IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV01748

BETWEEN	RUTAIR LIMITED	CLAMANT
AND	JAMAICA CIVIL AVIATION AUTHORITY	1ST DEFENDANT
AND	HOWARD McCALLA	2ND DEFENDANT

Mr. Paul Beswick instructed by Beswick Ballentyne & Co. for Claimants/respondents.

Ms. Katherine Francis instructed by Director of State Proceedings for Applicant/Defendants.

Heard 16th May and 18th September 2006

Application to Set Aside Default Judgment
Public Authority - Crown Proceedings Act S. 29 (2) (c)
Interpretation Act S. 28

Campbell, J.

Background

(1) Rutair Limited (Rutair) is a commercial operator of a fleet of aircrafts of which the subject of the suit is a Cessna 208B Grand Caravan (the Cessna). It is a nine-seater passenger aircraft, bearing Jamaican registration, which carries passengers and cargo throughout Jamaica and to such other destinations as its operations specifications allow.

(2) Jamaica Civil Aviation Authority (the Authority) is the regulator for civil aircraft operations in Jamaica. It is constituted under the Civil Aviation Act and the Regulations made thereunder among its oversight functions are the issuance and renewal of Certificates of Airworthiness (the Certificate), without which an aircraft is precluded from flying.

(3) Mr. Howard McCalla is a Director of Flight Safety in the Authority, the department which has responsibility for the issuance of the Certificate. All the flight safety officers report to Mr. McCalla.

(4) When the Cessna was being added to Rutair's fleet, officers of the Authority stipulated that service scheduling of the type called a Daily Inspection (DI) should be performed every 48 hours. Additionally, it was ordered for this to be done when the aircraft was away from its home base and that the inspection should not be done by a Rutair pilot. The DI is similar to the pre-flight checks done by the pilot.

(5) Central to the dispute between the parties is a test required in accordance with the manufacturers approved maintenance schedule. The schedule designated that a non-destructive test (NDT) was due to be done in January 2005. This is an important test. It seeks to determine the aircraft's stress and metal fatigue status. Rutair chose a Miami based entity called Engineering and Inspections Unlimited (EIU) to perform the NDT. In March 2005, an agent of the Authority wrote Rutair,

indicating that the services of EIU had been used without the prior approval of the Authority.

(6) The Cessna's Certificate was due to expire on the 12th April 2005. On the 7th March 2005, an employee of Rutair wrote to the Authority, requesting that an inspection be done on the 10th March 2005 to facilitate the renewal of the Certificate. The inspection was not done and a Mr. Bryan of Rutair wrote to the Authority, applying for an extension of the Certificate. This was refused.

(7) Rutair claims that the Authority unreasonably and capriciously refused to extend the Cessna's Certificate, furthermore the Authority failed to schedule the inspection of the aircraft during the refusal period. That certain tests were not maintenance items and were therefore not susceptible to the regulatory reach of the Authority.

<u>The Claim</u>

(8) On 21st June 2005, Rutair filed a claim seeking;

(1) Damages for loss of revenue in the amount of US$90,000.00

(2) Damages for loss of goodwill due to the reduction of the claimant's availability to service its clientele

(3) Interest on US$45,000.00 at the rate of 25% per annum from the 18th March 2005, until payment.

(4) Interest on the US$45,000.00 at the rate of 25% per annum from the 23rd March, 2005, until payment.

(5) Interest on damages for loss of goodwill at such rate and for such period as to this Honourable Court may seem fit.

(6) Costs and attorneys-at-law costs.

(7) Such further and other relief as to this Honourable Court may seem just.

(9) On the 5th July 2005, an Acknowledgment of Service was filed. The final date for filing of the defence was the 20th September 2005. On the 21st September 2005, the Claimant entered default judgment. The entry of default judgment was done on day 43, after the service of the claim form.

(10) In an affidavit filed on behalf of the Defendants, Katherine Francis, Assistant Attorney General, states that she wrote to Rutair's attorneys-at-law on the 12th October 2005, seeking their consent to file defence out of time. The Claimants returned the consent form advising that they had already entered default judgment.

