TRANSPAC EXPRESS LTD V MALAYSIAN AIRLINES

IN THE HIGH COURT OF NEW ZEALAND

IN ADMIRALTY

AUCKLAND REGISTRY

AD 36 SD 99

BETWEEN: TRANSPAC EXPRESS LTD

Plaintiff

AND: MALAYSIAN AIRLINES

Defendant

Heard: 5, 6, 7 June 2002

Counsel: G Bogiatto for the plaintiff

L Ponniah for the defendant

Judgment: 18 June 2002

JUDGMENT OF SMELLIE J

Solicitors

George Bogiatto, PO Box 106-120, Auckland

Corban Revell, PO Box 21-180, Henderson

Introduction

[1] Early in November 1999 the defendant ("MAL") chartered its Boeing 737-3H6 cargo aircraft to Australia Pacific Direct Pty Ltd ("APD") for two weeks (originally to 25.11.99 but subsequently extended to 30.11.99) to fly three rotations on 12, 19 and 25 November Auckland-Tonga-Samoa-Wallis Island (a French Protectorate), Australia-Auckland. APD then contracted separately with the plaintiff ("Transpac") to carry Transpac's cargo on the rotation flights. Transpac was a company allied to one already extensively engaged in shipping in the Pacific. The contract with APD was a venture by Transpac into extending its cargo business to transport by air.

[2] The charter between MAL and APD did not go smoothly. For one reason or another payments agreed to be made before the aircraft left Kuala Lumpur ("KL") in the first instance and subsequently before it embarked on any of the rotation flights, were not met or paid late.

[3] Transpac purported to cancel its contract with APD and claims that on or about 18 or 19 November it entered into a 12 months "wet lease" (to be explained later) of the Boeing 737-3H6 with MAL through the agency of Captain Christopher Hill ("the Hill contract"). Captain Hill was the MAL pilot who had flown the aircraft from KL to Auckland and was to fly the rotations, all pursuant to the charter with APD. MAL denied that any such agreement had been entered into and refused to carry cargo for Transpac on any

basis other than pursuant to its charter with APD. Although Transpac attempted to secure a direct arrangement with MAL, it failed.

[4] When the APD charter expired on 30 November 1999 the aircraft was prepared for the return flight to KL. Learning of this and relying upon sections 4 and 5 of the Admiralty Act 1973 and the alleged Hill contract, Transpac applied unilaterally to the Registrar of the High Court and obtained a warrant for arrest. MAL responded immediately and when the matter came before the Court on 2 December 1999 Paterson J, by consent, released the aircraft and subsequently ordered Transpac to pay costs of $15,000. It is now expressly admitted by Mr Bogiatto on behalf of Transpac that there was no jurisdiction pursuant to Admiralty Act to arrest the aircraft. Presumably that is why it was released by consent in December 1999. It was submitted for Transpac, however, that there was an absence of malice or abuse of process and the validity of the Hill contract is still maintained.

[5] On 19 April 2000 Transpac commenced proceedings against MAL claiming general damages for breach of contract for refusing to carry cargo pursuant to the Hill contract, plus certain over payments as special damages in a total sum of $62,654. In respect of the general damages claim an enquiry is sought.

[6] MAL responded to those proceedings denying the Hill contract or liability for the special damages. In addition, MAL counter-claimed alleging abuse of process in relation to the wrongful arrest of the Boeing 737-3H6. Special damages are claimed for the losses suffered as a result of the aircraft and crew being held in Auckland from 30 November to 2 December 1999 and general damages are claimed for any other losses suffered by the defendant and for damage to MAL's reputation. Interest on any recovery at 11% is claimed.

[7] I was advised by counsel when the case was opened that at a pre trial conference (prior to my involvement) the parties agreed that the hearing before me should relate to liability only with the question of damages reserved for another day.

The essential issues before the Court

[8] Both counsel agreed that the issues in relation to liability are as expressed in Mr Ponniah's closing submissions at paragraphs 9.1 and 9.2 as follows:

9.1 First, whether a verbal agreement was entered into as between Transpac and Captain Charles Hill on 18 November for a 12 month charter of the aircraft to give life to the "dead" 9 November formality document.

9.2 If however it is found that the alleged verbal agreement occurred, the second question will be as to whether Captain Chris Hill had the requisite authority to enter into such a 12 month charter with Transpac on behalf of MAL.

[9] Some elaboration in respect of facts which are not in dispute is required to flesh out the significance of those two points.

[10] It is common ground that when APD entered into the charter with MAL on or about 5 November 1999 there was a potential problem in relation to landing rights for the Boeing 737-3H6 in the French territory of Wallis Island. Initially, with the approval and connivance of Transpac, a letter was written by MAL to the Ministry of Transport in France, seeking authorisation for the flights on the basis that Transpac had chartered the Boeing 737-3H6 for a period up to six months commencing from 12 November 1999. Subsequently, however, the French authorities required something more substantial and in order to satisfy them a charter agreement was drawn up and signed by Captain Huzlan who was in charge of short-term charters at MAL in KL, and by an officer of Transpac. It purported to be a charter for 12 months and is described within the airline industry as a "wet charter" which means that the aircraft owner provides not only the aircraft, the crew and the engineer but also all the other expenses such as crew accommodation at turnovers, handling of cargo, refuelling of the aircraft etc. There is no dispute, however, that before Captain Huzlan signed the charter document he insisted on a letter signed by the chairman of Transpac which is document No.17 in the agreed bundle and which reads as follows:

9 November 1999

The Director

Flight Operations

Malaysian Airlines

KUALA LUMPUR

Dear Sir

Re Charter Contract - Transpac Express Limited - B737

We refer to recent discussions regarding the above.

This letter will serve as formal confirmation that Transpac Express Limited does not seek to bind Malaysian Airlines to the terms of such contract, it being acknowledged that such contract has been signed merely for the purpose of complying with the requirements of the French Civil Aviation Authority in respect of Wallis Island. It is acknowledged further that Transpac Express Limited has a formal charter contract with Australia Pacific Direct Pty Ltd for the charter of the aircraft and it is that agreement that is operative in respect of any charter of the aircraft.

