



[2024] JMSC Civ 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 003577

BETWEEN	RUTAIR LIMITED	CLAIMANT / APPLICANT
AND	JAMAICA CIVIL AVIATION AUTHORITY	1ST DEFENDANT / RESPONDENT
AND	MINISTER OF TRANSPORT AND MINING	2ND DEFENDANT / REPSONDENT

IN CHAMBERS

**Terri-Ann Guyah Tolan and Aisha Thomas instructed by Guyah Tolan & Associates,
Attorneys-at-Law for the Claimant/Applicant**

**Jonathan Morgan instructed by DunnCox Attorneys-at-Law for the 1st Defendant/
Respondent**

**Taneisha Rowe-Coke instructed by the Director of State Proceedings for the 2nd
Defendant/Respondent**

Heard: 6th December 2023, 19th February and 3rd April 2024.

**Judicial Review - Application to amend ground for judicial review after leave and
first hearing stages - Considerations - Application to file additional evidence in
support of judicial review application after the filing of fixed date claim form**

C. BARNABY, J

INTRODUCTION AND SUMMARY DETERMINATION

[1] On 6th December 2023, the substantive application for judicial review came on for hearing before me. Shortly before that hearing however, on 28th November 2023,

the Claimant/Applicant filed a Notice of Application for Court Orders (the Application) supported by an Affidavit of Treshauna Kelly, Amended Fixed Date Claim Form, and a 3rd Affidavit of Howard Levy in Support of the Amended Fixed Date Claim Form. These orders are sought on the Application:

1. *The time for service of this Notice be dispensed with to the time of actual service thereof.*
2. *That leave be granted to amend the Fixed Date Claim Form and for the Applicant to file a 3rd Affidavit in Support of the Amended Fixed Date Claim Form.*
3. *That the Amended Fixed Date Claim Form and the 3rd Affidavit of Howard Levy in Support of the Amended Fixed Date Claim filed on the 28th of November, 2023 be permitted to stand as properly filed.*
4. *Time be extended to the 28th of November, 2023 for the Claimant to file an Affidavit.*
5. *That the Affidavit of Treshauna Kelly filed the 9th day of November, 2023 be permitted to stand as properly filed.*
6. *If necessary, that the order contained in paragraph 4 of the Formal Order of Mrs. Justice Wolf-Reece made on the 24th day of April, 2023 be varied accordingly.*
7. *Relief from any sanctions imposed.*
8. *Costs to be costs in the claim.*
9. *Such further and other relief as this Honourable Court deems fit.*

[2] The grounds on which the Application is made will be addressed later in considering the reliefs sought.

[3] It suffices to say here that in responding to the Application on the occasion scheduled for the hearing of the judicial review claim, the Respondents expressed concern about the failure of the Applicant to serve the same in a timely manner. While there was an attempt to address the court on matters of law, in light of the contention, which I found meritorious - that the Respondents had not had ample opportunity to complete instructions and file evidence in response to the evidence

relied on if so advised, or to properly consider the import of the amendments sought - the hearing was part heard and the ensuing orders, so far as relevant were made.

1. ...
2. *The hearing of the Notice of Application for Court Orders filed 28th November, 2023 is part heard until 19th February, 2024 at 10:00am for one (1) hour.*
3. *The Defendants/Respondents to the Notice of Application for Court Orders referenced in order 2 are permitted to file Affidavit evidence in response to the application on or before 11th January 2024 if so advised.*
4. *If advised, the Claimant/Applicant is permitted to file Affidavit evidence in reply on or before 22nd January 2024.*
5. *Parties are permitted to file and serve written submissions and authorities on or before 6th February 2024.*
6. *The trial of the claim is adjourned for a date to be fixed by the court following the determination of the Notice of Application for court orders filed 28th November 2023*
7. ...

[4] The Affidavit of Nari Williams-Singh in Opposition to Notice of Application for Court Orders was filed on 11th January 2024 by the 1st Respondent, and on 18th January 2024 the Applicant filed a 4th Affidavit of Howard Levy in response thereto. The Applicant duly filed its written submissions and authorities on 6th February 2024. A bundle with the 1st Defendant's Speaking Notes and authorities was filed belatedly on 19th February 2024. The court was advised by Counsel for the 1st Respondent that having taken instructions and arrived at the position that the amendments sought did not touch and concern the Minister, no written submissions and authorities were filed.

[5] Following delivery of additional oral arguments on 19th February 2024, a decision on the Application was reserved to today's date, to provide an opportunity to the Applicant to consider and respond to the belated submissions and authorities filed by the 1st Respondent on or before 4th March 2024, and for the 1st Respondent to

file a response to any additional authorities raised. The Applicant filed submissions in response to the those of the 1st Respondent on 6th March 2024.

- [6] On consideration of the competing submissions and authorities, and for reasons set out below, I find that the Application should be allowed in part and make the orders set out at paragraph 61.