(11) On 18th October 2005, the Defendants filed an application to set aside judgment in default of defence. The relevant procedure is enumerated in Rule 13.3 which states:

(1) Where rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant-

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered:

(b) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

Should the Applicants have sought leave to enter default against the Authority?

(12) Counsel for Rutair submitted that there was no requirement for seeking leave pursuant to S. 29 (2) (c) Crown Proceedings Act, which provides:

> (2) Provision shall be made by rules of Court and Resident Magistrate Court rules with respect to the following matters:
>
> (a) ....
>
> (b) ....
>
> (c) For providing that in the case of proceedings against the Crown the plaintiff should not enter judgment against the Crown in default of appearance or pleading without leave of the Court to be obtained on an application of which notice has been given to the Crown.

(13) The Authority, although a statutory agency, was formerly a department in a Ministry of Government. It was established in 1995 pursuant to S. 6 of the Civil Aviation Act, as a body corporate to which the provision of Section 28 of the Interpretation Act applies.

(14) Section 28 of the Interpretation Act provides inter alia:

> (1) Subject to Subsection (2) where an Act passed after the 1st April 1968, contains words establishing, or providing for the establishment of a body corporate and applying this section to that body those words shall operate-
>
> (a) to vest in that body when established
>
> (i) the power to sue in its corporate name,

(ii)the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;

(b) to make that body liable to be sued in its corporate name.

(15)Prior to the coming into effect of the Civil Procedure Rules 2002, Section 258 B of the Civil Procedure Code provided:

> "258B. In any proceedings against the Crown no judgment for the plaintiff shall be entered in default of pleading without the leave of the Court or a Judge, and any application for such leave shall be made by notice of motion or summons served not less than seven days before the return day."

(16) The reason for leave to be granted recognizes that various departments, agencies and emanations comprise a modern state. The Rule makes due allowance for the Attorney General (in whose name all civil proceedings for and against the Crown should be brought) has knowledge of and service of the matter.

In D & LH Services Ltd. v The Attorney General and The Commissioner of the Fire Brigade SCCA NO.53/98 (unreported) Harrison, J.A. said at page 4;

> "The requirement of leave by the Court or a Judge prior to entry of judgment in proceedings against the Crown is not peculiar to section 258B. The restriction also exists under section 79 (summary judgment). The purpose and rationale are that the Crown consists of so many various arms and agencies that the court takes the precaution to make it certain that knowledge of and service of the correct government agency has been effected"

(17) The Civil Procedure Rules 2002 are silent on Proceedings by or against the Crown. The Rules are made pursuant to Section 4 of the Judicature (Rules of

Court) Act. The provisions of Section 29 cannot be repealed by "side-wind," it would need the clear unambiguous words of a statute to do so.

(18) The learned authors of 'Maxwell on the Interpretation Statutes' Twelfth Edition, at page 196 states:

> **Generalia speciaibus non derogant**
>
> "Now if anything is certain it is this," said the Earl of Selborne L.C in Vera Cruz, "that where there are general words in a later act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated, from merely by force of such general words, without any indication of a particular intention to do so. In a later case Viscount Haldane said; "We are bound...to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provisions for it unambiguously, there arises presumption that if in a subsequent statute the legislature lays down a general principle that general principle is not to be taken to rip up what the Legislature had before provided for individually, unless an intention to do so has been declared."

Parliament had specifically made provisions for the procedure to be applied in proceedings for and against the Crown. Rules made pursuant to S. 4 of the Judicature (Rules of Court) Act, which makes no specific reference to S. 29 of the Crown Proceedings Act, cannot repeal, alter or derogate from that Act.

(19) It is therefore required that leave by the Court or a Judge be granted prior to entry of judgment in proceedings against the Crown. The Authority is a body

corporate that pursuant to S. 28 of the Interpretation Act can be sued and be sued in its own name. The Public Authority Act provides no requirement for the grant of leave before the entry of a default judgment against a Public Authority. Section 29 (2) (c) is therefore not applicable and there was no requirement for leave to be obtained before the entry of default judgment by Rutair against the Authority.