Yours faithfully,

TRANSPAC EXPRESS LIMITED

(Sgd) Jean Ravel, Chairman

[11] The sending of the earlier letter and the provision of this non binding charter to the French authorities does not reflect well on the commercial integrity of those concerned but that is not an issue the Court is required to address in this action. What matters is that as at 9 November the document which is also at tab 17 of the agreed bundle and is numbered 121, although having the appearance of a possibly binding charter arrangement for 12 months, in fact had no effect. I note in passing that execution of the contract was to be by the affixing of the common seal of MAL whereas it was only signed by Captain Huzlan, but apparently that was sufficient to satisfy the French authorities. Having given that explanation it will now be apparent why, in issue 9.1 quoted above, the 9 November formality document is described as "dead".

[12] I propose now to deal with the two issues in paragraphs 9.1 and 9.2 referred to above in the reverse order.

Did Captain Chris Hill have authority to bind MAL?

[13] The captain himself swore that he had no such authority. His jurisdiction was confined to operational matters and any discussions that he had in Auckland with representatives of Transpac and references back to Captain Huzlan as a consequence, were merely designed to facilitate negotiations which might, had they been successful, have led to a long-term arrangement between Transpac and MAL in relation to the use of the Boeing 737-3H6.

[14] Captain Huzlan was also called and he likewise was adamant, first that Captain Hill had no authority and secondly that indeed his (Captain Huzlan's) authority was limited to short-term charters of two to three weeks and that any longer term arrangement would have had to be finalised with the heads of other departments which he identified as Malaysian Airline Services Cargo and Malaysian Airlines Services Asset Management. The last mentioned department is the one, according to Captain Huzlan, that deals with the sale of aircraft or long term lease proposals.

[15] To some extent the evidence of Messrs Hill and Huzlan was challenged. In particular, as we shall see later, the firm contention of Transpac was that Captain Hill had held himself out as having authority and had committed MAL to the agreement. I observe in passing, however, that the significant letter of 9 November was not addressed to Captain Hill but to Captain Huzlan in KL. Furthermore, evidence to be discussed later will show that in an endeavour to get a firm arrangement for future operations, Mr Ravel, the chairman of Transpac, went to KL while the aircraft and Captain Hill were stationed in Auckland and had discussions with Captain Huzlan and the respective managers of MAS Cargo and MAS Asset Management. Mr Ravel acknowledged that his attempt to get such an arrangement as a consequence of that visit failed, but it is also significant that upon returning to Auckland he continued to pursue his objective by taxed communications to Captain Huzlan, by-passing Captain Hill altogether.

[16] The most significant factor, however, relates to an admission made by Mr Bogiatto during his closing submissions. As we were about to take an afternoon adjournment I indicated to counsel that I wished to have my attention drawn to any direct evidence that the plaintiff contended could be found in the record that MAL had indicated or held out Captain Hill as having authority to deal directly with Transpac.

[17] After the adjournment Mr Bogiatto properly and responsibly acknowledged that there is no direct evidence to show that MAL indicated that Captain Hill had authority to deal directly with Transpac.

[18] The law as to apparent or ostensible authority is stated in the 28th ed. of Chitty on Contract at paragraph 32-057. The text reads in part as follows:

Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorised them. This doctrine, called the doctrine of apparent or ostensible authority, applies to cases where a person allows another who is not his agent at all to appear as his agent, to cases where the principal allows his agent to appear to have more authority than he actually has, to cases where a principal makes reservations in his agent's authority that limit the authority which such agent would normally have, but fails to inform the third party of this, and to cases where a principal allows it to appear that an agent has authority when such authority has in fact been terminated. The doctrine is said to be an application of the estoppel principle, but is a somewhat vague one, the normal rules being leniently applied, particularly as regards reliance on representation, and it might be better attributed to normal principles of objective interpretation of contract. The applicable rules may be divided as follows.

(i) A representation must be made by words or conduct...

(ii) The representation must be made by the principal or someone authorised in accordance with the law of agency to act for him. A representation by the agent as to his authority cannot of itself create apparent authority...

(iii) On general principles the representation must be of fact and not of law.

(iv) The party must act on the representation... .

[19] Bowstead & Reynolds on Agency, 17th ed., deals with apparent or ostensible authority in Article 74 commencing at paragraph 8-013. The formulation itself is in these words:

Where a person, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the face of any such representation. To the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.

[20] In the comment on the article at paragraph 8-017 the text reads:

Represents by words or conduct. There must be a representation made. This seems to occur in three main ways. It may be express (whether orally or in writing); or implied from a course of dealing; or it may be made 'by permitting the agent to act in some way in the conduct of the principal's business with other persons'... .

[21] These established principles were applied by McMullin J in his judgment in the Court of Appeal in *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 at 305 commencing at line 45 where His Honour said:

It does not assist the appellants to say that Mr Savage may have given Mr Savill the impression that he had authority to bind Chase Corporation. It is not enough for a third party to show that he relied on the agent's representation that he had the authority of his principal. He must show that he relied on the representation of the principal that the agent had the necessary authority... This critical factor applies with equal force to the undertaking of 29 May. Mr Savage gave that undertaking at least irresponsibly, perhaps dishonestly. He had no authority to give it and Chase Corporation cannot be said to have represented that Mr Savage had the authority to give it.

[22] Subsequently when the decision of the Court of Appeal was before the Privy Council their Lordships specifically found that there was no error of law in any of the judgments, including that of McMullin J.

[23] In all the circumstances then I am prepared to find on the facts that there was no direct or implied representation by MAL to Transpac that Captain Hill had authority to bind his employer to a contract which involved bringing to life the "dead" non binding charter of 9 November.

In any event, did Captain Hill purport to bring the "dead" charter to life?