REASONS

Application to Amend Fixed Date Claim Form

- [7] In order to properly consider the application to amend the Fixed Date Claim Form, it is necessary to set out with some particularity the circumstances and grounds on which the Applicant was permitted to apply for judicial review by K. Anderson J on 27th January 2022, on its application for leave filed on 20th September 2018 praying that:

- (1) The time for service of this application be abridged to the time of actual service thereof;*
- (2) The Applicant herein is granted leave to apply for Judicial Review seeking certiorari to quash the decision of the Minister of Transport and Mining, the Honourable Mr. Robert Montague upon a recommendation from the Chairman of the Jamaica Civil Aviation Authority Phillip Henriques, and which decision was published in the Jamaica Gazette Vol. CXXI No. 78C' on Wednesday, June 20, 2018, appointing Christopher Raleigh Bickford as duly qualified Investigator-in-Charge in keeping with Part IIA, Section 5C of the Civil Aviation Act, 1966 as amended, to investigate the circumstances of the aviation occurrence involving Cessna U206F Aircraft, bearing Registration Markings N8281Q, operated by the Applicant herein, which crashed in Samuels Prospect, Trelawny causing the death of three persons who had been in the aircraft on May 3, 2018;*
- (3) The Applicant is hereby permitted to file a Fixed Date Claim Form and Affidavit in Support within fourteen (14) days of the date of this order;*
- (4) The Appointment of Mr. Christopher Raleigh Bickford as duly qualified Investigator-in-Charge to investigate the circumstances of the aviation*

occurrence involving a Cessna U206F Aircraft, bearing Registration Markings N8281Q, operated by the Applicant herein, is stayed pending the determination of this claim or until further order of the Court;

(5) Costs to be costs in the claim;

(6) Such further order/s as this Honourable Court deems fit.

[8] The grounds on which the Applicant relied are that:

- 1. This application is being made pursuant to CPR 56.3 for leave to apply for Judicial Review against the decision of the Jamaica Civil Aviation Authority and the Minister of Transport and Mining, appointing Christopher Raleigh Bickford as duly qualified Investigator-in-Charge in keeping with Part IIA, Section 5C of the Civil Aviation Act, 1966 as amended, to investigate the circumstances of the aviation occurrence involving a Cessna U206F Aircraft, bearing Registration Markings N8281Q, operated by the Applicant herein, which crashed in Samuels Prospect, Trelawny causing the death of three persons who had been in the aircraft on May 3, 2018.*
- 2. The aircraft in question was at all material times operated by the Applicant herein. On June 11, 2018 the Applicant through their Managing Director, Mr. Howard Levy objected to the appointment of Mr. Raleigh Bickford as investigator in the accident involving the subject aircraft.*
- 3. This investigator, Mr. Christopher Raleigh Bickford should not be appointed on the grounds that: -*
 - a. He was the investigator in charge of a previous incident involving a different aircraft operated by the Applicant, which resulted in him generating occurrence report number JA-2008-02 wherein he made findings which were biased, prejudicial and contrary to the findings of the Transport Canada Safety Board;*
 - b. Notwithstanding repeated requests by the applicant for the report of Mr. Bickford be withdrawn and amended for it to correspond with the findings of the Transport Canada Safety Board, he has failed to comply;*
 - c. That the Applicant believes that Mr. Bickford will not be fair and his history of open prejudice and bias to the Applicant makes him unfit to participate in any future investigations involving the Applicant;*

- d. *There is active litigation in the Supreme Court in Claim No. 2005HCV1748 seeking to challenge the contents and findings of his report and as such it would be irrational, unfair and highly prejudicial to appoint him in circumstances where his abilities are being questioned;*
4. *Notwithstanding this objection, the Jamaica Civil Aviation Authority proceeded to appoint Mr. Christopher Raleigh Bickford as the Investigator to review the accident hereinbefore referenced;*
5. *On September 20, 2018 Mr. Bickford wrote to the Applicant herein enclosing Jamaica Gazette Vol. CXLI No, 78C¹ dated Wednesday, June 20, 2018 under the hand of the 1st and 2nd Respondents indicating his appointment as duly qualified Investigator-in-Charge.*
6. *There is a good arguable case given the foregoing that there is inherent prejudice on the part of Mr. Bickford and he should not be allowed to have any dealings with the investigation herein into the Applicant, and said decision should be stayed pending the determination of the claim herein;*
7. *Leave should be granted to the Applicant herein to challenge the decision of the 1st and 2nd Respondents as they acted irrationally in appointing Mr. Bickford as such a decision would defeat the rights of the Applicant to a fair investigation and any input from Mr. Bickford given his previous conduct would amount to an injustice to the Applicant.*

[9] The record reflects that “... *the application for leave to apply for Judicial Review ... not being opposed ... leave is granted... tthe Applicant shall be required to file a Fixed Dated Claim Form seeking the Judicial Review reliefs applied for in the application for leave, by no later than February 11, 2022.*” The relief sought on the Fixed Date Claim Form filed 11th February 2022 are that:

