[2022] JMSC Civ 192

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2005HCV01748

BETWEEN	**RUTAIR LIMITED**	**CLAIMANT**
AND	**JAMAICA CIVIL AVIATION AUTHORITY**	**1ST DEFENDANT**
	HOWARD MCCALLA	**2ND DEFENDANT**

Tort-Breach of Statutory Duty- Negligence- Whether oral permission granted for aircraft to be serviced outside jurisdiction-Whether certificate of airworthiness ought to be renewed-Whether delay in renewing result of negligence or malice-Whether claim for breach of statutory duty possible.

Captain Paul Beswick, Jerrisa Brown, Koyode Smith instructed by Ballantyne Beswick & Co. for the Claimant.

Althea Jarrett KC, Richard Jones and Lisa Whyte instructed by the Director of State Proceedings for the Defendants.

HEARD: 8th, 9th, 10th, 11th,12th December 2014, 21st January 2015(in Chambers), 24th February 2015, 3rd , 4th , 5th , 6th March 2015, 26th , 27th May 2015, 28th , 29th July 2015, 12th , 13th, 14 November 2018, 18 January 2021, 13 May 2021 (Zoom hearing in Chambers), 22nd September 2021, 27th January 2022 (Zoom hearing in Chambers), 13th July 2022 and 4th November 2022.

In Open Court

COR: BATTS J

INTRODUCTION

1. The trial of this matter took place over an extended period as it has been plagued by delays due mostly to unfortunate circumstances. Sadly, the Claimant's principal lost his son in a tragic event which occurred outside our shores. This

understandably prevented resumption of trial for a considerable time. Then there was the "Covid 19" pandemic which took the life of Captain Paul Beswick the Claimant's lead counsel. This court records its profound regret at the passing of Captain Beswick whose awesome presence in these courts will be sadly missed. His usual indomitable representation of clients was admirably displayed in the course of this trial. On a cheerier note lead counsel for the Defendants became a judge of the Supreme Court but this too necessitated a further delay. These delays, being unavoidable, I endeavoured to deliver this decision at the earliest possible time.

2. The Claimant is a registered company which operates an air transport business. Its Claim, filed on the 2nd June 2005, is for:

> *"…damages for loss of revenue money caused by breach of statutory duty and negligence committed by the defendants. The defendants without justification and/or reasonable cause, deliberately and capriciously refused to effect an airworthiness inspection of the claimant's aircraft when so requested for a period of 6 days. Subsequently when the said aircraft was inspected, the defendants without justification refused to renew the certificate of airworthiness of the claimant's aircraft for a further period of 6 days".*

The Particulars of Claim, filed on the same date, particularise the loss of revenue as being U$7,500.00 per day from 12th to 23rd March 2005 making a total of U$90,000.00. General damages, for loss of goodwill, is also claimed. Interest on special damages is claimed at a rate of 25% per annum.

3. The 1st Defendant is a regulatory body, established by statute, and the 2nd Defendant was its acting director-general at the material time. The Defendants deny liability and assert that the Claimant had, in breach of the relevant regulations, effected repairs on its aircraft outside the jurisdiction and at a facility which had not been approved. This necessitated an investigation. The inspection, which accompanied the investigation, revealed certain irregularities. The result was a delay in the renewal of the relevant Certificate of Airworthiness (referred to as C-of-A).

4. On the first morning of trial counsel indicated that documents, contained in certain bundles, were agreed. They were each, by consent, admitted as: Exhibit 1, the Claimant's Bundle of documents filed on the 5th December 2014; Exhibit 2, Defendant's Bundle of documents filed on 3rd December 2014; Exhibit 3, A Bundle of seventeen Statements of Account; and, Exhibit 4, A letter from HBG & Associates (chartered accountants) dated 14th November 2014.

5. The Claimant, also on the first morning, applied to substitute a new witness for Colonel Oscar Darby. The circumstances being that the Colonel was unable to give evidence. Counsel affirmed that the new witness, Captain Christopher Read, would give *"effectively the same evidence*" as contained in the witness summary of Colonel Darby. This application was opposed. I allowed the substitution on the basis that there could be no discernible prejudice to the Defendants. Several witnesses gave evidence and each was fulsomely cross-examined. In this judgment I shall outline the evidence, and will reference details, only where necessary to explain my decision.

THE CLAIMANT'S CASE

6. The Claimant's first witness was Mr Gilbert Gunn a licenced aircraft engineer with considerable experience in aircraft maintenance and, in particular, the maintenance of turbo prop engines. He had been in aviation for 56 years. He was the Claimant's director of maintenance (DOM) at the material time. A witness summary, but no witness statement, was filed for this witness who therefore gave his evidence in chief orally. He deponed to the Claimant's system and to the repairs and inspections done to the particular aircraft. With respect to its inspection and repair at the relevant time and place he said:

> *"Q: Were you in charge*
>
> *A: No, Director of Quality Assurance*
>
> *Q: Were you present*
>
> *A: I made up the worksheet. I went up when the job was completed to do duplicate inspection.*

Q: To best of your knowledge Rutair engineer pulled it apart and inspection done you then did duplicate inspection

A: He asked for additional inspection of wing bolts because in my view although not a requirement I felt it was so critical. I made entry for duplicate inspection. Means two individuals, one not associated with the job doing second one

Q: Non Destructive Testing (NDT) completed and aircraft put back together and inspected then flew back to Jamaica

A: Yes"

7. This witness explained the difference between the "Air Operating Certificate" (AOC) and the Certificate of Airworthiness" (COA). The former, approximated or was similar to a motor vehicle registration, the latter was like a certificate of fitness and required that a physical inspection be done. With respect to the aircraft in question he said:

"Q: Prior to 2005 any issues in relation to renewal of COA

A: Normally the JCAA investigator raise certain minor matters. Most times pass it on. Normally minor."

The witness was referred to Exhibit 2 page 15 being a letter dated 18th March 2005 which he said he had not seen before. That letter was from the 1st Defendant to the Claimant and referred to several "*discrepancies".* The examination in chief continued:

"Q: "Discrepancies noted" letter states seven of them. You did not see letter

A: No, Mr Bryan would have seen and if necessary forward to me

Q: Do you recall the seven items submitted to you for correction

A: Yes by Mr Bryan. Most corrected and some allowed to carry forward. These are minor as in Jamaica always corrosion. The cracked antennae needed replacement but the others can be carried forward.

Q: Placard attached?

A: Tell you type of ...fuel"

8. Mr. Gunn when cross-examined had this to say about the repair of the aircraft overseas:

"Q: In fact you needed an approved repair station

A: Yes, depends on situation normally Jamaica Civil Aviation Authority (JCAA) approve FAA approved stations

Q: Given the example put to you you would have had to have JCAA approval for that repair station.

A: Yes"

Later the following:

"Q: Plane Exhaust is corporation in Fort Lauderdale that did the welding on assembly

A: Yes

Q: They would also have had to have approval

A: Yes, that is not my area of responsibility.

Q: You were Director of Maintenance

A: Yes and aware of responsibility…

Q: So as Director of Maintenance you not concerned to find out whether repair station had been approved

A: Responsibility of Quality Control Manager. He arranged with JCAA. He went with plane. When job completed I reviewed the documentation. Director of Quality Assurance ensure quality of work.