[24] There is no evidence that Captain Hill was actually shown the "dead" charter while he was in New Zealand during 1999 and indeed his evidence on oath was that he did not become aware of it until he visited New Zealand earlier this year for the purpose of having his statement of evidence prepared in the offices of the solicitors representing MAL. As earlier recorded, Captain Hill insisted throughout his evidence that not only was he not aware of the "dead" charter, but that he had no authority to bind his employers to any arrangement with Transpac. The evidence shows clearly, however, that Transpac was anxious to secure a firm arrangement and discussed that possibility and forms which it might take, extensively with Captain Hill. while he was in Auckland. Transpac also relied upon him as a go-between to translate their ideas and aspirations to Captain Huzlan and to sound out the possibility of their success. It is also inescapable from the correspondence that Captain Hill personally believed there was good business for his employer to be done out of New Zealand into the Pacific and was enthusiastic about MAL filling the gap that had recently been opened up as a result of Air New Zealand withdrawing its cargo services in the area.

[25] Transpac's contention that the "dead" charter of 9 November came to life on 19 November 1999 depends entirely on the evidence of Messrs Varnier and Moss. They say that at a meeting at Transpac's office on the 19th Captain Hill accepted a Transpac cheque for the rotation to commence that day and agreed that the 9 November charter would come into force. The respective backgrounds and positions of Messrs Varnier and Moss are significant. Mr Varnier was general manager and had an extensive background in aviation which he had been engaged in since 1971. He had had experience with Air Caledonia and Thai Airlines and claimed to have been instrumental in the creation of Air Caledonia International in 1971.

[26] Mr Moss was in-house counsel for Transpac. He gained a degree in law in 1975 after which he worked for four years in an insurance company and then joined Subritzky Tetley-Jones in Wellington and worked subsequently for Kensington Haines & White in Auckland. Thereafter he practised for some years on his own, relinquishing his practising certificate in 1989.

[27] In their prepared statements of evidence-in-chief both witnesses were surprisingly economical in what they had to say about the charter they claimed existed between Transpac and MAL.

[28] Mr Varnier in paragraph 12, having indicated at a meeting Transpac's interest in a long-term relationship, said:

Captain Hill agreed at this meeting that Malaysian Airlines would continue to provide the 737 cargo aircraft to Transpac for the balance of the charter period of one year in terms of the charter agreement which had been entered into on 5 November 1999 between Transpac and Malaysian Airlines provided that prepayment was made for each flight. As a consequence of this agreement the second flight on 19 November 1999 occurred with arrangements made directly between Transpac and Malaysian Airlines in Auckland.

[29] Mr Moss at paragraph 5 of his statement said:

I was present during a discussion between Mr Varnier and Captain Chris Hill at the offices of Transpac on or about the 18th day of November 1999. The purpose of this meeting was to discuss how the flight schedule for 19 November was to proceed. As a result of that dialogue Captain Chris Hill on behalf of Malaysian Airlines agreed with Mr Varnier that the flight schedule for 19 November would proceed on the basis of the charter agreement which had been entered into between Transpac and Malaysian Airlines on about 5 November, notwithstanding that that charter agreement had been entered into for other purposes. It was further agreed by Captain Hill that future flights would occur on the basis of that charter agreement for the balance of the term of 12 months... The discussions which occurred were not recorded in writing. At the conclusion of those discussions it was my clear view that Transpac had secured the use of the Boeing 737 aircraft for a period of up to 12 months.

[30] Despite their respective backgrounds neither witness could explain why this dramatic shift in the status of the "dead" charter affecting an aircraft worth $30 million for 12 months was not recorded anywhere or referred to in correspondence and meetings which continued to occur between 19 November and 30 November. Both witnesses conceded that with hindsight a record should have been made and a letter sent confirming that the earlier letter of 9 November (the text of which is set out in an earlier section of this judgment) was no longer effective and the charter had become binding. Both witnesses seemed to think it was sufficient simply to reply on discussions with Captain Hill without any confirmation from MAL that he had authority to so contract or that MAL agreed with what they contended had been agreed.

[31] The one exception to the absence of writing is a letter from the chairman of Transpac, Mr Jean Ravel, prepared on 27 November 1999 but dispatched by fax on 30 November 1999 prior to the arrest of the aircraft that took place later that day. I shall return to that letter later.

[32] Although Mr Ravel was not at the meeting on the 19th about which Messrs Moss and Varnier gave evidence, as chairman of the board and a major shareholder in the company he played a significant role throughout.

[33] Captain Hill's evidence was that when Transpac became dissatisfied with APD and wanted to establish a long-term relationship with MAL he recommended that senior Transpac people should go to KL to establish contact with those officers of MAL who had authority to entered into such transactions. He communicated with KL by forwarding a letter which Mr Ravel sent to him on 22 November which is document 71 in the agreed bundle of documents. In it Mr Ravel indicated that he intended to go to KL and laid out the matters which he hoped would be agreed. There was no mention in that letter of an already binding contract having come into existence on 19 November.

[34] Mr Ravel, accompanied by a Mr Ken Bryce, travelled to KL and had meetings on 24 November with MAL heads of Cargo and Asset Management as well as with Captain Huzlan. Mr Bryce had resigned as a director of APD earlier in November and had almost immediately been engaged by Transpac as a consultant. It appears he was taken along because he had negotiated the APD/MAL charter and knew the people Mr Ravel wanted to see. Mr Ravel's evidence was that his objective was to get a variation of the 19 November (resurrected) charter from a wet lease to a damp lease. He wanted various other concessions (eg no flights over the Christmas period) and he was prepared to offer bank guarantees to support Transpac's obligations to pay flight by flight. Apparently a damp lease is the most favourable for the party who charters the aircraft.

[35] Captain Huzlan, on the other hand, says at that time the APD charter was still on foot and that APD personnel were coming to KL for further discussions with him. Furthermore he says it was never suggested to him that MAL was and had been since 19 November bound by the original dummy charter

to which his letter of 9 November (set out above) referred. Furthermore, his evidence was that on 24 November he told Mr Ravel that the APD charter had been renewed until 30 November and that only after that could MAL could begin serious negotiations for a long-term arrangement with Transpac. He advised Mr Ravel of what would be involved, indicating what would be expected of him and that he should not anticipate agreement overnight. Captain Huzlan said he advised that the first step was for Transpac to send a letter of intent, setting out its proposition.

[36] It was put to Mr Ravel that he was told by Captain Huzlan in KL on 24 November that the APD charter had been extended. At page 100 of the record between lines 12 and 26 the evidence was as follows:

At that meeting Captain Huzlan advised you that he had extended the contract with APD until 30 May? I have no remember, no records about that.