1. *... the first hearing of the Fixed Date Claim Form be treated as the hearing of the claim;*
2. *An order of writ of certiorari to have the decision of the Minister of Transport and Mining, the Honourable Mr. Robert Montague upon a recommendation from the Chairman of the Jamaica Civil Aviation Authority Phillip Henriques,*

and which decision is published in the Jamaica Gazette Vol. CXLI No. 78C' on Wednesday, June 20, 2018, appointing Christopher Raleigh Bickford as duly qualified Investigator-in-Charge in keeping with Part IIA, Section 5C of the Civil Aviation Act, 1966 as amended, to investigate the circumstances of the aviation occurrence involving a Cessna U206F Aircraft, bearing Registration Markings N8281Q, operated by the Claimant herein, and which aircraft had an accident in Samuels Prospect, Trelawny on May 3, 2018; brought into this Honourable Court and quashed;

- 3. A declaration that the appointment of Mr. Christopher Raleigh Bickford as duly qualified Investigator-in-Charge to conduct any investigation whatsoever which touch and concern Rutair Limited is prejudicial and unfair and the Defendants are to ensure that where such an investigation is deemed necessary, an alternate investigator is selected;*
- 4. Any resultant report whether interim, preliminary or final, any recommendation, action or directive issued pursuant to any investigation conducted by Mr. Christopher Raleigh Bickford which touch and concern Rutair Limited is hereby declared null and void, and said reports are to be retracted and cancelled by the Defendants;*
- 5. The injunction of March 22, 2019 issued by the Honourable Justice K. Laing, in these proceedings shall remain in force;*
- 6. Costs and Attorney-at-Law fees to the Claimant herein;*
- 7. Such further and/or other relief as this Honourable Court deems fit.*

[10] Laing J had granted interim injunctive relief to the Applicant in the following terms on 22nd March 2019, prohibiting the Respondent or any persons connected to them

... from writing, publishing or otherwise disclosing to any person or entity, the contents of final Aircraft Accident Investigation Report (Final report# JA-2018-01) or any other report or findings of investigation regarding the aviation occurrence on May 3, 2018 involving a Cessna U206F Aircraft, bearing Registration Markings N8281Q belonging to the Applicant which crashed in Samuels Prospect, Trelawny except to the Applicant herein, until the hearing of the claim or further order of the Court.

[11] It is observed that the reliefs sought at orders 3 to 5 of the Fixed Date Claim Form were not among the orders for which leave was sought and obtained by the Applicant to pursue on its application for judicial review.

[12] Returning to the amendments sought on the Application it is observed that they relate exclusively to the grounds on which judicial review is being sought and not the reliefs being pursued.

Removal of paragraph 4(d)

[13] The first proposed amendment relates to the removal of paragraph 4(d) of the Fixed Date Claim Form and reads:

There is active litigation in the Supreme Court in Claim No. 2005HCV 1748 seeking to challenge the contents and findings of Mr. Bickford's report and as such it would be irrational, unfair and highly prejudicial to appoint him in circumstances where his abilities, motives and true intention are being questioned and scrutinized. (sic)

There is no objection to the removal of this ground and its removal does not affect the progress of the case or the position of the Respondents. The amendment will accordingly be allowed and is easily accomplished by striking through the relevant paragraph of the Fixed Date Claim Form.

Addition of paragraph 4(f)

[14] The second amendment concerns the inclusion of what appears at paragraph 4(f) of the Amended Fixed Date Claim Form filed by the Applicant and reads:

The Claimant contends that this investigator, Mr. Christopher Raleigh Bickford should not be appointed or be in any way concerned with any investigation concerning Rutair Limited on the grounds that: -

f. The appointment of Mr. Bickford as Investigator-in-charge is a breach of the Convention on International Civil Aviation Annex 13, which has been incorporated in the Jamaica Civil Aviation Act as Mr.

Bickford was employed to the 1st Defendant during the period June 2007-June 2015 and served as the Principal Operations Inspector assigned to the Claimant during the period of the 2008 Accident. This represents a conflict of interest as the 1st Defendant is the regulatory body and Mr. Bickford had principal oversight of the Claimant's compliance and operations and as the investigative authority, would be in a position of influence over the investigation. The appointment of Mr. Bickford to conduct an investigation into the 2008 accident and further into the 2018 accident, in light of his history and relationship with the 1st Defendant and previous knowledge and experience with the Claimant, demonstrates the bias against the Claimant in failing to ensure independence and impartiality in the investigation of aircraft occurrences of the Claimant.

- [15] The 1st Respondent concedes that the Court is empowered to permit amendments to statements of case in judicial review proceedings and cites as guidance the decision of the Court of Appeal in **Beep Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation** [2022] JMCA App 18, on which the Applicant also relies. There, Sinclair-Haynes JA with whom the rest of the court agreed stated:

[53] Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court's overriding objective. The factors for the court's guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge's consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide.

(i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties;

(ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed;

(iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late stage, for example close to the trial date with the result that there may need to be an adjournment or if the application is made after trial has commenced, it should be considered with greater scrutiny;

(iv) whether there was delay in making the application to amend, the extent of the delay and the reason(s) for the delay;

(v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment;

(vi) whether any prejudice to the parties may be appropriately compensated by an order for costs;

(vii) the arguability of the proposed amendment;

(viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice;

(ix) the reason(s) advanced by the applicant for seeking an amendment; and

(x) the importance of having finality in litigation.

