IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. CV 005 of 2013
BZ Civil Appeal No. 5 of 2011

BETWEEN

ERROL PRATT, DOING BUSINESS AS TOUCAN HELICOPTER LTD
TOUCAN HELICOPTER LTD **APPELLANTS**

AND

KARL R. RENZ III
CONTINENTAL HELICOPTERS INC
WAYNE MACAULAY
ATLANTIS HELICOPTERS DE MEXICO S.A DE C.V. **RESPONDENTS**

Before The Honourables **Mr Justice R Nelson**
Mr Justice A Saunders
Mr Justice J Wit
Mr Justice D Hayton
Mr Justice W Anderson

Appearances

Mr Denys Barrow SC for the Appellants

Mr Fred Lumor, SC for the Respondents

JUDGMENT
of
Justices Nelson, Saunders, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Hayton
on the 26th day of March 2014

Introduction

[1] This is an unfortunate dispute over a badly drafted "Helicopter Lease/Purchase Agreement" ("the Agreement") that fails to deal fully with the issues arising under it. The Appellants had been ordered by Muria J and by the Court of Appeal to deliver the leased helicopter back to the Respondents but the Appellants then obtained a stay of execution of those orders. Since 2007 the helicopter has remained idle, grounded in Belize in the possession of an independent body, so increasing the losses that the losing party must ultimately bear. The determination of this losing party turns on the true nature of the Agreement and whether there has been effective service of valid notices of default and of termination of the Agreement.

[2] The Caribbean Court of Justice in its appellate jurisdiction is fundamentally a court of law and not a court of fact. Normally, it will not interfere where the trial judge and the Court of Appeal are agreed on the facts. It has, however, accepted that it may review fact-finding in an exceptional case where on a review of the evidence findings of fact have been entirely unwarranted or else have not been made as and when required so that there is a real possibility of a serious miscarriage of justice.[1] The Appellants' counsel, who did not represent them below, has thus led this Court to examine transcripts of evidence and documents relating to particular types of payments and to hear his objections to the hearsay status of certain significant evidence that he submits should not have been admitted. He also complains of the lack of reasoning of the trial judge in finding certain facts to have been proved. Once, however, counsel has not objected to hearsay being admitted by the trial judge in a civil case, it is too late in the appellate courts to object to the admitted evidence: emphasis can then only be placed on the lack of weight of the evidence.[2] Moreover, the time of this Court should not be taken up with trying to ascertain from exhibits what amounts of particular payments had been paid by particular times. If these matters have not

[1] Further see Lachana v Arjune [2008] CCJ 12 (AJ) [11]-[14].
[2] Guyana Bank v Alleyne [2011] CCJ 5 (AJ), Sheermohamed v Nabi & Sons Ltd. [2011] CCJ 11 (AJ).

been resolved at trial or in the Court of Appeal, as should be the case, all the time-taking ground-work to resolve these matters should be done prior to the hearing before this Court so that the position is clearly set out on paper, showing any discrepancies between counsel. At the hearing before us counsel thus had to be given a week to submit such paperwork after significant time spent examining documents had produced no clear conclusion.

[3] Ultimately, Appellants' counsel failed to discharge the heavy burden of persuading this Court that this was an exceptional case where it should upset the findings of fact of the trial judge and of the Court of Appeal. He also failed to persuade us that the reasoning of Muria J and the Court of Appeal was erroneous when they found the Agreement to be a one year lease or hire arrangement of a helicopter that included an option to purchase the helicopter in circumstances where it could not have been exercised.

The 'Helicopter Lease/Purchase Agreement'

[4] By email of 10th January 2005 to Mr Errol Pratt, the First Appellant, the helicopter in question was offered for sale by Mr Karl Renz III, the First Respondent and chief executive officer of the Second Respondent, Continental Helicopters Inc. The purchase price was to be US$240,000 with Mr Pratt paying the sum of US$100,000 before April 30th 2005 as a deposit towards this purchase price and providing (at a cost to him of US$55,132) the blades needed to make the helicopter airworthy. The $140,000 balance was to be due 90-180 days after acceptance of the helicopter.