No recollection? I cannot recall it.

BENCH: Mr Ravel, this could be important so I want to know. Do you say that if Captain Huzlan says he did tell you that that he would be telling an untruth or do you say well I have no recollection of him saying that, but I would not go so far as to say he would be lying if he says he did tell me that? I will not say so Your Honour. I have a lot of respect for Captain Huzlan who is an important person at Malaysian Airlines and frankly speaking I don't remember this specific point of the discuss that Mr Solicitor is explaining and I apologise that and I would not qualify Captain Huzlan of anything. I have a lot of respect for him.

[37] That the APD contract had been so extended was confirmed by Mr Leigh Morden, a director of APD who gave evidence that written confirmation was received of the extension from MAL on 24 November which of course was the day that Mr Ravel was in KL.

[38] Upon Mr Ravel's return to Auckland (possibly in the early morning of 25 November) Transpac sent a number of letters to MAL. They are tabulated below with brief descriptions.

- 25 November (signed by Moss as general counsel) referring to a telephone discussion with Captain Huzlan and acknowledging that the dispute between "Transpac and APD did not involve MAL" - document 389 in the supplementary bundle of documents.
- 25 November (signed by Varnier as chairman) letter of intent covering letter saying "as discussed with Jean Ravel during his stay at your offices" and the letter of intent itself commences "This is our letter of intent to commence a formal agreement to utilise aircraft operated by Malaysian Airlines Systems etc." These documents are under tabs 90 and 92 in the agreed bundle of documents. There is no suggestion in either of them that MAL was already bound by the Hill agreement of 19 November.

- 26 November (signed by Jean Ravel as chairman) it talks of "an intention to enter a damp lease agreement" commencing on 25 November 1999. There is no mention of the alleged 19 November Hill contract charter. The letter also offers to pay up to $US 100,000 over time to settle outstanding debts owed by APD to MAL. This letter is under tab 97 of the agreed bundle of documents.
- 29 November (signed by Jean Ravel as chairman) again states prepared to "entered into damp lease". No mention that MAL already bound to charter. The letter also indicates Transpac's agreement to the damp lease being subject to termination on 30 days notice if MAL should decide to sell the aircraft. This letter is document 100 in the agreed bundle of documents.

[39] All of this correspondence is entirely consistent with Captain Huzlan's evidence that there was no agreement and MAL/Transpac were merely exploring the possibility of a permanent long-term arrangement.

[40] On the above evidence, on the balance of probabilities, I would have been prepared to hold that there was no agreement on 19 February to resurrect the non-binding charter of 9 November. Be that as it may, however, the letter of 27 November (referred to earlier) adds another twist although surprisingly it was largely overlooked by counsel. It appears to me, however, to have great significance.

The letter of 27 November

[41] This letter appears in the agreed bundle at tabs 99 and 101. It is dated 27 November and Captain Huzlan, in his prepared evidence, said he received it on that date but it appears he must have been mistaken. This is because the letter was Exhibit "I" to Mr Ravel's affidavit sworn in support of the application for a warrant to arrest on 30 November 1999. Paragraph 19 of that affidavit reads as follows:

19. The plaintiff has written to the owners of the defendant. (This was at the stage when the defendant was the named aircraft.) Annexed hereto and marked with the letter "I" is a copy of that letter which was forwarded by facsimile***today*** setting out the plaintiff's predicament.

(emphasis added)

[42] Because of its significance the letter is attached to this judgment as an appendix.

[43] The second paragraph of the letter, having commenced with a bitter complaint that the rotation of the 26th and 27th have not taken place, states:

Such incident is completely unacceptable and contrary to the charter agreement that was signed between our two companies on 5/6 November 1999 and which came into force on 19th November with the flight Auckland/Tonga/Wallis/Apia/Tonga/Auckland.

The letter then continues to detail the circumstances under which the aircraft did not fly on 26 November. It refers to evidence that was called which shows that MAL was prepared to accept payment for the flight from Transpac on behalf of APD but subject to Transpac acknowledging that APD was the

charterer. Transpac offered the cheque but refused the acknowledgement as a consequence of which Captain Huzlan would not give approval for the flight to take place.

[44] The consequence was that Transpac then purported to cancel the charter it had hitherto claimed to be relying upon.

[45] The penultimate paragraph (which was referred to in Captain Huzlan's evidence-in-chief) reads:

Therefore, we hereby advise the immediate termination of the charter agreement entered into with MAL on 5/6 November 1999 and we reserve the right to claim, before the appropriate court, damages for loss sustained as a result of your actions.

[46] The result is an escapable conclusion that at the time Mr Ravel swore the affidavit which was filed in support of the application for the warrant of arrest, he knew and intended that whatever may have been the position prior to the fax of 30 November, by the time the affidavit was placed before the Registrar Transpac had no contractual relationship with MAL which gave it any rights to the possession or availability of the Boeing aircraft Transpac was seeking to arrest.

Findings in respect of the alleged 19 November Hill agreement

[47] I have already held, given the factual situation, that in law, Captain Hill had no apparent or ostensible authority to bind MAL to such a contract.

[48] In addition, I have held on the balance of probabilities pursuant to the evidence other than the letter of 27 November, that no Hill contract was in fact entered into.

[49] Finally, there is the remarkable situation where by the hand of the chairman of directors and major shareholder of Transpac in the letter of 27 November 1999 it is acknowledged that immediately prior to the application for the warrant for arrest there was no binding contract for charter in existence.

[50] In reaching these conclusions I have not overlooked that Captain Hill became involved in trying to facilitate a binding arrangement between MAL and Transpac. As Captain Huzlan said in evidence "he dabbled in areas" outside his operational responsibilities. Nor have I overlooked the document under tab 65 of the agreed bundle of documents which is a fax from Captain Huzlan to Captain Hill in which a degree of frustration and even anger is displayed and some very direct questions are asked. One of which was "who is now chartering the aircraft?" Naturally the plaintiff sought to make as much of those matters as possible but neither individually nor collectively do they shake or trench upon my central holding as to the law on apparent/ostensible authority, or my findings of fact based upon my assessment of the witnesses, the significance of the documents and the inherent improbability of such an important matter as a 12 month charter of a $30 million aircraft being concluded on the alleged oral statement of an operations pilot on stand-by in New Zealand, when all other matters of significance were transacted with senior MAL personnel at MAL headquarters in KL.