[16] While not exhaustive, the application of the stated considerations - adapted having regard to the peculiarities of judicial review proceedings - is sufficient to dispose of the instant application and are addressed below.

The nature of the proposed amendment

[17] In paragraphs 6 to 7 of the affidavit of Treshauna Kelly which was filed in support of the Application, the affiant avers that:

6. Whilst preparing for the judicial review hearing, Counsel for the Claimant realized that the particularization in relation to the employment of Mr. Bickford

to the Civil Aviation Authority (JCAA) and his history with the Applicant whilst in the employ of JCCA was not detailed in the Fixed Date Claim Form, and that **it is prudent to amend the Fixed Date Claim Form to reflect that additional ground of bias only.**

7. There is no prejudice to the Defendants as the employment history of Mr. Bickford and his relationship with the Claimant was acknowledged in the 1st Defendant's case in the Affidavit of Nari Williams-Singh filed on October 30, 2018 in that he admitted that Mr. Bickford was employed to the 1st Defendant from the period June 2007 - June 2015 and was the certification or Principal Operations Inspector to oversee the Claimant. On the Claimant's case it is admitted that Mr. Bickford conducted inspections and audit processes and would therefore have had sight of compliance or maintenance records of the Claimant.

8. Therefore, the Applicant's cause of action has not changed as the issue before the court concerns the bias of the Investigator-in-Charge in previous dealings with the Claimant. The Applicant is essentially seeking leave from the court to amend the Fixed Date Claim Form to include an additional ground of this bias, but the substance and gravamen of the claim remains the same.

[Emphasis added]

[18] There are three well established grounds for judicial review as set out in the oft cited dicta of Lord Diplock in **Council of Civil Service Unions and ors. v Minister for the Civil Service** [1984] 3 WLR 1174 - illegality, irrationality and procedural impropriety.

[19] While the averments from Ms. Kelly may cause one to think that the amendment does not invoke any new ground, the true import of the proposed amendment is laid bare on a careful reading of its terms, and the written submissions of the Applicant, paragraph 14 of which states:

The nature of the amendment does seek to introduce the ground of illegality which we also say lends itself to as further support of the bias/procedural irregularity.

[Emphasis added]

[20] The Applicant relies on the decision in **Robert Foster v Coroporal Haye and the Attorney General** [2023] JMSC Civ 36 in contending that the proposed amendment should be allowed as it does not amount to the inclusion of a new “*cause of action*” but arose out of facts which were substantially the same as those already pleaded, and that it would be in the interest of justice to do so. That decision is incapable of assisting the Applicant however as it does not have as its concern the amendment of statements of case on applications for judicial review, which engages a very distinct procedure. In order to pursue an application for judicial review, leave of the court must first be sought and obtained. The success of an application for leave is dependent on the court being “*satisfied that there is an arguable ground for judicial review having a realistic prospect of success*”, as observed by the Board in **Sharma v Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)** [2006] UKPC 57 [14], a decision which has been consistently applied in this jurisdiction including in **John Reginald Mais v Administrator-General of Jamaica** [2019] JMSC Civ 40 cited by the 1st Respondent.

[21] On a review of the Application for Leave to Apply for Judicial Review, while allegations of procedural impropriety and unreasonableness were engaged, illegality was never alleged either explicitly or inferentially, as a ground for judicial review. Further, while it is evident that the Applicant has always alleged procedural impropriety, which is premised on allegations of bias, the fact of Mr. Bickford’s employment with the Respondent JCAA or prior involvement in the oversight of the Applicant in the context of that engagement had not been previously deployed to ground the Applicant’s allegation of bias. In these premises it is my view that the proposed amendment, if permitted, would constitute a significant reframing of the judicial review application which the Applicant obtained the leave of the court to pursue.

The stage of the proceedings; reason for delay; prejudice; and detriment to good administration; whether award of costs appropriately compensates for prejudice

[22] The Applicant rightly concedes that the application for amendment has been made at a late stage in the proceedings - it came on the cusp of the hearing of the substantive judicial review application and necessitated an adjournment.

[23] While any application to amend pleadings at a late stage requires great scrutiny, the level of inspection must be heightened for judicial review which requires the leave of the court to be pursued; and for which rules of court, informed by substantive law provide specifically for delay. In that regard CPR 56.6 provides thus.

(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

(2) However the court may extend the time if good reason for doing so is shown.

(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.

(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration.

[24] While specifically referable to the applications for leave to apply for judicial review, the matters which the court is required to consider are no less important in advancing the overriding objective of dealing with cases justly, when confronted with an application to amend a fixed date claim form filed consequent on leave being granted to pursue judicial review, where a new ground of challenge is sought to be introduced.

[25] The amendment under consideration being so concerned, the threshold at rule 56.6(1) must be met. The application to amend must have been promptly made and in any event, within three months when the proposed ground for judicial review first arose. To approach the exercise otherwise, leaves open to abuse this very important process established to check usurpation of power by public functionaries.

