

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

**Civil**  
**Case No. 21/3489 SC/CIVL**

**AND: Airports Vanuatu Limited**  
*Claimant/ Respondent*

**AND: Belair Airways Vanuatu Limited**  
*Defendant/ Counterclaimant*

**Before:** *Justice Oliver A. Saksak*

**In Attendance:** *Mr Nigel Morrison for the Claimant*  
*Mr Bill Bani for the Defendant / Counter-claimant*

**Date of Hearing :** *9<sup>th</sup> September 2022*

**Date of Judgment:** *31<sup>st</sup> October 2022*

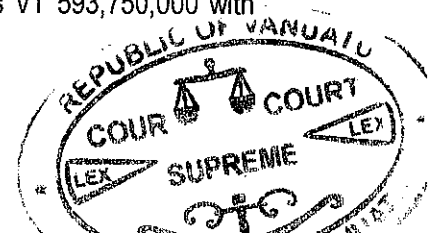
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**JUDGMENT**

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**Introduction and Background**

1. The defendant counter-claimed against Airports Vanuatu Limited ( AVL) in the sum of VT 653,125,000 with interest of 10% per annum, and costs.
2. The basis of the claim is a letter dated 23<sup>rd</sup> November 2012 which the defendant and counter-claimant claims is a confirmation of AVL agreeing to provide a hangar facility to the defendant.
3. The defendant claims that AVL breached the terms of the letter of 23<sup>rd</sup> November 2012 by failing, refusing and/or neglecting to provide the said hangar facility.
4. As a result the defendant says they suffered losses and damages to their airline operations.
5. The relevant periods claimed for commenced in September 2014 to December 2021 during which they incurred losses in the sum of Vt 442,415,000 for Aircraft 1.
6. For Aircraft 2 from May 2016 through November 2021 inclusive, the defendant suffered losses in the sum of VT 151,335,000.
7. The total losses for both Aircrafts for the periods from 2016 and 2018 was VT 593,750,000 with interest of 10% of VT 59,375,000.



8. Adding all those losses together the defendant is claiming VT 653,125,000 in damages.

### Defence of the Claimant

9. The claimant filed their defence on 11<sup>th</sup> March 2022 generally denying all the claims in the counter-claim from paragraphs 1-5 and the reliefs sought.

### Evidence

10. The counter-claimant relied on the evidence by sworn statement of Toara Whitely Karie filed on 9<sup>th</sup> June 2022 in support of their counter-claims. He was cross-examined on his sworn statement during a short hearing on 9<sup>th</sup> September 2022.

11. The claimant offered no evidence on the hearing date having not filed any sworn statement.

12. In his examination in chief Mr Karie merely identified and confirmed in his sworn statement of 9<sup>th</sup> June 2022. It was tendered into evidence without objection as Exhibit C1.

13. Mr Morrison cross-examined Mr Karie as follows:-

Q: Refer to Annexure "D" dated 23<sup>rd</sup> November 2012, paragraph 1. You did not have a hangar?

A: No.

Q: Eventually you had to make your own hangar?

A: Yes

Q: That letter confirms their promises AVL made to you?

A: That is correct, they made previous promises.

Q: Refer to paragraph 15 (b)\_ of your statement showing the Aircraft was grounded from 21/9/18 to 2022?

A: Yes

Q: That means Aircraft did not fly?

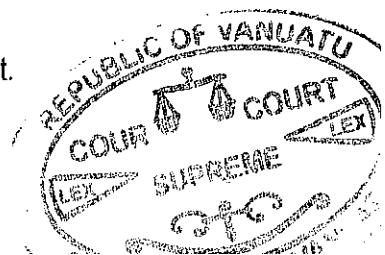
A: There was no maintenance of aircraft. Air Vanuatu did not want to maintain it.

Q: If it was maintained, it would do 960 hours?

A: Yes

Q: Second Aircraft YJ- TK2, any period of time it was grounded?

A: From May 2021 to June 2022, that was also due to maintenance not carried out.



Q: Refer to paragraph 25, October 2020, you sought approval to have your own hangar?

A: Yes

Q: When was it completed?

A: Around June 2022.

14. At the end of the cross-examination Mr Bani did not re-examine Mr Karie.

### **Submissions**

15. Mr Morrison made oral submissions immediately after the evidence of Mr Karie. Counsel spoke to his written closing submissions (unfiled) but dated 2<sup>nd</sup> September 2022 prepared well in advance of the hearing.

16. Mr Morrison emphasized paragraph 7 of his submissions arguing in essence that in contract law for a contract to be enforceable and binding it requires (a) an offer, (b) acceptance, (c) consideration and (d) intention to create legal relations.

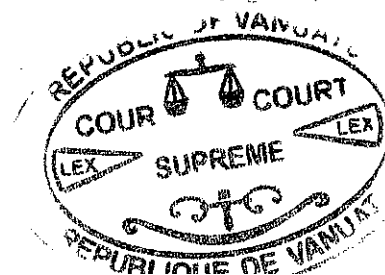
17. Mr Morrison submitted there was no offer, no acceptance, no consideration and no intention to create legal relations. Counsel relied on the case authorities of Las Peles Shipping & Plantation Management Services Ltd v Buak & others [2015] PNGC 50 and Kalpokas v Vohor [1998] VUSC 55.