Q: Before you sign off on work done at a repair station overseas is it that you assume the Director of Quality Assurance would first obtain approval

A: No I always check

Q: Did you check whether there was approval

A: That is not my responsibility

Q: When you sign entry for Plane Exhaust did you know whether they had approval

A: I was advised by Quality Assurance Manager Mr Anthony Bryan that they had approval

Q: When did he so advise you

A: Sure there is correspondence

Q: Was it before you signed off

A: Before aircraft went up"

9. On this question, of whether Plane Exhaust had been approved by the Claimant regulator (JCAA), to do repairs, the witness was shown exhibit 2 pages 133-135 and asked:

"Q: Your signature on it

A: Yes

Q: That statement was given 16th March 2005

A: Yes

Q: Look at page 134, 2nd page of statement

A: It is difficult to read

Q: It says "who is Plane Exhaust"

A: Yes

Q: See answer you gave

A: Yes

Q: Was approval sought to use them

A: At time I said I have to check with Mr Bryan

Q: You did not know in March 2005 whether approval had been obtained

A: I told you Mr Bryan advised me

Q: On 16th March based on your answer did you not know

A: I did not know of my own knowledge. When asked I would have to check

Q: This is Plane Exhaust

A: Yes the repair station

Q: If approval had not been obtained from JCAA would you have signed off on that work

A: No, I would query it and find out why"

10. Mr. Howard Levy, the Managing Director of the Claimant company, was the second witness called. His witness statement dated 30th September 2014 stood

as his evidence in chief. The statement was amplified by oral evidence. He explained that the aircraft in question, a 208B Grand Caravan which seated 9 persons and had registration number 6Y-JRG, carried passengers and cargo. In January 2005 it became due for a manufacturer's design inspection which included Non Destructive Testing (NDT). Engineering and Inspections Unlimited Inc (EIU), a company based in Florida, was used to do the testing because it held an Air Agency Certificate issued by the Federal Aviation Authority (FAA) of the United States. The 1st Defendant, the Jamaican regulator, does not have repair stations or sufficient personnel to do the inspection and testing necessary. The Claimant therefore relies on FAA certified facilities in that regard. The JCAA, he said, only does "*operational"* inspections.

11. Mr. Howard Levy stated that it was customary in the industry to obtain verbal approval and then "*followed by a paper trail*". The letter of the 5th January 2005, see exhibit 2 page 2, is the paper trail which followed the verbal approval. On the 28th February 2005, however, another copy of EIU's FAA certificate was given to Mr Lincoln Jackson the 1st Defendant's airworthiness inspector (AI). On the 3rd March 2005 Mr Jackson wrote to the Claimant alleging that the letter of 5th January 2005 was only received on the 2nd March 2005, see exhibit 2 page 6. The Claimant was accused of operating the aircraft contrary to the Civil Aviation Regulations (2004). Mr Levy asserts that it was not uncommon for the 1st Defendant to lose documents and to have more than one copy delivered to them.

12. Mr. Levy stated that, by letter dated the 7th March 2005 exhibit 2 page 7, the 1st Defendant requested an inspection of the aircraft. That inspection was scheduled for the 10th March 2005. This was necessary for renewal of the aircraft's Certificate of Airworthiness (C-of-A) which would expire on the 12th March 2005. This inspection was aborted due to "*unavailability"* of the Defendant's personnel. The C-of-A, Mr Levy explained, involved among other things a "*service check"* which was not required by the manufacturers of the aircraft (see paragraph 9 of his witness statement). He said that the C-of-A was necessary if the aircraft was to lawfully fly pursuant to section 28(1) Part V of

the Jamaica Civil Aviation (Safety, Security Aerodromes) Regulations 2004 (The Regulations), see paragraph 10 of his witness statement.

13. Consequent to the postponement of the inspection the Claimant, by letter dated 10th March 2005, exhibit 2 page 8, requested an extension of the C-of-A. This was refused by letter dated 11th March 2005 exhibit 2 page 9. The basis of the refusal was what Mr. Levy described as an "*alleged*" investigation. The letter advising of an investigation was dated 12th March 2005 exhibit 2 page 10. This letter was received on a Friday and as such the documentation requested was made available to the Defendants on Monday the 14 March 2005. Mr Levy states, in paragraph 16 of his witness statement, that on the 14th March 2005 the Claimant's Director of Quality Assurance (DQA) was orally advised by the 1st Defendant's Principal Maintenance Inspector (PMI), Mr Lincoln Jackson, that the annual inspection (AI) of the aircraft was cancelled on the instructions of the 2nd Defendant. By letter of the 14 March 2005, exhibit 2 page 11, the Claimant protested the said cancellation. Mr Levy maintains, in paragraph 21 of his witness statement, that at no time was the aircraft operated without a valid C-of-A. He describes the refusal of the Defendants to renew it as unreasonable. The "*investigation*" he says revealed no evidence of breach by the Claimant. The refusal to extend the C-of-A was therefore, "*without merit, unreasonable, unsubstantiated by the Regulations, capricious".* The rescheduled inspection only occurred on the 18th March 2005 (Paragraph 45 of his witness statement). The Claimant in consequence lost income, from the carriage of passengers and cargo, for the period 12th March 2005 to 17th March 2005 (Paragraphs 48 and 49).

14. Mr Levy went into considerable detail about the testing required by the Regulations and his understanding of how they applied. He also details at considerable length his company's, and its personnel's, experience with this type of aircraft. He endeavoured to demonstrate that at all material times the aircraft was airworthy (see paragraphs 27 to 44 of his witness statement).

15. Mr Levy asserts that by letter of the 18th March 2005 (exhibit 2 page 15), issued subsequent to the inspection, the Defendant raised alleged discrepancies.

Seven of them entitled "*Aircraft Inspection*" and the others *"Records Inspection*". Mr Levy asserts that none of these items could properly form the basis for refusal of a C-of-A. He says the Defendant's inspectors *"negligently and/or deliberately*" used them as a basis to refuse renewal of the C-of-A. Furthermore, the requirement for "*sign off*" by personnel at EIU in relation to the non-destructive testing (NDT) process is not a maintenance item. This caused further delay in the renewal of the C-of-A. The C-of-A was eventually issued on the 23rd March 2005 exhibit 2 pages 65 and 66. He states, "*This Certificate was issued without any action taken on the part of the Claimant in respect to the matters raised in the C-of-A, thereby causing the Claimant loss and damage"* (Paragraph 56 of his witness statement). The Defendant, he says, is therefore liable for further losses incurred in the period 18th to 23rd March 2005.

16. Mr Levy ends his evidence in chief by reference to Regulations: 5.105(c)(2), 5.040 (a) (2) and 5.110. He states that the aircraft was exempt from the requirement of an annual inspection because the aircraft inspection programme had been approved pursuant to Regulation 5.110.