Consequences of conclusion so far

[51] I hold against the plaintiff on its claim for an enquiry into damages on the basis of breaches by the defendant because there were none. The claim for specific damages, however, should more properly be resolved in the next round. Not because there is any breach to support them, but because it is alleged that Transpac may have paid certain expenses in error and be entitled to reimbursment. I heard no evidence as to that contention and make no finding in that regard. The whole matter, both as to right to recover and quantum, is for another day.

[52] 1 hold for the defendant on the counter-claim in respect of the losses and damages pleaded in paragraph 21. The quantum to be established at a later stage. Although it is not directly my concern I remind counsel that I did express the view that there is no apparent basis upon which the defendant can claim these damages in other than New Zealand currency. I would add that I should have thought only the actual losses suffered, rather than agreed amounts in the APD/MAL charter could be recoverable.

[53] The claims for damages in paragraph 22 and prayers 23.2 and 23.3 of the counter-claim which read as follows:

22. The adverse publicity as a result of the plaintiff s actions has caused injury and damage to the defendant's reputation.

23. Wherefore the plaintiff claims

23.1 ...

23.2 an enquiry as to. further or other loss or damages suffered by the defendant.

23.3 An enquiry into the damages to the defendant's reputation.

are, however, more complex. The submissions of counsel did not touch on whether my function as the Judge deciding issues of liability only, involves making findings as to whether or not the plaintiff s action in having the aircraft arrested amounted to abuse of process, and further, whether, if established, damages to reputation and/or other and further damages as pleaded, can be recovered.

[54] Doing the best I can in the circumstances, 1 have decided I should rule on whether or not abuse of process has been established, and if so, the circumstances surrounding it. As to whether the damages in paragraph 22 and prayers 23.2 and 23.3 flow as a consequence, however, I see as appropriately left for the quantum hearing along with any assessments of amount.

Abuse of process: Erroneous Interpretation of Admiralty Act

[55] First the absence of jurisdiction point. I accept the submission of Mr Bogiatto that on a preliminary reading of sections 4 and 5 of the Admiralty Act and in particular subsection (2) of section 4 and subsection (1) of section 5, one could, under the time constraints that applied in this case (a decision being made to attempt to arrest only hours before the plane was due to take off) an error of judgment

could be made. Mr Bogiatto's admission that there was no jurisdiction was based upon the decision of Hewson J in the Admiralty Division in *The Glider Standard Austria S.H. 1964* [1965] 2 All ER 1022 where the headnote reads:

The only jurisdiction given to the Admiralty court in relation to aircraft is that mentioned in para. (j), para. (k) and para. (l) of s. 1(1) of the Administration of Justice Act, 1956, which are concerned with claims in the nature of salvage, towage, and pilotage, and it is to these matters alone that, in relation to aircraft, sub-s. (4) of s. 1 of the Act... refers.

[56] It was common ground between counsel that that holding in relation to the English legislation applied equally to the Admiralty Act 1986 and accordingly, because Transpac was not making any claims of the nature identified, there was no jurisdiction pursuant to the Admiralty Act to arrest. The erroneous view of the legislation in so far as it was a factor in the decision to arrest was an error of judgment, which in my opinion was devoid of any element of bad faith or gross negligence. As such, it would not support anything other than compensatory damages.

Abuse of process: bad faith and/or gross negligence

[57] It was Mr Moss, in-house counsel for Transpac, who prepared the charter document upon which the application seeking the issue of a warrant of arrest was based. He was, of course, fully aware at the time the document was signed, that it was not intended to bind either party.

[58] It was also Mr Moss who first thought of attempting to arrest the aircraft pursuant to the Admiralty Act 1973. Although he denied drafting Mr Ravel's statement upon which the affidavit in support was founded, he nonetheless attended at Mr Bogiatto's office while the papers were prepared. He then attended at the High Court to file them and, according to his evidence, sat across the Registrar's desk as the papers were considered and the Registrar reached his decision to issue the warrant. All this of course against the background that Mr Moss, as a qualified lawyer and in-house counsel, on the balance of probabilities, either knew or ought to have known that no binding 12 month charter between Transpac and MAL existed. Mr Moss also knew that the papers placed before the Registrar did not include the letter of 9 November which declared the true status of the charter document relied upon.

[59] Furthermore, in the instructions given by Mr Moss to Mr Bogiatto's office there was a claim that breach of the non-existent charter by MAL would result in damages of $2,187,976.90. The Notice of Proceedings in Rem which accompanied the application for the warrant, in paragraph 3 pleads:

3. The Plaintiff claims the sum of $2,187,976.90 being the damages sustained by the Plaintiff as a result of the breach committed by the owners of the Boeing 737-3H6 (Serial No. 27125 & Registration No. 9M-MZA) painted up as a Malaysian Airlines Aircraft pursuant to a charter agreement made in writing and

executed on or about 8 November 1999. The Plaintiff also claims the sum of $1,540.00 for the costs of and incidental to service of this notice of proceedings.

[60] Item No.2 of the agreed bundle of documents, although not specifically referred to during the hearing, is described as "Transpac budget". It is a 45 page document containing budgets and forecasts for airfreight business on various bases such as route, frequency and tonnage to be carried. It appears to be the document from which the figure of $2,187,976.90 derives. But in the absence of any binding contract between MAL and Transpac it must have been apparent to Mr Moss that there was no basis for the claim.

[61] I regret I am obliged to conclude and so find, that there was bad faith on the part of Mr Moss as in-house counsel for Transpac in advancing the application on the basis that there was a binding contract and that damages of $2.19 million would be suffered as a consequence of the alleged breach. I interpolate to say that quite apart from anything else, the alleged contract could only have been in existence from 19 November to 30 November 1999; clearly insufficient time for such a massive loss to accumulate. Without resiling from the finding of bad faith it is nonetheless obvious that if not bad faith then certainly there was gross negligence on Mr Moss's part.