18. Mr Bani sought time to file written submissions within 7 days and for Mr Morrison to have liberty to reply within a further 7 days thereafter. Until 28 October 2022 Mr Bani still had not filed written submissions. I considered more than ample time was allowed and with so much delays already in the matter, Mr Bani's submissions will regrettably be dispensed with.

### **Discussion**

19. From the counter-claims, the defence and evidence of the counter-claimant I identify the following to be the issues-

- a) Was there a contract or agreement between the parties for hangar facility to be provided by AVL to Belair Airways Limited?



b) If so, did AVL breach the agreement resulting in losses to the counter-claimant?

c) If so what is the amount of damages to be awarded to Belair Airways Limited?

20. For the first issue it is essential to examine the letter dated 23<sup>rd</sup> November 2012 annexed as " D" to the evidence of Mr Karie ( Exhibit C1). It reads:

*" Our Ref: 1758/ AS/ BAL  
23<sup>rd</sup> November 2012*

*Belair Airways Limited  
PO Box 1285  
Port Vila*

*Dear Mr Karie,*

*Re: Confirmation of Hangar Facility within Bauerfield Airport*

*Further to discussions had between Belair Airways Limited and Airports Vanuatu Limited, as per agreement established between both parties, AVL hereby confirms that a Hangar facility will (sic) available for utilization by Belair Airways Limited in March 2013.*

*AVL appreciates the patience expressed by the Management of Belair Airways Ltd toward AVL's pursuit in operations are in compliance with all international safety and security standards and practices, as it is obligated to do.*

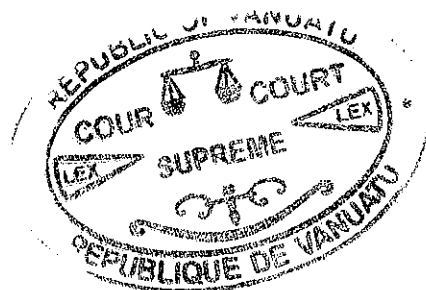
*Yours Sincerely,  
Airports Vanuatu Limited  
(signed)*

*Harrison Luen  
Acting Chief Executive Officer*

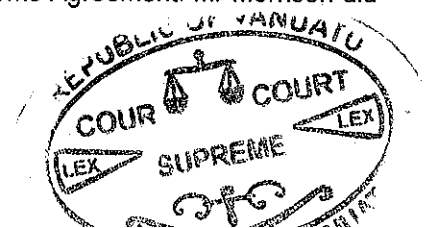
*Cc: Joseph Niel, Civil Aviation Authority Vanuatu  
Alan Carlot, General Manager Accounts, AVL  
Kevin Dick Abel, General Manager Operations, AVL."*

**(My underlining for emphasis)**

21. In paragraph 1 of AVL's defence to the counter-claim, whilst denying paragraph 1 AVL " says that the discussions between the parties recognized no more than that the Defendant would need a hangar to be licenced to operate and subject to condition the claimant would endeavor to assist with that need."



22. AVL gave the particulars of conditions Associated with Discussions between the Parties as follows:  
*" All discussions re hangar between the parties included oral agreement and understanding that the Defendant should not incur significant debt with the claimant and significant debt occurred and has continued to occur."*
23. Regrettably AVL filed no evidence to support and reinforce those assertions. It is trite law that one who asserts must prove.
24. The contents of the letter of 23<sup>rd</sup> November 2012 are clear. They do not include the words particularized by AVL in paragraph 1 of their defence.
25. Paragraph 1 of the letter as indeed the Heading is a clear and unequivocal confirmation that AVL would provide a hangar facility to Belair Airways in March 2013. The letter makes reference to an "agreement established between both parties" re: the hangar.
26. The letter was in "Furtherance" to previous " discussions" they had between themselves and was a " confirmation". AVL did not produce any evidence to the contrary. Belair Airways Limited had proved on the balance of probabilities that an agreement was " established" between them. Those are the words used in the letter by the Acting Executive of AVL.
27. As such, AVL cannot now turn around and say there was no offer, no acceptance, no consideration and no intention to create legal relations. It was all evident in the contents of AVL's letter of 23<sup>rd</sup> November 2012 that all those elements of an agreement were available, and agreed. The letter itself is a confirmation of an agreement by AVL to provide a hangar to the counter-claim from March 2013. The 2 cases referred to by Mr Morrison do not assist AVL's position.
28. And according to Mr Karie's evidence he had to build his own hanger which was completed in about June 2022.
29. His evidence went further to show an agreement with Air Vanuatu executed on 27<sup>th</sup> August 2015 which he annexes as "E" to his sworn statement. Clause 4.5 of that Agreement provides for use of Air Vanuatu Engineering Hangar. It is an Engineering/ General Terms Agreement. Mr Morrison did

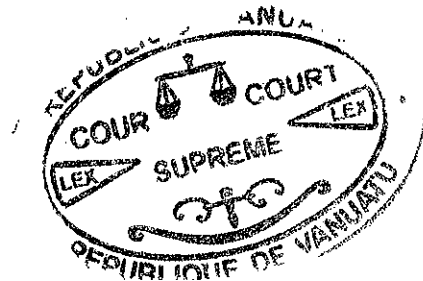


not cross-examine Mr Karie about this Agreement to clarify whether this was the Agreement referred to in the letter of 23<sup>rd</sup> November 2012.