17. By way of amplification Mr. Levy put in evidence the Minimum Equipment List (MEL) for the aircraft in question, see exhibit 5. Exhibit 6 is the Pre-Flight Inspection document and procedure for the aircraft issued by its manufacturer. Exhibit 7 is the Daily Inspection sheet required by the 1st Defendant. The witness also commented on some items mentioned in the letter of 18 March 2005, Exhibit 2 page 15. Notably the Automatic Direction Finder (ADF), which relies on an antennae and, which the letter describes as being cracked. The witness explained that one did not need an ADF to fly the plane. The witness went through each of the items in the letter. He also explained that Mr Anthony Bryan was deceased. The witness detailed his experience as a pilot and stated pilots do pre-flight inspections. This he attempted to demonstrate covered the same ground as the daily inspection. As regards the letter of the 5th February 2005 the following exchange occurred:

> *"Q: Comment on the contention that letter not sent*
>
> *A: Normally we can get verbal approval. If Mr Bryan says sent it is sent. Sometimes in authority and right after new year*

things get lost, I personally have had to submit documents more than once.

Q: Page 2 of Exhibit 2 you are copied

A: I got my copy so I have every reason to believe it went out."

After some more rather technical evidence and comment on other allegations his evidence in chief ended with the following exchange:

"Q: Do you remember the investigation letter referred to by Jackson, McCalla. You said nine years after no enforcement action. Since your witness statement has your position changed.

A: Up to now no sanction or payment of money, no interview in relation to investigation

Q: What happen to investigation

A: Your guess is as good as mine".

18. Mr. Levy when cross-examined admitted that the Defendant was obliged to inspect records and do an inspection prior to renewal of the C-of-A. He also admitted that the inspection by the Defendant prior to issuing the C-of-A is not the same inspection done by the Claimant on its own aircraft. The following exchange is important:

"Q: In paragraph 59 you are saying the authority need not have come to inspect to renew C-of-A

A: That is what I have written here

Q: Suggest that is incorrect

A: The authority itself they can choose not to inspect the aircraft. That is what I say

Q: Your C-of-A has a life span

A: Yes

Q: So it is authorities' prerogative if they choose to inspect

A: Yes

Q: Suggest it has to inspect

A: Don't agree

Q: Are you aware that under regulations C-of-A ceases to be valid if aircraft is repaired otherwise than in a manner approved by authority.

A: Yes records 40% of the value of aircraft

Q: In fact regulations mandate that Rutair must keep records for aircraft

A: Yes".

19. The witness insisted that the welding of a component was not repair to the aircraft. It was only to a component. This activity by Plane Exhaust Inc. did not therefore require approval from the Defendant. EIU he said only did testing not repair. Later the following exchange:

"Q: The welding done by Plane Exhaust constituted repairs

A: Yes repair and overhaul

Q: Suggest repair and overhaul are two different things

A: My response is some repair can be overhaul. The component that has been repaired, overhaul means repair. Repair does not mean overhaul.

Q: Suggest it was repair by Plane Exhaust

A: Yes

Q: Are you still saying that Rutair did not have to get approval of authority

A: Yes until today I do"

And later:

"Q: There can be no doubt that welding done by Plane Exhaust constituted major repairs under the regulations

A: (Pause) Yes

Q: By virtue of your ML manual, approval would have been required by authority before that major repair is done

A: Let me look at the manual

Q; Exhibit 2 page 94

A: On page 94 it says "an aircraft". When you pull off a component and take it to repair or overhaul it does not consist of the aircraft

Q: So a part of the aircraft is not the aircraft

A: That is exactly what I am saying. May I add, engine mount consists of eight several different parts. What was welded was only a part of the mount not the complete mount. MGM dealing with structural things. Damage to aircraft itself like fuselage (the body of aircraft). The AC43-13-1-2 is an FAA manual that FAA issues. That is what gives us a controlling state under the ICAO".

20. When confronted with Mr Gunn's earlier evidence, that he would not have signed off on repair if approval had not been granted, Mr. Levy said: *"Benn (Mr Gunn) is a soldier and is used to system of permission. He is up in age. He has been out of the company. His mind is not as sharp…".* When asked, if permission was not necessary why was it requested, he said,

> *"Because we were in an industry because it caused less problems when you ask permission even when you don't need it".*

The witness was taken through the various issues raised by the Defendant in the letter of 18th March 2005, exhibit 2 page 15. He gave varying responses but ultimately concluded that none went to the plane's airworthiness. For reasons, which will become apparent, I do not need in this judgment to reference all the technical explanations and/or details stated.

21. The witness was shown the letter dated 7th March 2005 signed by Mr Bryan which letter requested renewal of the C-of-A, see exhibit 2 page 7. At page 9 of Exhibit 2 is the letter signed by the 2nd Defendant which declined to do so. Mr Levy recalled receipt of that letter. He was shown his letter of the 12th March 2005 and his statement, at page 150 of Exhibit 2. It was suggested to him that there was no response from the Claimant to the letter of 3rd March 2005, exhibit 2 page 6. Mr. Levy responded:

> *"It is Mr Bryan who has to answer. I don't know"*

The following exchange followed:

"Q: You agree that the 48 hour daily inspection is part of Rutair's daily inspection programme

A: From day one that I disagree with Mr McCalla. It is not a part of the manufacturer's programme. Civil Aviation Authority does not have equipment to test

Q: It is included in you MCM

Obj:

J: Noted

Q: Repeated

A: It is included in MCM I signed. But if I did not sign to it the aircraft would not have flown. I objected …over the years. The last caravan we had operating it was not part of it

Q: Since 2001 you made no application to vary 48 hour daily

A: When I objection that is when it started

Q: Question repeated

A: Made verbal objection. Don't know if written but sure wrote several letters over the years

Q: You have them

A: Would have to go into archives"

22. On the 12th December 2014 the matter was adjourned part heard to the 24th February 2015. I adjourned into Chambers on the 21st January 2015 to consider the Defendants' application to strike certain paragraphs from a witness statement of Christopher Reid which had recently been filed. Orders for written submissions on that question were made. At the hearing in chambers I dismissed the application and granted permission to the Defendants to file and serve a witness statement in answer. On the 24th February 2015 we were unable to proceed due to the absence of Capt. Christopher Reid. The matter was adjourned for continuation on the 3rd March 2015. On that date Captain Beswick applied to ask Mr Levy further questions in chief. The application was not opposed and permission was granted.

23. In his further evidence in chief the witness gave some technical evidence related to navigational systems and other matters connected to exhibits 8(a), 8(b) and 8(c). These exhibits were admitted by consent. The content of the letter of 18th March 2005, exhibit 2 page 15, was revisited with specific reference to "*placards*". Mr Levy stated that he was not present when Mr Jackson inspected the plane. There were he said two investigators from the Defendant a Mr Jones and a Mr Jackson. The witness stated that had the placards been illegible it would not affect the fuel purchased or supplied because they buy fuel from only one supplier which only sold Jet blue. He was again asked to give further detailed technical evidence related to the content of the letter dated 18th March 2005. He was then taken to the engine mount assembly. He opined that the engine mount is not attached to the truss. There is an engine ring which he said connects to the aircraft's structure. There was he said no work done on the engine ring by EIU or by Plane Exhaust. Therefore, he said, the welding was not major repairs within the meaning of Regulation 5.75 Appendix II.

24. During further cross-examination Mr Levy agreed proper maintenance records were very important. The following exchange occurred:

"Q: Agree that when JCAA is doing annual inspection of Certificate of Airworthiness it inspects not only aircraft but its records

A: Yes

…..

