

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 725 of 2015

BETWEEN

SHERROL VALMAY MASCOLL

CLAIMANT

AND

CARIBBEAN HANDLING CO. LTD.

FIRST DEFENDANT

AMERICAN AIRLINES

SECOND DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2017: January 20

**2019: January 8
March 22**

Appearances:

Mr. Pearson Leacock, Attorney-at-law on behalf of the Claimant

Mr. Bryan L. Weekes, Attorney-at-law on behalf of the First Defendant

Mrs. Sherica Mohammed-Cumberbatch, Attorney-at-law on behalf of the Second Defendant

DECISION

INTRODUCTION

[1] This matter concerns an application by the Second Defendant for an order striking out the Claimant's claim form and statement of claim. The application and an affidavit in support thereof were filed on December 9, 2016. The

application contends that the matter should be struck out as the Claimant initiated proceedings to recover damages for personal injuries after the right to damages had been extinguished, as an abuse of process and that the Claimant needed the court's permission to commence a new claim against the Second Defendant arising out of facts which are the same or substantially the same as those relating to this claim.

[2] The grounds of the application to strike out the claim are:

“1. That the Claimant's cause of action accrued more than two years before the commencement of these proceedings and if the Claimant was entitled to damages for personal injuries, such entitlement was extinguished by May 27 of 2014 given that Barbados acceded to the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal 1999) which, by Articles 29 and 53 respectively, establish that a right to damages in respect of personal injury sustained on board an airplane will be extinguished on the expiration of two years.

2. The claim amounts to an abuse of the process of the court given that the proceedings were commenced after the period of limitation when the right to damages had already been extinguished.”

[3] This matter also concerns an application by the First Defendant filed in August, 2018 for an order dismissing the Claimant's claim against the First Defendant pursuant to Part 26.1(i) of the Supreme Court (Civil Procedure Rules) 2008 on the consideration of a preliminary point as to whether the Claimant's claim is statute barred pursuant to the provisions of the Carriage by Air Act 1932 UK and the Carriage by Air (Colonies, Protectorates and

Trust Territories) Order 1953 which states that the articles of the 1929 Warsaw Convention for the unification of certain rules relating to the International Carriage by Air (“the Convention”) form part of the Laws of Barbados and in particular Article 29 which establishes a two year limitation for the filing of claims for damages.

- [4] The substantive matter is an action for general and special damages for personal injuries suffered by the Claimant, in an accident that occurred on the 27th May, 2012 when the Claimant was boarding an American Airlines aircraft at the Grantley Adams International Airport. The injuries sustained were allegedly due to the negligence of ramp operators of the First Defendant and the flight crew of the Second Defendant.

THE FACTS

- [5] The facts can be shortly stated. The Claimant was a passenger on board American Airlines flight AA 1384 on the 27th May, 2012. As she was about to board the airplane she fell at the top of the steps leading into the airplane onto the floor of the airplane. She sustained injuries to her left foot and accepted advice from the Second Defendant’s staff to get attention from two paramedics of the Island Care Ambulance Service. The paramedics cleaned and dressed the affected area and according to the Claimant did a blood sugar test and filled out an incident form which they kept. The Second Defendant’s employee and the paramedics also advised her to seek medical attention on her arrival in New York.

- [6] The Claimant arrived in New York on the 27th May, 2012 and visited the office of Dr. Bonnie Vader D.P.M., Podiatric Surgeon and Foot Specialist on the 29th May, 2012 for treatment.
- [7] She reported the accident to the First Defendant's supervisor Ms. Gail Lee who resided in New York but was advised that the matter had to be dealt with in Barbados.

SUBMISSIONS

The Second Defendant's Submissions

- [8] Counsel for the Second Defendant submitted that the Carriage by Air Act, 1932 and the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, No. 1474 governs international air travel in Barbados.
- [9] It was her contention that the Carriage by Air Act, 1932 had the effect of incorporating the provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12, 1929 into law. She noted that specifically incorporated into the Convention was the two year limitation period of the right to damages for causes of actions, which accrued during international carriage.
- [10] She therefore submitted that **section 20(2)** of the Limitations of Action Act, Cap. 231 which establishes that a claim for personal injuries must be brought three years from the date the injury occurred is inapplicable to the Claimant's application and the correct time frame in which an action should be brought is two years from the date the injury occurred.