[5] On 30th April 2005, however, a "Lease/Purchase Agreement" was entered into "between Karl R Renz III referred to as the Lessor and Toucan Helicopter Company CEO Errol C Pratt hereinafter referred to as Lessee" in respect of the 1973 Bell helicopter registration number N73AJ commencing on 30th April 2005 and terminating 30th April 2006. The Lessor was described as "the registered

owner" of the helicopter. As Sosa P stated in the course of the hearing below[3] when being addressed by the Appellants' counsel, the above wording amounted to "a clear statement that it's an agreement between two individuals" and Appellants' counsel, Mr Elrington SC, agreed, with no contrary interjection from Respondents' counsel.

[6] Muria J, however, in his judgment had simply made orders against the "Defendants" and the Court of Appeal in its judgment merely endorsed this. The Appellants made no issue of this before us, so we leave the Appellants to be liable jointly and severally upon failure of their appeal, while making it clear that the "Karl R Reinz III" in the title to these proceedings below is actually "Karl R Renz III". Muria J's judgment was simply in favour of the four Claimants, and the Court of Appeal merely endorsed this. Issues concerning the Claimants/Respondents other than Karl Renz will, however, be dealt with later at [32]-[33].

[7] Clause 1, headed 'Leased Aircraft', provided for the Lessor as the registered owner of the helicopter to lease it to the Lessee, for the Lessee to maintain the helicopter according to all Bell Helicopter Corporation manuals and to be responsible for all day-to-day maintenance during the term of the lease, and for the Lessor to be responsible during the term of the lease only for the Major Components listed on the Computer Sheet provided as Appendix 1 to the lease. Clause 3 dealt with 'Delivery' of the helicopter. There then followed Clauses 4 to 15.

> "**4. <u>Payment</u>**
> 1. Lessee promises and agrees to pay Lessor for the rental of the Helicopter in the amount of $300.00 per flight hour with a minimum of 20 flight hours per 1-month period. Lessee shall promptly report to Lessor the first day of each month the total flight hours flown the previous month. These hours will be taken from the collective Hobbs Meter located in the Battery nose compartment of the Helicopter.

[3] CCJ Record p 61.

2. Lessor will credit Lessee 75%[4] of all monthly payments toward the remaining purchase price of the Helicopter that being $140,000.00.
3. Payments for a portion of a month or hour will be prorated according (*sic*). Payment shall be sent to the below Bank.

Karl R. Renz III
15827 N. 41st Place
Phoenix, Arizona 85032
Wells Fargo Bank
ABA# 122105278
Acct# 3214956777

5. Deposit

Will be the (*sic*) for the sum of $100,000.00 of the purchase price of $240,000.00.

6. Return of Helicopter

Will be at Lessee expense back to Mesa, Arizona.

7. Lessee Covenants

1. To furnish at it (*sic*) own expense all fuels, oil and lubricants as necessary for the operation of the helicopter.
2. To indemnify and hold the Lessor harmless from and against any and all actions, prosecutions, administrative proceedings or similar terminate (sic) with a 30 day notice by either Lessor or Lessee, assertions or threats arising in any way out of the custody, use or operation of the helicopter during the term of the lease.[A jumbled sentence on its face]
3. The lessee shall not without written consent from the Lessor make any alterations, additions or improvements to the helicopter.

8. Mandatory Modifications

Modifications required by FAA or Bell Helicopter to insure (*sic*) the safety and airworthiness of the helicopter shall be performed by the Lessee and charged back to the Lessor.