[26] Notification of the decision of the 2nd Respondent to appoint Mr. Bickford as Investigator-in charge of the 3rd May 2018 occurrence, on the recommendation of the 1st Defendant, was made on 20th June 2018 by publication in the *Gazette*. The appointment was therefore after Mr. Bickford's previous employment with the 1st Respondent and participation in the investigation of the 2008 occurrence involving one of the Applicant's aircraft. Both circumstances were known to the Applicant. Further, the regulations incorporating the Convention and Annex13 on which the Applicant relies to ground the allegation of illegality has existed since 2012, some six years before Mr. Bickford's appointment. In the circumstances the proposed ground arose on 20th June 2018. Over five years elapsed between that date and the filing of the application for amendment on 28th November 2023. This application cannot by any stretch be regarded as prompt and is well beyond three months since the proposed ground arose.

[27] Delay is only a discretionary bar however, as the court is permitted, in accordance with rule 56.6(2) to extend time where good reason for doing so has been shown. The *averred* "oversight on the part of counsel for the Applicant" does not so qualify, and is not assisted by the pre CPR dicta of Brett MR in **Clarapede and Co v Commercial Union Association** (1883) 32 WR 262 that

However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.

[28] While the adequacy of costs to remedy some prejudice caused by delay is generally a significant consideration on applications for the amendment of

pleadings, particularly those made at a late stage, having regard to the purpose of judicial review proceedings, it must yield to other considerations. The prescription at rule 56.6(5) is of utility to that end. It requires the court in considering whether to refuse leave or to grant relief because of delay, to consider whether there would be substantial hardship or prejudice to the rights of any person or whether the refusal or grant, as appropriate, would be detrimental to good administration.

- [29]** The 1st Respondent submits that it continues to be saddled with the strain of litigation relative to time and increased costs because of what it terms the Applicant's "inefficient conduct" of the matter. While the delay of the Applicant in applying for the amendment is in fact a serious matter, this alone would not bar the court from granting the proposed amendment. More significant to the current exercise are the concerns raised in respect of the 1st Respondent's ability to discharge its statutory responsibilities.
- [30]** The objective of an investigation into an aviation occurrence, whether at the domestic or international level, is the prevention of accidents and incidents. Consequently, the timely conduct, conclusion and reporting on investigations into aircraft accidents and incidents is critical for aviation safety and regulation of the aviation industry. While unnecessary and avoidable delay in judicial review proceedings which seek to challenge these investigations can be prejudicial to the 1st Respondent and detrimental to good administration, subject to what will be said on the arguability of the proposed ground, I do not believe that the grant of the application alone would cause substantial prejudice or detriment in the present circumstances.
- [31]** On my assessment, the proposed ground concerns matters of law to which submissions would go in aid. The Respondents having been given the opportunity to file submissions in opposition to the application at the adjourned substantive hearing on 6th December 2023, no substantial prejudice would be caused if the amendment is permitted. Additionally, the scheduling of a further hearing date for the substantive application has been reserved for the determination of the

application so that if further submissions are required to be made, they could be ordered without any further delay of the proceedings.

Importance of proposed amendment in resolving the real issues in dispute and arguability of the proposed ground for judicial review

[32] Of the importance of the proposed amendment, the Applicant submits as follows at paragraph 13 of its submissions.

... the amendment is critical to the Claimant's case as it sets the foundation upon which the Claimant alleges the appointment of Mr. Bickford is biased and acted unreasonably in breach of the principles of natural justice. The function of the court in judicial review proceedings relative to this matter is to see that lawful authority is not abused by unfair treatment. In order to assess unfair treatment, the real issue in dispute is to ascertain the standing of Mr. Bickford at the time of his previous involvement with the Claimant and to examine whether there was bias and/or breach of the law. This, we submit, would assist in the court's determination of the recent appointment of Mr. Bickford and whether the Claimant was given a fair hearing on its objection. Natural justice requires an examination of whether Mr. Bickford and the 1st Defendant was a judge in his own cause in order to determine the issue of bias squarely and plainly.

[33] The substantive application being one for judicial review, the merit or otherwise of the Applicant's contention must be assessed within the context of the established threshold for permitting an applicant to pursue judicial review, that is, the existence of an arguable ground with a realistic prospect of success.

[34] It is submitted by the Applicant that there is "good merit" in the proposed amendment. Reliance is placed on Jamaica's ratification and incorporation of the *Convention on International Civil Aviation* also known as the *Chicago Convention*, including *Annex 13* thereto, which make provision for the investigation of international civil aircraft incidents and accidents.

[35] Pursuant to reg. 2 of the **Civil Aviation Regulations, 2012**

*For the purposes of this **Civil Aviation Act and of these Regulations**, the **provisions of the Chicago Convention and the annexes thereto** together with the standards and recommended practices established by the International Civil Aviation Organization (hereinafter referred to as "ICAO") thereunder and such other internationally recognized standards and practices shall **(to the extent necessary to meet Jamaica's international obligations) be adopted and applied in Jamaica.***

- [36] From the foregoing, the adoption and application of the Convention, annexes or standards and recommended practices established by ICAO is not at large but is expressly limited to the extent necessary to enable Jamaica to meet its international obligations. The international obligation which is imposed by the Convention relative to the investigation of accidents is to be found in art. 26 which prescribes:

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

[Emphasis added]

- [37] It seems to me that the Convention, certainly as it relates to aircraft investigations, is geared towards regulating accidents to an aircraft of one contracting State in the territory of another contracting States, and therefore international in character. There is nothing on the evidence which suggests that the occurrence for which Mr. Bickford has been appointed as the Investigator-in-charge is of such a character, to enable the Applicant to rely on the Convention and Annex 13 to impugn the exercise of the powers given to the Respondents under the **Civil Aviation Act (CAA)** for the investigation of an accident in respect a domestic aircraft within

Jamaica. If I am incorrect in this view, my assessment of the proposed amendment on the basis that the Convention is applicable to a domestic civil aviation occurrence follows.