[62] Unfortunately similar findings against Mr Ravel are also inevitable. I make full allowance for the fact that English is not his first language and his understanding of legal matters is based upon Roman law as it has evolved in modern France. Nonetheless, it is inescapable that he negotiated in KL on 24 November without claiming that there was a binding charter already in existence. Furthermore, his correspondence, when he returned (with the exception of 27 November letter) confirms that negotiations only were in train, not variation of an existing charter. And of course by the penultimate paragraph of the letter of 27 November (set out above) he had certain knowledge that if there ever was a binding contract it had been repudiated by the faxing of that letter on 30 November before the application for a warrant for arrest was filed in the Court.

The law as to abuse of process

[63] This is an area of the law not much encountered.

[64] In the 17th edition of McGregor on Damages (Sweet & Maxwell Limited 1997) the topic is discussed in Chapter 36 which is headed "Malicious Prosecution and Cognate Torts". In the first paragraph (1859) of the chapter it is said:

Formerly, for a person... to institute legal proceedings maliciously... could lead to tortious liability for abuse of process... .

There is then a sub-heading reading "Types of Actionable Damage" after which paragraph 1860 reads:

For the defendant to institute certain types of legal proceedings against the plaintiff maliciously and without reasonable and probable cause is actionable, but only on proof of certain types of damage. The types of proceedings and the types of damage form the two sides of the same coin, since it is because these kinds of damage flow from these kinds of legal proceedings that they are made actionable in the first place, and these kinds of damage are then in all cases presumed to flow from these kinds of legal proceedings. According to Lord Holt in the leading case of *Savile v Roberts*(1699) 1 Ld.Raym 374 at 378:

There are three sorts of damage, any of which would be sufficient ground to support this action. (1) The damage to a man's fame, as if the matter whereof he is accused be scandalous... (2) Such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty. (3) Damage to a man's property, as where he is forced to spend his money in necessary charges to acquit himself of the crime of which he is accused.

This statement has been accepted ever since as authoritative.

[65] In the next paragraph (1861) the text commences:

The satisfaction of one or other of these conditions points to what kinds of legal proceedings are actionable.

There is then brief reference to actions involving individuals but in the middle of the paragraph it continues:

In the second place, and conversely, most civil actions and proceedings are not actionable as they satisfy none of the three conditions... . Exceptionally, there are some civil proceedings which have been held to suffice, namely petitions to have a trader adjudicated a bankrupt and petitions to have a company wound up as insolvent. Condition (1) is satisfied in these, for the very allegations involve damage to the fair fame of the person assailed, which cannot be afterwards repaired by the failure of the proceedings.... . And fourth and last is malicious execution against the property of the plaintiff by judicial process; condition (3) will be satisfied in such cases.

[66] McGregor then continues in Chapter 36 on to paragraph 1864 which deals with malicious bankruptcy and company liquidation proceedings. At the end of the chapter there is a discussion in paragraph 1868 under the heading "Aggravation and Mitigation". The commencement of that paragraph reads:

Torts involving malicious abuse of process fall into the general category where the manner in which the tort is committed may lead to aggravation or mitigation of the damage, and hence of the damages. The

few cases do not go into this and therefore reliance must be placed on analogies from such torts as false imprisonment and defamation.

The final paragraph in the chapter deals with exemplary damages but on the basis of the House of Lords decision in *Rookes v Barnard* [1964] AC 1129 which is not part of the law of New Zealand.

[67] As Richardson J (as he then was) said in *Taylor v Beere* [1982] 1 NZLR 81 at pages 87 and 88, at the commencement of his judgment:

The primary issue on this appeal arises from the directions given by the trial Judge on the question of exemplary damages. The underlying questions are: (1) whether exemplary damages should hereafter be awarded in New Zealand Courts; and, if so, (2) whether the categories of cases in which they may be awarded should be defined and limited either in terms of the restrictions laid down by the House of Lords in *Rookes v Barnard* [1964] AC 1129;... and *Broome v Cassell & Co Ltd* [1972] AC 1027... or in some other manner. These questions could be debated at very great length. However, in the view I take it is not necessary to develop an elaborate argument. A number of points may be mentioned quite briefly before turning to consider, again quite briefly, the two critical questions to which I have referred.

1. It is well settled that exemplary damages and ordinary damages (including aggravated damages) serve essentially different purposes. That point is given some emphasis in *Rookes v Barnard* where the House of Lords narrowed the classes of cases in which exemplary damages could be awarded in England. In the language of Lord Devlin (p 1221; 407): "Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter." In *Huljich v Hall* [1973] 2 NZLR 279, 287, in this Court, McCarthy J expressed the same distinction in this way:

Aggravated damages are extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted. Exemplary damages, on the other hand, are damages which, in certain instances only, are allowed to punish a defendant for his conduct in inflicting the harm complained of.

[68] The examples cited by McGregor of malicious execution against property are analogous to what happened here. In addition, however, the law has evolved rather more directly in Admiralty.

[69] In the text "Admiralty Jurisdiction and Practice" Second Edition (LLP 2000) the learned editor, Nigel Meeson, discusses the Admiralty rules regarding wrongful arrest. At page 136, paragraph 4-029 the text reads:

4-29 Where a ship is arrested when it ought not to have been the ship owners may suffer substantial loss. The question therefore arises whether they may recover that loss from the arresting party who has improperly detained their ship. The answer to that question is that they may only do so where the

arresting party is guilty of *mala fides* or *crassa negligentia*. In *The "Evangelismos"* Mr Pemberton Leigh giving the judgment of the Privy Council said:
Undoubtedly there may be cases in which there is either mala fides *or that* crassa negligentia *which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained... The real question in this case ... comes to this: is there or is there not reason to say that the action was so unwarrantably brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?*

The text then continues at paragraph 4-030 as follows:
4-30 On the facts of the case damages were not awarded because the claimant had acted *bona fide* with probable cause, and without *crassa negligentia*, having had reason to suspect that the defendant's vessel was one which had run his own vessel down, and got away in the night. That decision was affirmed subsequently by the Privy Council in *The "Strathnaver"* (1875) 1 App. Cas. 58 (PC) where no damages were payable because there was "simply an error in judgment in bringing the suit".