9. Insurance

Throughout the term of the lease at the Lessee's expense obtain and maintain in full force and effect, insurance policies covering comprehensive, public liability, property damage and the loss of or damage to the helicopter. The policy will include the following
A Combined Single Limit Aircraft Public Liability, Bodily Injury and Property Damage and Passenger Liability Insurance.
All Risk Ground and Flight Hull Insurance in the agreed value of $350,000.00
The policy will (*sic*) on the subject Helicopter shall contain a contractual liability endorsement covering the provisions of this lease and name 1st

[4] See CCJ Record p 559(Respondents' documents), though the copy at p 541 (Appellants' documents) has 100% handwritten over the typed 75%, yet Muria J at [15] of his judgment (CCJ Record p 523) refers to 75% (presumably based on evidence at pp 305,312-313, 318-319,362,443) as does Appellants' counsel, Elrington SC, at p 313 at trial and p 122 before the Court of Appeal, though that Court then at [5] (Record pp. 172 and 178) sets out clause 4 as using "100%" and assumed a 100% credit at [26], without appreciating that it was acting contrary to the finding of Muria J which Elrington SC seems to have accepted.

Source Bank as Loss Payee and also include Lessor Karl R. Renz III, Continental Helicopters Inc. as additional insured.

10. Risk of Loss

In the event the Helicopter is partially damaged, Lessee shall restore the Helicopter to the same condition as it was prior to the loss. In such event the Lessor shall reimburse Lessee from any insurance proceeds received by Lessor resulting from such loss.

In the event of a total loss of the Helicopter, payment should be made to Lessor for the remaining balance of the cost of the helicopter and the remaining (*sic*) sent to the lessee.

11. Non Assignment

The Lessee (*sic)* shall not be assigned of the Helicopter sublet (*sic)* without the prior written consent of the Lessor.

12. Default

If the Lessee defaults in the Lease payments or defaults in the performance or observance (*sic*) shall not been remedied within (10) days following written notice thereof given by the Lessor to the Lessee, the Lessor may at his options (*sic*) terminate this lease by written notice and take possession of the Helicopter. All rents due at that time be due and payable immediately.

13. Notices

All notices required or contemplated under the lease shall be deemed to be given 10 days after the notice is deposited in the US Mail first class, postage prepaid and address (*sic*) to the parties as follows

Lessor:	Lessee:Toucan Helicopter Company
Karl. R. Renz III	Errol C. Pratt
15827 N. 41st Place	175 Southwood Court
Phoenix, AZ 85032	Fayetteville, GA 30314

14. Applicable Law

This agreement is entered into, governed by and construed in accordance with the laws of the State of Arizona.

15. Entire Agreement

This lease agreement sets forth the complete and entire understanding of the parties with respect to its subject matter superseding any and all prior negotiations, representations, warranties or agreement. This lease may not be amended or modified except in writing, executed by the parties thereto."

The true nature of the Agreement

[8] It is to be noted that, as held by Muria J in a preliminary ruling on 9th November 2007, Clause 14 is a choice of law clause which selected the law of the State of Arizona but not a jurisdictional clause. Thus Mr Barry Becker was called as an

expert witness on the law of Arizona by the Respondents as Claimants at the trial before Muria J. Mr Becker, an Arizona attorney since 1973 and a commercial and tax specialist, gave evidence[5] that the 30th April Agreement was "a lease agreement that grants Lessee an option to purchase the helicopter if during the term of the agreement he did not materially default on any provisions of the Lease." He took the view that the Lessee had defaulted on the terms of the agreement but was entitled to the return of the $100,000 deposit minus the amount of unpaid rent and of the damages flowing to the lessor from his breach.

[9] Instead of relying on this uncontradicted evidence, Muria J applied Belize law to hold that the agreement construed as a whole was a lease or hire arrangement that granted the Lessee an option to purchase the helicopter. In their notice of appeal the Appellants alleged that Muria J had been wrong to apply Belize law instead of Arizona law but when the appeal came on for hearing this ground was abandoned for some reason. The Court of Appeal thus applied Belize law and held that Muria J had been quite correct in his conclusion.

[10] We endorse the reasoning of the Court of Appeal and Muria J as to the position established by the application of Belize law to the nature of the Agreement, which fortunately coincides with the position under Arizona law.