- [38] Pursuant to article 3.1 of “*Annex 13 – Aircraft Accident and Incident Investigation*”, the objective of an investigation of an aircraft occurrence is the prevention of accidents and incident, it is not to apportion blame or liability. Article 3.2 goes on to provide that

A State shall establish an accident investigation authority that is independent from State aviation authorities and other entities that could interfere with the conduct or objectivity of an investigation.

Note. – Guidance on the independence of an accident investigation authority is contained in the Manual of Aircraft Accident and Incident Investigation (Doc 9756), Part 1 - Organization and Planning and the Manual on Accident and Incident Investigation Policies and Procedures (Doc 9962)

- [39] Under the heading “*Organization and Conduct of the Investigation*”, this appears.

Note. – The Manual of Aircraft Accident and Incident Investigation (Doc 9756) contains guidance material for the organization, conduct and control of an investigation.

- [40] That is immediately followed by the subheading, “*Responsibility of the State in Conducting the Investigation*”, which provides thus, so far as is immediately relevant:

*Note. - **Nothing in the following provisions is intended to preclude the State conducting the investigation from calling upon the best technical expertise from any source.***

General

5.4 The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct,

consistent with the provisions of this Annex. The investigation shall normally include:

- a) the gathering, recording and analysis of all relevant information on that accident or incident;*
- b) the protection of certain accident and incident investigation records in accordance with 5.12;*
- c) if appropriate, the issuance of safety recommendations;*
- d) if possible, the determination of the causes and/or contributing factors; and*
- e) the completion of the Final Report.*

Where feasible, the scene of the accident shall be visited, the wreckage examined and statements taken from witnesses. The extent of the investigation and the procedures to be followed in carrying out such an investigation shall be determined by the accident investigation authority, based on the lessons it expects to draw from the investigation for the improvement of safety.

[Emphasis added]

[41] As relevant, the *Manual of Aircraft Accident and Incident Investigation (Doc 9756)* states that

2.1.1 In conformity with Article 26 of the Convention on International Civil Aviation, it is incumbent on the State in which an aircraft accident occurs to institute an inquiry into the circumstances of the accident. This obligation can be met only when appropriate legislation on aircraft accident investigation is in place. Such legislation shall make provision for the establishment of an accident investigation authority (or commission, board or other body) for the investigation of aircraft accidents and incidents that is independent from State aviation authorities and other entities that could interfere with the conduct or objectivity of an investigation.

2.1.2 The accident investigation authority must be strictly objective and totally impartial and must also be perceived to be so. The authority should be established in such a way that it can withstand political or other interference or pressure. Many States have achieved this objective by setting up their accident investigation authority as an independent statutory body or by

establishing an accident investigation organization that is separate from the civil aviation administration. In these States, the accident investigation authority reports directly to Congress, Parliament or a ministerial level of government...

2.1.3 In accordance with Annex 13, the State conducting the investigation shall designate the investigator-in-charge of the investigation, who will be responsible for the organization, conduct and control of the investigation. The investigator-in-charge would preferably come from the accident investigation authority. Notwithstanding, nothing precludes the assignment of the functions of the investigator-in-charge to a commission or other body.

2.1.4 In some States there might be a need for the accident investigation commission to be composed of members seconded from the civil aviation authority. It is essential that such a commission report directly to a ministerial level of government so that the findings and safety recommendations of the investigation are not diluted during passage through regular administrative channels.

[Emphasis added]

- [42] In this jurisdiction, pursuant to section 6A (1)(b)(v) of the CAA, it is the duty of the Civil Aviation Authority “*to provide aviation safety and security oversight by aircraft accident investigation.*” Under section 5C, where it is determined by the Authority that an investigation into the circumstances of an aviation occurrence is necessary, it shall appoint an Investigator-in-charge by notification in writing. The Minister may confirm or for good cause revoke such an appointment in writing and appoint another person to be the investigator-in-charge.
- [43] When the Convention documents are read, it clear that the independence of accident/incident investigation is ideally achieved through legislation which makes provision for the establishment of an accident investigation authority (or commission, board or other body) which is independent from the State aviation authority and other entities that could interfere with the conduct or objectivity of an investigation. Equally clear is that not all States have been able to achieve this, and that in some States it might be necessary for the investigation authority to be

composed of members who are seconded from the civil aviation authority. Where this is the position, the investigating authority should report directly to a ministerial level of government, to prevent dilution of the findings and safety recommendations of the investigation during passage through regular administrative channels. Also clear is that while the functions of an investigator-in-charge may be assigned to a commission or other body, it is preferable that the investigator-in-charge comes from the accident investigation authority. In all these circumstances, the appointment of an investigator-in-charge who was previously employed or indeed currently employed to the civil aviation authority does not appear to me to rise to the level of breach of Annex 13 as alleged in the amendment proposed by the Applicant.