Q: Show Exhibit 2 page 15 (letter of 18/3/05) items 1-7 your maintenance records had not noted these

A: Right these were defects CAA found on inspecting the aircraft

Q: Your pilot or AME had not identified before

A: Correct

Q: Duty of JCAA to identify them,

A: No, because any experienced mechanic can find something on a brand new plane. These are minor. Most have to do with

minor surface corrosion. These will not make an aircraft unairworthy. 99% of aircraft have corrosion spots.

Q: Are you saying the defects here need not be raised in your records.

A: Minor. Once or twice a year they clean or every 100 hours do major check. Certain surface corrosion found. Clean it with and use primer to paint to. It is continual thing.

Q: Your maintenance record ought to have reflected

A: If Director of Maintenance had seen it.

Q: If he did not see it but JCAA saw it it had to be raised and addressed

A: If raised but not addressed immediately. Yes by all means. Once raised we have to address it whether being deferred."

Mr Levy thereafter admitted that corrosion was a physical and chemical change which had to be removed. He also agreed there was corrosion around the antennae. There then followed this exchange:

"*Q: Did Mr Bryan accept the antennae was cracked*

Objection: Evidence to the opposite

J: Will allow

A: To be honest I could not tell you that I don't know."

He thereafter admitted that Mr Gunn acknowledged antennae was cracked and that the letter of 21st March 2005, exhibit 2 page 21(omitted from my bundle), showed that these discrepancies were not addressed until then. The omission is of no moment as a letter dated 22nd march 2005, exhibit 2 page 37, also demonstrates that the 1st Defendant's queries were not then all addressed. Mr Levy admitted that he was unable to say whether the placards were illegible, but that Mr Gunn had signed acknowledging they were, see exhibit 2 page 31. He admitted the plane sometimes flew to Cayman and may need to refuel in other countries.

25. When re-examined Mr Levy returned to the question of the engine mount and defined the truss. He explained what may have caused placards to be illegible and expressed the view that cleaning can make them legible. He denied ever

being required to give a two week lead time before applying for renewal of certification for an aircraft.

26. Captain Christopher Stewart Read was the Claimant's final witness. His witness statement dated 9th December 2014 was unsigned. I therefore allowed him to read it and sign it in the witness box. It is therefore dated 4th March 2015 and stood as his evidence in chief. He stated his impressive flying experience. He is also a licenced aircraft engineer in Jamaica and the USA. In Jamaica he is a licenced Aircraft Maintenance Engineer (AME). He had been operating and maintaining aircraft, including the Cessna Grand Caravan, for over 40 years. He reviewed the letter of the 18th March 2014, exhibit 2 page 15, and opined that, see paragraph 5 of his witness statement:

> *"None of items mentioned in this letter are structural defects which have an impact on safety or the handling or operation of the aircraft. Surface corrosion is a reality which is expected in the operation of all aircraft in a tropical environment where the aircraft is never far from a salty environment. This corrosion is routinely removed to ensure that it does not become endemic."*

The witness ventured the opinion that none of the items ought to have resulted in the refusal to extend the Claimant's C-of-A. He said in paragraph 7:

> *"The refusal in my opinion was frivolous, probably due to a lack of experience in the operation of the type of airplane. It should be noted that the standard of maintenance that is required for thirty and forty year old aircraft must be realistic and practical without compromising safety."*

27. He further deponed that he had, in the past, received oral approval from the JCAA. Paperwork would thereafter follow. This he said is due to the "*exigencies of commercial aviation"*. He then stated, in paragraph 8:

> *"However, the modus operandi of the JCAA has become inflexible and adversarial, creating undue economic hardships on operators for even routine administrative functions such as renewing an Aircraft Maintenance Engineer's Licence".*

He opined that the daily inspection (DI), required by the 1st Defendant, is the same as the pre-flight check done by pilots.

He then said in paragraph 9:

> *"This inspection acquires no greater currency because it is performed by an aircraft engineer. I can assert that pilots are extremely well trained and are more than capable of performing a pre flight check."*

28. His evidence was amplified. In this regard he opined that light surface corrosion was normal in Jamaica. He did say:

> *"Q: Is it [*surface corrosion*] likely to compromise airworthiness*
>
> *A: Depends, the older regulations left more latitude the newer ones say all defects must be rectified before release*
>
> *Q: Does light surface corrosion affect safety of aircraft*
>
> *A: We strive for perfection. However, within that frame work perfection would ground most airplanes in the world so you can defer defect, a minimum equipment to allow plane to fly. This will allow plane to be released, sometimes with conditions".*

The witness was permitted to comment on the Defendants' evidence to come. He was asked whether the Daily Inspection and Pre Flight Inspection for the Cessna 208B were the same thing:

> *"A: The DI is a simplified version of the pre-flight. It is a less detailed checklist than the pre-flight. One or two dealing with documentation record keeping not on pre-flight."*

He also spoke to the relevance of the crack on the antennae because that system of navigation was outdated and more modern navigational systems were in use.

29. When cross-examined Captain Read admitted that he had not seen the letter of the 18th March 2005, exhibit 2 page 15, "*in its entirety*". The following exchanges occurred:

> *"Q: Do you agree that when an operator seeking to have any work done maintenance or repairs by an overseas repair station approval would need to be obtained.*
>
> *A: That is now the case but was not always. In early days as long as supplier or contractor was duly certified in own jurisdiction it was unnecessary.*
>
> *Q: In 2005 an overseas repair station could not*
>
> *A: I cannot say I remember that. I would have to be referred to the Regulations*
>
> *Q: Please look at this, page 32, 2004 Regulations, Regulation 33(2). Do you agree if Rutair used a repair station outside Jamaica to effect maintenance, notify repair*
>
> *A: If it were so. I do recall there was a master list of companies that JCAA had approved"*
>
> *…….*
>
> *Q: "If not on list and used to do work itemised in regulation 33 it would be a breach*
>
> *A: Yes unless sought individual approval"*
>
> *……*

And later,

> *"Q: You were not aware there was issue re use of EIU and Plane Exhaust*
>
> *A: I was not aware"*
>
> *…….*
>
> *"Q: You say the authority was acting frivolously if the use by AOC of repair stations unapproved and did work on Jamaican registered aircraft do you agree not frivolous to investigate that*
>
> *A: If a breach of the Regulations they have the right to do that*

Q: You are aware of the importance of keeping proper records

A: Absolutely"

……

"Q: When authority has application to renew C-of –A it must inspect aircraft and records

A: Yes"

……..

"Q: You distinguish what obtained in old days and now

A: Yes

Q: What is period of time of newer regulations

A: 1995 or 1996

Q: 2000

A: Well into it"

……..

"Q: If an inspection by the authority the inspector identifies defects as in 18th March letter he was obliged to inform the operator

A: Yes

Q: It would be entitled to require operator to address defects

A: Yes

Q: By recording it

A: Yes

Q: And dealing with it

A: Yes"

……..

"Q: Given the "records inspection" discrepancies do you agree they were critical items that needed to be properly rectified

A: I would say this would take more than 5 minutes

J: Please answer the question

A: Without benefit of context of who did repairs. If done by duly certified approved equipped facilities they are formalities. It would be formality to dispense with query. Then not critical. They are significant items. Regulations. If not duly certified facilities then it becomes a critical matter.

