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

Civil Action No. HBC 17 of 2015

BETWEEN
AIRPORTS FIJI LIMITED
a Government commercial company
established pursuant to the Public Enterprises Act, 1996 and duly incorporated under the Companies Act, Cap 247 and having its registered office at Airports Fiji Limited Headquarters, AFL Estate, Namaka, Nadi in the Republic of Fiji.
Plaintiff

AND
AEROLINK AIR SERVICES PTY LTD
a limited liability company having its registered address at Hangar 410,
Drover Road, Bankstown Airport NSW 2200, Australia.
Defendant

Date of Judgment: Friday, 30th November 2018
Counsel: Mr. F. Haniff for the Plaintiff
Mr. C.B. Young for the Defendant

JUDGMENT

A. (A) INTRODUCTION

1. (1) The plaintiff filed an 'Originating Summons' on 03rd February 2015 seeking an Order to sell the defendants' aircraft, 'Embraer Bandeirante EMB 110' to recover outstanding parking fees which the plaintiff alleges is owed by the defendant.

1. (2) The plaintiff was given leave on 17th October 2016, by Justice Sapuvida to amend the relief it was seeking with an alternative relief in the following terms; (Page 4 of the transcript)

> *"alternatively, the defendant pay the plaintiffs' parking fees of F$77,280.00 accrued from January 2007 to 31st August 2014 and accruing at the rate of $1.00 per hour from 01st September 2014 until the aircraft is removed from the plaintiffs' premises upon payment of the outstanding parking fees."*

1. (3) The defendant filed its **'Notice of Counter-Claim'** on 23rd September 2015 and the plaintiff filed its defence to the defendants' Counter-Claim on 29th January 2016.

1. (4) The **defendants' Counter-Claim is based on two causes of action**. They are;

A. (A) unlawfully detaining the air-craft (paragraph 8 of the Notice of Counter-Claim)

A. (B) in relocating the air-craft it was in breach of its duty to take reasonable care and skill (negligently towed and parked the aircraft by the plaintiff) See; paragraph 4 and 5 of the Notice of Counter Claim by the defendant)

In addition, the **defendant claims exemplary damages** from the plaintiff. (See; paragraph 10 of the Notice of Counter-Claim by the defendant)

1. (5) The defendant was given leave on 17th October 2016, by Justice Sapuvida to amend its pleadings as follows (See; page 4 and 5 of the transcript)

> *"The defendant join issues with paragraph (i) to (ii) and the defendant denies that the parking fees or any part thereof is due or payable and it further says that the plaintiff is not entitled to charge parking fees because;*

i. *(i) The plaintiff is in breach of Section 12 of the State Lands Act and/or*

i. *(ii) The Statute of Limitation bars the plaintiff from making any claims before 03rd February 2009 and/or*

i. *(iii) The plaintiff was not the owner of the Crown Lease No.- 3469 until 08th January 2010 and/or the charging of the parking fees was in breach of the Commerce Commission Decree 2010 and/or the parking fees did not comply with the provisions of the Civil Aviation Reform Act (section 12).*

(B) PARTIES

1. (1) The plaintiff, **Airports Fiji Limited** (hereinafter referred to as "AFL) is a government commercial company registered with the Registrar of Companies. AFL is responsible for services and facilities for air navigation and air traffic services in the Fiji Islands under Section 06 of the Civil Aviation Reform Act 1999.

1. (2) The defendant, '**Aerolink Air Services Pty Ltd**.' (hereinafter referred to as "Aerolink") is an aircraft charter company operating from Hanger 410, Drover Rd, Bankstown Airport NSW 2200, Australia.

A. (C) FACTS NOT IN DISPUTE

1. (1) Aerolink is the owner of the aircraft '**Embraer Bandeirante EMB 110**' (the aircraft)

1. (2) The aircraft has been parked at the Nadi International Airport since 2007.

1. (3) The plaintiff moved the aircraft in June 2012.

1. (4) The cyclone Evan struck the Western Division of Fiji in December 2012.

A. (D) CONSIDERATION AND DETERMINATION

1. (1) Counsel for the plaintiff and the defendant have tendered extensive written submissions in support of their respective cases. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

1. (2) As I understand the proceedings before Justice Sapuvida, dated 17th October 2016, **the defendant contends that the plaintiff is not entitled to charge parking fees because;**

(a) the plaintiff is in breach of **Section 13 of the State Lands Act**;

(b) the **Statute of limitation** bars the plaintiff from making any claims.

(c) the plaintiff was not the owner of the **Crown Lease No:- 3469** until the 08th January 2010.

(d) the charging of the parking fees was in breach of the **Commerce Commission Decree 2010.**

(e) the plaintiff has not complied with **Section 12 of the Civil Aviation Reform Act, 1999.**

I will consider these challenges in turn.

1. (3) **Section 13 of the State Lands Act**

i. (i) The Nadi International Airport complex for arrival and departure is situated on land partly comprised in Crown Lease No. 3469. (see, annexure DR-2 in the affidavit of Daniel Patrick Ryan sworn on 01st September 2015)

i. (ii) According to the memorial No. 727693, the plaintiff became the registered lessee on 08th January 2010.

i. (iii) Clause (2) of the Crown Lease provides;

(2) The lessee shall maintain and operate on the land an aerodrome for international regional and internal air services.

i. (iv) Clause (4) of the Crown Lease provides;

(4) The Lessee shall not without the consent in writing of the lessor erect, use or occupy or suffer to be erected, used or occupied any building or structure other than a building or structure required for the efficient operation and

maintenance of an international airport or for auxiliary and ancillary services connected with the airport and aircraft passengers.

Provided that nothing in this condition shall be deemed to prohibit the erection, occupation or use of –

a. *(a) buildings or structures for the accommodation of persons employed on the aerodrome by the Administering Authority or an approved sub-lessee;*

a. *(b) building or structure required for the storage or handling of petroleum products;*

a. *(c) buildings or structures required for the education, welfare and amenities of persons employed on the aerodrome by the Administering Authority or an approved sub-lessee;*

a. *(d) buildings or structures required for use by persons, organizations or firms engaged in industries or services normally associated with an international airport or for auxiliary and ancillary services connected with the airport and aircraft passengers*

i. (v) The defendant says that no parking charges are payable because parking of an aircraft is a dealing in crown (state) land for which consent of the Director of Lands has not been obtained pursuant to Section 13 of the State Lands Act.

i. (vi) The stance on the part of the plaintiff is that; (Reference is made to paragraph 49 and 50 of the plaintiffs' written submissions filed on 05th April 2017)

49. The Plaintiff's position is that the lease granted by the State was for the specific purpose of maintaining and operating an airport. Clause 2 of the Lease – to be found at Tab 2 of the affidavit of Daniel Ryan filed herein on 8 September 2015 – states that the "Lessee shall maintain and operate on the land an aerodrome for international, regional and internal air services." It is clear that the Director of Lands has given its consent to the land being used as an airport and "any purpose directly connected with the efficient operation management and maintenance of the airport." See clause 3 of the Lease.

*50. It is a blanket consent – similar **Singh's Shopping Ltd v. Labasa Town Council** [2013] FJHC 586, Action No. 9 of 2005 [Tab 8] where the Court held that the "consent was given on a once and for all basis". In this case also, blanket consent has been given to maintain and operate an airport.*

i. (vii) The defendants' counter submission is that; (Reference is made to paragraph 06 of the defendants' submissions in reply filed on 06th June 2017).

*6.1 The Plaintiff submits at para. 49 & 50 that there is a "blanket consent" because there is reference to the lease allowing the lessee to "maintain and operate on the land an aerodrome". This submission has a fatal flaw in that all leases from the State (previously Crown) Lands Act allows for different purposes. You have residential leases, agricultural leases and so on but if a lessee "deals" with the lease in any way and dealing involves a third party i.e. between the lessee and another person like Aerolink Air Services Pty Ltd involving parking space it is a dealing requiring consent. Airports Fiji Ltd is not dealing with itself here, it is dealing with Aerolink Air Services Pty Ltd. The case of **Singhs Shopping Ltd v. Labasa Town Council** cited by the Plaintiff [Tab 8] is of no support for the Plaintiff's submissions. The condition in the lease of the case cited by the Plaintiff had the words:*

> *"The lessee shall not without the consent in writing of the lessor transfer sublet assign or part with possession of the demised land or any part thereof **provided however that the lessee shall be entitled without such consent to sublet** or licence the use of any part of any building or structure on the demised land for any advertising purposes or any kiosks, shops, offices, stalls, booths, or … provided by the lessee on the demised land in conformity with the provisions or condition (3) hereof to such persons and at such rents or fees and upon such other terms and conditions as the lessee may think fit." (emphasis added)*
>
> *[recited in para. 6.2.5 of the judgment]*

The Court is asked to compare the wording of condition 4 in the case cited and the wording in the Airports Fiji Ltd's lease [p. 135 of the Defendant's List of Documents] in condition 1:

> *"The lessee shall not transfer, sublet, mortgage, assign or part with the possession of the demised land or any part thereof without the written consent of the lessor first had and obtained, provided that such consent shall not be unreasonably withheld."*

There is no similar condition 4 in the Airports Fiji Ltd's lease therefore written consent was required to that "parking" by the Defendant.

i. (viii) The evidence here shows that the Director of Lands has given its consent to the land being used as an airport and "**any purpose directly connected with the efficient operation, management and maintenance of the airport**". Reference is made to clause (3) of the Crown Lease which provides;

*3. The lessee shall not without the consent in writing of the lessor use the land for any purpose **other than** –*

a. *(a) The construction, maintenance, and operating of an aerodrome; and any purpose directly connected with the efficient operation, management and maintenance of the aerodrome;*

a. *(b) Any other purpose approved by the lessor.*

Provided that nothing in this condition shall be deemed to prohibit the cultivation of crops on the aerodrome.

(Emphasis added)

i. (ix) Therefore, **I do not agree** with the defendants' ground that *"any demand for payment by the plaintiff for the parking charges is illegal, void and unenforceable"*. The argument of the defendant in that respect appears to me manifestly groundless.

