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

Civil
Case No. 15/173 SC/CIVL

BETWEEN : SARATOGA LTD
First Claimant

AND: CHRISTINE BOLAND
Second Claimant

AND: ISLAND AIR LIMITED TRADING AS AIR SAFARIS
First Defendant

AND: MATTHEW ERCEG
Second Defendant

Coram: *Justice Aru*

Counsel: *Mr. M. Hurley for the Claimants*
Mr. E. Nalyal for the Defendants

RESERVED JUDGMENT
(DAMAGES)

Introduction

1. This proceeding arises from a dispute over a 1977 Cessna 185 YJ – CCM SN18503403 aircraft. Saratoga Ltd is the owner of the aircraft. Under a Hiring agreement, the parties agreed for the defendants to use the aircraft under certain conditions. As a result of alleged breaches of the agreement the claimant filed these proceedings.

2. On 17 June 2017 I struck out the defendants' defence and counter claim. The matter was then appealed and the Court of Appeal dismissed the appeal on the 17 November 2017. As a result I proceeded to hear the parties on the assessment of damages. This is my assessment.

Background

3. Saratoga Ltd is a company incorporated under the Marshall Islands Business Corporation Act. Its sole director is a Ms Christine Boland who is a citizen of Vanuatu. Island Air Limited trading as Air Safaris is a local company incorporated in Vanuatu under the Companies Act [CAP 191]. It is the registered proprietor of the business name Air Safaris. Mr Mathew Ercerg is the sole director of Island Air.

4. Mr Erceg and Ms Boland knew each other. In 2010 they were in a relationship and Ms Boland assisted Mr Erceg to purchase the aircraft.

5. In 2010 Saratoga Ltd took out a loan with Bred Bank for USD220, 000 for the defendants to use to purchase the aircraft. Ms Boland's apartment at Irririki was mortgaged as security for the loan.

6. On 30 June that same year, Saratoga and Island Air entered into the Hiring Agreement (the Agreement). The term of the Agreement was 5 years and it ended in June 2015. Before the Agreement ended, the personal relationship between Mr Erceg and Ms Boalnd had ended. Proceedings were instituted when at the end of the Agreement, the defendants returned the aircraft but kept the log books. Mr Erceg said he owned the engine in the aircraft.

Claim

7. The claim is for damages alleging that the defendants were in breach of the Agreement It alleges that the following provisions were breached:-

Under clause 4 – Hourly Hire

- Clause 4.1.1: failure to pay the claimant the minimum monthly hire (Base Rate) equivalent to 1% point more than the interest rate being charged by BRED Bank in respect of the claimant's variable loan;

- Clause 4.1.2: failure to pay the claimant the hourly hire equivalent to USD 100 per flight hour for every hour flown in the previous month;

- Clause 4.5: failure to make every endeavour to operate the aircraft for a minimum of 200 flying hours per annum;

Under clause 5 - Aircraft Operations

- Clause 5.6: during the hire period failure to use reasonable endeavours to observe and abide by the Aircraft's Maintenance Manual and to ensure that the Aircraft underwent any overhaul, repair or service required to maintain the aircraft its engine and equipment in a proper airworthy condition;

- Clause 5.8: during the hire period failure to notify the claimant to seek its approval to do any unscheduled maintenance outside the requirements for 50 hourly and 100 hourly inspections;

Under clause 6 - Prohibitions on Island Air Ltd Trading as Air Safaris

- Clause 6.1.4: in breach of the obligations not to encumber or deal with the aircraft except as provided for in the Agreement, the defendants have purported to exercise a lien over Continental Engine SN 293419 – R (the engine) fitted to the aircraft , the technical log documents for the engine, and also the following

fittings to the aircraft: flap gap seals, Cessna 206 seat rail STC, Snyder speed kit, exhaust faring and fibre glass tail cone;

Under clause 7 – Maintenance

- Clause 7.5: during the hire period permitted persons to carry out servicing , maintenance or repairs of the aircraft without obtaining the claimant's prior approval in writing prior to the commencement of such servicing , maintenance or repairs;

Under clause 11 – Return of Assets

- Clause 11.1: on the termination of the hire period , failure to return the aircraft in the same condition as it was in at the commencement of the hiring, fair wear and tear only excepted ; and

- Clause 11.2: on the termination of the hire period breached the obligations to return the aircraft in an airworthy condition.

