentioned above, one of her sworn statements challenged Mr Mata's evidence about the witnessing of both the settlement deed and Mr Fogarty's contract of employment. My note of her oral evidence was that on Monday morning 17th October she went to Mr Mariasua's office and he signed the settlement deed and it was witnessed by Mr Fogarty. She then signed it and took it to the Mr Mata and he witnessed her signature. That is clearly wrong because the document shows Mr Fogarty signed it and his signature was witnessed by Mr Mariasua. I am prepared to accept that the answer came out the way it did because it was part of the answer to a question covering several aspects of Mr Mata's evidence. I do not believe Ms Ngwele meant to say that the Deed of Settlement was signed by Mr Mariasua and witnessed by Mr Fogarty because that would be contrary to her pleaded case. I believe it was merely a slip of the tongue.

31. Later in cross examination she told the court that she did not know why her case was struck out in 2012. She said the case was struck out without her knowledge. She had been instructing Messrs George Vasaris & Co and they ceased to act for her. She agreed she knew she had been directed by the Court to find another lawyer and she then engaged Mr Sugden to take care of the case. She did not deny that the court orders were served on the company so it is difficult to accept she did not know why the claim was struck out and she gave no explanation of why she let it be struck out.

32. Ms Ngwele was not re-examined and in answer to questions from the Bench she said she prepared the Deed of Settlement with the assistance of two local lawyers. She prepared the Deed when she received a copy of a letter from Mr Mariasua. As a result of those questions Ms Ngwele was further cross examined and confirmed the two local lawyers were Mr Justin Ngwele and Mr John Timakata. She agreed she knew Mr Nalyal had been acting for the airline since 2009. She added that she, "....was advised by the Chairman of the Board to contact Mr Daniel Yawha who was acting for Air Vanuatu in this matter". That was plainly incorrect and was known by Ms Ngwele to be incorrect. In Re-examination she agreed a letter shown to her had been sent to Mr Laloyer by Mr Mariasua and copied to her. This letter had not been disclosed to the Defence and was not tendered. However the oral evidence established that there had been extensive contact between Ms Ngwele and Mr Mariasua over a considerable period prior to the events of 14th to 17th October.

2011. He had even sent her copies of confidential company documents dealing with her claim.

33. The next witness was Mr Yoan Mariasua. I say at the outset that I found him to be a most unsatisfactory witness and much of what he said in cross examination lacked any credibility. He relied on his sworn statement of 22nd August 2013. In that he says he chaired the Board meeting on 14th October. He says he signed the minutes and he gave a copy of them to Ms Ngwele, "*...as I was anxious that she be aware that the Board had approved the settling of her case against us".* He confirms he was witness to Mr Fogarty's signature on the Deed of Settlement on 17th October. He referred to a travelling minute and said that he did not see it at the time but he did see some document which may or may not have been it about a week later. He said that he had seen no other document "purporting to dismiss me" prior to then. He produced a copy of a letter from the State Law Office dated 8th April 2011 which he says formed a very prominent part of the Board's discussions on 14th October. That however was not borne out by the Minutes and he could not point to any other evidence to support his assertion.

34. In cross examination he agreed he had been a Director of the airline on two separate occasions and was aware of all company procedures. He was asked about Mr Laloyer's suspension on 14th October 2011. He said the suspension, "... was done after collective discussion on whether he should stay or if they sent him out". He implied that Mr Laloyer was part of those discussions. It was only when the wording of the minute he produced was pointed out that he accepted Mr Laloyer had been sent out ***before*** any discussion. He was then, against objections from Mr Sugden, taken to the part of the minutes dealing with the settlement. He conceded that the minutes did not authorise Mr Fogarty to sign a Deed of Settlement. In fact the minutes record a resolution to require the CEO to write to the lawyers for both parties to agree a deed of release that will be beneficial to both parties.

35. He agreed Mr Laloyer was, "...still the CEO" and he said that his (Mr Laloyer's) suspension was, "nothing to do with the Isleno matter and only related to the Commission of Inquiry". After that he gave evidence on the rational for suspending Mr Laloyer which was confusing. He was asked, for example, why if as he thought the CEO was required to sign the Deed of Settlement immediately, the CEO had been suspended.