1. (4) LIMITATION ACT

i. (i) The basis for plaintiffs' claim against the defendant is on an alleged default of parking fees. The plaintiff has invoiced the defendant the following parking fees; (see; annexure MM5 in the Affidavit of Molly Murphy deposed on 12/12/2014)

- ϖ January 2007 - September 2012, Invoice No:- MINVO 23, FJ$57,960.00
- ϖ October 2012 - January 2014, Invoice No:- MINV 001, FJ$13,468.00
- ϖ February 2014 - August 2014, Invoice No:- MINV 014 FJ$5,851.20

i. (ii) The defendant says that certain claims of the plaintiff are statute barred. It is to be noted that Counsel for the defendant did not press this point in his written submission.

i. (iii) Section 4(1) (d) of the Limitation Act (Cap. 35) provides;

S. 4(1)

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(d) Actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that –

i. *(i) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and*

i. *(ii) Nothing in this subsection shall be taken to refer to any action to which section 6 applies".*

(iv) On 10th May 2012, the plaintiffs' General Manager wrote to Mr. Daniel Ryan, the Director of the defendant company and given notice that the parking fees were outstanding. (See; annexure MM6 in the affidavit of Molly Murphy, sworn on 12th December 2014.) The letter and the reminders have gone unanswered.

Almost two years later, on 15th September 2014, Mr. Ryan responded denying that any parking fees were owed to the plaintiff. (See; annexure MM8 in the affidavit of Molly Murphy, sworn on 12th December 2014).

The date of accrual of the cause of action for the recovery of the outstanding parking fees was the date the default occurred. The six year (06) limitation period started to run from 10th May 2012. The cause of action has arisen on 10th May 2012. The plaintiff instituted the action by way of an 'Originating Summons' on 03rd February 2015. Therefore, the action has been instituted within the limitation period. The plaintiffs' action is not time barred. The defendants' argument fails.

1. (5) CROWN LEASE NO: 3469

i. (i) The plaintiff became the registered lessee of Crown Lease No: 3469 (exhibit DR-2 in the affidavit of Daniel Patrick Ryan sworn on 01st September 2015) on 08th January 2010.

Therefore, since 08th January 2010, the plaintiff has the mandate to maintain and operate on the crown land an aerodrome for international and internal air services.

i. (ii) Therefore, I do agree with the contention on the part of the defendant that the plaintiff has no mandate to charge parking fees prior to 08th January 2010.

1. (6) COMMERCE COMMISSION DECREE

i. (i) The defendant says that the charging of parking fees was in breach of Commerce Decree 2010.

i. (ii) Section 31, 34(1) and (2) of the Commerce Act 1998 states:

"S. 31;

In this part, unless the contrary intention appears –
"controlled goods or services" means goods or services in respect of which an Order is for the time being force;

"order" means an order made under section 32.

34(1) A person must not supply any controlled goods or services unless a price for those goods or services has been authorised by the Commission and the goods or services are supplied in accordance with the authorisation. Penalty: $50,000.

(2) Any provision of a contract, and any covenant, in contravention of subsection (1) is unenforceable.

The Commerce Act 1998 was replaced by the Commerce Commission Decree 2010. Section 31 of the 1998 Act is reproduced in Section 39(1) of the 2010 Decree. Section 34 of the 1998 Act is reproduced in Section 41. However, Section 44(1) of the 2010 Decree states:

"The Commission may, with the approval of the Minister, by order, fix and declare the maximum price or charges by any person (including the State) in the course of business for the sale of goods or the performance of services, either generally or in any specified part of or place in Fiji."

i. (iii) The plaintiff concedes that the "Final Determination for Aeronautical Fees and Charges" at MM1 in the affidavit of Molly Murphy deposed on 12th December 2014 has not been gazetted and states further that the Airport (Fees) (Amendment) Regulations promulgated in 1993 still governs the charges.

In my view, the plaintiffs' justification wholly fails. Because the 1993 Regulation is a result of Section 29 (a), (b) and (d) of the 1979 Civil Aviation Act which has been repealed by Section 33 of the Civil Aviation Reform Act 1999.

1. (7) CIVIL AVIATION REFORM ACT NO: 16 of 1999

i. (i) The plaintiff says that the defendants' aircraft has been parked at Nadi International airport since 2007 accruing parking fees. The plaintiff alleges that the defendant has defaulted in paying the parking charges. The plaintiff further says that it detained the aircraft pending the payment of the parking charges.

i. (ii) The defendant says that the detention of the aircraft is illegal because no lawful charges were payable at the time when the aircraft was detained because;

- ϖ the plaintiff has not satisfied Section 12 of the Civil Aviation Reform Act No. 16 of 1999 (the plaintiff frankly conceded in para 26 of its written submissions filed on 07th April 2017 that "*It has not expressly determined parking charges under Section 12 of the 1999 Aviation Act as yet.*")

- ϖ according to the plaintiffs' exhibit "AIP Fiji Islands" the charges which it is relying on became effective only from 31st May 2016 and no earlier

i. (iii) The counter submissions of the plaintiff proceeded as follows; (Reference is made to paragraphs 13, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46 of the plaintiffs' written submissions filed on 07-04-2007)

13. Before the 1999 reforms, Section 29 of the 1979 Act conferred a regulation making power on the Civil Aviation Authority of Fiji ("the Authority") to prescribe fees for the provision of airport services. That section was coupled to Section 30 of the same Act i.e. the 1979 Act, which conferred the enforcement power to detain and sell any aircraft in respect of which arrears had accrued. Under Airport (Fees) (Amendment) Regulations promulgated in 1993 [Tab 2], airport parking fees were prescribed under Section 29 (a) which continue in force to the present day. It has never repealed.

24. The plaintiff has satisfied and complied with the pre-requisites of Section 13 (3) of the Aviation Act.

25. The Defendant has disputed whether the first requirement under Section 13(3)(a) of the Aviation Act has been met. Section 13(3)(a) requires for the Court to be satisfied that a "sum is due to the airport operator for charges under Section 12." Section 12(1) under the heading "Charges for services in connection with aircraft" states that the operator of an airport – the Plaintiff in this case – may from time to time determine charges for services performed and facilities provided at the airport in connection with aircraft. Notwithstanding, Airport (Fees) (Amendment) Regulations promulgated in 1993 [Tab 2] continues to be in force.

*26. The plaintiff conceded that it has not expressly determined parking charges under Section 12 of the 1999 Aviation Act as yet. But the plaintiff submission is that in times of comprehensive legislative reform, the courts have expressed a commitment to "make the Act work as Parliament must have intended" (**Northland Milk Vendors Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530 (CA) at 538 per Cooke P [Tab 4]. This robust approach to interpreting and applying legislation would justify a court attributing to Section 13 of the 1999 Aviation Act a strained interpretation which embraced by implication arrears accrued under Section 29 of the 1979 Civil Aviation of Fiji Act ("the 1979 Act") [Tab 2].*

The Legislative Scheme

27. Before the 1999 reforms, section 29 of the 1979 Act conferred a regulation-making power on the Civil Aviation Authority of Fiji ("the Authority") to prescribed fees for the provision of airport services. That section was coupled to Section 30 of the same Act i.e. the 1979 Act, which conferred the enforcement power to detain and sell any aircraft in respect of which arrears had accrued. Under Airport (Fees) (Amendment) Regulations promulgated in 1993 [Tab 5], airport parking fees were prescribed under Section 29 (a) which continue in force to the present day. It has never repealed.

28. The 1999 reforms altered the legislative balance. The 1999 Aviation Act introduced a new power to detain, being Section 13, and sell aircraft where aircraft charges were unpaid and repealed the former detention and sale power under s 30 of the 1979 Act. The new power was introduced under Section 13, and the repeal was effected under Section 34. The 1999 Aviation Act, although repealing the detention and sale power under Section 30, left intact Section 29 which conferred on the Authority a regulation-making power to prescribe fees for airport services. Section 29 remains intact to this day.

29. Section 12 of the 1999 Aviation Act introduced a new regime for charging for airport services from "time to time". Section 12 allows airport operators to fix charges "for services performed and facilities provided at the airport in connection with aircraft". This regime exists alongside Section 29 of the 1979 Act, which authorizes the Authority to prescribe fees payable for airport services.

30. Section 13 of the 1999 Aviation Act is the "detention and sale" section. Read literally, Section 13 is engaged only where a default is made in the payment of charges determined under Section 12. Section 13 (1) reads:

> *"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, [detain and sell the aircraft]"*

Lacuna

31. The 1999 reforms created a lacuna in the legislative scheme that must have been unintended. The 1999 Aviation Act left intact Section 29 of the 1979 Act, which authorizes the Authority to prescribe airport service fees. Previously, Section 30 (repealed by the 1999 Aviation Act) conferred the necessary enforcement power to detain and sell aircraft in respect of which service fees were in arrears. The detention and sale power under Section 13 of the 1999 Aviation Act does not, in terms, apply to arrears under Section 29.

32. Could Parliament have intended this outcome? It is most unlikely. Until

*the 1999 reforms, airport service fees that were in arrears could be recouped under the Section 30 detention and sale power of the 1979 Act. Following those reforms, Section 13 of the 1999 Aviation Act remained the only detention and sale power. However, the policy of the law has always been to couple a power to prescribe airport service fees with an enforcement power of detention and sale. This, therefore, invites a robust approach to statutory interpretation in order to "make the Act work as Parliament must have intended" (**Northland Milk Vendors Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530 (CA) at 538 per Cooke P) [Tab 4].*

Need for robust statutory interpretation

33. A regime for setting airport service fees is incomplete without an effective enforcement mechanism. That mechanism has always been a power of detention and sale but that power has ostensibly been lacking since 1999. The question then becomes: How best to supply the omission of the legislature?

34. The courts have accepted the responsibility to make the legislation work by resorting to robust techniques of statutory interpretation. In Northland Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530 (CA) at 537-538, Cooke P observed (emphasis added):

> *"[There] are cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act … The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. The present case is in our opinion another illustration of a hiatus which the Court can legitimately and should bridge."*

35. Recently, the New Zealand Court of Appeal reiterated that legislation "should be interpreted in a realistic and practical way in order to make it work" (Canterbury Regional Council v Independent Fisheries Ltd [2012] NZCA 601, [2013] 2 NZLR 57 at paragraph 12 [Tab 6]. There are several other authorities of the New Zealand courts that have held to similar effect.

36. The 1999 legislative reforms to the civil aviation sector created a lacuna or "hiatus" (to use the language of Cooke P in the Northland Milk Vendors case) in the legislative scheme that is the responsibility of the courts to fill. It is submitted with respect that it is the responsibility of this Court to make the legislation work by adopting a realistic and practical interpretation of Section 13 of the 1999 Aviation Act.