- [11] She further submitted that despite the limitation set out in **section 20(2) of Cap. 231, section 20(2)** is subject to **section 61(a) of Cap. 231** which states that the Act does not apply “to any action or arbitration for which a period of limitation is prescribed by or under any other enactment...” given that the applicable law is the Carriage by Air Act, 1932 and the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953.
- [12] Counsel submitted that Article 17 of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 establishes a passenger’s right to damages in the event of death, if the passenger sustained wounding or any other bodily injury if the accident which caused the damage took place on board the aircraft or whilst embarking or disembarking.
- [13] She further noted that any claim for damages for personal injuries must be subject to the conditions and limits set out in the First Schedule of the Act.
- [14] Counsel also submitted that the method of calculating the two year limitation period as set out in the Act, should be determined by the law of the court seised of the case. In support of this submission, she noted that **section 39** of the Interpretation Act, Cap. 1 is instructive. She therefore submitted that the Claimant’s right to damages was extinguished on the 26th March, 2014. It is also her position that the aforementioned Act or Order does not make provision for the discretionary disapplication of the limitation period.
- [15] She also asserted that the Act and Order referred to above are still relevant as there is no evidence of any Order of the Prime Minister amending or revoking

the Order-in-Council and this is evidenced by the recognition and application of the Carriage by Air Act, 1932 and Order 1953 in Barbadian legislation.

- [16] In further support of her case Counsel relied on the case of *Francois et al v. Cardinal Airlines Limited et al DM 2008 CA 5*. In that case the Court of Appeal in Dominica found that the provisions of the Carriage by Air Act 1932 and the Convention were still applicable since they formed part of the domestic law. She noted that this case is instructive since Dominica has similar laws to Barbados. On this point she also referred to *Lawrence Bart v. British West Indian Airways Ltd. (1966) 11WIR. 378* where the Guyanese Court of Appeal confirmed that the 1929 Warsaw Convention was codified into UK law with the passing of the Carriage by Air Act, 1932 and the provisions of the Act were extended to countries including Guyana.
- [17] In support of the Second Defendant's claim that the Claimant's action is statute barred and as such an abuse of process, Counsel relied on *Ronex Properties v. John Liang Construction Limited [1982] 3 All E.R. 961*.
- [18] Counsel for the Second Defendant submitted that Rule 65.11 of the CPR governs the assessment of the amount of costs in interlocutory applications. She also submitted that the instant claim was not for a specific amount and Rule 65.5(2) (b)(iii) makes provisions for such claims, however it is her submission that the amount, which would be due according to this rule, is insufficient. It is her position that since submissions still had to be prepared, responded to and heard, that the proper time for the assessment of costs is after the oral arguments are heard. She therefore reserved the Second Defendant's

rights to submit to the court full representations on time spent in making the application, preparing for and attending the hearing of the application, disbursements, the attorney's fees and the basis on which the attorney's fees are calculated.

Claimant's Submissions

- [19] In response, counsel for the Claimant submitted that the limitation period for person injury is three years as prescribed by **section 20(2)** of the Limitation of Actions Act, Cap. 231. He further submitted that personal injury is a cause of action simpliciter and not an action per se and therefore **section 61(a) of Cap. 231** which states "This Act does not apply (a) To any action or arbitration for which a period of limitation is prescribed by or under any other enactments..." is inapplicable.
- [20] He argued that the Carriage by Air Act, 1932 and the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 do not specifically exclude common law negligence and is therefore applicable to this case.
- [21] It is his submission that the court should exercise its discretion sparingly in striking out applications and further that the court should consider the overriding objective which enables the court to deal with cases justly. Based on this, in dealing with cases justly, the court may allow the statement of case to be amended rather than striking it out if it accords with the overriding objective.

[22] He relied on the case of Paradise Beach Limited and Paradise 88 v. Edghill and Patel, Civil Appeal No. 10 of 2011 in support of the view that the court should not strike out a claim where there are clearly issues to be tried.