Q: So Plane Exhaust and A-o-C if not part of master list would have to submit

A: Yes"

30. I have gone into some detail with the Claimant's evidence to demonstrate that, even before the start of the defence, weaknesses emerged. It is apparent that the Claimant's own expert acknowledged that the use of an unapproved repair station warranted an investigation. He acknowledged the import of correct documentation and that defects discovered ought to be corrected prior to issuing a C-of-A. Although deferral is possible this would be a discretionary matter. The witness had never seen a C-of-A issued whilst an investigation was in progress.

THE DEFENDANTS' CASE

31. It was the case for the Defendants that among other things:

a) The Civil Aviation Regulations 2004 (The Regulations) require prior approval from the Jamaica Civil Aviation Authority (the JCAA) for all inspections and/or maintenance, including NDT, performed overseas on aircraft regulated by the JCAA (Paragraph 3 Defence)

b) Engineering and Inspections Unlimited (EIU) was not a facility approved by the First Defendant (JCAA) (Paragraph 4 Defence)

c) Although there was a conversation with Mr Bryan the Claimant's version of it is denied. (Paragraph 5 Defence)

d) The letter dated 5th January 2005 was not received until March 14 2004 when a faxed copy was submitted (Paragraph 6 Defence)

e) Mr Lincoln Jackson (Senior Flight Safety Inspector) conducted a routine base inspection or audit of Claimant's facility.

f) The Certification for EIU was not given to the 1st Defendant until March 14, 2005 (paragraph 7 of Defence).

g) At a meeting between personnel, including the Deputy Director General Regulatory Affairs and the 2nd Defendant and others, held on the 11th March 2005 it was decided that the Claimant's

request for an extention of the C-of-A would be denied and a letter of investigation issued. (Paragraph 14 Defence)

h) The purpose of the investigation was to ascertain the circumstances surrounding the positioning of the aircraft at EIU without prior approval of the Defendant, to confirm work was done and whether it was done in accordance with regulatory requirements. (Paragraph 15 Defence)

i) The arrangement to inspect the aircraft on the 14th March 2005 was made prior to the decision to investigate being taken (Paragraph 18 Defence)

j) The decision to postpone the inspection was taken after the meeting of the 11th March 2005 and the decision to issue a letter of inspection (Paragraph 18 Defence)

k) The decision to refuse an extension of the C-of-A was not arbitrary or baseless but was because all tasks had not been completed or certified (Paragraph 20 Defence)

l) A service check pursuant to the approved maintenance control manual required a Certificate of Release to service and only an aircraft maintenance engineer could so certify. This requirement was there because of Claimant's inexperience with the particular aircraft and was intended to provide a safety margin (Paragraph 27 Defence)

m) A pilot's pre-flight check is not sufficient to certify the aircraft's airworthiness (Paragraph 29 Defence)

n) A complete review of the Claimant's records was completed on the 16th March 2005. The review revealed serious discrepancies which prevented issuance of a C-of-A (Paragraph 39)

o) The aircraft was inspected on the 18th March 2005 which revealed 14 items of discrepancy. These were communicated to the Claimant in a report. They prevented the C-of-A being renewed. The discrepancies are particularized as:

    i. Incomplete aircraft records by EIU and Plane Exhaust
    ii. Engine Condition Trend Monitoring programme not in place as required by the maintenance schedule

iii. Work performed in Florida (NDT and welding) improperly signed off on)

iv. Missing fasteners and rivets as well as corrosion on aircraft

(Paragraph 40 of Defence)

p) All outstanding matters were not addressed by the Claimant until the 23rd March 2005 on which date the C-of-A was issued (Paragraph 42 Defence)

q) At all material times the Defendants acted reasonably, in good faith without malice and in accordance with the Civil Aviation Act and Regulations (Paragraph 51 Defence)

32. The Defendants' witnesses were Mr. Lincoln Jackson (the Senior Flight Safety Inspector), Mr. Neri William Singh (the Director General) and, Mr Howard McCalla the second Defendant. It is fair to say that, for the most part, the assertions in the defence were supported by documentation and by the evidence of those witnesses. I do not find it necessary to traverse the details of that evidence as, when considered alongside certain admissions by the Claimant's witnesses, the result on a balance of probabilities is clear.

ANALYSIS OF THE EVIDENCE AND APPLICATION OF LAW

33. Upon completion of the evidence the matter was adjourned for written submissions to be filed and a date for oral submissions. The Defendants' closing submissions were filed on the 26th November 2021 and the Claimant's on the 29th April and 8th July 2022. The parties attended before me and made oral submissions on the 13th July 2022. I am grateful to all concerned for the efforts made in the presentation of this matter. The submissions provided were of tremendous assistance. I will not repeat them for fear of extending an already too extensive judgment. Suffice it to say the parties are to rest assured I have read and considered them all. In this regard I have found greater favour with the submissions made on behalf of the Defendants. My reasons follow.

34. The claim is for negligence and breach of statutory duty. Neither tort has been established. There is no doubt that, in breach of the Regulations, the aircraft was serviced by an unapproved service provider. The questions, whether or not there was oral approval or, whether the letter of the 5th January 2005 was sent on the 5th January or not until March 2005, are not terribly relevant. This is because no approval in writing, as required by Regulations: 30 (1) (a) [page 336],33 (2) [page 340] and Schedule 1 A.1.015(a) (18), (19) and (24) [page400], was ever sent. The Regulations just cited are to be found in the Jamaica Gazette Supplement Proclamations, Rules and Regulations Vol CXXVII Wednesday, December 1,2004 No.95 being No. 134 under the Civil Aviation Act, and cited as, the *"The Civil Aviation Regulations 2004".* It is clear from these provisions that "*Approval"* must be obtained before utilising a maintenance organization situated outside Jamaica to carry out *"maintenance work or modify or repair'* the aircraft unless "*approval"* for such work has been given by the Authority. Approval is defined as *"A formal instrument issued by the Authority*" and, "*Approved by the Authority*" is defined in the same vein. The term "*formal instrument'* connotes something in writing. Therefore oral approval, as contended for by the Claimant, would be ultra vires the Regulations. The Claimant does not assert they received such a document. It follows that when it came to the attention of the Defendants, that the aircraft had been flown overseas for maintenance and/or repair by an unapproved service provider, they were entitled and I dare say duty bound to investigate.

35. The allegation of breach of duty, for failure to issue an interim C-of-A, is also untenable. In the first place that would be a discretionary matter. It would be a matter of judgment for the relevant agency. Negligence arises when there is a duty to act and the duty is breached. There is no duty to issue an interim C-of-A whilst outstanding issues remain and/or an investigation is in progress. So there can be no question of negligence. It follows too that no statutory duty has been breached in that regard. The evidence reveals that there were discrepancies in record keeping and defects on the aircraft. These were not all addressed until the 23rd March 2005 at which time the C-of-A was issued, see exhibit 2 pages 65 and 66.