37. Section 12 authorises the detention and sale of any aircraft in respect of which a default has occurred in the payment of any charges determined under Section 12 of that Act (s (13(1). To make the legislative scheme work as Parliament must have intended, the following words must also be read into Section 13(1): "or in respect of which a default has occurred in the payment of any fees levied under Section 29 of the 1979 Act". Section 13(3) requires an airport operator to obtain the leave of the High Court in order to exercise the Section 13 power. Consequently, the following italicized words should also be read into 13(3): "(a) a sum is due to the airport operator for changes under Section 12 or for unpaid fees levied under Section 29 of the 1999 Act." The High Court is prevented from granting leave unless it is satisfied that such a sum is due and payable.

38. It could not have been Parliament's intention when it left Section 29 intact to leave the fee-levying power without any effective enforcement mechanism in the event of non-payment. The additional words identified in paragraph 16 above must be read into section 13 in order to make Parliament's legislation work. This might ineloquently be called "filling gaps" in an Act where Parliament unintentionally leaves a lacuna or hiatus in the legislative scheme (see the Northland Milk Vendors cases cited above).

39. Since 1999, the plaintiff has been charging fees under the Airport (Fees) (Amendment) regulations promulgated in 1993. As the affidavit of Molly Murphy filed herein on 13 October 2015 at Annexure MM 1 at page 38 shows, approximately 20% of the Plaintiff revenue - $58 million and $57 million in 2013 and 2014 – was derived from parking fees. It cannot be so that these fees were charged in a vacuum in the absence of any legislative framework to charge the fees. Further still, it is conceivable that airlines could now stop paying parking fees for service provided by the Plaintiff on account of there being no legislative framework to charge fees. As we have submitted above. Parliament could not have intended for there to be this gap in the law.

An uneasy legislative patchwork

40. It is apparent from comparing the 1979 Act and 1999 Aviation Act that the 1999 reforms created an uneasy legislative patchwork. The two Acts do not mesh well together, which requires the courts to take an innovative and robust approach when applying them.

41. The Airport (Fees) (Amendment) Regulations 1993 were made under the authority of Section 29 of the 1979 Act and were unaffected by the 1999 reforms, and remain in force to this day. It was under these regulations that AFL was charging airport parking fees (in respect of which AFL is now seeking to

exercise the detention and sale power to recoup arrears). But Section 29 authorises fees levied under that section to be paid to the Authority, not an airport operator. AFL was established in 1999 as the new commercial arm of Fiji civil aviation that would operate airports, and presumably AFL began collecting the airport parking fees as the new airport operator. But, arguably, the Authority and not AFL has lawful authority to do that. Section 29 explicitly acknowledges so.

42. Contrast the wording of Section 13 of the 1999 Aviation Act, which takes account of the new commercial environment which the Act set in place. Section 13 authorises the airport operator (meaning AFL, the plaintiff) to exercise the detention and sale power. In 1999 the Authority's functions were reined in to encompass purely regulatory matters within the industry. When the reforms were introduced in 1999, Parliament omitted to amend Section 29 so as to make fees levied under it to be paid henceforth to the airport operator.

43. The 1999 reforms resulted in two further legislative anomalies. First, the Airport (Fees) (Amendment) Regulations 1993 were expressed to be promulgated under Section 29 (a) of the 1979 Act. However, Section 29 (a) authorizes the levying of fees in connection with the issuing of any certificate or licence, or the undergoing of any examination, test inspection or investigation, or the granting of any permission or approval under the Act. It is difficult to envisage airport parking fees falling within the scope of these authorisations. Section 29(c) would seem to be the more appropriate empowering provision. This authorizes the levying of fees "for any other service provided in the discharge of [the Authority's] functions under the Act".

44. Secondly, Section 33 of the 1999 Aviation Act amended Section 29 of the 1979 Act by deleting paragraphs (a), (b) and (d). However, Section 29 contained no paragraph (d). Its three paragraphs were (a), (b) and (c).

45. These anomalies are indicative of the unhappy interrelationship of the 1979 Act and the 1999 Aviation Act. This emphasizes the responsibility which the courts must accept in order to iron out the wrinkles. They must adopt innovative and imaginative approaches to the interpretation and application of the two Acts. They must make the legislation work as Parliament must have intended, filling the gaps where this is necessary to reconcile and accommodate the two Acts.

46. The courts' responsibility is to read into Section 13 of the 1999 Act the additional words set out in paragraph [16] above.

i. (iv) As against this, the defendant responds; (Reference is made to paragraphs (1) to (5.3) of the submissions in reply by the defendant filed on 06th January 2017).

1. *1. The plaintiff's claim for parking fees is fundamentally flawed by the plaintiff's own concession that "IT has not expressly determined parking charges under Section 12 of the 1999 Aviation Act as yet". [See page 8 para. 26 of the plaintiff's submissions]*

1. *2. Hence, there is no room to "make the Act work as Parliament must have intended" because section 12 on its own does not need the Court's intervention to make that provision work. Section 12 of the Civil Aviation Reform 1999 Act states:*

"12.(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.

(4) This section does not apply in relation to a charge, fee or rent set under a contract, licence, lease or other agreement between the airport operator and a third person under which the airport operator provides premises, facilities or services at the airport to enable the third party to provide goods or services to passengers or the public at the airport.

1. *3. Hence, if Airports Fiji Ltd complies with section 12 and there is nothing to suggest that any of the criteria set out in section 12 is or are impossible to fulfill then Airports Fiji Ltd can proceed to legally charge for parking fees at*

whatever rate it has determined under section 12. Certainly, there is no need for a strained interpretation of the section because the section is clear on its own merits.

1. *4. The fact that the Plaintiff has conceded that section 12 has not been fulfilled by it makes any parking charges that are sought, to be unenforceable and therefore any detention of the aircraft is unlawful.*

1. ***5. <u>Lacuna</u>***

5.1 The Defendant submits that the Plaintiff's submissions that there is a lacuna in the legislation is without basis because no lacuna exists and if there was one, why did the Government not do anything all these years to correct that lacuna. Hence, the words in the judgment of the Australian High Court (per Gleeson CJ, Gummow, Hayne and Crennan JJ) in Foots v Southern Cross Mine Management Pty Ltd [2007] HCA 56 at para. 68 is instructive:

> *"If it be thought that the result reveals a lacuna in the text or operation of the Bankruptcy Act the questions whether and if so how changes should be made are for the Parliament." [emphasis added]*

*5.1.1 The case of **Northland Milk Vendors Association** cited by the Plaintiff does not assist the Plaintiff's submissions because there are no "gaps" to fill by the Court to make the Act work as Parliament must have intended. Whilst citing a principle of law, the Plaintiff has not shown where the gap is. There is no "gap" in Section 12.*

5.2 On one hand Airports Fiji Ltd has argued that the Court should take a Robust approach to the statutory interpretation to fill in the gaps. However, the plaintiff's Exhibit AIP Fiji Islands which was finally after several adjournments produced to the Court clearly shows that the relevant part [see page 5 of the plaintiff's submissions] quoted by the Plaintiff states that those charges were "Effective: 31 May 2016". Hence, it is submitted that the plaintiff cannot come to this Court and say that was effective before 31st May 2016. Since it is the plaintiff's own document and it has sought to rely on it as the basis of his claim it must accept what is stated in its written form as the effective date of the parking charges being no earlier than 31st May 2016. The Court is also asked to look through the exhibit and see the different effective dates for different matters. Example, there are different dates like effective 10th November 2016 for publication of certain documents, National Regulations and Requirement effective 15th April 2004, Designated Authorities effective 4th April 2013 and the list goes on. Since the Plaintiff has not led any evidence that it has complied with section 12 and the fact that it only produces an exhibit that says that the charges are effective from "31st May 2016" [the actual page of the exhibit is attached for reference] the date of 12th June 2006 when the Defendant's aircraft was detained was illegal because no lawful charges was payable at the time when the aircraft was detained either because it has not satisfied section 12 (as the plaintiff concedes in his submissions) and/or by its own exhibit document, the charges which it is relying on became effective only from 31st May 2016 and no earlier. Your Lordship in his ruling of 15th September 2016 had rightly made the point that the "dispute needs further investigation" and the plaintiff had the opportunity to furnish further evidence which it had not done but by its exhibit, reinforced the position that if anything, the plaintiff did not comply with section 12 until 31st May 2016. It must be noted that the Defendant is not saying that the exhibit document was effective from 31st May 2016 is evidence that Airports Fiji Ltd has complied with section 12 to the contrary. Rather the Defendant is saying, at the very best the Plaintiff can only argue (if at all) that the Plaintiff had complied with section 12 from 31st May 2016.

5.3 At para 37 of the plaintiff's submissions, it is suggested to the Court that "the following words must also be read into section 13(1). "or in respect of which a default has occurred in the payment of any fees levied under section 29 of the 1979 Act." The "1979 Act" referred to by the plaintiff is the Civil Aviation of Fiji Act 1979. (See para. 26 [Tab 2] of the Plaintiff's Submissions) The changes under "the 1979 Act" is applied to Civil Aviation Authority of Fiji which still exist as an entity. Therefore, if there are monies owing under section 29 of "the 1979 Act, then Civil Aviation of Fiji which still exist today is the proper plaintiff to seek payment for any monies owed to Civil Aviation Authority of Fiji under section 29. It is clear from Civil Aviation Reform Act 1999 (which the Plaintiff has referred to as "the Aviation Act") that only certain rights, powers and responsibilities were transferred from the Civil Aviation Authority of Fiji to the operations of an airport like Airports Fiji Ltd.

i. (v) The Plaintiffs' proceedings commenced by way of an "**<u>Originating Summons</u>**" dated 03 February, 2015 seeking leave of this Court for the selling of the defendants' aircraft which is more fully described in the said Summons. **<u>The application is made pursuant to Section 13 (3) of the Civil Aviation Reform Act 1999</u>** (hereinafter referred to as the CARA 1999) and under the inherent jurisdiction of the High Court.

i. (vi) The basis of plaintiffs' claim against the defendant is an alleged default of parking fees which are invoiced by the plaintiff as follows:

a. (a) January 2007 – September 2012, Invoice Number MINVO23 FJD$57,960.00

a. (b) October 2012 – January 2014, Invoice Number MINV001 FJD$13,468.80

a. (c) February 2014 – August 2014, Invoice Number MINV014 FJD$5851.20

The copies of the invoices are in the annexure MM 5 in the affidavit of Molly Murphy filed on 3 February 2015.

i. (vii) In this case, the plaintiff's application to sell the aircraft of the defendant is made under a specific law, viz., under Section 13 (3) of the CARA 1999.

i. (viii) Section 13 (1) and (2) of the CARA 1999 provides:

13(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. *(a) Detain, pending payment, either –*
i. *(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); or*

i. *(ii) Any aircraft of which the person in default is the operator at the time the detention begins; and*

a. *(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.

i. (ix) The section 13 (3) of the CARA 1999 states:

Section 13(3);

"An airport operator must not sell an aircraft under this section without the leave of the High Court, and the court must not give leave except on proof that-

a. *(a) A sum is due to the airport operator for charges under section 12;*

a. *(b) Default has been in the payment of charges; and*

a. *(c) The aircraft that the airport operator seeks leave to sell is liable to sale under this section by reason of the default.*

(d) Reasonable steps have been taken to bring the application to the notice of all persons whose interests may be affected by a sale; and

(e) Reasonable opportunity has been given to all such persons to become a party to the proceedings on the application."