[11] It is difficult to see how there could be much argument with the findings of the courts below that the Agreement could be anything other than a one year hire of the helicopter with an option to purchase it, especially when looking at the manner in which the case was pleaded and defended. The claim was instituted on the premise that the helicopter was leased. The filed claim was for re-delivery of the helicopter, mesne profits, interest on any damages awarded and costs. The Statement of Claim was drawn up accordingly, so, for example, paragraph 2 states, "The Lease commenced on 30th April, 2005 and would have expired on 30th April, 2006." Interestingly, paragraph 2 of the Defence states, "The First,

[5] CCJ Record p 715 (witness statement), pp 301 and 306 (cross-examination).

Second and Third Defendants admits (sic) paragraph 2 of the Statement of Claim." Paragraph 5 of that Statement states "In breach of the aforementioned Lease the Defendants failed or refused to …." and then there follows certain alleged breaches of the Lease. The Defence then simply attempted to explain away these alleged breaches.

[12] Upon an examination of the Defence and Counterclaim it is strikingly apparent that the claim is *not* made that the helicopter was sold to the Defendants or that the Agreement should be construed in a manner that was different from the way in which the Claimants did. Furthermore, as a result, in breach of Rules 10.5(4) and (5) and 10.7 of the Supreme Court (Civil Procedure) Rules 2005 many of the allegations in the Defence and Counterclaim consist of bare denials or denials of knowledge of averments, focusing negatively against the Claimant-Respondents having a right to terminate the Agreement and recover the helicopter without spelling out any positive case for having title to the helicopter under a contract of sale payable by instalments. Such a case did not even emerge as a fundamental issue at the pre-trial conference where counsel agreed[6] the following issues for trial:

> "(1) Whether the Claimants lawfully terminated the Lease/Purchase Agreement.
> (2) Whether the Claimants are entitled to delivery or possession of the helicopter.
> (3) Whether the Claimants are entitled to damages."

[13] It was only at trial that it was argued that the agreement was a contract of sale and that title to the helicopter had passed under Belize law to the Defendants, subject to the Claimants' lien for outstanding payments of the purchase price.[7] Some basis for this appeared from the witness statement of the First Respondent but, while such statements may supply particulars that formerly were required to be

[6] CCJ Record p 725.
[7] Trial judgment [6], CCJ Record pp 518-519.

contained in pleadings,[8] a clear positive case ought to have been asserted in the pleadings to lay the foundation for particulars supplied in a witness statement before the court can resort to investigation of such particulars. To ensure a fair and expeditious trial, counsel must ensure that the key issues in their clients' disputes feature expressly in their pleadings: a key issue cannot be left to be teased out of witness statements. Furthermore, where there are several claimants and defendants it should be made clear why all those particular parties have been made parties. This would very much have clarified issues that had to be dealt with here at [6] and [32]-[33].

[14] Even if one were to ignore the pleadings, although there is some support for a sale agreement in the last sentence of Clause 10 providing that, in the event of a total loss of the helicopter, payment of insurance proceeds "should be made to Lessor for the remaining balance of the cost of the helicopter and the remaining (*sic*) sent to the Lessee", there are strong contraindications against any obligation to purchase the helicopter. Clause 6 provides that in the event of a return of the helicopter it would be returned to Mesa, Arizona, at the Lessee's expense. Such a return could be necessary under Clause 7.2 envisaging a 30-day notice by either party to terminate the Agreement and under clause 12 entitling the Lessor to terminate the Agreement by written notice for default in performance of covenants during the year-long lease. Such a return could also be necessary if the Lessee did not exercise his option to purchase the helicopter when the lease expired on 30 April 2006. This could arise because of difficulty in providing the $140,000 balance of the $240,000 purchase price. Twelve payments of $4,500 (75% of the minimum $6,000 a month) amount only to $54,000 and it seems unlikely that hours of use per month in excess of the 20 hour minimum would bridge the gap between $54,000 and $140,000. In the last month of the Agreement it could turn out that a significant amount would be needed to find the balance of purchase price due on expiry of the lease by the Appellants in order to acquire ownership of the helicopter. The Lessee could then – as will be seen –

[8] DMV Ltd v Tom L Vidrine Civil Appeal No 1 of 2010, Belize Court of Appeal 20th October 2010(unreported).

recover his $100,000 deposit as a penalty except so far as any damages could be offset by the Lessor.