36. What he seemed to be saying was the Commission of Inquiry was very important and that Mr Laloyer got in the way and had prevented the Commissioners from interviewing all the staff. He said the staff, "...were not in a position to provide full reports". The implication was Mr Laloyer was being obstructive. What is said in that regard by the Commission (whose report Mr Mariasua tendered in evidence) was that Mr Laloyer; by giving advice to employees of the airline that they must or should appear with legal counsel and by saying they should be aware of the airline's

confidentiality policy but otherwise they should co-operate with any legitimate investigation, made things difficult for the Commissioners. The report does not say that advice was wrong. The report also notes that in any event only two witnesses refused to co-operate. One because he had a, "history of conflict with the secretary", and one who gave a statement but seems to have felt answering questions might be self-incriminating. There was no absolute evidence on the point but the impression gained was that the inquiry had ended its work by October 14th. It is difficult to understand Mr Mariasua's contention that Mr Laloyer was preventing the Commissioners from obtaining evidence in their work.

37. Mr Mariasua was asked about the contract with Mr Fogarty. Again I found his evidence confusing, even evasive. He was asked about Mr Laloyer being suspended for a month but Mr Fogarty being employed for 6 months. He was asked what would happen to Mr Laloyer after 14th October. His reply was that it didn't matter because the whole Board was terminated by the Prime Minister shortly after anyway. He agreed that the salary being offered to Mr Fogarty was more than Mr Laloyer was getting but that the payments had been authorised by the Board. There is no such evidence in the Minutes. He was asked why the contract was for more than a month and he seemed to say the Commission of Inquiry was for more than a month.

38. Mr Mariasua agreed he knew Ms Ngwele and had had frequent contact with her. This contradicted her evidence. When asked about a statement he made supporting a criminal complaint against Mr Laloyer (this was in relation to alleged perjury in the cases which was struck out) he first said he could not remember then, rather grudgingly, agreed he had made a statement. He further agreed that he did so at the end of July 2011 a few months before the events in October. The statement he gave consisted of a copy of a letter he had written dated 26th July 2011. It reads in part, "As First Political Advisor of the Minister and also as Chairman of the Board of Directors of AVOL, I highly recommend that you arrest him and question his allegations concerning that particular allegation". The statement makes clear Mr Mariasua's view of the matter.

39. Mr Mariasua then gave contradictory evidence about the Deed of Settlement. He made the extraordinary assertion he first learnt about the Isleno case at the Board meeting in October 2011. That is hard to accept as Mr Mariasua introduces into evidence letters from various people dealing with it. In particular there is a letter of "advice" from the State law Office in April 2011. As pointed out above he had just previously agreed he made a statement in the criminal case against Mr Laloyer. He was certainly aware of the "Isleno case". He then said the issue of a Deed of Settlement might have been before other Boards. On being pressed he said the Deed of Settlement was referred to in earlier minutes and had been agreed to in earlier minutes. The "earlier" minutes did not quite say that. As in October the earlier Minutes expressed a desire for the matter to be settled out of Court.

40. Mr Mariasua was taken through his evidence about Mr Fogarty signing the document. He did not think there was anything unusual in the document being signed away from the offices of the airline. He did not think the company seal was required because that was just an administrative requirement. He then said that he directed Mr Fogarty to sign the document, "...in accordance with the minutes". He did not consult any of the other Directors, "...because there was agreement at the Board of Directors meeting on 14th October." This is completely contrary to what is said in the Minutes produced as evidence by Ms Ngwele and the "other" version as produced by Mr Laloyer. He was unable to produce any evidence of a direction from the Board that the CEO had to immediately sign a deed of any kind.

41. He was then re-examined on his evidence and at that time tendered "YM 1" the Commission of Inquiry report and "YM 2" a letter to Mr Laloyer dated 9th May 2011. That letter has been referred to earlier by Ms Ngwele [8] .

42. I find that Mr Mariasua's evidence was extremely damaging to the Claimant's case. As shown above there are two versions of the minutes of the Board meeting on 14th October. One bears Mr Mariasua's signature and technically it must be accepted as the official version.