(x) In addition to the guidelines given under Section 13 (1) above, the plaintiff in order to succeed in the outcome, must satisfy the criteria set out in Section 12(1), (2) and (3) of the CARA 1999 which provides:

1. *(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.*

1. *(2) Charges under subsection (1) may be set by –*

a. *a. Fixing amounts;*
b. *b. Fixing maximum amounts; or*
c. *c. Setting a method of calculation.*

a. *(3) Notice of a determination under subsection (1) must be given to the Authority and must be published in the Gazette."*

(xi) The plaintiff conceded that it has not determined parking charges under Section 12 of the CARA 1999. (See; paragraph 26 of the plaintiffs' written submissions filed on 07th April 2017)

a. (xii) The argument for the plaintiff, as presented in this Court by Mr. Haniff is that;
"Under Airport (Fees) (Amendment) Regulations promulgated in 1993 [Tab 2], airport parking fees were prescribed under ***Section 29 (a) which continue in force to the present day. It has never repealed.*****"**
[Emphasis Added]

(See; para. 13 of the plaintiffs' written submissions filed on 07th April 2017).

a. (xiii) I am unable to agree.

a. (xiv) Counsel for the defendant very accurately pointed out to me that Section 29 (a), (b) and (d) of the Civil Aviation Authority of the Fiji Islands Act 1979 [Cap 174A] has been repealed by Section 33 of the Civil Aviation Reform Act No:- 16 of 1999. So the repeal takes away the power of the plaintiff to charge airport charges which it previously had under Section 29 (a), (b) and (d) of the Civil Aviation Authority Act 1979 (Cap 174A).

a. (xv) The 'Civil Aviation Authority of Fiji', in the exercise of the powers conferred upon it by Section 29 (a) of the 'Civil Aviation Authority of Fiji Act, 1979 (Cap 174A), made 'Airport (Parking fees) (Amendment) Regulation 1993, prescribing airport parking fees. The regulation 1993, came into force on 01st June 1993. It is here that Section 29 (a) of the 'Civil Aviation Authority of Fiji Act' 1979 [Cap 174A] becomes of critical importance to 'Airport (Parking fees) (Amendment) Regulation 1993.

a. (xvi) For the sake of completeness, 'Airport (Parking fees) (Amendment) Regulation 1993 is reproduced below in full.

(xvii) It should be firmly stated that the 'Airport (parking fees) (Amendment) Regulation 1993 **cannot continue to exist** without Section 29 (a) of the Civil Aviation Authority of the Fiji Islands Act 1979 [Cap 174A).

(xviii) As I said in para (xiv) Section 29 (a), (b) and (d) of the Civil Aviation Authority of the Fiji Islands Act No:- 1979 [Cap 174 (A)] has been **repealed** by Section 33 of the Civil Aviation Reform Act No:- 16 of 1999.

(xix) **In effect therefore, 'Airport (parking fees) (Amendment) Regulation' did not exist after the passing of the 'Civil Aviation Reform Act No:- 16 of 1999**.'

(xx) In those circumstances, the following propositions of the plaintiff are untenable.

- ϖ ..... *Section 29 (a) which continue in force to the present day. It has never repealed.*

  (**Para 13 of the written submission of the plaintiff filed on 07.04.2017)**

- ϖ ….. *The 1999 Aviation Act, although repealing the detention and sale power under Section 30, left intact Section 29 which conferred on the Authority a regulation-making power to prescribe fees for airport services. Section 29 remains intact to this day.*
  (Para 28 of the written submission of the plaintiff filed on 07.04.2017)

- ϖ ….. *the following words must also be read into Section 13(1): "or in respect of which a default has occurred in the payment of any fees levied under Section 29 of the 1979 Act.*

  (Para 37 of the written submission of the plaintiff filed on 07.04.2017)

- ϖ ….. *the following italicised words should also be read into 13(3): "(a) a sum is due to the airport operator for charges under Section 12 or for unpaid fees levied under Section 29 of the 1999 Act.*

  (Para 37 of the written submission of the plaintiff filed on 07.04.2017)

(xxi) **I do not see any ambiguity, gap, hiatus or lacuna in Section 13 of the Civil Aviation Reform Act No:- 16 of 1999. There is nothing to be bridged in Section 13.** I cannot assent to the contention of the plaintiff. I cannot give to the Section in question the interpretation for which the plaintiff contends.

(xxii) Section 12 of the Civil Aviation Reform Act No:-16 of 1999, as I have said gives the right to determine parking charges and the obligation to publish the Notice of determination in the Gazette. Counsel for the plaintiff frankly conceded that the plaintiff has not yet determine the parking charges under Section 12 of the Act.

(xxiii) In those circumstances, the plaintiff is not authorized to charge parking fees. I have had put before me, by the plaintiff, 'AIP Fiji Islands' to justify their act. It is to be noted that the charges prescribed in 'AIP Fiji Islands' were effective from 31st May 2016. Therefore, the plaintiffs' justification wholly fails.

(xxiv) For the reasons which I have endeavored to explain in the preceding paragraphs, I have come to the clear conclusion that **the plaintiff is not authorized to claim parking fees from the defendant. The result is that the detention of the defendants' aircraft is wrongful**. In effect therefore, the plaintiff has no legal standing to bring this action pursuant to Section 13(3) of the Civil Aviation Reform Act 1999 to sell the defendants' aircraft to recover parking fees. The claim of the plaintiff in that respect is manifestly groundless. The plaintiffs' claim fails.

I find myself in agreement with the view expressed by Counsel for the Defendant, Mr. Young.

a. (8) Let me now turn to the counter-claim of the defendant. The defendant has pleaded two causes of action against the plaintiff. They are;

a. **(A)** **Unlawful detention of the aircraft**.
(Para (08) of the Notice of Counter-Claim)

a. (B) **Negligent towing and parking the aircraft**.
(Para (4) and (5) of the Notice of Counter-Claim)

a. (9) **UNLAWFUL DETENTION OF THE AIRCRAFT**

a. (i) The defendant claims damages for unlawful detention of the aircraft.

a. (ii) This raises a question of law. In my opinion, the defendants' remedy is in **conversion.** As, I understand the situation, that the aircraft had not been returned meant that the action is one of conversion by keeping.

a. (iii) In the illuminating judgment of 'Somers' J in '**Archbald Arthur Cuff and others v Broadlands Finance Limited**' 1987 (2) NZLR 343 contained the very significant passage following;

"The tort of conversion is constituted by the interference with the use and possession of a chattel of another, willfully and without lawful justification. It requires a dealing with the chattel in a manner inconsistent with the plaintiff's right and with an intention in so doing to deny that right, or to assert an inconsistent right. See e.g. Salmond and Heuston's Law of Torts, 18th Ed. 92. It commonly arises when the plaintiff's chattel is taken by the defendant without lawful justification and with the intention of exercising dominion over it whether permanently or only for a time. Conversion may also arise in other ways, as 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. See General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd. [1963] 1 W.L.R. 644."

a. (iv) In the case before me the defendant has not pleaded a cause of action in conversion. It is not the function of the trial judge in the context of an adversarial trial to assist a party to overcome the problems consequent to the position taken by that party in the pleadings. In the present case, there is no notice in the pleadings in relation to a cause of action in conversion. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct its evidence to the issue disclosed by them.

a. (v) There are important distinctions between **a cause of action in conversion** and **a cause of action in detention (*detinu*)**. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to return the chattle and continues until return of the chattle or judgment in the action for detention (*detinu*).

a. (vi) The demand for return of the chattle is an essential requirement of an action in detention and the date of the accrual of cause of action is the date of the unqualified refusal to comply with the demand for delivery.

a. **(vii) In the case before me, no demand for return of the aircraft was sufficiently established. In effect therefore, the defendants' First cause of action wholly fails.**

a. (10) NEGLIGENT TOWING AND PARKING THE AIRCRAFT

a. (i) Let me now turn to the defendants' Second cause of action. The defendant alleges negligence. The negligence is put under two heads: First, that there was negligent towing of the aircraft, and secondly, there was negligence parking of the aircraft. The plaintiff by its defence denied the alleged negligence.

I have had careful and competent submissions from both Counsel. If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that submission is not relevant; it is simply that; in the time available, I am not able to cover in this decision every point that has been made before Court.

a. (ii) Negligence does not entail liability unless the law exacts a 'duty' in the circumstances to observe care. **(See; The Law of Torts, John G. Fleming, 09th Edition, Para 149)**.

*"The liability for negligence whether we style it such or treat it as in other systems as a species of '**culpa**' cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequences of a breach of that duty". (*per **Lord Macmillan, Donoghue v Stevenson, (1932) A.C 562, 618**).