Defaults under Clause 4 as to payments and reporting hours flown

[15] Under Clause 4, $300 per flight hour is payable monthly in arrears (since payment in advance is not stipulated for) with a minimum $6,000 payable for 20 hours together with payment for extra hours flown. The Lessee was obliged to report promptly to the Lessor on the first day of each month the total flight hours flown the previous month, calculated by deducting from the meter reading shown on the Hobbs Meter at the end of the current month the meter reading for the end of the previous month. Assuming the Lessee exercised the option to purchase at the end of the 12 months, the Lessor would keep 25% of the rental payments as rental but 75% would be credited towards the balance of purchase price. It was important for the Lessor to know each month the hours flown the previous month so that he could receive extra payment for more than 20 hours each month. Thus if 10 hours were flown on the 1st, 3rd, 5th, 7th, 9th and 11th month of the lease and 30 hours flown on the six even months, the reading on the Hobbs Meter for the year from 30th April 2005 would show 240 hours flown, averaging out at 20 hours a month. The Lessee, however, who had paid for the minimum 20 hours each month would still be liable to pay for the 10 extra hours flown each even month, amounting to $18,000 for 60 hours at $300 per hour. If the Lessee did not report the hours flown each month and at the end of the year the Hobbs Meter only revealed 240 hours flown from 30th April 2005 the Lessee would be able to escape with not paying $18,000 due under the Agreement.

[16] In any event, the duty to record hours flown, so that the Lessee would receive prompt payment for extra hours as well as the $6,000 a month, was important for helping the Lessor's cash flow, the Lessee accepting in his witness statement that he had been told by the Lessor that the monthly payments were needed for his company, the second Respondent to meet its monthly financial obligations. Indeed, the Lessee and Lessor agreed in February 2006 that, due to the Lessor's

company's sizeable overdraft with 1st Source Bank of Indiana guaranteed by the Lessor, payment of money due under Clause 4 should be paid to that bank instead of Wells Fargo Bank.

[17] So far as rental payments are concerned, the Appellants filed their position as to 'Record of payments made by Errol Pratt' the day prior to the hearing before us. A week later the Respondents filed their position as to such payments supported by copies of relevant documents. From our examination of the position it is clear that $6,000 was paid to the 1st Source Bank as above on 2nd March 2006 for the month of February but no payments were thereafter made for the months of March and April 2006. Although the Respondents claim that no payment of rent was made to the Wells Fargo Bank in October 2005 for the month of September 2005 their Statement of Claim only claims non-payment of rent for March and April 2006, so that they are limited to that.

[18] As a result of such non-payment and the failure to report flown hours, a notice of default dated 1st May 2006 and a notice of termination dated 1st June 2006 were given to Mr Pratt under Clause 12. Muria J held at [22] that he was "satisfied on the evidence before the court that the defendants defaulted by failing to comply with Clause 4(1) of the Agreement" which extends to the obligation to report hours flown each month so that payments due in excess of the $6,000 per month would be duly paid. There is no evidence of such reporting, which is not surprising when, in paragraph 10 of his witness statement, Mr Pratt states that he never promised to make such reports. Muria J specifically held that 1st Source Bank had last received one month's payment of rent in February 2006, overlooking that the American date 03/02/06 relates to March not February (and so covering the rent for February due in arrears), with no further payments being received thereafter.

[19] Thus, as held by Muria J and endorsed by the Court of Appeal, there were Clause 4 defaults as to a failure to report hours flown and non-payment of rent due for March and April, so entitling the Lessor to invoke Clauses 12 and 13.