I shall now consider the pertinent Rules in the CPR, where the Court may set aside a default judgment.

(20) **Rule 13.3 (1) (a)**

It was submitted on behalf of the Applicant that the application was done within four days of the default judgment entered coming to the attention of the Defendants. The Claimant had not given the Defendant notice that he had obtained a default judgment. The Defendant had written to the Claimant's attorneys requesting that they agree an extension of time, as provided for by Rule 10.3 (5). The request was refused and Counsel for the Defendants was informed that a defence had already been filed. That letter was received on the 14th October 2005. The Defendants' application to set aside that judgment is dated the 18th October 2005 and filed on the 19th October 2005. Counsel for the Claimant, neither in his written submissions nor in his oral presentation, contended that the period of four days was unreasonable. I find that the Defendant had made their application to set aside the judgment as soon as was reasonably practicable.

(21) **Rule 13 (3) (1) (b)**

The Claimant contends that the Defendant has not offered a good explanation for the failure to file a defence. The defence contends that the defence was only able to file a defence after the receipt of full and detailed instructions were received. The particulars of claim covers 53 paragraphs. It deals with several agencies, including Jamaican Civil Aviation Authority and Federal Aviation Administration, and the statutory regulations made under these bodies. Several technical documents are referred to in the particulars of claim, manufacturers' maintenance operating specifications for the Cessna Certificate of Airworthiness and various maintenance certificates and tests. Several officers of the Authority are therein named. There was testing done by a foreign entity. It is noted that a draft defence has been prepared.

(22) In the case of D & L H Services Limited (supra), there was an appeal against the setting aside of a judgment in default of defence, which had been entered after a hearing for leave to enter judgment against the Defendant. It was ordered that the Claimant be at liberty to enter judgment but execution stayed for 14 days and the Defendant had leave to file its defence. The Defendant failed to comply with the "unless" order and the Claimant entered default. The Defendant then filed to set aside the judgment and sought time in which to file there defence. In the affidavit supporting the application, it was explained that the Director of

Litigation was involved in two cases in the Court of Appeal and was therefore tardy in vetting the draft defence that junior counsel had prepared.

The Court held that at page 9 of the judgment, Harrison J.A

> "In the circumstances of the case, I am of the view that the tardiness in returning the approval of the draft defence prepared from 10th March 1998 is a sufficient explanation of the delay in obeying the "unless" order of 10th March 1998."

I find that in the circumstances of this case, with the myriad of agencies, persons, testing, documentation involved, the assertion by Katherine Francis that the failure to file defence within the time prescribed was a result of not receiving full instructions within the time is a sufficient explanation. In coming to this decision, I take into consideration the scope and range of the Authority's work; the large numbers of persons who were mentioned in the particulars and whose role was important to the issues.

Rule 13.3 (1) (c)

(23) Has the Defendant a real prospect of successfully defending the claim. There is nothing false or fanciful about the Defendant's case. It is a real case, there is adequate "grist" for the mill of the Defendant's counsel to argue the proposition that prior approval from the Authority is necessary for the "tester" who will conduct the NDT. Similarly, it is a real issue whether the regulations covered the involvement of EIU. Other than the resolution of factual issues particularly between Mr. Bryan and officers of the Authority, there are several issues where the

Authority as regulator has instituted practices affecting the Claimant which both sides appear convinced of the merits of their respective cases. I find that the Defendants have a "real prospect" of successfully defending the claim.

(24) Even if the Defendants had failed to satisfy one or more of the standards established by Rule 13.3 (1), the court is enabled to adopt a "flexible approach" depending on the circumstances of the case. (See Rule 1.2 of C.P.R.) Keith O'Connor v Paul Haufman Percival Piccot and Eugene Adolphus Piccott SCCA No. 33/2002. I would have been minded in the circumstances of this case to grant the Defendants' application to set aside the default judgment in the event they had not satisfied any or all of the standards prescribed under Rule 13 (1) (a).

The application to set aside default judgment is granted, the time for the filing the defence is extended for a period of 14 days from the date of the order herein. Costs to the Claimant to be agreed or taxed.