A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. See; **Le Lievre v Gould (1893) 1 A.B 491 at 497 per Lord Esher MR.**

a. **(iii)** **<u>Generally, in a plain case of negligence the elements of the cause of action for negligence are itemized as follows;</u>**

- **ϖ The existence of a duty, recognized by law, requiring conformity to a certain standard of conduct for the protection of others against unreasonable risks.**

- **ϖ The breach of that duty (negligence)**

- **ϖ Material injury resulting to the interests of the Plaintiff.**

- **ϖ The question of proximate cause.**

- **ϖ The absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered.**

a. (iv) With those considerations in mind, I now turn to the defendants' Notice of Counter-Claim.

a. (v) The defendants' '**<u>Notice of Counter-Claim</u>**' in substance alleges that;

4. In towing and parking the Aircraft, the plaintiff was under a duty to take reasonable care and skills (hereinafter referred to as "the said duty") in doing so.

a. *5. In breach of the said duty, the Aircraft was negligently towed and parked by the plaintiff through its servants or agents, and as a consequence caused substantial damage to the Aircraft rendering the same inoperative.*

<u>Particulars of Negligence</u>

a. *(i) The plaintiff's servant or agent who towed and parked the Aircraft was not experienced or trained or qualified to do so.*

a. *(ii) The plaintiff's servants or agents failed or neglected to remove the locking pin from the nose of the Aircraft wheel steering assembly.*

a. *(iii) The plaintiff's servants or agents removed the control locks from the elevator and rudder of the Aircraft and then overlooked to replace the same after it was towed and parked.*

a. *(iv) The plaintiff's servants or agents removed the control locks in the Aircraft when there was no need to do so.*

a. *(v) The plaintiff's servants or agents failed or neglected to properly secure and restrain the propellers of the Aircraft after it was towed and parked.*

a. *(vi) The area in which the Aircraft was towed to and parked was not on a hard surface but was on grass which was water logged when it rained and exposed the Aircraft to or made it vulnerable to adverse weather conditions.*

a. *6. Soon after the Aircraft was towed and parked, Cyclone Evan (a Category 4 cyclone) struck the Western Division of Fiji (including the area where the Aircraft was towed and parked) from on or about 16th December 2012 with heavy rainfall and wind gusts that exceeded 120 km per hour with momentary gusts as high as 270 km per hour.*

a. *7. Due to the aforesaid negligent manner and way in which the plaintiff had towed and parked the Aircraft, the Aircraft was damaged and the Defendant suffered special damages as follows:*

a. (11) **<u>WHETHER THERE IS A DUTY OF CARE?</u>**

a. (i) The plaintiff (AFL) is responsible for services and facilities for air navigation and air traffic services in the Fiji Islands under Section 6 of the 'Civil Aviation Reform Act 1999'. The plaintiff is the airport operator for the Nadi International Airport.

a. (ii) Mr. Young, Counsel for the defendant very candidly admitted that the defendants' aircraft has been parked at Nadi International Airport since 2007.

a. (iii) The plaintiff alleges that the defendant has defaulted in paying the parking charges. The plaintiff submits that it detained the aircraft pending the payment of the parking charges.

a. (iv) It was argued that the plaintiff did not owe a duty to exercise reasonable care in relocating the defendants' aircraft because the defendant failed to move it despite receiving notice to do so.

a. (v) I am unable to accept that argument.
b. **(vi)** **The plaintiff is the airport operator and has the care and management of the aircrafts parked in the airport. The defendants' aircraft was in actual possession of the plaintiff. In those circumstances, the plaintiff owed a duty of care at common law to exercise reasonable care.**

a. (vii) I cannot for a moment accede to the plaintiffs' argument that "*the plaintiff did not owe a duty to take reasonable care in relocating the defendants' aircraft because the defendant failed to move it despite receiving Notice to do so*".

a. (viii) I am by no means prepared to adopt the view that was suggested by the plaintiff. I will dismiss it.

a. (ix) Besides, the plaintiffs' own evidence here shows that the plaintiff hired a pilot who had flown the same aircraft and other similar ones to relocate the aircraft.

If no duty of care is owed by the plaintiff to the defendant in relocating the defendants' aircraft, it is difficult to see any conceivable reason why a pilot who had flown the same aircraft and other similar ones should be hired in relocating the aircraft.

a. (x) In those circumstances, it does seem an absurdity to say that; "*the plaintiff did not owe a duty to take reasonable care in relocating the defendants' aircraft because the defendant failed to move it despite receiving Notice to do so*".

a. (12) AFFIDAVIT

a. (i) The defendant submits that the affidavit of 'Daniel Patrick Ryan' (the Company Director of the defendant sworn on 01/09/2015) was not challenged by 'Molly Murphy', the Manager of AFL (the plaintiff) sworn on 13th October 2015. It is submitted, therefore, that; (a*) Since Daniel Patrick Ryan's affidavit evidence is not challenged, the Court has little choice but to accept that Molly Murphy has accepted the affidavit evidence of Daniel Patrick Ryan (b) the defendant has proved its case on the balance of probabilities.*

a. **(ii)** **With all respect to Mr. Young, that submission is wholly misconceived. His startling proposition founders on the rocks of elementary principle.**

a. (iii) Obviously, the plaintiffs' "Originating Summons" was heard on oral evidence under Order 28, r.5 (3) because there is a substantial dispute of fact requiring issues to be triable.

a. (iv) That being the case, I reject the contention put forward by Counsel for the defendant.

a. (13) PARTICULARS OF NEGLIGENCE

a. (i) The particulars given under para (5) of the Notice of Counter-Claim by the defendant are headed "Particulars of Negligence" and read as follows;

Particulars of Negligence

a. *(i) The plaintiff's servant or agent who towed and parked the Aircraft was not experienced or trained or qualified to do so.*

a. *(ii) The plaintiff's servants or agents failed or neglected to remove the locking pin from the nose of the Aircraft wheel steering assembly.*

a. *(iii) The plaintiff's servants or agents removed the control locks from the elevator and rudder of the Aircraft and then overlooked to replace the same after it was towed and parked.*

a. *(iv) The plaintiff's servants or agents removed the control locks in the Aircraft when there was no need to do so.*

b. *(v) The plaintiff's servants or agents failed or neglected to properly secure and restrain the propellers of the Aircraft after it was towed and parked.*

a. *(vi) The area in which the Aircraft was towed to and parked was not on a hard surface but was on grass which was water logged when it rained and exposed the Aircraft to or made it vulnerable to adverse weather conditions.*

(ii) What the pleader done is to summarize under the heading "Particulars of Negligence" the matters proposed to be proved (on a balance of probabilities) as to the manner in which the plaintiff "towed and parked" the defendants' aircraft from all of which is alleged negligence to found a cause of action in negligence.
I will consider the particulars of alleged negligence in turn.

(14) EXPERTISE

a. (i) Let me now turn to the first particular given under para (5);

"The plaintiffs' servant or agent who towed and parked the aircraft was not experienced or trained or qualified to do so."

a. (ii) The evidence here shows that the plaintiff hired Mr. Anu Patel to move the aircraft. He is an experienced Pilot in the employment of Fiji Airways Limited. He had flown the defendants' aircraft and other similar ones.

a. (iii) Mr. Haniff, Counsel for the plaintiff asked several questions as to Mr. Anu Patels' qualifications and experience as a Pilot.

The transcript of Mr. Anu Patels' evidence in chief contains this; (page 26 to 28 of the transcript)

Q: You said that you are the pilot, can you just tell the court what is your current qualifications?
A: I'm the Captain on the Fiji Airways Fiji Limited and have a 5 years' experience

Q: At the moment where are you employed?
A: Fiji Airways Fiji Limited

Q: And you said you are Captain flying what Aircraft?
A: ATR 72

Q: And what is the capacity of that plane?
A: 70

Q: And what other experience you have in flying Aircraft?
A: Flying the bigger aircraft as well in India the Boeing 777

Q: And how long did you flying that for?
A: Two years

Q: You have over 7441.85 hours of flying time?
A: Yes

Q: And from that list for B777 you've flown 942.95 hours?
A: Yes

Q: And for a ……. command 1,989 hours?
A: Yes

Q: For co-pilot on a ……13002 hrs, is that correct?
A: Yes correct

Q: On a EN1D10 Command 1311 hrs?
A: Yes

Q: Now what is a EN1D10?
A: Bandarante

Q: You've also ENB110 443 hours?
A: Yes

Q: And BN2A m case 3command what kind of aircraft is that?
A: That's an Islander but it's also a Trilander for free entrance.

Q: And BN2A Command you have a 504 hours flying time on that?
A: Yes

Q: Can you just list for me, is there any other professional activity that you take part in?
A: I was also a Management for Fiji Airways and Air Fiji.

Q: Did you also done some Aviation Security Management Training?
A: Yes that was part of the Management force

Q: And you've being the President of the Air Fiji Pilot's social club?
A: Yes

Q: And you've also been the Manager Airport of the Nausori International?
A: For Fiji Airways

Q: We know that this proceedings concern a Bandsierante aircraft and you have just told the court that you have flown quite a number of hours on the Bandsierante the proceedings concern a Bandsierante that goes by the core sign VHWVR which was formally known as VQWVI?
A: Yes correct

Q: Right. Have you flown this particular aircraft before?
A: Yes when it was registered as VQWVI

Q: Okay and how many times did you fly this particular Aircraft?
A: Over the period of three years

Q: And within those periods of 3 years how many times did you fly this aircraft?
A: We had three of the same type of aircraft so it was whichever one that was on roster

Q: So it means there's a couple of hundreds flights with in twice a week or over three years, weekly?
A: Yeah

a. (iv) Mr. Anu Patel deposed under cross-examination at much greater length; his testimony under cross examination covered (33) pages of transcript. There was no suggestion made to Mr. Anu Patel in cross-examination that "he was not experienced, trained or qualified". His qualification and experience as a Pilot was not challenged in cross-examination.

Not one word was put to Mr. Anu Patel to challenge his qualifications and experience as a Pilot. Mr. Young, in his cross-examination, appeared to treat Mr. Anu Patel as an appropriately qualified Pilot.

a. (v) I do not for one moment suggest that Counsel should abandon the arts and fair devices of cross-examination. All I am saying is that no witness should be attacked behind his back; he should have a fair opportunity of meeting whatever the challenge is offered to him.

a. (vi) To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their competency as an expert, and, not having given them such an opportunity, to ask the court afterwards to disbelieve what they have said.

a. (vii) For the reasons which I have given in the preceding paragraphs, I come to the conclusion that the defendant has failed to discharge the onus lay upon it to prove the First particular of alleged negligence given under para (5) of the Notice of Counter-Claim.

a. **(15)** **LOCKING PIN**

a. (i) Let me now turn to the second particular given under paragraph (5)

"The plaintiffs' servants or agents failed or neglected to remove the locking pin from the nose of the aircraft wheel steering assembly."

a. (ii) Mr. Anu Patel, the Pilot was asked in his examination-in chief; (page 29 of the transcript)

Q: Okay so you were asked to towed this aircraft and then so just explain to his Lordship in preparation for the towing what did you do?

A: The first thing I do when the aircraft is under the ……. there is a gear locking pin that you need to removed first and that made the wheel to be free of movement. So the first thing to do is to take that pin out and I remember taking the pin out because it was rusted and it wasn't coming out so we had CRC and I need a hammer, a spanner and chisel to push it up and then it came out.