Law

8. Both parties accept that the general principles in relation to damages awarded for breach of contract are as stated by the Court of Appeal in **Vanuatu Copra and Cocoa Exporters (VCCE) Ltd v Vanuatu Coconut Product Ltd (VCPL)** [2011] VUCA 29 at paragraphs 13 to 17 of the judgement. What the Court said is:-

> *"[13] The basic rule governing the law of remoteness of damage in contract was stated by Alderson B in Hadley v. Baxendale [1854] EWHC J70; [1854] 156 ER 145 at 151: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, OR such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*
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> *[14] The word "OR" has been emphasized to indicate that there are two branches or limbs to the rule in Hadley v. Baxendale. Under the first limb damages awarded are broadly described as "general" damages, and those awarded under the second limb as "special" damages. The general damages are those which the law presumes to follow "naturally" from the breach, whereas special damages are of an exceptional nature and are only recoverable where the defendant had prior knowledge of a likelihood that the loss would be suffered.*
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> *[15] The development of the rule in Hadley v. Baxendale, and a modern statement of the rule may be found in Chitty on Contracts, 29th edition, vol 1 at paragraph 26-044 and following. As we have observed, the two heads of damage asserted in the appellant's sworn statements are losses of a kind that are unlikely to be considered as arising naturally or in the ordinary cause of things from a failure to pay a liquidated debt, and will not be recoverable unless at the time when the contract was*

made the defendants were made fully aware that the claimant intended to outlay the copra subsidy receipts in the particular ways now alleged by the Appellant.

[16] Claims for damages for consequential loss flowing from a failure to pay a liquidated amount are usually resolved by treating the consequential loss as equivalent to the opportunity cost of the amount of the debt. That opportunity cost will be assessed in the circumstances of the particular case. For example, where the plaintiff is a commercial enterprise the value of the money is likely to be the cost which the plaintiff will incur in borrowing a like amount from a banking institution. In Dods v. Copper Creek Vineyards Ltd [1987] 1 NZLR 530 the plaintiff was held entitled to recover under the second limb of Hadley v. Baxendale special damages equal to the interest incurred as a result of late payment of a debt. The Court was satisfied by the evidence in that case that it would have been in the contemplation of both parties, at the time the contract was made, that such a loss would be the probable result of the failure to pay the debt.

[17] In Hungerfords v. Walker [1989] HCA 8; [1989] 171 CLR 125: 84 ALR 119 the High Court of Australia upheld an award to the plaintiffs of damages equal to the interest on money they had paid out in consequence of a breach of contract under the first limb of the rule in Hadley v. Baxendale. The Court did so on the ground that the cost of obtaining that money by a commercial enterprise was a loss "according to the usual course of things" following the defendant's breach of contract. In that case, the award was based on the actual interest costs which the plaintiff had incurred, and the award was based on compound interest rates."

Submissions

9. The claimants rely on their evidence filed and tendered as Exhibit 'C1' to 'C9'. Mr Hurly submitted that the claimants are entitled to be awarded damages as set out in their Summary of Saratoga's Damages and Loss dated 12 October 2018; And whilst Island Air is responsible for damages and loss caused to the claimants pertaining to the Agreement, Mr Erceg should also be held jointly and severally liable with Island Air damages and loss caused to the claimants for the period after the Agreement ended ie retaining the log books of the aircraft without the claimant's authority resulting in the proceedings brought and non-payment of costs orders etc.

10. Mr Hurley submits that I accept Ms Boland's evidence in Exhibit C 5 as a substantial part of it was not challenged under cross examination. Secondly Ms Boland was not cross examined on Saratoga's Summary of Damages and Loss as deposed to at paragraph 18 of Exhibit C 4 and as revised in the Summary of Saratoga's Damages and Loss.

11. It was finally submitted that the defendants did not comply with the requirements of the rule in *Browne v Dunn* therefore I should prefer the claimants' evidence to the defendants'.

12. The defendants rely on their evidence as filed and tendered as Exhibit D1 to D 5. Mr Nalyal relies on his submissions filed on 18 September 2018 and the submissions filed by Mr Erceg himself on 23 July 2018.

13. Mr Nalyal submits that the Agreement was between Saratoga Ltd and Island Air and only Island Air should be ordered to pay damages if the Court finds that there was a breach. It was submitted that there were costs incurred by the defendants and these should be offset against any award of damages in favour of the claimants.

14. It was submitted that the monthly base rate should be limited to 28 days and Island Air should be compensated for the new engine, the airframe and propeller parts and the overhaul costs of these items. Furthermore it was submitted that during the 32 months of grounding, Island Air lost flying time revenue therefore the base rate and hourly payment obligations under the Agreement must be discounted. It was submitted that during the period of the Agreement Island Air never received any invoice from the claimants and had no knowledge or control over deductions to Island Air USD call account. It was submitted that the following costs should be set off from the award of damages namely:-

- Costs of ground risk insurance for 13 months when the aircraft was not operational;
- Costs of purchasing new life rafts and jackets;
- Costs of the cargo pod/ insurance;
- Costs of the spider tracker;
- Costs of overhauling propeller blades;
- Costs of repairs to the engine;

15. It was submitted that Island Air was not responsible for the diminished value of the aircraft when it was put for sale as it was in Ms Boland's possession.

Assessment

16. During the assessment hearing, the claimants called Ms Boland and Mr James Garae from the Bred Bank. They were both cross examined by Mr Nalyal. For the defendants they called Mr Erceg and he was cross examined at length by Mr Hurley.