43. However when Ms Barthelemy gave evidence for the airline later, her evidence raised serious doubts as to whether it was a true and correct version of the Minutes. She is the Secretary to the Board of Directors (and executive secretary to the CEO). As such she takes the minutes of Board meetings and types them up. She recalls the meeting on 14th October 2011 which was postponed from the day before. She recalled the resolution relating to Isleno and the discussion about the Commission of Inquiry. She remembers Mr Laloyer leaving the meeting at about 6:45 pm. She also remembers Mr Athy leaving the meeting later. There were resolutions about Mr Laloyer's suspension and Mr Fogarty's acting appointment. The meeting closed about 7 pm and Mr Mariasua the Chairman gave her 3 letters, one for Mr Laloyer, one for Mr Fogarty and one addressed to the Vanuatu Civil Aviation Authority. She states that on the morning of Monday 17th October Mr Mariasua telephoned her asking if she had delivered the letters. She told him no because she had not been able to deliver them at the weekend. Mr Mariasua told her he would come to her home to collect the letter addressed to Mr Fogarty. Mr Mariasua arrived at her home about 6:45 to 7:00 am. She went to work and dropped of the letter to the Vanuatu Civil Aviation Authority on the way. She arrived at work and gave Mr Laloyer his letter. She recollects both Mr Laloyer and Mr Fogarty being in the office. Mr Laloyer in his office and Mr Fogarty in the Board Room.

44. It is correct that there was an overall objection by the Claimant because Ms Barthelemy had been in court when Mr Athy gave evidence. I overruled the objection

[8] See paragraph 29

and said that whilst it was unfortunate that she had inadvertently been allowed to sit in I would evaluate her evidence when I heard it and give it such weight as I thought appropriate. If there was any suspicion that her evidence was tainted by what Mr Athy said then I would say so. She did not depart from her evidence as set out in statements filed on 31st August 2012 (in the name of Eileen Roy) and a subsequent one dated 2nd October 2015. (The simple explanation for the name change is that she was married between statements. Legal scholars will no doubt recall a similar situation in the case of *Donoghue v Stevenson* which started life as *McAllister v Stevenson.* It only became known by the name which every law student remembers when Ms McAllister married Mr Donoghue halfway through the case.)

45. In her second statement Ms Barthelemy explains how she types up the minutes and gives them to the CEO. She states she typed up the minutes for the 14th October meeting on "Monday 18th October". That must be a mistake because Monday was the 17th. However, she could not arrange for them to be signed by the Chairman of the Board because Mr Mariasua was not in the office on Monday and then she learnt he had been removed from his position on 14th October anyway. She states that she has seen the minutes attached as "B" to Ms Ngwele's sworn statement and as far as she is concerned she did not type them. The correct version of the minutes that she typed is that attached to Mr Laloyer's sworn statement.

46. She was cross examined. She confirmed that she had been the CEO's secretary since 2005. She confirmed she attended Board meetings as secretary to the Board and typed up her notes of the minutes. Then they would go to the Chairman of the Board to sign. She knew that the Chairman at the relevant time (Mr Mariasua) was a Political Adviser to a Minister. She had sent correspondence to him through the office. She was asked about the three letters. She said she did not type them, they were given to her by Mr Mariasua in sealed envelopes. She knew roughly what the letters were about because she had been in the meeting and in any event Mr Mariasua told her what they were after the meeting.

47. She them confirmed that she took the notes in handwriting. She did not have the original notes with her. Ms Barthelemy was then asked about her sworn statements. She said she had typed them herself and gave them to the lawyer. The letters given to her were dated 15th October but she wasn't sure that was when they were signed because they were in sealed envelopes. She agreed 15th was a Saturday but said that they were not given to her on Saturday nor was a copy of the signed Minutes available to her on Saturday nor did she produce a typed copy on Saturday.

48. Ms Barthelemy was then asked if she had been given any "inducements" to make her statements. She did not understand the question and so I put it to her she was being asked if she had been bribed to make her statements. No evidence was offered to even suggest any impropriety on her behalf and it seemed to me to be a

gratuitous attack on a witness with no interest in the outcome of the case. I am uncomfortable with a party strenuously objecting to the slightest suggestion of impropriety on his own behalf and then launching a gratuitous attack on a witness.

49. She was asked about the minutes. She could not recall whether she had emailed the minutes to Mr Mariasua on the Monday. She could not recall why she gave them to Mr Laloyer. She did not recall typing the Minutes on the Saturday.

50. She went into the office Monday morning but could not say what time that was. Mr Laloyer was in his office and Mr Fogarty arrived as she did.