Service of valid notices on the Lessee

[20] By a letter dated 1st May 2006, headed 'Notice of Default' and addressed to the Lessee's Clause 13 address, the Lessor gave notice of Clause 4 defaults to the Lessee, namely (1) failure to report the hours flown in March and April 2006 and to pay for them and (2) failure to pay the minimum $6,000 per month for those months. The Lessee was given until 20th May 2006 to remedy those defaults or the Lessor would terminate the Agreement and take possession of the helicopter under Clause 12. It appears that the grace period of 20 days was calculated on the basis of the ten days' grace following written notice of default specified in Clause 12, such a notice being deemed by Clause 13 to be given ten days after the notice was deposited in the US Mail first class, postage prepaid and duly addressed to the Lessee.

[21] Because the reported amount of flight hours (with a minimum of twenty hours) was implicitly due to be paid at $300 per hour in arrears on the first of each month, the notice should not have been sent out until the 2nd of May in respect of the month of April, but could validly have been sent out on the 1st of May in respect of the month of March.

[22] By a duly addressed letter dated 1st June 2006, headed 'Notice of Termination', the Lessor gave to the Lessee written termination of the Agreement by reason of the Lessee not having remedied the defaults set out in the 1st May Notice of Default, stating that all rights of the Lessee under the Agreement had ended and the Lessor was immediately entitled to possession of the helicopter. Furthermore, it correctly stated that the one year lease term had expired on 30th April 2006.

[23] It was suggested that the period of grace to 20th May was inadequate on the basis that a 1st May notice would be deemed under Clause 13 to be given on the 11th and that ten days following this under Clause 12 would take one to the 21st, while if properly the notice was a 2nd May notice it would be deemed given on the 12th and take effect if not complied with by the end of the 22nd. This, however, does not vitiate the notice when the notice makes it sufficiently clear to the reasonable recipient that the sender intends to exercise the rights available to him which become exercisable under a particular clause and has merely made a slight miscalculation.[9] What is crucial is that the Lessee had not remedied his defaults by the end of 22nd May and that Clause 12 required "all rents due at that time be payable immediately", while the failure each month to report miles flown the previous month appears irremediable since the accuracy of late reported miles flown could not be checked.

[24] It was further suggested that once the lease term expired on 30th April the Lessor could not exercise the rights he claimed to exercise by his letters of 1st May and 1st June. This overlooks the fact that the Agreement contains a bundle of rights some of which are independent of the one year term. If after the term had expired it had been discovered that during the term the Lessee had not paid rent or had not maintained the helicopter properly as promised, it obviously would not be a defence for the Lessee to state that the term had expired. When a contract is terminated by acceptance of a repudiatory breach or by a notice of termination or by effluxion of time it is terminated for the future but without prejudice to rights accrued before termination.[10] Since the Lessee had an option to purchase the helicopter that was conditional on not having defaulted on obligations owed during the currency of the lease and he had defaulted so as to confer a vested right on the Lessor to have the helicopter free from the option, it is not a defence for him to state that the Lessor did not take action to exercise his vested right until a month or so after the lease had expired (unless the Lessee had remedied

[9] Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749.
[10] Johnson v Agnew [1980] AC 367 at 393 and at 396 per Lord Wilberforce, endorsing McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 at 476-477.

remediable breaches of his obligations before the vested right was effectively exercised).[11]

The fact of service

[25] The Court of Appeal did not think that Appellants' counsel had shown that the judge's fact-finding was aberrant enough to justify interference with it although the judge had held that notice of default and termination had been served on the Lessee without any detailed consideration of the evidence. It seems that the judge must have been influenced by the Lessee in his witness statement not having denied receiving the notices from the Lessor, though denying this in his defence and in his oral evidence that mainly concerned other matters relating to the efforts made to pay unpaid rent and tender the balance of the purchase price, where the judge might not have been impressed by him. It seems too that, despite the extent of hearsay evidence given by the Third Claimant (in the absence of the First Claimant) and admitted into evidence, the judge was prepared to give more weight to such evidence than Appellants' counsel considered proper.

[26] Significantly, however, on appeal to the Court of Appeal, the following exchange is recorded:[12]

Justice Morrison: "So the two notices that are in the record, the Appellant's position is that it was not received by him."

Mr Elrington SC: "Not that it was not received by him. It was not the notice contemplated by the contract."