36. The suggestion, with which I disagree, that neither maintenance nor repair was done, even if true, cannot support the cause of action. This is because that question would be one the investigator needed to address. The Defendants were aware work was done on the aircraft overseas and that a letter of request for approval was allegedly issued. It cannot therefore be credibly maintained that an investigation, into whether maintenance and/or repair was done overseas by an unapproved entity, was unwarranted. Even if the investigation revealed that there had been no repair or maintenance done the decision to investigate would, given the information in the Defendants' possession at the time, still have been a reasonable one.

37. The court is generally reluctant to interfere with the decision of experts appointed by statute, see ***Allen v Guardian Life Limited et al [2018] JMSC Civ 32 (unreported judgment delivered 21st September 2018) at paragraph 18*** *and* ***United Kingdom Association of Professional Engineers and another v Advisory, Conciliation and Arbitration Service [1981] AC 424*** per Lord Scarman at page 442:

> *"The language of the judgment is very different from the language of industrial relations but the principle is clear and applicable. The courts will not tell a statutory body how it is to conduct its business or what decision, report or recommendation it is to make. They will invalidate the exercise of a statutory body's judgment or discretion only if satisfied that no reasonable person charged with the body's responsibilities under the statute could have exercised its power in the way that it did. Applying the principle to this case, the courts will not invalidate the ACA's report unless satisfied that no reasonable advisory, conciliation and arbitration service, with a due appreciation of its statutory duties and responsibilities, could have reported as it did."*

In this case the Claimant's own expert conceded, having seen the letters of 15th and 18th March, that a refusal to issue the C-of-A was at least understandable. The fact that a judge or some other person may have been a little more lenient is not a basis to find negligence or breach of statutory duty.

38. In the event the above stated view of the law, and its application to the Claimant's case, is wrong I will briefly review the Defendants' evidence and make specific findings of fact. Mr Jackson stated that although the Claimant knew they had the maintenance to do they made no effort to have the oversees facility approved. He also stated that Non- Destructive Testing was part of the maintenance programme and therefore approval was required. I accept this evidence, see schedule I page 403 Regulation # 62. He also denied it was customary for such approvals to be given verbally. I also accept this evidence. Indeed it would be shocking to the ordinary Jamaican to learn that matters, concerning the safety of aircraft and approval of personnel to effect repairs, could be handled in so casual a manner. I found Mr Jackson to be a truthful witness. His answer in cross examination to the question when was the aircraft not airworthy is instructive:

> *"When it left Ft. Lauderdale with maintenance by not approved agencies, when the aircraft was signed out by Mr Gunn when he was not present to do disassembly visual inspection and reassembly, when aircraft flew without a service check as required by their maintenance personnel".*

39. The witness was asked whether he consulted regulations before making a determination that the aircraft was flown illegally. His response was to refer to Regulations 33(2) (page 340) and 28(8) (b) at page 335. The following important exchange followed:

"Q: How do you conclude the flight was illegal

A: No approval obtained to use AIU or Plane Exhaust under rule 33

Q: What mean

A: Owing sites was not approved to work on aircraft.

Q: What makes flight illegal

A: Maintenance was done on the aircraft not approved and invalidated Certificate of Airworthiness

Q: Where does it say so in the Regulations

A: It is implied and in the other regulation says so."

40. On the question whether, if the flight back to Jamaica was not a commercial flight, the C-of –A remained valid there was the following exchange:

"Q: You cannot operate a commercial aircraft privately

A: No can't

J: Can you

A: It can be used for private purpose but the maintenance requirements do not change

……..

Q: Regulation 76 page 359 that is for commercial flight

A: Negative, in accordance with Fifth and Twelfth Schedule for airworthiness reports

Q: Daily inspection was required for commercial operation of Cessna 208A

A: Yes"

41. The witness in an exhaustive manner was taken through the pre-flight checklist and asked to compare it item by item with the Daily Inspection list required. This in an effort to show both were the same. The following exchange then occurred:

"Q: Agree that Exhibit 6 is an extremely comprehensive pre-flight inspection

A: It is a comprehensive pre-flight inspection for the crew

Q: If a trained mechanic were to check on oil…and find it within limits and a trained pilot to do the same would you expect either of them to be wrong

A: (Pause) No I would not say either is wrong. When maintenance does that task he has to record it. The pilot does not have to record it.

Q: So if pilot finds low oil level what is he to do

A: If pilot finds it in that condition he should alert maintenance

Q: When maintenance alerted it is recorded

A: Yes

Q: Does it not appear that however condition is observed it ends up being recorded

A: Yes

42. As regards the engine mount, and the use of a repaired or replacement part, Mr Jackson was clear it was not the equivalent of a new part. He said,

"Q: Regulations. 8130 what is your definition

A: If a part is removed and replaced that part can go to a repair station that can overhaul or repair it. When it leaves that repair station to go back into system as spare part then form 8130-3 would be attached to it and can be recommissioned and put on shelf ready to be used as a replacement part"

43. The witness clarified the issue as to documentation as to the repaired part

"Q: A part taken off and repaired. Put on shelf. The aircraft is sold to another owner. New owner buys the part that has been repaired 8130, but if plane not sold the same part put back in but 8130 not sufficient.

A: You are so correct"

44. The following exchange clarified the issues he investigated:

"Q: You were investigating officer

A: Yes

Q: What investigating

A: Investigating

1) *Breach by having repair outside Jamaica perform work on a Jamaican registered airplane without approval*
2) *In doing that other things came up like not having service check although it should be*
3) *Also the sign off of the work."*

45. The witness was carefully cross-examined on his investigation, his acceptance of a statement from Mr McCalla while interviewing Mr Bryan and, his decision not to accept Mr Bryan's account. The following exchange occurred:

"Q: You never get letter in January issue never raised on 28th February and at no time you received scope of work an FAA approval

A: Not on 28th No

Q: You saying Mr Bryan a liar

A: No don't agree. People can be mistaken but would not say he is a liar"

46. Mr Jackson's credibility was not shaken in any material respect. In re-examination he gave a clear reason why the pilot's pre flight was not the same as the mechanic's inspection:

"J: I will allow him to explain why one is not a simplified version of the other

A: Because of the purpose they serve. It is purpose not so functional. The checklist is what mechanic use to say fit to fly. The pre flight is for captain to satisfy himself that aircraft is ready to be flown. Pilot's own does not become a matter of record"

47. The Defendant's next witness was Mr Howard McCalla. His witness statement, with three amendments, was allowed to stand as his evidence in chief. He orally outlined his very impressive qualifications and experience. On the issue of whether verbal approval, to do repair overseas, had been given he said,

"Q: He says you gave verbal approval

A: A verbal request was made no question there. Mr Tony Bryan called me. Now Mr Bryan very briefly said they had work to be done, I don't recall what station he said it was he ask if EIU and I said to him it should not be problem but please get repair station certificate and operation specifics for the repair stations. Put them with the request and send it to the attention of his PMI, Mr Lincoln Jackson. That was the sum total of the conversation

Q: You gave no oral approval

A: I cannot give oral approval. A document is required unless you have it pre-approved

Q: He said customary to give verbal approval to be followed by paper trail.

A: In period of time I was acting as Director Flight Safety it was not normal. I don't know what he is referring to. If I gave verbal approval and have heart attack the next day somebody left holding the bag. How I approved operators with problem on my computer at my home I have a template for every single approval the Director Flight Safety could give. I had CAA letterhead available. On numerous occasions on weekends and at night I could give approval for pilots to fly extra hours, for persons operators to borrow a part from a company we not familiar with but you verify by telephone send paper work and you send approval to them.