The text then goes on to discuss further cases in which claims of bad faith or gross negligence were made in Admiralty cases. Perhaps the most recent and enlightening is the decision of the Supreme Court of Canada in *Armada Lines Ltd (now Clipper Shipping Lines) v Chaleur Fertilizers Ltd* [1997] 2 SCR 617. The decision of the seven-man Court was delivered by Justice Iacobucci.
[70] In this case cargo was arrested for breach of contract but the shipper subsequently secured release of the cargo. The issue was whether the arrest had been lawful and was dealt with, of course applying the same principles as applied to the arrest of a vessel. The facts are set out, as are the relevant Canadian statutory provisions followed by summaries of the judgments in the Courts below. At page 623 of the report the issues in the case are set out as follows:
1. Did the Federal Court of Appeal err in awarding damages for loss of interest in posting security?
2. Did the Federal Court of Appeal err in awarding damages for loss of use of working capital under the heading "damages for wrongful arrest"?

[71] That second issue is addressed at page 625 of the report where the judgment of the Court reads:
The rule governing when a party can claim damages for wrongful arrest was laid down in *The "Evangelismos"* (1985), 12 Moo. PC 352, 14 ER 945. In that case, the Privy Council held that a court may only award damages for wrongful arrest where the arresting party acts with either bad faith or gross negligence (at p.359):

Undoubtedly there may be cases in which there is either mala fide or that crassa negligentia, which implies malice, which would justify a Court of admiralty giving damage...
The real question... comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?
Holmes J explained in *Frontera Fruit Co v Dowling* 1937 AMC 1259 (5th Cir. 1937), at p.1266:
The gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice, or gross negligence of the offending party.

The rule in *The "Evangelismos"* survives to this day. See, for example, *Mondel Transport Inc. v Afram Lines Ltd*, [1990] 3 FC 684 (TD). I am not aware of any Canadian case where a court has awarded damages for wrongful arrest in the absence of conduct amounting to either malice or gross negligence.

[72] The judgment then goes on to address a submission that the *The "Evangelismos"* should no longer be followed. At paragraph 23 on page 626 the judgment reads:
In asking this Court to depart from the *Evangelismos* rule, the respondent focused on the similarities between the maritime arrest procedure, on the other hand, and the seizure of assets pursuant to a *Mareva* injunction, on the other. And, indeed, in substance, the two orders are not dissimilar: both the admiralty arrest and the *Mareva* injunction restrain a defendant from dealing with his or her property prior to judgment.

There is then further discussion of the proposition but at 627 the judgment records as follows:
While I have some sympathy with this argument, in my view, any such change in the law falls not to the courts, but rather to the legislature to carry out. As noted above, the rule in *The "Evangelismos"* is of long standing. Whether it does or does not operate harshly upon defendants is a question best resolved by the legislature. As this Court said in *Rhône (The) v Peter AB Widener (The)*, [1993] 1 SCR 497, at p.531
...whether this regime is responsive to modern realities is a question of policy to be determined by Parliament and not the courts whose task is to interpret and give effect to the intention of Parliament.

[73] There then follows the following relevant paragraph:
In this regard, I note that, apparently alone among the common law in jurisdictions, Australia has departed from the rule *The "Evangelismos"*. Section 34(1)(a)(ii) of the Australian Admiralty Act 1988, No.34 of 1988, provides that a party may recover damages arising out of the arrest of property if the arrest was obtained "unreasonably and without good cause". As pointed out by counsel for the appellant, this change was effected not through judicial means, but rather by specific legislative enactment. In my

opinion, any analogous change in Canadian law must originate in the legislative branch of government. For these reasons, in my view, the rule in *The "Evangelismos"* remains good law in Canada.

[74] 1 hold that *The "Evangelismos"* is also good law in New Zealand. Further, having found that bad faith or at the very least gross negligence resulted in the arrest of the aircraft, a holding that what occurred was an abuse of process is logical and legitimate. In other words, my conclusion is that Transpac has a cause of action for abuse of process and that the necessary ingredients for recovery in respect of it have been proved. Furthermore, I hold that aggravated damages may be recovered over and above compensatory damages. I doubt, however, without deciding, that exemplary damages would be appropriate here.

[75] As to the quantum of compensatory and aggravated damages (and exemplary also if found to be available) that is for resolution in the follow-on hearing on quantum.

The publication in the "Independent" and "Apology" to customers

[76] Later in the afternoon after the arrest on 30 November 1999 Mr Ravel responded to the request of a journalist from the Independent newspaper for information regarding the arrest. The Independent, having run an article in an earlier issue regarding Air New Zealand pulling out of freight services to the Pacific Islands, then published the following:

Air Operator arrests Malaysian plane

Rob O'Neill

Auckland-based air cargo start-up Transpac used the little-known Admiralty Act to arrest a Malaysia Airlines 737 cargo plane at Auckland International Airport yesterday.

Transpac says it originally subchartered the plane from another company, Australia-Pacific Direct. It terminated that deal and entered into a direct contract with Malaysia Airlines on 5 November.

However, Malaysia insisted on payment it said was owed by APD before taking perishable Transpac cargo to the islands on Friday.

Transpac director Jean Ravel went to Malaysia to sort out the mess last week. He says his company guaranteed payment of up to $US100,000 to Malaysia and was told it would receive confirmation of the deal by 1.30 yesterday.

However yesterday the plane was going to fly to Seoul for another cargo. Transpac, with its cargo waiting to be transported, was not prepared to let the plane leave and applied to the High Court for a writ of arrest.

"This court will be involved as we consider Malaysia in breach of contract," Ravel says. "It was the intention of Malaysia to remove the aircraft and we obtained a court order to seize it to guarantee our claim."

Malaysia Airlines' local office could not be contacted for comment before The Independent went to press. Police at Auckland Airport confirmed serving the writ of arrest on the plane early yesterday afternoon. The Malaysian Airlines 737 is now sitting on the tarmac.

[77] Mr Ravel agreed that the content of the article attributed to him was substantially accurate but of course the headline and format were beyond his control.