[27] Thus Appellant's senior counsel is accepting that the notices were received by the Appellant, but going on to submit that a proper notice contemplated something further, which he went on to submit was evidence being provided of the date of posting with prepaid postage to the requisite address so that the precise running of time could be ascertained. Such evidence would, of course, be helpful. In its

[11] Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd [1971] QB 488.
[12] CCJ Record p 77.

absence, however, there is nothing to indicate that the First Appellant did not receive the 1st May Notice of Default or the 1st June Notice of Termination at his requisite address within ten days of such Notice as provided in Clause 13.

Effective termination of the Agreement

[28] From 23rd May 2006 the Lessor had a vested right to terminate that part of the Agreement not comprising the hiring part that had automatically expired on 30th April 2006. There had been a failure to pay all rents due immediately and the failure each month to report the flown mileage appears to be irremediable. The Lessee's right to use the helicopter had already expired on 30th April 2006 so the Lessor left it until 1st June 2006 to take advantage of his 23rd May 2006 rights to send the Notice of Termination, making it clear that all the Lessee's rights under the Agreement had ended and that the Lessor was entitled to unpaid rent and its equivalent until return of the helicopter plus the cost of recovering the helicopter.

[29] By virtue of Clause 13 the 1st June Notice would take effect on 11th June thereby affording the Lessee a further grace period for remedying his rental defaults,[13] but not the irremediable flight hours reporting default. As it happens, it appears from a 13th October 2006 affidavit of Mr Tommy Thompson that in March 2006 the Lessee had provided him with $12,000 to pay two months due rent but, despite his best efforts, he had not been able to obtain the precise details of the 1st Source Bank into which to deposit the money (though on 2nd March 2006 $6,000 had been paid in to that Bank by the Lessee) and so on 2nd June he had, on the Lessee's instructions, deposited it with "the Citizen's Trust Bank in Toucan Investment and Financial Services Account" and forwarded the deposit slip to the Lessee.[14] The Lessee attempted no payment or tender of payment until mid-July but by 12th June the Lessee had lost the opportunity to purchase the helicopter, which on 8th July had, indeed, been leased to the Fourth Respondent, Atlantis Helicopters de Mexico SA de CV, whose chief executive was the Third

[13] Empresa(supra).
[14] CCJ Record p 558.

Respondent, Wayne Macauley. What, however, was to happen in respect of the Lessee's $100,000 deposit?

The $100,000 deposit and the order of Muria J upheld by the Court of Appeal

[30] The Order of Muria J endorsed by the Court of Appeal was as follows:

> "1. Judgment for the claimants.
> 2. The 1973 Bell 206B Helicopter Registration N73AJ Serial No 922 to be delivered to the claimants.
> 3. Damages by way of rent arrears to be assessed and to be paid to the claimants.
> 4. The deposit of US$100,000 paid is forfeited to the claimants.
> 5. The amount of damages as assessed is to carry 6% interest per annum from the date of issue of the claim to the date of judgment.
> 6. Costs to be paid to the claimant, including the costs of repossession of the helicopter."

[31] As made clear at [8] above, the uncontradicted evidence of Mr Barry Becker, the expert witness on Arizona law applicable to the Agreement according to Clause 14 thereof and by the ruling of Muria J on 9th November 2007, was that the deposit was not forfeited but repayable to the Lessee subject to being offset by unpaid rent and any damages for which he was liable. Belize law is to the same effect. The lower courts appear to have overlooked the impact upon Belize law of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*[15] where the Privy Council held that if the amount of a deposit is not a genuine pre-estimate of the loss which at the time of the contract it appeared likely that the innocent party would suffer by reason of a breach, the whole deposit is treated as an *in terrorem* penalty liable to be returned. It appears to us that forfeiture of the $100,000 deposit in respect of a $240,000 purchase, being over 41% of the purchase price,

[15] [1993] AC 573, [1993] 2 All ER 370 (PC).

was not in April 2005 a genuine pre-estimate of likely loss and so amounts to a penalty. It follows that the whole $100,000 deposit is due to be returned to the Lessee except to the extent that it is more than offset by unpaid rent and the damages flowing from the Lessee's breaches of the Agreement. Fortunately, Arizona and Belize law have the same effect.

