

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2007 HCV 02231

BETWEEN JANET MORGAN CLAIMANT
AND AIR JAMAICA LIMITED DEFENDANT

IN CHAMBERS

Audré Reynolds instructed by Patrick Bailey and Company for the claimant

Stacey Ann Smith for the defendant

December 18, 2008, January 15 and 23, 2009

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF DEFENCE
- REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM - RULE
13.3 OF THE CIVIL PROCEDURE CODE

SYKES J.

1. On May 3, 2004, Miss Janet Morgan, a passenger on Air Jamaica flight 014 from John F. Kennedy International Airport in the United States of America, slipped and fell, as she disembarked at the Norman Manley International Airport, Kingston, Jamaica. There is no doubt that the flight was an international flight.
2. According to the claim filed by Miss Morgan, she was descending a stairway that led from the cabin of the aircraft to the tarmac when she slipped on a metallic surface. The resulting injuries were (a) pain, tenderness and swelling of the right ankle and foot; (b) fracture of the right ankle and foot and (c) decreased range of motion of the mid-back.

3. After this injury, negotiations between the parties ensued but came to nothing. Miss Morgan filed claim on May 29, 2007, three years after the injuries, seeking compensation. The claim form and particulars of claim were served by registered mail. The documents were posted on June 1, 2007 and arrived at Air Jamaica on June 20, 2007. Air Jamaica filed an acknowledgment of service on June 22, 2007 but failed to file a defence.
4. No defence was filed and on August 3, 2007, Miss Morgan applied for judgment in default of defence. The registry of the Supreme Court declared, on January 1, 2008, (four months after the documents were filed) that there was some defect in the document filed and requested that Miss Morgan re-file the request for default judgment as well as other relevant documents. Miss Morgan complied and judgment was entered on January 10, 2008.
5. Air Jamaica was served with the judgment on or about March 18, 2008. On March 20, Air Jamaica applied to have the judgment set aside. Air Jamaica says that it has a real prospect of successfully defending the claim.
6. Miss Smith submitted that there is an international convention that governs international air travel. According to her, that convention covers the present case and therefore all rights and obligations of the carrier and the passenger are to be found within the four corners of that convention and nowhere else. Miss Smith further submitted, relying on English cases, that once the convention applies, a claimant is precluded from relying on the common law tort of negligence.
7. Miss Reynolds took a contrary position and was of the view that the common law action was not excluded by the convention. Let us look more closely at Miss Smith's arguments. The purpose of this examination is not to determine whether Miss Smith is correct but whether the submissions demonstrate that there is a real prospect of successfully defending the claim. This is the primary test laid down by rule 13.3 of the Civil Procedure Rules ("CPR").

The Warsaw Convention

8. Miss Smith submitted that the convention of which she spoke is the Warsaw Convention. The Warsaw Convention was signed on 12th day of October 1929 by the British Government. At that time, Jamaica was a colony of England and so did not have treaty making powers. The research done by Miss Smith has unearthed a United Kingdom statute known as the Carriage by Air Act of 1932. This Act was passed to give effect to the United Kingdom's obligations under the Warsaw Convention of 1929 to which it was a party. The Act also gave power to Her Majesty to extend the Convention to the entire British Empire.
9. This power was exercised. Her Majesty, by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, extended the Warsaw Convention to Jamaica (see second schedule of the Order). The Order has the Convention annexed to it.
10. One of the first things to note about this Convention is that article one declares that it applies "to all international carriage of persons, luggage or goods performed by an aircraft for reward." Therefore, it seems safe to say that Convention applies to this dispute between Miss Morgan and Air Jamaica.
11. I need not go into the details of the cases cited by Miss Smith. I only wish to say that if they are adopted and applied there then it means that the Convention is the sole source of rights, duties and obligations of all persons engaging international travel into and out of Jamaica. For this, she relied on the cases of *Sidhu v British Airways plc* [1997] 1 All ER 193 H.L. and *Phillips v Air New Zealand* [2002] 1 All ER (Comm) 801, which applied *Sidhu*.
12. If this Convention is applicable, then articles 22 and 23 which place a limit on the quantum of damages recoverable, applies, as well as article 29 which provides that the claim must be brought within two years from the time it arose.
13. Setting out the matter in syllogistic form, the proposition of Miss Smith is this: where any country is a party to the Warsaw Convention on international air travel, then that convention is the exclusive

source of the cause of action and remedy in all cases against an airline engaged in international travel in which a claim is brought in the courts of any of the contracting parties to the Convention. Jamaica is a party to the Warsaw Convention. Therefore, any cause of action or remedy against Air Jamaica, in Jamaican courts, arising from an international flight is governed exclusively by the Warsaw Convention. The normal municipal law of Jamaica is excluded.

14. The practical consequence of this is that the six year limitation period which normally applies to tort actions does not apply where the convention applies. So much for the substantive law, it is now time to see what the CPR says about setting aside judgments.

The Civil Procedure Rules

15. Under rule 13.3 (2) in deciding whether to set aside the judgment under rule 13.3, the court must consider whether the defendant has:

- a. applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;
- b. given a good explanation for the failure to file a defence.

Resolution

16. There is no question that the application to set aside the judgment was made promptly. It appears that the parties were in discussion with the hope of resolving the matter. This is the explanation put forward by Air Jamaica. The airline has said that it was distracted by the discussion and omitted to file a defence. I do not think that this explanation is a good one. Once a defendant is served with a claim form he needs to act in accordance with the rules. This does not prevent a negotiated settlement occurring. However, despite failing the good explanation test, that is not the end of the matter. Under the amended rule, the primary test is whether there is a real prospect of successfully defending the claim. This means that the case has to be more than arguable but does not have to rise to the level of certainty of success.

17. It seems that the Warsaw Convention, as interpreted by the English courts, provides support for Air Jamaica's position. It may be that this question has been determined already, but in the time available more exhaustive research could not have been done. This means that Air Jamaica has a real prospect of successfully defending the claim either because (a) even if liability is established the quantum of damages may be lower under the Convention than under the common law; or (b) the claim is barred by the terms of the convention. Other questions do arise but those would have to be resolved at the trial of this matter. These other questions include, whether Jamaica is still bound by this Convention which was imposed on her because she was a colony of European power; (ii) whether the currency referred to in the Convention as it stood in 1929 still applies; and (iii) whether Hague amendment of 1955 applies to Jamaica. In the short time available to do some research, there is an indication that the Warsaw Convention is to be replaced with the Montreal Convention once the requisite number of states ratifies it. These matters are best resolved at a trial and a full ventilation of the issues.

18. For these reasons, the judgment is set aside.