[44] The Applicant also argues that there is nothing supplied by the 1st Respondent by way of documentary evidence to demonstrate that there has been compliance with art. 38 of the Convention which requires a State which finds it impracticable to comply, or deems it necessary to deviate from international standard or procedure to “... *give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established in the international standard...*” Having regard to the discussion on and the conclusions reached on the arguability of the proposed ground of illegality, I do not believe there is any merit to the contention. Further and in any event, the proposed ground does not allege that the absence of notification or deviation constituted a breach.

[45] In framing the proposed amendment under discussion, and in submissions, the Applicant also refers to a 2008 occurrence involving one of its aircraft and refers to the fact that Mr. Bickford served as the Principal Operations Inspector assigned to the Claimant during the period of that occurrence. I do not find this aspect of the proposed amendment to be important in resolving the real issues in dispute, as the matters referenced are the premise of the grounds which appeared at paragraphs 3 (a) to (c) of the Notice of Application for Court Orders for Leave to Apply for Judicial Review, and which now appear at paragraphs 4 (a) to (c) of the Fixed Date Claim Form.

[46] In all these premises I am not satisfied that the ground which the Applicant proposes to pursue, and which is contained at paragraph 4(f) of the Amended Fixed Date Claim Form is an arguable ground for judicial review having a realistic prospect of success. Accordingly, permission to amend is refused.

Application to permit additional affidavits

3rd Affidavit of Howard Levy

[47] The 3rd Affidavit of Howard Levy in Support of the Amended Fixed Date Claim Form - as suggested by its name - goes in aid of the proposed amendment. Having concluded that the proposed amendment to paragraph 4(f) of the Fixed Date Claim Form will not be allowed - for reasons already stated - the affidavit is otiose and permission to use it in the proceedings refused.

Affidavit of Treshauna Kelly filed 9th November 2023

[48] On 24th April 2023, at an adjourned First Hearing of the Fixed Date Claim Form, Woolfe-Reece J made the following orders:

1. *The hearing of the Fixed Date Claim Form filed on February 11, 2022 is now set in open Court before Judge alone on 6th December 2023 at 10:00 am for one (1) day.*
2. *The Claimant and 2nd Defendant if necessary are permitted to file **Affidavit in response to the Affidavit of Nari Williams-Singh filed on the 16th June 2023.***
3. *The **Affidavits in response** are to be **filed and served on or before 14th July 2023.***
4. ***No further Affidavits in response are to be filed and served after the 29th September 2023 without the leave of the Court.***
5. *The parties are to file and exchange written submissions and list of authorities on or before the 24th November 2023;*
6. *Claimant's Attorney is to file a Judge's Bundle on or before the 24th November 2023. Claimant's Attorney is to file and serve an Index to Judge's Bundle on the Defendant on or before the 24th November 2023;*

7. *Claimant's Attorney to prepare, file and serve Orders made herein.*

- [49] Among the orders sought by the Application are orders for an extension of time to 28th November 2023 for the Claimant to file an affidavit; that the Affidavit of Treshauna Kelly filed on 9th November 2023 be permitted to stand as properly filed; "if necessary" that paragraph 4 of Justice Woolfe-Reece's order be varied accordingly; and the Applicant be granted relief from any sanctions imposed.
- [50] The 1st Respondent opposes the application on the basis that the Applicant is attempting to obtain relief from sanction which is regulated by CPR 26.8, but has failed to make the application promptly or provide any good explanation for the failure to comply with rule 56.6(1). That rule requires applications for leave for judicial review to be made promptly and within three months from the date when grounds for the application first arose, in any event.
- [51] It seems clear to me from orders 2 and 3 of Woolfe-Reece, J that leave was given to the Claimant/Applicant and 2nd Defendant/Respondent to file affidavits in response to that of Mr. Singh on 16th June 2023 by 14th July 2023, and that reference to the filing of further affidavits "*in response*" at paragraph 4 relate to replies made to any such affidavits. The Affidavit of Treshauna Kelly sworn and filed on 9th November 2023 is not within the scope of the order as it is not in response or reply to any affidavit in the proceedings and is expressly stated as being "[made] ... *in support of the Fixed Date Claim Form which is being filed on February 11, 2022*". A variation of the orders of Woolfe-Reece, J is not required.
- [52] As earlier stated, leave was granted to the Applicant to pursue judicial review by K. Anderson, J on condition that the Applicant file a Fixed Dated Claim Form, the initiating process for applications for judicial review. CPR 56.9(2) requires a claimant to file evidence on affidavit "*with the claim form*" to make the substantive application. It is that rule which I believe is engaged on the Application, and not CPR 56.6(1) as contended by the 1st Respondent.
- [53] The affidavit of Ms. Kelly filed 9th November 2023, being sworn in support of the claim form, ought properly to have been filed with it on 11th February 2022. Affidavit

evidence having been filed with the Fixed Date Claim Form however, it cannot be said that there is no competent application for judicial review on account of non-compliance with rule 56.9(2) or the order of K. Anderson, J. In the circumstances I do not believe that there was any breach of any rule or court order to which a sanction is attached to engage an application for relief from sanction.¹ Its invocation by the Applicant was unwarranted and the opposition of the 1st Respondent on the basis that conditions of promptitude and the provision of a good explanation for the delay have not been met, as required by rule 26.8, is without merit.