51. Ms Barthelemy was shown the Minutes signed by Mr Mariasua but she said she could not recall exactly what was said at the Board meeting. She said that she did remember the subject of Isleno possibly being discussed in previous meetings. She was not re-examined but in answer to the Court said that when the meeting closed at 7 pm she went straight home.

52. At this point it seems sensible to set out the different versions of the Minutes. First, the copy signed by Mr Mariasua;

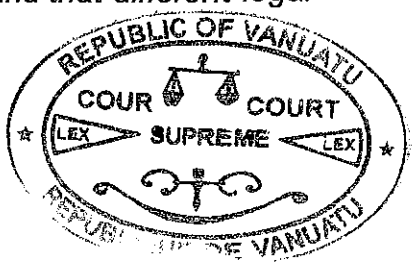
> *"C2. Isleno*
> *A brief was given by Mr Laloyer on ISLENO. Isleno has a case against Air Vanuatu in court in regards to a three year contract that was signed by Mr Joseph Laloyer.*
>
> *Again this was discussed at length where the meeting agrees that a resolution has been done in a previous meeting that due to the advise (sic) from State law, the Isleno contract need to be settled out of court in the best interest of Air Vanuatu which was seconded by Pacific lawyers.*
>
> *The meeting resolved that the chief executive officer writes to Lawyers of both parties to agree on a deed of release that will be beneficial to both parties.*
> *Moved by Member Rasu and seconded by Member (sic) seconded by Member Arnhambat. Carried unanimously."*

Next the version presented by the defence;

> *"C2. Isleno*

A brief was given by Mr Laloyer on ISLENO form (sic) the beginning and that ISLENO put a court case to court against Air Vanuatu for a three years contracts been signed.

Again this was discussed at length where issues were raised and that different legal firms give their opinions to whether "to win or lose" the cases.



This was a resolution being passed in previous minutes and a reminder to Mr Laloyer to write to the two Lawyers of both parties to make a deal for Settlement out of Court" with both parties interest for Board's consideration.

Moved by Member Rasu and seconded by Member Arnhambat. Carried."

53. Looking at these two versions, there is absolutely no reason to doubt Ms Barthelemy's evidence. It is to be preferred over evidence by Mr Mariasua. I am in no doubt that the Minute signed by Mr Mariasua is not the correct record of what was said at the meeting. The "unsigned copy attached to Mr Laloyer's sworn statement of 31st August 2012 is far more likely to record the truth of what went on at the Board meeting. The bizarre aspect of the different minutes is that even on the signed version introduced as evidence by the Claimant there is no Board authority given to the CEO (or indeed anyone else) to sign a deed of settlement with Isleno. There is no doubt whatsoever that the Board were interested in reaching a settlement but what they clearly wanted to do was reach a negotiated settlement. There was no resolution by the Board that someone should sign a deed of settlement immediately.

54. I also heard other evidence in the airline's defence. The First witness was Mr Athy. Before we heard from him Mr Sugden objected to certain parts of his sworn statement. Mr Sugden objected to the reference to the contents of the Travelling Minute because the author of the document had not been (would not be) called and the contents were therefore hearsay. However Mr Mariasua's evidence was that the Directors were, on 14th October 2011, terminated by the Prime Minister. Mr Mariasua saw the minute (on his evidence several days later) and acted on it because he plainly did not consider that he was a Director following sight of the document. Mr Sugden also objected to paragraph 13 of Mr Athy's sworn statement (of 12th August 2013). In that paragraph Mr Athy said he prepared a press statement. He attached a copy of the statement as "SA 3". I did not understand the objection because clearly the evidence was not that the contents of the statement were true, the evidence was a press statement had been prepared and issued.

55. Mr Sugden objected to paragraph 14 of Mr Athy's statement where he made allegations about the *bone fides* of several people including Mr Mariasua, Mr Fogarty and Ms Ngwele. I allowed the objections on the basis of relevance. The allegations were simply that and I would place whatever weight I saw fit on Mr Athy's opinions. I can say that they did not carry any weight in my considerations of the evidence by Isleno's witnesses. Paragraph 15 was also objected to and I said that I would make whatever I could of what Mr Athy said which was, in any event, largely irrelevant as the Commission of Inquiry report had already been tendered and I could make up my own mind on what it was about.