Q: So who actually took the pin out?
A: I did it

Q: You actually took the locking pin out right?
A: Yes

a. **(iii)** **Again no suggestion was made to the witness in cross-examination that this was not the case and had been let go unchallenged so far as the conduct of the defendants' case was concerned**. By itself it does prove that the defendants' Counsel, Mr. Young did not have reasonable grounds to suspect the evidence of Mr. Patel. In other words, the absence of any grounds for suspicion have been provided by Mr. Young. It must be accorded weight.

a. (iv) It should be firmly stated that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, then that circumstances would often be a very good reason for accepting the evidence of that witness upon that matter. For example, in **Cross on Evidence (2nd Australian ed, 1979)** the authors state (at para 10.50):

"Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, a failure to do this may be held to imply acceptance of the evidence in chief".

See; **Phipson On Evidence (12th ed, 1976) at para 1593**.

a. (v) The evidence of Mr. Anu Patel, the Pilot is direct evidence of removing the locking pin and he is the only person able to give that evidence as the facts are peculiarly within his own knowledge. **His evidence was based on a better memory and recollection of events. His evidence appeared to be logical and consistent.** If Mr. Young proposes to submit that the evidence of Mr. Anu Patel should not be accepted, the witness should be allowed an opportunity to deal with the suggestion. The significance in that suggestion is that (1) It gives the witness the opportunity to deny the suggestion on oath (2) It gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a suggestion is unlikely to have been called.

a. (vi) I say, by the absence of cross-examination upon evidence showing that Mr. Patel removed the locking pin; the defendant does admit that the evidence of Mr. Patel is true. What is there for the Court?

a. (vii) For the reasons which I have given in the preceding paragraphs, I come to the conclusion that the defendant has failed to discharge the onus lay upon it to prove the Second particular of alleged negligence given under para (5) of the Notice of Counter-Claim.

a. (16) CONTROL LOCKS

a. (i) I propose to consider particular (iii) and (iv) given under para (5) of the Notice of Counter-Claim together.

(iii) The plaintiff's servants or agents removed the control locks from the elevator and rudder of the Aircraft and then overlooked to replace the same after it was towed and parked.

(iv)The plaintiff's servants or agents removed the control locks in the Aircraft when there was no need to do so.

[Emphasis Added]

a. **(ii)** **Mr. Anu Patel said that he did not remove any other locks apart from the locking pin in the nose gear.** This is direct positive evidence. I quote the following portion of his evidence given in his evidence in chief (page 31 of the transcript).

Q: And apart from the locking pins were there any other locks that were in the plane. Can you tell the lordships what other locks you have there in that plane?
A: In the Aircraft there's the rudder pedal pins which was there, then there is a Aaron locks at the side which was there as well. And then we have the engine covers which I don't think were there and then we have a propeller locked by a rope to the engine as well which I don't recall.

Q: Now apart from taking up the <u>locking pin from the nose gear</u> is that where it is?
A: Yeah

Q: Did you take out any other control pins?
A: No I didn't take out anything else just the locking pin.

[Emphasis Added]

a. (iii) Again no suggestion was made to the witness in cross-examination that this was not the case and had been let go unchallenged so far as the conduct of the defendants' case was concerned.

Mr. Young did not question into the truth and accuracy of the answer of Mr. Anu Patel.

I confess to a feeling of unease that the answer or the evidence was not cross-examined or challenged.

I spent considerable time trying to understand why it was decided to conduct the defendants' case in this way. Mr. Anu Patel was available to test the truth and accuracy by cross-examination on that evidence. But it was left unchallenged. By itself it does prove that the plaintiff did not remove the control locks. By itself it does prove that the defendant did not have reasonable grounds to suspect Mr. Anu Patel. Again, the absence of any grounds for suspicion having been provided by Mr. Anu Patel must be accorded weight. The defendant alleged negligence. Its cause of action is negligence. The defendant must prove negligence. The onus of showing negligence lies on the party alleging it.

<u>For a counter-claim based on negligence at common law to succeed, the defendant must prove on balance of probabilities (the burden lies on it) the acts or omissions (the particulars of negligence) delivered under para (5) of the 'Notice of Counter-Claim'.</u>

The defendant sought to prove it by the evidence of (1) Mr. Daniel Patrick Ryan, the director of the defendant company, (2) Mr. Collin John Miller, the aircraft maintenance engineer, (3) Mr. Misaeli Funaki, the Meteorologist and (4) (Ms) Ateca Nairova, Senior Lands Officer from the Office of the Divisional Surveyor, Western.

In negligence the plaintiff in the present case needs only plead a denial. The plaintiff by its defence denied the alleged negligence. **<u>In this defendants' Counter-Claim based on negligence the plaintiff is only bound to negate the negligence alleged.</u>**

The plaintiff bears an onus to negate each of the particulars of negligence delivered under para (5) of the 'Notice of Counter-Claim' by the defendant. The plaintiff brought Mr. Anu Patel, the pilot to negate each of the particulars of negligence delivered under para (5) of the 'Notice of Counter-Claim.' **<u>The evidence of Mr. Anu Patel, the Pilot is direct positive evidence as to the manner in which the plaintiff towed and parked the defendants' aircraft from</u>** all of which is alleged negligence to found a cause of action in negligence. **<u>His role was not supervisory.</u>** The facts are within his own knowledge and the approach of the plaintiff to negate each of the particulars of negligence appeared to have placed a weight upon Mr. Anu Patel similar to that placed upon 'Atlas', who carried the whole weight of the heaven as well as the globe of the universe upon his shoulders.

The plaintiff discharged the burden of establishing a negative. **<u>It should be firmly stated that the defendant bears an onus to produce evidence in rebuttal to rebut each of the objective facts in the evidence of Mr. Anu Patel.</u>** The defendant called no evidence in rebuttal. It is clearly incumbent on the defendant to call rebuttal evidence.

Mr. Anu Patel was asked in his evidence-in-chief;
(page 31 of the transcript)

Q: Now apart from taking up the locking pin from the nose gear is that where it is?
A: Yeah.

Q: Did you take out any other control pins?
A: No I did not take out anything else just the locking pin.

Further down at page 32;

Q: And the allegation is also that in moving the aircraft that you moved the aircraft also removed the control locks from the elevator and rudder but then overlooked to replace the same after it was towed. Now did you remove the locks from the elevator and the rudder when you were towing this aircraft?
A: No.

Mr. Young, Counsel for the defendant did not cross-examine on his answer or upon that evidence. I say, by the absence of cross-examination, the defendant does admit that the plaintiff did not remove the control locks. What negligence is there when the allegation as to the "removing of control locks" is negated by Mr. Anu Patel? In those circumstances, **I do not think that there is any basis here for arguing;** "*(iii) The plaintiff's servants or agents removed the control locks from the elevator and rudder of the Aircraft and then overlooked to replace the same after it was towed and parked. (iv) The plaintiff's servants or agents removed the control locks in the Aircraft when there was no need to do so.*"

In my judgment, at the end of the day the fact that the plaintiff did not remove any other locks except the locking pin in the nose gear is sufficiently made out.

a. (iv) The defendants' witness Mr. Ryan said that the locking pin to the rudder pedals were not in. (page 153 of the transcript). He also said when he First inspected the aircraft after the cyclone he did not see a gust lock in place but he found it inside the cabin. (Page 155 of the transcript). That clearly is his position. This was never suggested to the plaintiffs' witness Mr. Anu Patel.

It is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence. Such a rule of practice is necessary both to give the opponent's witness the opportunity to deal with that other evidence and to allow the other party the opportunity to call evidence to corroborate their evidence.

On the probabilities, I am prepared to accept the version of Mr. Anu Patel. It is direct positive evidence of towing and parking the defendants' aircraft. It was based on a better memory and recollection of events. The court prefers his evidence as being more reliable. I am impressed with the Pilot, Mr. Anu Patel as a witness. He spoke to facts within his knowledge. This is a fact of very considerable importance in this case.

At the cost of some repetition, I state that the defendant alleged negligence. Its cause of action is negligence. The defendant must prove negligence. The onus of showing negligence lies on the party alleging it.

The defendant sought to prove it by the evidence of (1) Mr. Daniel Patrick Ryan, the director of the defendant company (2) Mr. Collin John Miller, the aircraft maintenance engineer (3) Mr. Misaeli Funaki, the Meteorologist and (4) (Ms) Ateca Nairova, Senior Lands Officer from the Office of the Divisional Surveyor, Western.

In negligence the plaintiff in the present case needs only plead a denial. The plaintiff by its defence denied the alleged negligence. In this defendants' counter-claim based on negligence the plaintiff is only bound to negate the negligence alleged.

The Plaintiff discharged the burden of establishing a negative. It should be firmly stated that the defendant bears an onus to produce evidence in rebuttal to rebut each of the objective facts in the evidence of Mr. Anu Patel. The defendant called no evidence in rebuttal. It is clearly incumbent on the defendant to call rebuttal evidence.

Besides, the testimony of Mr. Ryan is of some concern to the court. Mr. Ryan said he came to Fiji in January 2013 (a few weeks after the cyclone) and examined the damage occasioned to his aircraft. **But no complaint was made of any damage occasioned to his aircraft until 15th September 2014. Why did he wait for one year and eight months to make a complaint to the plaintiff?** I thought upon this, and I am of the opinion that a reasonable, sensible and discreet man would have inquired into that from the plaintiff immediately. Why did Mr. Ryan abstain from doing that and avoided taking steps which any prudent and reasonable man would have taken? **It remains a puzzle and a mystery to me.**

a. (v) There is nothing more frustrating to a court of law than to be presented with two important bodies of evidence which are inherently opposed in substance but have not been brought into direct opposition, and serenely pass one another by like two trains in a silent night.

a. (17) WHETHER PROPELLERS WERE SECURED AND RESTRAINED

a. (i) I now turn to consider particular (v) in paragraph (5)

(v) The plaintiff's servants or agents failed or neglected to properly secure and restrain the propellers of the Aircraft after it was towed and parked.

a. (ii) The defendants' witness Mr. Daniel Ryan said that he came to Fiji after the December 2012 Cyclone and took some photographs of the aircraft in January 2013.

a. (iii) At transcript page 139 (the evidence-in-chief of Mr Ryan) contains the following questions and answers.