Orders against the Appellants but in whose favour?

[32] Four Claimants/Respondents have featured in the titles of this action through all its stages. It is, however, clear from the admissions[16] under cross examination of the Third Claimant/ Respondent, Wayne Macauley, who is chief executive officer of the Fourth Claimant/Respondent, Atlantis Helicopter de Mexico S.A. de CV, that neither of them has rights against the Lessee of the helicopter under the Agreement expiring on 30th April 2006. Such Agreement was between the Lessee and the First Claimant/Respondent Lessor, Karl Renz III (chief executive of the Second Respondent, Continental Helicopters Inc.) so that it is Karl Renz III alone who can sue the Lessee in respect of breaches of the Agreement (in the absence of any evidence of an assignment of his rights, and the Third Respondent denied that he had received any assignment).[17]

[33] The interests of the Second, Third and Fourth Respondents relate to a new agreement to lease the helicopter commencing on 1st August 2006 and terminating

[16] CCJ Record pp 340-341.
[17] CCJ Record p 339.

on 31st July 2009, and made on 8th July 2006[18] between the Second Respondent as Lessor and the Fourth Respondent as Lessee.[19] The Fourth Respondent as Lessee of the new lease can sue the Second Respondent as Lessor for its failure to make the helicopter available to it from 1st August 2006 to 31st July 2009, but neither of them can sue the Lessee under the earlier 2005 Agreement who is liable only to the First Respondent as the other party to it. It is trite law that strangers to a contract cannot sue in respect of it. The Second and Fourth Respondents knew of the 2005 Agreement and should not have proceeded with their lease until the helicopter had been recovered from the Lessee.

[34] It follows that it is the First Respondent as Lessor under the Agreement who is entitled to have the helicopter returned to him in Mesa, Arizona, at the Lessee's expense (pursuant to Clause 6 of the Agreement) and to unpaid rent in the sum of US$12,000. He is also entitled to damages for loss of use of the helicopter from 1st May 2006 until delivery of the helicopter to him by the Appellants or repossession by him, such damages to amount to a reasonable rent for the helicopter for each month from that date. As Lord Lloyd stated on behalf of the Privy Council in *Inverugie Investments Ltd v Hackett:*[20]

> "a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself … Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent."

[18] CCJ Record p 568
[19] CCJ Record p 573.
[20] [1995] 1 WLR 713,717- 718

[35] There is no reason for this principle to be circumvented because the Appellants in their own interests have obtained stays of execution of the judgments below so as to have the helicopter grounded in Belize. The law has always been strict towards someone who rents or hires another person's property for a particular period but who refuses to give possession of it back to that person when the period is over.

[36] While the Appellants are entitled to the return of the deposit of US$100,000, the First Respondent is entitled to set off against the deposit the amount due to him for unpaid rent and damages with interest thereon at 6% from the date of the issue of the claim to the date of judgment.

The Declarations and Orders of the Court

[37] The Court accordingly

DECLARES

(a) that the Appellants are in breach of the Agreement dated 30th April 2005;

(b) that the First Respondent is entitled to possession of the 1973 Bell helicopter registration N73AJ serial no 922 and to unpaid rent of US$12,000;

(c) that the Appellants are entitled to the return of their US$100,000 deposit, but such sum is to be set off against the above unpaid rent and any amount of damages found payable to the First Respondent together with interest thereon.

ORDERS

(a) damages for breach of the said Agreement to be assessed by a judge in chambers, with interest thereon at 6% from the date of the issue of the claim to the date of judgment;

(b) the appeal be dismissed with costs payable by the Appellants to the First Respondent.

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The Hon Mr Justice R Nelson

_____ _____

The Hon Mr Justice A Saunders **The Hon Mr Justice J Wit**

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The Hon Mr Justice D Hayton **The Hon Mr Justice W Anderson**