IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P: 314/93

BETWEEN: ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PROPRIETARY LIMITED "A.C.N. NO.004 209 410" a company duly incorporated under the laws of Australia, having its registered office at 501 Swanston Road, Melbourne. Victoria 3,000.00, Australia:

PLAINTIFF

A N D: POLYNESIAN AIRLINES (HOLDINGS) LIMITED a duly incorporated company having its registered office at Apia:

DEFENDANT

Counsel: R. Drake for Plaintiff
M.G. Phillip for Defendant

Dates of Hearing: 31 January and 16 February 1994

Date of Decision: 17 February 1994

DECISION OF SAPOLU, CJ

Originally this is a motion by the defendant to strike out the plaintiff's claim on the ground that it has been brought in the wrong forum, but a further ground of estopple was later advanced by the defendant for striking out the statement of claim.

The plaintiff's claim relates to a twin otter aircraft which it alleges to have leased to the defendant under a specific lease agreement executed for that purpose between the plaintiff and the defendant on 16 April 1992. The plaintiff's claim relies on the provisions of that lease agreement and seeks an order for possession of the aircraft still being flown by the defendant as

well as an enquiry into and judgment on certain matters including unpaid rental claimed to have arisen from alleged breaches by the defendant of the lease arrangements.

Essentially the defendant says that the dispute between the plaintiff and the defendant relating to the twin otter aircraft is part of a wider dispute between the parties on issues which have arisen under six separate but inter-dependent management and operations agreements entered into between the parties when the plaintiff was managing the operations of the defendant. That being so the defendant argues that the issue of the twin otter aircraft should be dealt with under those six agreements. As those six agreements provide that any dispute arising under those agreements should be dealt with by arbitration, the defendant further says that the twin otter aircraft issue should be dealt with by arbitration and not litigation proceedings. It follows that the plaintiff's action before this Court must be struck out as it has been brought in the wrong forum.

After hearing argument from counsel for the plaintiff, it is clear to the Court that the lease of the twin otter aircraft was the subject of a separate and specific lease agreement between the plaintiff and the defendant. And the plaintiff's action is brought under that lease agreement and not under any of the six management and operations agreement mentioned by the defendant. I have also been unable to find in any of those six agreements any reference to the lease of the twin otter aircraft which is the subject of the plaintiff's claim. The lease agreement for the twin otter aircraft is also not only subsequent in time to the six agreements but it is a specific agreement dealing with a specific matter, namely, the lease of the aircraft. I have also found no express provision or clear implication in the lease agreement that it is to be subject to the six management and operations agreements. There is also no provision for arbitration in the lease agreement. In fact it is clear from certain provisions of clauses 10 and 11 of the lease agreement that court action

may be taken by the plaintiff as lessor if certain stipulated events including non-payment of rent and non-observance or non-performance of any lease condition or covenant is committed by the defendant as lessee. That to me is inconsistent with the argument that arbitration and not litigation is the proper proceedings for the claim by the plaintiff.

It is granted, as counsel for the plaintiff pointed out, that the lease agreement is expressed to expire on 19 May 1992. But even if that is so, there is nothing in the lease agreement or subsequent developments relating to the twin otter aircraft to show that the proper forum for the present action by the plaintiff is arbitration proceedings and not the Court. I am therefore not prepared to deny to the plaintiff access to the Court for the purpose of its present claim.

When this matter was about to be heard by the Court on 31 January 1994, counsel for the defendant produced a further memorandum and affidavit in support of the motion to strike out the statement of claim. Counsel for the defendant says that she advised counsel for the plaintiff on Friday, 28 January 1994, about fresh documents the defendant proposed to produce. Those fresh documents were not served on counsel for the plaintiff until proceedings were about to commence on the morning of 31 January 1994. It was at that same time that the fresh documents were produced to the Court. A short adjournment was then taken by the Court to give counsel for the plaintiff the opportunity to peruse those fresh documents. When the Court resumed, counsel for the plaintiff made objection to the production of those fresh documents by the defendant on the ground that they are not relevant. I reserved my ruling on the objection by counsel for the plaintiff but allowed the defendant to proceed with its motion.

Having duly considered the plaintiff's objection, I decided to allow the production of the defendant's fresh documents for the Court's consideration. Counsel for the plaintiff and the defendant were advised accordingly through the Registrar. Counsel for the plaintiff was also asked to file an affidavit

in reply to the fresh affidavit filed by the defendant on 31 January 1994, and to make any necessary submissions to the defendant's fresh documents. On 16 February 1994 when this matter was recalled, counsel for the plaintiff produced to the Court and counsel for the defendant an affidavit in reply to the defendant's fresh affidavit. The affidavit by the plaintiff opposes the essential matters raised in the fresh affidavit filed by the defendant. Both counsel for the plaintiff and the defendant were then allowed to make further submissions to the Court on the fresh affidavit by the plaintiff. And they both made further submissions.

It appears to me that in essence what the defendant is saying in its fresh documents is that the plaintiff by its conduct during correspondence and a meeting with the defendant after the plaintiff's claim was filed is now estopped from continuing in Court with its claim. The plaintiff disputes this in its fresh affidavit produced on 16 February 1994. Given the conflicts between the allegations in the defendant's fresh documents and the plaintiff's fresh affidavit, I am of the view that it will not be appropriate to make any decision on the issue of estopple at this stage without oral evidence being called. This does not prevent the defendant from pleading estopple as a defence in the appropriate proceedings when oral evidence will be called to show whether estopple is in fact available to the defendant. But on this preliminary matter whether the statement of claim should be struck out because of an estopple alleged by the defendant, I am not prepared to accede to the submissions by the defendant.

In all then, the motion to strike out the statement of claim is dismissed. Costs of $250 is awarded to the plaintiff.

T F M Sapolu

CHIEF JUSTICE