Q: *Did you notice any other restraints on this aircraft?*
A: *No there was no other restraint, there was three of those small concrete blocks*

Q: *So where were they situated?*
A: *One was on the right, one was on the left and one was on the tail*

Q: *And did you see any restrains on the propellers?*
A: *No*

Q: *And can you look at page 44?*
A: *yes, that shows the restrains on the tail and its lying on the side and being pulled over*

Q: *That's on the tail right?*
A: *Yes.*

a. (iv) At transcript page 183 and 184 (the cross-examination of Mr Ryan) contain the following questions and answers;

Q: *And then yesterday just to go from the bottom up from the airplane you said there were 3 drums that were holding the plane down when you first saw the plane tie downs?*
A: *Yes*

Q: *What did you say concrete what?*
A: *3 concrete mooring blocks*

Q: *And that were all attached to the planes?*
A: *Yes*

Q: *Again that shows the care that AFL took in securing your plane?*
A: *I am told that those mooring blocks were only put there when they knew the cyclone was coming, that was an afterthought by AFL, they didn't do that at the time they put the aircraft*

Q: *But you were not there were you?*
A: *I wasn't there*

Q: *But the evidence says when they moved it they put the blocks there, but now go back to the ropes, if you go to page 60 and 61, you say that you put on that particular rope didn't you ?*
A: *I did*

Q: *I am putting it to you that you actually misleading the court, that is the plaintiffs position, and I will tell you why, because if AFL had taken the care to secure your aircraft on those drums they would also have secured the propeller?*
A: *No, you are looking at the fantasy world, I put those on at the end of the day, they are on correctly and they are on exactly how they should be to stop that propeller from rotating*

Q: *As soon as you put the ropes on you took the photograph?*
A: *Yes*

Q: *So if you go to page 51, how could you put it on and take a photograph without the rope wrapped around the propeller?*
A: *That rope I would have pulled it off and throw it away, I pulled the debris out of the exhaust outlet and then, the last thing that I did after I had taken all the photographs on when I finished there for the day was to secure those props and all the locks were in the aircraft not on it in the aircraft, they were not put back on they were in the aircraft*

Q: ***So you found the aircraft with some ropes around it?***
A: ***I found the aircraft with a piece of rope that wasn't attached to anything and its obviously have been caught in while the propeller was wind milling in that cyclone were bound around that spinner***

(Emphasis added)

The evidence here shows that the defendant's aircraft was anchored by concrete blocks. The photograph 51 shows a rope around the propeller. Mr. Anu Patel deposed in evidence-in-chief; (at page 31 of the transcript).

Q: ***And you saying you flying now just in terms of, have you seen that plane after you recently did you see that Bandsierante?***
A: ***Yeah everyday***

Q: ***Okay you were able to describe how the plane is tied down?***

A: Yeah they are tie down so I've noticed. I think it's got ropes on the wings and tie down to the concrete blocks but I have being too close to see if they have Aileron locks and all that but I know I can see the ropes been tied on that and there is no engine.

(Emphasis added)

Mr. Miller deposed in re-examination (page 118 of the transcript)

Q: Mr Miller can I just take you to photograph 47 please, page 47, you were asked by Mr Haniff about the concrete what you call stabilizer whatever it is the anchors?
A: Yes

Q: You will see that there are two of them one on the left and one on the right?
A: Yes

Q: And can you just tell this court how is normally, have you dealt with concrete anchors?
A: I use to have a very similar style at home, very frequently

(Emphasis added)

a. (v) As I said, the photograph 51 shows a rope around the propeller. This photograph was taken by Mr. Ryan in January 2013. The plaintiff moved the aircraft on 18th June 2012. I should not without assistance be able to say whether the propellers were properly tied down on 18th June 2012. But the evidence here shows that the defendants' aircraft was anchored to three concrete blocks. All I can say is that the aircraft had been tied down and restrained by the plaintiff. I should feel able to say that using three concrete blocks to tie down and restrain the aircraft is not a careless and unskillful one.

a. (vi) When Mr. Anu Patel was questioned about the importance of restraining the propeller, he deposed in cross examination; (page 36 of the transcript)

Q: And for ATR, I'm just talking about the ATR and I'll come back for the other aircraft. If the propeller is not restrained will it free spin?
A: You mean the wind, yes

Q: And how much knot wind will it take to have a free spin?
A: If it's right across the aircraft – 15knots and spin slowly

Q: And for the ATR only when it free spinning is that a good work you as a pilot would you try and prevent that from free spinning or it doesn't really matter if it does spinning?
A: It doesn't really matter

Q: Why is that it's a turban engine?
A: Yeah it's the same as Bandsierante it has a bigger engine

Q: Let me ask you this particular question about the ATR when a propeller spins, without the engine being started a free spinning. What other parts of the engine or of the aircraft is affected it that all by the spinning?
A: Not much the turber don't spin with it. It's just the shaft because it's disengaged from the starter.

Q: I don't understand that
A: It's just that a propeller and the shaft spinning and the whole engine component aren't working
Q: Okay so are you suggesting to this court that if you are allowed for the ATR to have the propeller spin for 12 hours or 10 hours non -stop there is no effect on the ATR?
A: I don't think so. No effect at all. If it's parked for 6 years or something then may be.

a. (vii) I couple with that evidence, the evidence given at the examination in chief by Mr. Miller. (page 92 and 93 of the transcript)

Q: Now, can you explain to this Court why there would be damage if the propeller was about to free-spin?
A: The propeller is connected to the power turbine through two stages of reduction gearing. The power turbine turns it around 32,000 rows per minute. The propeller turns at 2,200 rows a minute this is around about 15 to 1 reduction ratio.

Q: Okay, just pause for a moment. Can you get back to the board, please? And now what you say is this,
A: Okay, what I'm saying is, if I do a simplified mechanical advantage diagram this wheel turns this wheel or vice versa. If this wheel turns 15 times this wheel turns 1. If this wheel turns once this gear turns once, this gear will turn 15 times.

Q: So?
A: So, if this from here 32,000 …..to near 2,200 ……if the propeller goes around once driven by the wind, the turbine does 15 turns. Or this heavy gears that's required a complex bit of machinery or may very, very eye

standards very, very …….…….has no oil pressure. The oil pressure is provided by this end of the engine. This end isn't turning. It's shut down. It's not working. All of these is gone. No lubrication.

Q: Okay. For that kind of aircraft the Bandit aircraft, how does lubrication occur?
A: That back end of the engine put pressure has to stage ……..

Q: How do you get that working?
A: It will come down the ….pump, will transfer tubes up to the front of the prop-reduction gear box and is sprained onto bearings and gears through oil jack knobs.

Q: Now, can that be done when the aircraft is not in movement or not operating?
A: When the engine is shut down turns……..……

Q: And the spinning of this propeller, doesn't that cause lubrication?
A: No.

Q: Why not?
A: Because it's not turning the oil onto the ……..……..

a. (viii) Mr. Miller said, as I understand his evidence, if the propellers are not restrained, it will allow the engine to rotate and will have an adverse impact on the fuel lubricated components on the engine. **The evidence adduced by him is of some concern to the Court.**

Mr. Miller is an 'Aircraft Maintenance Engineer'. He was summoned to Court on behalf of the defendant for a specific purpose. He was summoned to Court to testify on his report on **"Inspection and Assessment of Embraer EMB 110P2 Bandierante"** (the defendant's aircraft).

Mr. Miller did not come as an expert witness. He came as a non-expert witness. Besides, page (02) of his report says;

Background

The purpose of this inspection was to identify and assess damage to the aircraft *caused by high wind gusts during cyclone EVAN which occurred in Fiji on the 17th and 18th December 2012.*
[Emphasis Added]

Therefore, his function was to identify and assess the damage. He was summoned to Court to testify for the above. In my view, he cannot express an oral expert opinion as to what caused or contributed to the damage he had identified. Besides, there was no notice to the opponent that he is going to express an expert opinion on what caused or contributed to the damage he had identified.

a. (18) WHETHER AIRCRAFT IS EXPOSED TO ADVERSE WEATHER CONDITIONS

a. (i) I now turn to particular (vi) given under para (5) of the Notice of Counter-Claim.
(vi) The area in which the Aircraft was towed to and parked was not on a hard surface but was on grass which was water logged when it rained and exposed the Aircraft to or made it vulnerable to adverse weather conditions.

(ii) The aircraft had been parked at Nadi International Airport since 2007. The Plaintiffs' witness Mr. Tudreu, the General Manager, Air Traffic Management and Aviation, said in his evidence that the aircraft was an obstruction and was endangering operations onto and out of that runway. (page 202 of the transcript).

However, the drawing made by Daniel Patrick Ryan shows that the aircraft was not blocking the runway.

The aircraft was left in the tarmac for a number of years, *viz*, from 2007 to 2012. In May 2012, Mr. Ryan received a letter from the plaintiff requesting him to move the aircraft. Mr. Ryan admitted that he received the letter (page 135 of the transcript). The defendants did not move the aircraft. On 18th June 2012, the plaintiff moved the aircraft to grassy area 100 meters away from the original location.

Mr. Anu Patel deposed in re-examination; (page 68 of the transcript)

Q: You don't have photograph 49 again to tell whether that was the bandarante that was parked there, alright. Now just in terms of my friend was putting the suggestion to you that you moved the aircraft to a more exposed area of the Airport. Please can you clarify or what is your response to that suggestion by my friend. Can you

explain where was the aircraft before and where did you move and which way was the aircraft facing when you first saw it?

A: I can't recall where it was facing but we moved it from face which was just as exposed as where we ended up. There was no shelter where it was parked. There was no shelter where we moved it and so I don't know whether, they were just as exposed to the cyclone or the atmospheric conditions where it was parked and to where it was moved.

The evidence here shows that the aircraft was parked on tarmac for (05) years and it was exposed to weather. And it was vulnerable to adverse weather conditions. Can anyone suppose for a moment that relocating the aircraft to a grassy area, 100 meters away from the original location would make it more vulnerable to weather conditions. **I cannot conceive it for a moment.**

(iii) Besides, I venture to think that the plaintiff can rely upon the **defence of necessity"** in relocating the aircraft. Because it was necessary for the safety of the other aircrafts. In negligence the plaintiff in this case needs only plead a denial.

a. (19) Cyclone Evan

a. (i) Finally, I turn to para (6) of the Notice of Counter-Claim filed by the defendant.

a. *6. Soon after the Aircraft was towed and parked, Cyclone Evan (a Category 4 cyclone) struck the Western Division of Fiji (including the area where the Aircraft was towed and parked) from on or about 16th December 2012 with heavy rainfall and wind gusts that exceed 120 km per hour with momentary gusts as high as 270 km per hour.*

a. (ii) The Cyclone 'Evan' struck Fiji in December 2012. Mr. John Miller (the defendants' witness) carried out an inspection and damage occasioned to the aircraft. The inspection was carried out at Nadi on 15th and 16th September 2014.

a. (iii) At page (02) of his report (Defendant exhibit No. 03) he explains the damages to the rudder of the aircraft. At page (3) of his report he had explained the damage to the 'Vertical Stabilizers' of the aircraft.

a. (iv) When Mr. Miller was asked to show the ultimate cause or causes, he said in cross-examination (page 112 and 113 of the transcript)

Q: Now I put it to you that in your report we have had this aircraft sitting there since 2005 at the tarmac till 2014, given your evidence about the fact that this damage could have been caused by knots less than 40 knots, it is ***impossible for you to say that this damage is solely related to cyclone Evan?***

A: Now how in the world I could ever say that unless I was standing there and watching it happened

Q: Yes very well, so you cannot say from your report that the damages you have identified from pages 28 to 31 is solely as a result of cyclone Evans?