[54] What the Applicant requires in my view is an order from the court permitting it to file additional affidavit evidence in support of the Fixed Date Claim Form. CPR 26.1(2)(c) was among the grounds relied upon by the Applicant.

[55] By that rule, the court is empowered, except where the Rules provide otherwise, to extend the time for compliance with any rule, order, or direction of the court, even if the application is made after the time for compliance has passed. The approach on the engagement of this rule is now well settled. The court is required to consider the length and reason for delay, the arguability of the case and the degree of prejudice to the other party if time is extended. Regard is to be had to advancing the overriding objective of dealing with cases justly.²

[56] The 1st Respondent submits that the application is marred by undue delay and that the explanation of “oversight” which has been proffered, is not a good one. The Fixed Date Claim Form was filed on 11th February 2022, almost two (2) years before the affidavit sought to be introduced and the Application filed. The Applicant is unable to resist either contention. Undue delay before the filing of an application

¹ See **SL v KS** [2024] JMCA Civ 4, [47] where Edwards JA addresses the circumstances under which an application for relief from sanction is triggered.

² See **Rose Marie Walsh v Clive Morgan (Administrator of Estate of Yvonne Iona Robinson, deceased)** [2023] JMCA Civ 27 [16] to [17] a recent decision in which the considerations were succinctly set out by Laing, JA (Ag) in delivering the judgment of the court.

for extension of time or the absence of a good reason for delay are not fatal to an application for extension of time, however.³

[57] The Applicant has already obtained leave to pursue judicial review and would accordingly have passed the hurdle of having an arguable case for pursuing the remedy. As to prejudice, except for adjournment of the substantive hearing date on 6th December 2023 caused by the belated filing of the Application (for which the Respondents were awarded costs), the 1st Respondent does not allude to other prejudice it would suffer if the Ms. Kelly's affidavit of 9th November 2023 is permitted to stand as properly filed.

[58] The purpose of the affidavit is to introduce into evidence two documents. They are *Continental Motors Field Notes* and *Air Safety Investigations Field Investigated Aircraft Incident/Accident Final Report* in respect of the occurrence the subject of the judicial review application and were disclosed to the Applicant by the 1st Respondent in its *Response to Request for Information* filed October 21, 2021. This followed the Applicant's *Request for Information* filed 5th October 2021 requiring the 1st Respondent to:

Provide a copy of the accident reports conducted by Cessna Aircraft Company (Aircraft Manufacturer) and Teledyne Continental (Engine manufacturer) with regards to the aircraft incident involving Cessna U206F Aircraft bearing Registration Markings N8281Q on May 3, 2018.

[59] The Applicant says the documents are directly relevant to the issues which are in dispute and there has been no suggestion to the contrary. In the absence of any obvious prejudice to the Respondents I can see no reason to refuse the Application to extend the time for the filing of the affidavit Ms. Kelly in support of the Fixed Date Claim Form to enable that which was filed on 9th November 2023 to stand as duly filed.

³ Ibid [18]

COSTS

[60] While the general rule in applications for judicial review is that orders for costs are not to be made against an applicant, having regard to the conduct of the Applicant in making the delayed Application without any good reasons for doing so, and considering that the most substantive request has been refused, a departure from the general rule is warranted in the circumstances of the case. I accordingly find that the Applicant is to bear the costs of the Respondents to the Application, to be taxed if not sooner agreed.

ORDER

[61] In all the foregoing premises it is ordered as follows:

1. Orders 2 and 3 sought on the Notice of Application for Court Orders filed 28th November 2023 (the Application) are refused.
2. The Fixed Date Claim Form filed 11th February 2022 is amended to remove paragraph 4(d) as a ground of review.
3. The time for the filing of additional affidavit evidence in support of the Fixed Date Claim Form is extended to allow the Affidavit of Treshauna Kelly filed on 9th November 2023, to stand as properly filed.
4. The substantive hearing of the application for judicial review is fixed for one (1) day in Open Court before a single Judge on 16th July 2024.
5. The 1st Defendant/Respondent is permitted to file affidavit evidence in response to the Affidavit of Treshauna Kelly filed on 9th November 2023, on or before 16th April 2024, if so advised.
6. The Claimant/Applicant is permitted to file affidavit evidence in reply to any response by the 1st Respondent pursuant to order 5 herein, on or before 1st May 2024, if so advised.

7. With the exceptions made at orders 5 and 6, no further affidavits are to be filed by any party except with the prior permission of the court.
8. Costs of the Application to the Respondents to be taxed if not sooner agreed.
9. The Applicant's Attorneys-at-Law to prepare, file and serve this order.

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Carole Barnaby
Puisne Judge