17. Mr Garae as a bank officer provided a bank statement of Saratoga Ltd's account with Bred Bank. [Exhibit C9]. Having heard the oral evidence I prefer the claimants' evidence to that of the defendants. Ms Boland gave her evidence in a forthright and responsive manner and relied on her evidence as contained in emails and other documents. Mr Erceg on the other hand was unresponsive at times and was evasive. He would answer questions asked by talking about other matters unrelated to the questions asked and which are unsubstantiated. His evidence is unreliable and is rejected.

18. The claimants submit that they are entitled to damages to be assessed as follows:

- Clause 4.5 of the Agreement

Did not fly 200 hrs (flew TS 567.1hours only	- $43,290
• Safety equipment	- $5,500.00
• Shipping	- $1500.00
• Cargo pod	- $5,295.00
• Shipping	- $500.00
• Spider tracker	- NZ$2,800.00
• Shipping	- $500.00
• Engine fee	- $16,000.00

Subtotal **NZ$ 2800.00 USD$ 73,585.00**

Consequential damages and loss arising from breach of the Agreement

- **871 DAYS DELAY IN MOVING FORWARD WITH AIRCRAFT SALE**

  Contract ended – 30 June
  Court decision - 17 November 2017

  Days 2015 – 184
  Days 2016 – 366
  Days 2017 – 321
  Days - 871

- **OPPORTUNITY COSTS – 5% INTEREST ON LOST CAPITAL FROM DELAYED SALE**

Value of aircraft in 2015	- $150,000
Per annum rate	- 365
Daily interest 5% per annum	- 0.05
Interest per day	- $21
Total days	- 871
Interest @ 871 days	**-$USD 17,897.26**

- **ADDITIONAL INTEREST PAID TO BRED BANK 871 DAYS**

Bred Bank loan	- $160,000
Per annum rate	- 365
Daily interest	- 5.5% interest per annum
- 0.05	
Interest per day	- $24
Total days	- 871
Interest @ 871 days -	**$20,999.45**

- **5% INTEREST ON SECURITY OF COSTS WITHELD FOR 830 DAYS**

IM Security of Costs (USD)	- VUV 1,000,000
USD 0.009202 Currency rate	- 0.00902

	$9,020.00
Per annum rate	- 365
Daily interest 5% per annum	- 0.05
Interest per day	- $1.24
Total days	-830
Interest @ 830 days -	**USD$1,025.56**

- **ADDITIONAL CORPORATE HOLDING COSTS FOR SARATOGA LTD**
  Annual incorporation and accounting fees (365 days) –USD$450
  Per day - USD$1.23
  871 days - USD$1,073.84 **USD $1,073.84**

- **MAINTENANCE & REPAIRS ON CYCLONE DAMAGED AIRCRAFT (Prior to June 15)**
  Airworx Invoice 3 October 201 - VUV643, 253 USD$5,802.14
  USD 0.00902 currency rate -0.00902

  Airworx Invoice 18 October 2016 - VUV29, 025 USD$265.58
  USD0.00915 currency rate – 0.00915

  Airworx Invoice 12 April 2018 – VUV48, 044 USD$444.90
  USD0.00926 currency rate – 0.00926

  TOTAL AIRWORX INVOICES: VT905, 722 OR USD$8,184.93

- **DEPRECIATED CAPITAL VALUE DUE TO 2 YEARS NON OPERATIONAL**
  Value when sold $65000.00- value in July 2015: USD150, 000 - loss USD85, 000

19. Mr Erceg purchased the aircraft with loan funds provided by Ms Boland. She knew nothing about aircrafts. As she was in a relationship with Mr Erceg at that time she trusted him. Mr Erceg negotiated the terms of the Agreement and she trusted him to comply with its terms. She was not informed that he intended to operate two aircrafts at the same time .As a result the aircraft did not fly for 200 hours per annum.

20. In addition the claimants were not notified of needed repairs and their approval was not sought for unscheduled maintenance according to the terms of the Agreement. The defendants allowed persons to do maintenance on the aircraft without the claimants' approval.

21. As a result, I am satisfied that the claimants suffered consequential losses. I accept the claimant's submissions. They are entitled to damages against the defendants. There will

be no set off for matters submitted by the defendants. These matters were raised in their pleadings which were struck out.

Result

22. I enter judgment for damages in favour of the claimants as follows:-

    a) USD$207,766.04.

    b) NZ$2,800.

    c) Interest at 5 % per annum from 1 July 2015.

    d) The Security for Costs in the sum of VT1 million held in the Chief Registrar's trust account is to be paid immediately to the claimants.

    e) The second defendant is jointly and severally liable for costs incurred after the expiry of the Agreement.

    f) The claimants are entitled to costs to be agreed or taxed.

DATED at Port Vila this 7 day of August, 2019.

BY THE COURT

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Dudley Aru
Judge