Q: Also in paragraph 7 Mr Levy says maintenance signed off by Rutair personnel and Mr Gunn had licence

A: The two items signed off by Mr Gunn. One was non destructive inspection and the other welding. Mr Gunn did not have authority to certify either of those tasks. Had EIU or Plane Exhaust been repair stations that were approved by CAA and the individual stations had provided Mr Gunn with approved documentation (by JCAA) then Mr Gunn could release the aircraft to service and quoting the worksheet on which they were certified. Because EIU was not approved by JCAA and Plane Exhaust was not approved by JCAA Mr Gunn in signing for release to service of aircraft committed two clear breaches….for which he had no authority. Once that happens and plane takes off there is a breach of regulations. Fly without certificate of airworthiness. Matters not whether passengers on board or not. Certificate of Insurance would also be jeopardised."

This answer, by way of amplification of his witness statement, comprehensively answers much of the claim. In effect Mr McCalla stated that the issue was never, whether any of the defects found meant the aircraft was unsafe to be flown but, rather that the Claimant's had breached the regulations necessitating an investigation. The investigation as we have seen revealed issues with documentation as well as with defects on the plane which needed correcting.

48. Cross-examination did not shake the credibility of this witness. It was comprehensive and exhaustive but the effect was to reaffirm the position of most aspects of the defence. A significant exchange occurred when the question of the truss assembly, and whether a "repair" occurred to it, was explored:

"Q: Does fact of no approval change status of eligibility of repair station

A: The Jamaican regulation says that a repair station carrying out work on Jamaican registered aircraft or part thereof which is a major repair has to be approved by JCAA

Q: Which regulation

A: The 5th schedule

Q: Please find the Regulation (Handed Regulations)

Court Rises resumes 3:35pm

A: Regulations 30 (1) (b)
32 (1) (b)
32 (3) (a)
33(2)
Fifth Schedule 5.255(d)(ii)
Appendix II to 5.005 (a)

Q: The AME cannot sign for a part that involves major repairs unless under the authority of an AMO

A: Yes

Q: Put it to you that Rutair is an AMO

A: Rutair has an AMO

Q: Does it mean Rutair was an AMO in 2005

A: I don't know

Q: Wasn't Rutair approved to carry out all their own maintenance

A: Not major repairs need individual approval to all major repairs"

And much later:

"Q: Suggest Truss Assembly was purchased from Plane Exhaust

A: The evidence suggests a repair done by Plane Exhaust. We had no reason to dispute that

Q: What part of evidence showed you that same Truss taken off was replaced by Plane Exhaust

A: Exhibit 2 page 17 says part removed repaired and reinstalled"

49. The witness maintained that inspectors were always available. The following exchange is relevant:

"Q: There is always inspector available is that every day of the week

A: Not normally done on Saturday or Sunday but if necessary will be done

Q: If Certificate will expire in a weekend may be necessary

A: Yes

Q: Why not done here

A: The fact that we had a situation where aircraft had gone to a station we know nothing about a Certificate of Inspection would not be done until the inspector was able to identify what work had been done whether that work was done by persons trained to do the work using the correct tools, equipment material and procedures. The reason for that the inspector would have to look physically at what was done

Q: You agree all of that could be done at inspection itself

A: If the documentations were available"

50. The Defendants next witness was Mr Neri William-Singh the Director General of the 1st Defendant. His witness statements dated 30th May 2014 and 16th February 2015 stood as his evidence in chief. In 2005 at the time of these events he was the Chief Airworthiness Inspector at the 1st Defendant. He too was extensively cross-examined. He denied being aware that oral approval was sometimes given to use overseas repairs. He was also challenged as to whether the Regulations required written approval:

> *"Q: Where does it say approval has to be in writing. Please look for it.*
>
> *….*
>
> *Q: So you would know chapter and verse of Regulations*
>
> *A: They have changed since then. Schedule I, Definition "approvals" page 400 item 18, "formal instrument".*
>
> *Q: Does it say maintenance*
>
> *A: Maintenance not specified. It covers all approvals, my interpretation"*

51. On the question whether the repair was minor his answers were instructive:

> *"Q: The cracks discovered were described as minor repairs*
>
> *A: No, they are part of entire engine mount assembly and as such is a major repair*
>
> *Q: Assuming it is major you say CAA defines particular maintenance application as major and then tells operator to use a practice and manual written by FAA which defines that as minor repairs*
>
> *A: No*
>
> *Q: The operator must comply with both*
>
> *A: Aircraft is Jamaican registered."*

52. Similarly when asked about the comparison between the Daily Inspection requirements and pilot's pre-flight checks:

"Q: Any general inspection by pilots about to operate an aircraft in doing general walk around must recognise the condition of skin and any corrosion

A: Should. But pilots do walk around from a different perspective to a maintenance engineer. The maintenance engineer is required to put his signature attesting to the fact that aircraft meets the requirement and is fit for flight"

53. The Civil Aviation Act establishes the 1st Defendant the "Jamaica Civil Aviation Authority" as a body corporate to which section 28 of the Interpretation Act applies, see section 6 (1) of the Act. Section 6(2) provides that the First Schedule to the Act had effect with respect to the 1st Defendant. Clause 11 of the First schedule to the Act provides:

"11 (1) No action, suit, prosecution or other proceedings shall be brought or instituted personally against any member of the Authority in respect of any act done "bona fide" in pursuance or execution or intended execution of this Act.

(2) Where any member of the Authority is exempt from liability by reason only of the provisions of this paragraph the Authority shall be liable to the extent that it would be if the said member was a servant or agent of the Authority."

54. The requirement of want of "*bona fides*" is not satisfied by mere negligence. Conduct approximating to reckless disregard, or which is intentional or malicious, is necessary if the 2nd Defendant is to be found liable, see ***D&L Services Limited et al v The Attorney General Claim No CL 1997/D-141 (unreported judgment dated 22nd October 2010)*** per Edwards J Ag (as she then was) at paragraph 177 (when considering a similar provision in relation to the fire brigade):

"It is not sufficient for the claimants to say the members of the fire brigade did not fight the fire in a manner they would have liked or expected. To succeed the claimants must show that the actions of the firemen were so grossly wanting in the care and skill of ordinary firemen as to call into question their abilities as firemen; that it was

this action which created the danger or increased the risk which resulted in their loss. This, the Claimants have failed to do."

[That judgment was upheld on appeal, see ***D&LH Services Limited et al v The Attorney General et al [2015] JMCA Civ 65 (unreported judgment 18th December 2015)***].

The Civil Aviation Act clearly contemplates the possibility of legal action, against the 1st Defendant, without the need to prove a want of bona fides.

55. The Act sets out the duties of the Authority in section 6A. Section 6B permits the Minister to give it directions. Viewed in the round I agree with the submissions of the Defendants' counsel that there is no scope for a claim to breach of statutory duty by the Claimant. It seems manifest that the Authority exists to protect the public and the public's interest. There is nothing to indicate that the Claimant, an operator, falls within a category which the Authority is designed to protect. There is nothing to suggest an intent to create a private law right of action by an aircraft operator for a breach of statutory duty. In this regard I accept the law as established in ***Hague v Deputy Governor of Parkhurst Prison [1991] 3 ALL ER 733***.