A: ***I can only say that as a result of extremely high winds***

(Emphasis added)

a. (v) As I understand his evidence, he says that extremely high winds caused the damage to the aircraft.

a. (vi) Mr. Ryan deposed in cross-examination; (page 189 of the transcript)

Q: Paragraph 50 that I put to you that you can't determine that the damages you are seeking/claiming to be caused by cyclone Evan cannot simply be substantiated, it could have been caused by any number of high winds in Nadi Airport from 2005 up till December 2012?

A: I inspected that aircraft on every occasion when I came here up to 18 times, the aircraft was always locked with the control and the props tethered, the only time that aircraft got damaged was after it was moved

Earlier at page 180 of the transcript

Q: What you are saying its impossible Mr Ryan you are trying to tell his Lordship that you took no action because you assumed that it was seized it was your aircraft, you say it was a million dollar plane, yet you didn't take immediate steps to advise?

A: I didn't do that at the time

a. **(vii)** **At the cost of some repetition** I state that, the testimony of Mr. Ryan is of some concern to the court. Mr. Ryan said he came to Fiji in January 2013 (a few weeks after the cyclone) and examined the

damage occasioned to his aircraft. But no complaint was made of any damage occasioned to his aircraft until 15th September 2014. Why did he wait for one year and eight months to make a complaint to the plaintiff? I thought upon this, and I am of the opinion that a reasonable, sensible and discreet man would have inquired into that from the plaintiff immediately. Why did Mr. Ryan abstain from doing that and avoided taking steps which any prudent and reasonable man would have taken? It remains a puzzle and a mystery to me.

a. (viii) Mr. Miller says that extremely high winds caused damage to the aircraft– (page 112 of the transcript). When he was questioned about the wind speed, he deposed in evidence in chief; (page 76 of the transcript).

Q: So, just to take you to one step back when you say winds, what kind of winds do you expect to cause that kind of situation?
A: I'd say winds of 40 knots.

Q: And?
A: It might happened at a lower speed but for sure 40 knots plus. Approximately 80 kilometres an hour.

a. (ix) Further down at page 79 of the transcript he said;

Q: And when you are talking about high can you just define that please? What you mean by that?
A: I would say anything definitely above 40 knots or 40 knots above. Possibly even below 40 knots.

a. (x) In re-examination he deposed; (page 122 and 123 of the transcript)

Mr Young: Well my Lord I would like to aux it and tend on my submissions on it and then your Lordship can decide after you hear my submission. Now Mr Miller the damages which you observe and you did a report on, what kind of wind speed would it take to cause those kind of damages?
A: I would say it would be abnormal wind speed in access of 40 knots

Q: In fact you already said it before in my examination in chief?
A: I did

Mr Haniff: No in his re-examination in chief he said sometimes less than 40 knots.

Witness: Yes it could be at times less than 40 knots

Mr Haniff: He didn't say in access, he said less than 40 knots

Witness: This time I will say in access

a. (xi) Therefore, there are **inconsistencies** in his evidence as to the wind speed.

a. (xii) The defendant alleges that Cyclone Evan (a Category 4 Cyclone) struck the Western Division on or about 16 December 2012 with heavy rainfall and wind gusts that exceeded 120km with momentary gusts as high as 270km per hour.

a. (xiii) The defendant called Mr. Misaeli Funaki, the Meteorologist to establish the wind speed of Cyclone Evans and the intensity of the rain.

Mr Funaki's evidence was deficient in many respects. As very correctly pointed out by Mr. Haniff, Mr. Funaki did not produce to the court the actual data to substantiate the various tables prepared by him. In cross-examination Mr. Funaki answered as follows: (page 20 of the transcript)

Q: Right, you saying the yellow represents the intensity of the rain?
A: That's correct my Lord.

Q: And I'm telling you that in Viti Levu there are no yellow markings or showing any rainfall at all, is that correct? From this diagram, not what you saw what you think from this diagram?
A: That's correct my Lord.

Q: *Right. Any you say that you don't have the raw data to your table number on the second page?*
A: *That's correct my Lord.*

Q: *You don't have any date for the 3rd page?*
A: *That's correct my Lord.*

Q: *Right. And you don't have any date to substantiate the 4th page?*
A: *That's correct my Lord.*

The defendant attempted to prove the rainfall by producing a series of tables and graphs. Defendants' Exhibit 1 was the attempt by the defendant to establish the intensity of the Cyclone.

It was Mr Funaki's evidence that the 'yellow' represented the intensity of the rain. I quite agree with Mr.Haniff that what the graphs show is no rainfall on 16 December 2012 in Nadi, contrary to what is pleaded in paragraph (6) of the Notice of Counterclaim. The defendants' Exhibit 1, page 1 clearly shows that Cyclone Evan did not even hit Viti Levu. **There is no evidence of any rain in Nadi shown on the four radar pages produced by the defendant in defendants' Exhibit 1**. The radar images show that the rain was most intense in Labasa, Vanua Levu.

Besides, I do not see an allegation of negligence pleaded in para (6) of the 'Notice of Counter-Claim'. As I see it, the para (6) is vague and equivocal. **There was no notice in para (6) of the 'Notice of Counter-Claim' alleging that**; (i) the plaintiff negligently allowed the ailerons and the rudder to slam back and forth in the high wind by not restraining the control locks (ii) the plaintiff negligently allowed the engine to rotate at high wind (affecting the integrity of the oil and fuel lubricated components of the engine) by not restraining the propeller.

The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

The defendants' pleadings show (para (4), (5) and (7), of the Counter-Claim) **negligent acts or omissions in towing and parking the aircraft**. The Court cannot travel beyond the negligence alleged by the defendant in para (4), (5) and (7) of the Counter-Claim.

a. (20) Due to the reasons which I have endeavored to explain in the preceding paragraphs, I come to the clear conclusion that the defendant has failed to establish on balance of probabilities the charge of negligence which it has pleaded.

For the reasons which I have endeavored to explain in the preceding paragraphs, although I confess with some regret, for I have sympathy with the defendant company, I come to the clear conclusion that the defendants' Counter-Claim fails.

a. (21) EXEMPLARY DAMAGES

A claim for exemplary damages was pleaded. The para (10) of the Notice of counter-claim is in these terms;

10. The Defendant further claims exemplary damages against the Plaintiff.

Particulars of Plaintiff's Conduct
Pursuant to Order 18 Rule 7 (3)

a. *(i) Purporting to detain the Aircraft for Airport charges when there was no legal basis to do so therefore acting ultra vires.*

a. *(ii) In detaining the Aircraft and or refusing the Defendant access to the Aircraft, the Plaintiff knew that it would cause loss and damage to the Defendant having the knowledge (either directly or constructively) that the Aircraft was previously hired to Air Fiji and later to the Sunflower Aviation Limited.*

a. *(iii) By permitting the aircraft to be unlawfully and negligently towed and parked by a person under the charge or control of the plaintiff who the plaintiff knew or ought to have known had no qualification or sufficient qualification or experience in preparing the Aircraft in a proper manner before it was towed, during towing and failing to properly or adequately secure the Aircraft after it was towed.*

a. *(iv) Being totally indifferent or if not reckless or having total disregard to the safety and security of the Aircraft after it was towed and parked when it had ample advance warning of Cyclone Evan and the destructive winds and rainfall that the Aircraft would be exposed to.*

Exemplary damages, involves an examination of the motive and the conduct or manner of inflicting the injury suffered by the defendant in the case before me.

The principle of awarding exemplary damages against a wrongdoer was accepted and applied in;

- ϖ **Uren v John Fairfax & Sons (PVT) Ltd.**
(1966) 117 CLR 118.

- ϖ **Lamb v Cotogno**
(1987) 164 CLR
- ϖ **Fontin v Katapodis**
(1962) HCA 63

The case of '**Uren v John'** (supra) represented the law of Fiji.

In **Uren v John Fairfax & Sons Ltd** (above) McTeiran J held that the following from the then current edition of Mayne & McGregor on Damages represented the law of Australia.

> *Such damages are variously called punitive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's right.*

Taylor J thought the law of Australia was as follows:

> *The law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights. Various expressions had been employed to describe such conduct and the law, though, of necessity invested with a degree of flexibility, was sufficiently certain.*

The belief that the plaintiff had the right under the "airport (parking fees) Amendment Regulation 1993" to recover parking fees is the underlying cause for the plaintiffs' interference with property rights of the defendant. This could be characterized as 'sloppy' or even 'negligent'. But the plaintiffs' conduct is **not** 'reprehensible', high-handed, insolent or malicious.

In my view none of the aspects of conduct on the part of the plaintiff either taken by themselves or cumulatively are sufficiently bad to fall within the test for exemplary damages to be found in '**Uren v John Fairfax'** (supra).

Accordingly, I hold that this need of damages is not justified in this case.

a. **(22) Release the aircraft**

a. (i) I concluded in para 7 (xxiv)(above) "that the plaintiff is not authorized to claim parking fees from the defendant. The result is that the detention of the defendants' aircraft by the plaintiff is wrongful."

a. (ii) Mr. Daniel Patrick Ryan, in his affidavit sworn on 01st September 2015 at para (19) sought from this Court; "*I am also asking the Court for an Order against the plaintiff to release the aircraft to the Defendant*."

(E) Orders

a. (i) The plaintiffs' claim is dismissed.

a. (ii) The plaintiff is ordered to release the aircraft, 'Embraer Bandeiratne EMB 110' to the defendant within 07 days from the date of this Judgment.

a. (iii) The defendants' counter- claim for damages is dismissed.

a. (iv) As claim and counter-claim have both failed, each party will bear its own costs.

……..
Jude Nanayakkara
Judge

At Lautoka,
Friday, 30th November 2018