56. Mr Athy was cross examined. In October 2014 he was a director of the airline. He attended the Board meeting. He confirmed the content of the copy

minutes annexed as B to Ms Ngwele's sworn statement of 10th August 2012. He confirmed there was no resolution authorising Mr Fogarty to sign a deed of release. He referred to exhibit JL1 annexed to Mr Laloyer's sworn statement of 31st August 2012 which is the "other" version of the Minutes. His evidence did not persuade me one way or the other about which version was the most accurate.

57. Mr Athy mentioned his disquiet when the Board were dealing with Mr Laloyer's suspension and says that was one of the reasons he left the meeting early. He then went to see the Prime Minister and "...briefed him about the meeting". The Prime Minister then issued the "Travelling Minute". After further discussions with the shareholders he was instructed to issue a press statement and did so. His evidence did not assist greatly because the appointment or not of Mr Fogarty and the dismissal or not of the Board is of no real importance in this case.

58. He was cross examined on his evidence. He agreed that he might have produced an outdated version of the airlines memo and articles. He agreed the copy exhibited by Ms Ngwele was the up to date version. Given the re-registration of the airline earlier this year I am not sure this is correct. (I complained at the beginning of this judgment about the lack of a trial bundle. This sort or argument could have been avoided if the parties had agreed a bundle of documents.) There was then some questions put about an Email from the Prime Minister which informed Mr Mariasua of his dismissal as a Director. It was agreed the Email is time stamped as being sent at 8:32 am on Monday 17th October 2011.

59. Mr Laloyer was the next witness for the airline. He relied on three sworn statements, one dated 31st August 2012, another dated 12th September 2013 and one dated 14th September 2015. In his first statement he confirms his position as CEO. He prepared the agenda for the meeting originally scheduled for 13th October. The meeting commenced at about 4:30 pm on Friday 14th October. Two items were for discussion, a claim by JP Virelala and the claim by Isleno. His recollection is of being reminded to write to letters, one to the airline's lawyer and one to Isleno's lawyer. The intention was to negotiate a settlement.

60. Another item on the agenda related to the Commission of Inquiry. He was then asked to leave the meeting and did so. He waited until 6:30 or 6:45 but then he returned to the Board Room and told the Directors he was leaving because he had another airline related appointment. He met Mr Athy in the car park. The first he knew of his suspension was on Monday morning. He arrived for work and was given the letter of suspension by his executive secretary. He is sure the Board never reached a resolution that a Deed of Settlement should be signed immediately.

61. Mr Laloyer's second statement dated 12th September 2013 exhibits a number of documents which relate to the civil claim which was struck out and a criminal

prosecution where a nolle was entered (the criminal prosecution is referred to at paragraph 38 above).

62. The third and last statement was made in response to an application for summary judgment. Most of it had only slight relevance to the trial. The sworn statement refers to another civil claim (CC 129 of 2013) involving Mr Fogarty suing the airline. A judgment was then awaited in that matter and I was not informed whether that judgment had been delivered before the trial of this matter.

63. In cross examination Mr Laloyer was asked about the Commission of Inquiry. I felt most of the questions bore little real relevance to the present trial. He was then asked about the letter he received on 17th October. Mr Laloyer confirmed he was handed the letter by Ms Barthelemy. However, he added that he did not leave his office (meaning the office of CEO) because on Saturday 15th October he had been instructed not to by the Director General of the Prime Minister's office. Over an objection by Mr Sugden he surmised that this was because the Vanuatu Civil Aviation Authority had said he was the only person licensed to hold the position of CEO. He was advised verbally on Saturday of the changes to the Board and on Monday was given a copy of the Shareholders instructions. He confirmed that annexure "A" to Mr Fogarty's sworn statement of 22nd August 2013 was the Email which was copied to him and which he received at about 8:32am.

64. Mr Laloyer said that he met Mr Fogarty 1 or 2 days later. They talked to each other and he thought both were trying to act professionally and wait for further instructions. Mr Fogarty was in the Boardroom and he was in his office. He added that Mr Fogarty moved between another Director's office and the Boardroom. Mr Laloyer agreed he did not speak to Mr Fogarty on the morning of Monday 17th October. That was because Mr Fogarty left the building at some time and did not return. He agreed he had a conversation with Mr Fogarty when he was asked why he was still there and he replied because he had been instructed to. He could not recall whether he (Mr Laloyer) referred to the Email from the Prime Minister.