56. There is however the possibility of a claim in negligence. Whereas the 1st Defendant may be liable for negligence simpliciter the 2nd Defendant, by virtue of the provisions cited above, cannot. It will be necessary to establish such gross negligence on his part, as would amount to reckless disregard and/or malice.

57. It should be noted that Claimant's counsel in written submissions prayed in aid principles related to misfeasance in public office. There is however no such cause of action raised in the Claim and Particulars of Claim. The evidence, necessary to establish such a cause of action, would suffice to establish a want of bona fides in the 2nd Defendant. The evidence before me however does not support such an averment. For the reasons which follow I find that there was, no want of bona fides in the conduct of the 2nd Defendant and, no negligence by the 1st Defendant.

58. I am satisfied on the evidence that there has not been negligence, misfeasance, malice and/or any breach of statutory duty. In the first place the Claimant said that it requested and received oral permission to use the overseas maintenance facilities. The evidence that permission was requested belies the later suggestion that permission was not required. However, more importantly, the fact that subsequent to the conversation, in which oral permission was allegedly granted, the letter of 5th January 2005 was sent indicates that the alleged oral permission was conditional. The condition being the submission of FAA certification for the two stations. If conditional the Claimant ought to have awaited receipt of confirmation from the Defendant, that the documentation submitted was accepted, before utilising the repair stations. This the Claimant failed to do. Even on its case therefore the Claimant's case, on the facts, would fail.

59. However it is far more probable, and I so find, that the 2nd Defendant informed the Claimant orally that he did not foresee a problem if the relevant documents were provided. He did not give oral approval. The Claimant as is apparent did not receive approval in writing. I find also that the letter of January 5, 2005 did not come to the Defendants' attention until the 2nd March 2005, see exhibit 2 page 2 and the receipt noted thereon. In this regard it matters not whether it was actually sent in January. A request for permission does not an approval become until and unless it is responded to positively. The evidence is not such as to convince me, on a balance of probabilities, that the letter was sent in January 2005 or that it was received by the Defendant.

60. The failure of the Claimant to obtain permission means that the Defendants were entitled to embark on an investigation. The reasons are articulated in the letter of 12th March 2005, exhibit 2 page 10. The fact that an unapproved maintenance facility was used sufficed to justify an enquiry. The Defendants would have been derelict in their duty not to have investigated the matter. It was also perfectly reasonable, and perhaps advisable, to delay issuing the certificate of airworthiness until the investigation was completed.

61. The Daily Inspection, every 48 hours, was a condition imposed by the 1st Defendant since 2001. Although apparently opposed to its necessity the Claimant had complied since then with it. However, now that it found itself in breach, the Claimant seeks to convince this court that such a requirement was unreasonable. There are two objections to this. In the first place this court will not substitute its view or judgment for that of expert bodies established by statue on a matter of a specialist nature, see paragraph 37 above. In the second place it does seem to me that an engineer's inspection, as required by the 1st Defendant, is qualitatively different from a pilots' pre-flight inspection. Even if it is not, and both examine the same items, the results of the former are documented because the engineer certifies the craft as fit to fly. The pilot only documents, by way of report, that which he finds to be wrong. It seems to me that the requirement for an engineer's daily inspection, every 48 hours, is consistent with a desire to ensure safety. There is no evidence to suggest that it is so unreasonable a requirement that no regulatory body, in the Defendants' position, would impose it.

62. The investigation revealed that the aircraft had Non Destructive Testing done and, when that revealed cracks, had the cracks corrected. Both actions by unapproved repairers. The Claimant argues that the Non Destructive Test is not maintenance within the meaning of the regulations. That cannot be so. The maintenance process must involve testing. How else will one know if there is something wrong which needs repair or other attention. The Claimant also asserts that the welding done was not major repair as it was not to the engine mount. The evidence which I accept is that the mount has three or four parts. The truss is one of these. It had to be disassembled for the welding to be done. There is some lack of clarity as to whether it was the same part welded and returned or whether a repaired part certified by form 8130 was used. It matters not. In either case a repair would have been done to the engine mount and this would be such as to require investigation because it was done by an unauthorised overseas repairer.

63. The Claimant argues that in fact the repairers were FAA approved and this was brought to the Defendants' attention. That may be so however the Defendants

cannot be faulted, at the time they initiated the investigation, in seeking to verify that was so. The investigation therefore reasonably considered not only the use of an overseas repairer but the conditions under which the plane was flown back to Jamaica. In the course of investigations documentary issues arose. In these circumstances the Defendants were entitled to take the view that the Certificate of Airworthiness, and hence the permit to fly, was not to be renewed until the investigation was completed and the issues identified satisfactorily addressed.

64. The investigation revealed several breaches of record keeping and of unnoticed defects in the aircraft, see letters dated 18th March 2005 exhibit 2 page 5 and, 22nd March 2005 exhibit 2 page 37. The Claimant complains these were minor and do not go to safety. Whether or not that is so is surely a question for the regulator. Any decision to waive a breach would also be a matter of discretion. There is no evidence to suggest that the discretion, not to renew the C-of-A, was so unreasonable that no reasonable regulator would have acted in that manner. Indeed for my part, it seems quite reasonable. So, to use one example, it is said the "placards" indicate fuel type and that since the Claimant only bought fuel from one source the Defendant was unreasonable to insist on replacement of the illegible placards. However, it was admitted that the plane sometimes flew overseas where it may need to be refuelled. At minimum it is then the placards become relevant. Therefore, the regulator in my view had not acted unreasonably in raising the illegible placards as an issue. Some fourteen breaches were discovered by the investigation. The Defendants acted reasonably in waiting for all breaches to be corrected before issuing the C-of-A. At any rate it cannot be said their decision, to withhold issuing a Certificate of Airworthiness pending completion of the investigation and satisfaction of all requisitions, was so unreasonable as to give rise to a cause of action.

65. Captain Read, whilst giving evidence, suggested that the Defendants "*modus operandi*" had become *"inflexible*". This may be so but it is not the purview of the court to instruct regulators how to do their duty. In any event that evidence, quoted in full at paragraph 27 above, suggests that the Defendants' strict application of the rules was not directed only at the Claimant but was the

Defendants' general approach to administration. This rules out malice. I do not accept, as contended by the Claimant, that the imposition of a requirement for Daily Inspection, the failure to impose a penalty, the timing of the decision to refuse the application for an extension of the C-of-A, the timing of the meeting at which a decision to investigate was taken and, the cancellation of the inspection originally scheduled for the 10th March, cumulatively or at all, establish that the Defendants were motivated by malice or mala fides. Save for the non-imposition of punishment each has been adequately explained by the Defendants' witnesses. The decision, whether or not to impose a sanction, is discretionary and it seems to me not to impose same leans against rather than in favour of alleged vindictiveness.

CONCLUSION

66. In the final analysis there has neither been a breach of statutory duty nor, a breach of duty, necessary to establish the tort of negligence. The Claim is dismissed and costs will go to the Defendant to be taxed or agreed.

David Batts

Puisne Judge.