[78] In respect of the publication in The Independent MAL argued that the publicity further damaged its commercial reputation and is additional evidence of bad faith or malice. Whether that matter should be taken into account in assessing the quantum of damages for wrongful arrest will be decided in the quantum hearing if Transpac elects to pursue the point. Again, without deciding the matter, I express the provisional view that the interview and publication are not sufficiently related to the wrongful arrest to be taken into account.

[79] On the same day as the arrest however, there was distributed by Transpac's Australian area manager to various of Transpac's customers, some of whom were also MAL customers, a statement which is to be found at page 392 of the supplementary list of documents. The statement commences by announcing with regret the temporary suspension of Transpac's airline service to the Pacific and then sets out what is said to be a "statement... by our legal department".

[80] The first three paragraphs of the statement from the legal department read as follows:

We regret to advise that due to internal difficulties within Malaysian Airlines, from whom Transpac Express Limited had chartered the Boeing B737 cargo aircraft - registration number 9M-MZA, we were unable to undertake the flight scheduled for 25h November 1999 from Auckland to Tonga, Wallis, Apia return. Such meant that Malaysian Airlines were in breach of their contract with Transpac Express Limited.

The Auckland High Court has therefore today (Tuesday, November 30, 1999) on Transpac Express Limited's application, ordered the seizure of the aircraft. A copy of the order for seizure can be obtained from our office if you need it.

It goes without saying, that entirely due to this situation and for this reason which is beyond our control, we are unable to operate the flights scheduled for the weeks ahead.

[81] In my judgment those three paragraphs are false and blatantly misleading. Furthermore, it may be that this document distributed to commercial entities, unlike The Independent article, is sufficiently related to the wrongful arrest to justify additional aggravated damages. Again, however, that issue will be decided by the Judge who presides at the quantum hearing.

Costs

[82] Having found that Transpac acted in bad faith or at the very least was grossly negligent in having MAL's aircraft arrested, and that such actions were an abuse of process, I award in favour of MAL solicitor and client costs. The application for arrest should never have been made and MAL should not have been put to the cost of meeting Transpac's claim in this matter, nor should it have had to pursue its own counter-claim for damages for the wrongful arrest.

[83] Counsel for MAL is to file a memorandum and serve on counsel for Transpac within five days of this judgment its claim for solicitor and client costs. Transpac is to respond with its memorandum within three days of receipt of MAL's memorandum. MAL's claim for solicitor and client costs, however, will be subject to a 10% discount because the prepared statements of witnesses for MAL were at the time of filing and indeed when presented to the Court, unduly prolix and strayed too often into areas of hearsay and argument. Provided the timetable for filing of memoranda is adhered to, I will be available to fix the quantum of MAL's costs in this matter. Costs of course will include all reasonable disbursments. If the timetable is not adhered to those costs will have to await my availability or possibly be held over to be fixed by the Judge who deals with the quantum issues.

APPENDIX

TRANSPAC

27th November 1999

Captain Nik Huzlan

Chief Pilot (Marketing & Sales)

Flight Operations Division

Malaysian Airlines

Fax 00603-7472939

Dear Sir,

I am writing to you in regard to the very serious incident which took place yesterday, 26th November 1999, when your chief pilot, Captain Chris Hill, refused, upon your instructions, to undertake the flight that was due to depart from Auckland to Tonga / Wallis / Apia / Tonga / Auckland on the pretext that Australia Pacific Direct Pty Ltd, your previous charterer, owed MAS the sum of approximately $US84,000.

Such incident is completely unacceptable and contrary to the charter agreement that was signed between our two companies on 5/6 November 1999 and which came into force on 19th November with the flight Auckland / Tonga / Wallis / Apia / Tonga / Auckland.

We record that as early as 12th November 1999 you were fully aware of the fact that APD were in default, as the payment that this company made to you was rejected, it having been made by means of

a cheque that was dishonoureded [sic] by the bank upon presentation. As a result of this Transpac also cancelled the sub-charter between Transpac and APD pursuant to the terms of our solicitor's letter of 16th November 1999.

Transpac as a result of having entered into a contract with MAS, which we believed gave us complete comfort in respect of matters that would be required to be undertaken to by us to ensure the successful operation of our services, undertook a very aggressive marketing campaign of our services so as to ensure, with effect from 4th December, the utilisation of your B737 for approximately 110 hours per month on the weekly services:

Auckland/Tonga/Wallis/Apia/Tonga/Auckland 9h

Auckland/Brisbane 3h30

Brisbane/Honiara/Brisbane 6h

Brisbane/Noumea/Vila/Auckland 6h30.

On top of this, Transpac has also invested considerable sums in equipment necessary for the handling of cargo (high loaders etc) in Honiara, Tonga, Apia and Wallis.

During the course of my visit to your offices in Kuala Lumpur on 24th November, You had indicated that you would be prepared to change the "Wet Lease" signed between our two companies on 5/6 November into a "Damp Lease," Transpac's agreement to which I confirmed in my letter of intent to you of 25th November.

Faced with the difficulties raised by MAS in undertaking the flight on 26th November and in order to save Transpac from the catastrophic situation that was unwinding as a result of your refusal to undertake such flight, I even agreed in my letter of the same day that Transpac would assume the responsibility of paying the debt of APD, by paying such in the cost of the "Damp Lease" even though such had nothing whatsoever to do with Transpac, it being a matter entirely between MAS and APD.

Your totally irresponsible attitude has lead to the ruin of an operation that Transpac has been working on for nearly two years and for which the cost for the company has been some $NZ2 million, and for which we now hold MAS responsible.

Therefore, we hereby advise the immediate termination of the charter agreement entered into with MAS on 5/6 November 1999 and we reserve the right to claim, before the appropriate court, damages for the loss sustained as a result of your actions.

We accordingly also hereby put you on notice that we require you to repay to us immediately the sum of $NZ64,602-27 that was paid to MAS on 25th November being the NZ dollar equivalent of the cost of the flight of 26th November which you refused to undertake.

Yours faithfully,

TRANSPAC EXPRESS LIMITED

(Sgd) Jean Ravel

Chairman