65. Mr Laloyer unfortunately did his credibility no good when he was asked about an earlier dismissal. He said he could not recall a letter dismissing him in July 2011. Nor did he re-call the then Prime Minister's intervention to have him re-instated. He was shown letters exhibits "JL 1" and "YM 2". He maintained the only time he was suspended was in October.

66. There then followed a series of questions and answers which dealt primarily with quantum rather than liability. He was asked about maintenance on the aircraft owned by Isleno.

67. Mr Laloyer was then re-examined. He was asked a series of questions about the Commission of Inquiry. The questions and answers were of little real relevance

to the issues in hand but the subject having been raised extensively in cross examination Mr Nalyal probably felt obliged to ask questions as well.

68. In answer to the Court Mr Laloyer said he arrived at his office at about 7:30 to 7:45 on Monday 17th October. He also confirmed that the appointments to the Commission of Inquiry were arranged solely by the Government at the time.

69. The final witness was the witness to the signatures, Mr Jacob Mata. Mr Mata confirmed that he is now a serving Member of Parliament. He made a sworn statement dated 17th April 2015. Mr Sugden objected to parts of that statement. Mr Sugden argued paragraph 6 was hearsay. I said I would not rule out the paragraph at that time but would hear in submissions about the relevance of it. Quite frankly there was nothing controversial in the paragraph and all it consisted of was Mr Mata saying, "... he had since learnt" about the board Meeting on 14th October 2011. He did not say how he had acquired his knowledge about the meeting but what he said about it really was not in dispute in any event.

70. Mr Mata says in his statement that he signed, as witness a Deed of Settlement and an Employment contract. He exhibits copies of the documents. He signed them both at the same time. It was during daylight hours. At the time he was employed in the Ministry of Public Utilities as a third political adviser. He was returning to his office when he was approached by Ms Ngwele. She produced two documents and said, "The Minister asked me to tell you to sign these papers for me". She opened the documents and placed them on the bonnet of her vehicle. Mr Mata signed and wrote in the date 14th October 2011. Ms Ngwele did not tell him what the documents were and he noticed that his was the only signature. He swore that he did not sign any document on the evening of the 14th October 2011.

71. He said that his office was some distance away at the other end of the building to the Minister and Mr Mariasua's offices. He saw several of the Directors of the airline at the time go into the Minister's office. He also saw Ms Ngwele meet with the Minister and sometimes Mr Mariasua would go in with her. This was denied by Ms Ngwele but accepted by Mr Mariasua. He also had a recollection of Ms Ngwele and Mr Fogarty going in to see the Minister.

72. In cross examination he said he was living in Vanuatu during April 2015 and made the statement because he was asked. He agreed he did not make notes at the time about his signing the documents. He remembered what was said to him because Ms Ngwele said those words. He was asked several times what day he signed the documents. He said he wasn't sure of the date but agreed with the Court that it was the date he wrote on the documents, 14th October 2011. He believed the time was about 8:30 in the morning.

73. He did not remember what he was doing on the day before the 14th October or the days after. He did remember signing a document at about 8:30 in the morning in front of the Ministry building on 14th October 2011. He was questioned at length but maintained he signed two documents on 14th October and signed nothing on the following Monday. It was put to him he was only asked to sign one document and he said he only remembered Ms Ngwele ever asking him to sign two documents. It was put to him several times he only signed one document at a time although he signed two documents in all but at different times. He did not budge from his evidence that he signed both documents at the one time on Friday 14th October at about 8:30 in the morning.

74. He was then questioned about asking Mr Fogarty for money. He agreed he stood for Parliament but he could not remember asking Mr Fogarty for a donation. He said that he knew Mr Fogarty well from his time working in the aviation industry. He could not remember ever asking for money but he did ask for drums. He said Mr Fogarty did not give him any drums.

75. The questions then returned to what he had signed. He agreed he was asked to sign documents but he did not read them through. He did not agree that he signed any documents at 7:30 in the evening of 14th October 2011.

76. The questioning then returned to his acquaintance with Mr Fogarty. He said again had known Mr Fogarty for some time. He knew him from his time as a senior security officer at the airport. He had never dealt with Mr Fogarty in business. He had never been to the Air Vanuatu HQ building and did not see Mr Fogarty there on Friday 14th October. He did not go to a restaurant that evening. He agreed that it was not his practice to sign documents he had not read. However on this occasion he had been asked by the Minister and Ms Ngwele to sign so he did. He said that he was not there when Mr Fogarty signed the document. He signed the document in front of the Ministry as he had said earlier.