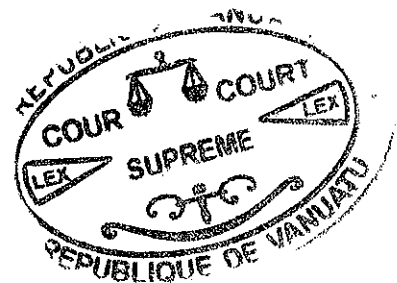
30. Be that as it may and despite AVL's defence and Counsel's submissions, I am satisfied from the letter of 23<sup>rd</sup> November 2012 that AVL had agreed to provide a hangar facility to Belair Airways Limited and having so agreed, they failed, refused and/or neglect AVL has caused loss and damages to the aircrafts and business operations of Belair Airways.

### The Result

31. The defendant succeeds in their counter-claim and judgment is entered in the defendant's favour.
32. The remaining issue is how much damages is Belair Airways entitled to. Mr Karie's evidence show a total loss for VT YJ-BA1 from 2014 -2022 at VT 498, 180,000 and for YJ -TIC 2 at VT 198,616,000 from 2016-2022.
33. His tables show normal hours of operation and shortfall in hours for each aircraft. His evidence does not show how many times each year his aircrafts were required to be in a hangar undergoing repairs or checks and for how many hours. Those information would have been more helpful to assist the Court make a proper and fair assessment as to how much damage should be awarded by the Court.
34. There were possibly other factors that might have contributed to the aircrafts making shortfalls in hours for instance, bad and extreme weather conditions which are beyond everyone's control.
35. I am therefore assisted to a limited extent only by the figures in the 2 tables provided to make an assessment as to damages in the amounts claimed.
36. I therefore have to look elsewhere. Mr Bani has not assisted the Court with any submissions. My only assistance is to resort to the Engineering/ General Terms Agreement of 27<sup>th</sup> August 2015 annexure "E" to Mr Karie's sworn statement ( Exhibit).



37. Clause 4.5 of the Agreement provides for the use of Air Vanuatu Engineering Hanger. In all probability it was that Hangar AVL had agreed to Belair Airways to use in 2013 but did not, resulting in losses and damage suffered by Belair Airways.
38. Clause 6 provides for limitation of liability as follows:-  
*" Air Vanuatu's liability to the customer in respect of any claim, loss, damage, action or costs which arises out of or in connection with this Aircraft support Agreement, the Maintenance of the Aircraft ( Whether as a result of Air Vanuatu's act of negligence or omission, breach of this Aircraft Support Agreement, willful misconduct or otherwise) will not under any circumstances exceed the lesser of: US\$ 5,000,000, or  
The amount actually paid by the customer to Air Vanuatu under this period Maintenance Contract."*
39. I am mindful of the fact that Belair Airways filed its counter-claim only in February 2022 claiming damages found in contract law claiming for losses from 2014.
40. I am also mindful of the provisions of the Limitation Act which places the period of limitation for claims under contract to be 6 years. That being so the claims from 2014-2020 are time-barred.
41. The only valid claims of Belair Airways are for 2021-2022 which are for YJ- BA1 are VT 91,200,000 and VT 198,616,000 for YJ-TK2. That is a total of VT 258,200,000. Converting this amount into US Dollars it would fall within the limits of the liability in clause 6 of the General Terms Agreement between Air Vanuatu and Belair Airways.
42. But mindful also of the fact that Vanuatu and the rest of the world were under lockdown due to COVID 19 from 2019 through to April 2022 which the Court takes judicial notice of, I must make a disallowance to ensure fairness, but this not an easy exercise.
43. I am equally mindful that Air Vanuatu Limited as well was affected by all these within the same period. But I do not think the counter-claim is about actual losses, rather it is to compensate reasonably for damages incurred by Belair Airways as result of Airports Vanuatu Limited not honoring their agreement to provide a hangar facility as agreed back in 2012.



44. As such I consider in the circumstances that the degree of liability of Airports Vanuatu Limited should be 33% or 1/3 of the total losses claimed for the 2 aircrafts which is  $VT\ 289,816,000 / 3 = VT\ 96,605,333$ .

**The Result**

45. Accordingly the defendant is entitled to damages for breach of contract and negligence in the sum of VT 96,605,333. The claimant also has judgment in the sum of VT 10,799,874 against the defendant which is to be deducted from VT 96,605,333. The balance to be paid to the defendant by AVL shall be VT 86,605,454 plus interest of 10% per annum from date of filing to judgment.

46. Finally the defendant is entitled to his costs of the counter-claim on the standard basis as agreed or taxed.

**DATED at Port Vila this 31<sup>st</sup> day of October 2022.**

**BY THE COURT**

  
**Oliver A. Saksak**

**Judge.**