77. In answer to a question from the Court he said he knew Ms Ngwele because he is related to her.

78. Having heard the evidence it is necessary to consider whether the Claimant has proved it's case, on the balance of probabilities, or whether the Defendant has shown, also on the balance of probabilities, that the Claimant cannot rely on the ostensible authority of company officers. What is clear from the evidence is that Mr Fogarty did not make any attempt to ascertain the limits of his authority. On his own evidence he says he was temporarily employed to implement the recommendations of the commission of Inquiry. Signed a Deed of Settlement was well beyond that brief. He could have asked to see the Minute but instead he says he relied on the advice of the Chairman. I find it very difficult to accept that he saw nothing wrong in being pressured into signing a legal document which would result in the airline

having to pay a very large sum of money in 7 days. He did not check with other directors, he could easily have done so. He did not discuss the financial implications with those who had information about the airlines' finances, he could easily have done so. He wants this court to accept he just signed what was put in front of him. It is impossible to say he acted in good faith in doing so.

79. Turning to Ms Ngwele, it is clear she had been in contact with the Chairman of the Board, Mr Mariasua, over a many months. The evidence from Mr Mariasua was that he had given her a copy of the Minutes of the meeting of 14th October 2011 before any deed was signed. She ought to have known the Board had not given Mr Fogarty authority to sign any Deed of Settlement. In her own words she wanted to see proof of a decision to settle her claim in the minutes. At the same time she wants this court to accept she did not actually read the Minutes given to her. She accepts in her evidence she was put on inquiry but simply chose to believe there was nothing untoward in the airline suddenly signing a document she had produced and which the airline had declined to sign in the past. It is impossible to accept she acted in good faith. As she acknowledged, given the history of this matter she was on notice to make sure someone who said they had authority to commit the airline to a settlement actually had authority. If she had read the minutes Mr Mariasua says he gave her on the Monday she would have clearly seen no one had authority to settle the case.

80. On looking at the evidence given by Mr Mariasua one is left with the distinct impression he had being trying to engineer the signing of the Deed of Settlement for some considerable time. He seems to have tried to do everything he could to remove Mr Laloyer from the picture. He even signed a statement in criminal proceedings saying his CEO had perjured himself and that he should be arrested. He repeatedly asserted in this court that the Board, at the meeting of 14th October 2011, had resolved that the CEO immediately sign a Deed of Settlement even though his own evidence clearly showed that to be untrue. He was evasive and I was left with the distinct impression that he had little regard for the truth. There is absolutely no doubt in my mind that he did not act in good faith. At one stage my concerns were such that I even considered passing the file to the police to ask them to investigate whether there was evidence of criminal behaviour.

81. In all the circumstances the Claim must fail. The Defendant airline has shown on the balance of probabilities that all three persons involved in the signing of the settlement had actual notice that what was being proposed was in excess of the powers given by the company to the officers involved. In the words of Browne-Wilkinson L.J " *A third party who has notice -actual or constructive - that a transaction, although intra vires the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the company*" [9].

[9] *Rolled Steel Products (Holdings) Ltd v British Steel Corp* ibid

It would be entirely wrong to allow the Claimant to rely on the indoor management rule in circumstances where, "*an over extensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies.*" [10] The bona fides of the three main protagonists involved in the signing of the document sought to be relied on are damaged. Mr Fogarty and Ms Ngwele were on close personal terms and knew each other well. It is difficult to accept they did not discuss the settlement before signing. Ms Ngwele would have known or ought to have known that Mr Fogarty did not have actual authority to settle her claim. Ms Ngwele had been in constant touch with Mr Mariasua for some many months. He had in the past supplied her with a number of documents about a settlement. He knew or ought to have known that there was no actual authority for a deed to be signed immediately and given the relationship between then it is hard to accept she did not know that as well. The claim is dismissed.

82. As to costs, I see no reason why costs should not follow the event. The Claimant shall pay the Defendant's costs, such costs to be taxed on a standard basis if not agreed..

Dated at Port Vila this 7th day of June 2016

BY THE COURT

David Chetwynd
Judge

[10] *Northside Developments Pty. Ltd v Registrar-General* ibid