[23] Finally it is his submission that in the alternative, leave should be granted to file the matter out of time and the date on which the matter was filed should be deemed to be within the time extended in which the matter should be filed, this he urged is to give full effect to the overriding objectives.

The First Defendant's Submissions

[24] Counsel for the First Defendant submitted that the court does not have the jurisdiction to extend the time period under Article 29 of the Warsaw Convention as the Convention establishes a separate code within the Laws of Barbados which the provisions of the Limitation Act does not impact. In support of his submission, he relied on the case of Larouche v. Spirit of Adventure (UK) Ltd. [2009] EWCA Civ 12 at paras [64] – [78] an English Court of Appeal decision which according to him provides persuasive authority for this proposition.

[25] He submitted that the Claimant's claim is statute barred and should therefore be dismissed.

ISSUE

[26] The issue for the court's determination is whether the Claimant's claim is statute barred and therefore should be struck out and the action dismissed.

LAW AND DISCUSSION

Limitation

[27] According to Stuart Sime in “A Practical Approach to Civil Procedure” 6th Edition at page 63, “Limitation period is a procedural defence. It will not be taken by the court of its own motion but must be specifically set out in the defence. ...The Claimant still has a cause of action, but one that cannot be enforced.”

[28] In *Ronex Properties Ltd., supra*, **Stephenson LJ** noted the following at page 408:

“There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiff’s claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgement of service or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process; and the court will be able to do, in I suspect most cases, which was done in *Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1091*, strike out the claim and dismiss the action.”

[29] Generally, in Barbados, personal injury claims are subject to the Limitations of Actions Act, Cap. 231 (‘Limitation Act’) of the Laws of Barbados. Under the said Act, the basic limitation period for personal injuries to the Claimant is three years.

[30] **Section 20(3)** provides the following:

“An action to which the section applies should not be brought after the expiration of the period of 3 years from the later of (a) the date on which the cause of action accrued; or (b) the date on which the person injured acquired knowledge of his cause of action.”

[31] **Section 6** of the Limitation Act provides that:

“No action founded on tort may be brought after the expiration of 6 years from the date on which the cause of action accrued.”

[32] By **section 52(1)** of the Act the court is given a broad discretion to exclude the limitation period in personal injury matters. It provides:

“If the court considers that it would be equitable to allow an action to proceed having regard to the degree to which

- (a) the provisions of section 20 and 22 prejudice the plaintiff or any person whom he represents; or
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents, the court may direct that those provisions shall not apply to the action, or do not apply to any specified cause of action to which the action relates.”

[33] However, there is a specific legislation with regards to personal injuries that occurs while on board, embarking or disembarking aircrafts, namely the Carriage by Air Act, 1932 and the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 which extended the provisions of the Warsaw Convention of 1929 to Barbados.

[34] **Section 1(1)** of the Carriage by Air Act 1932 states that:

“The provisions of the Convention as set out in the First Annex to this Schedule shall, so far as they relate to the rights and

liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the colony in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.”

[35] Article one of the Montreal Convention provides that:

“This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.”

[36] In terms of liability, the Montreal Convention provides in Article 17 that:

“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

[37] Article 33 states:

“An action for damages must be brought, at the option of the plaintiff, in the territory of the States Parties, either before the court of the domicile of the carrier is ordinary resident, or has his principal place of business or where it has a place of business through which the contract has been made or before the court at the place of destination.”

[38] Article 35 addresses the limitation period in which an action for personal injuries may be brought against an aircraft carrier. It states that:

“1. The right to damages shall (emphasis mine) be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court seised of the case.”

[39] In *Phillips v. Air New Zealand 2002 1All ER (Comm) 801*, the court in discussing the effect of Article 29 of the Warsaw Convention which is equivalent to Article 35 of the Montreal Convention, was concerned with whether the circumstances of the claim brought it within the Warsaw Convention with the consequences it had to be brought within two years of the accident rather than the three years permitted by the Limitation Act 1980. The court held that the Claimant had been injured in an accident in the course of embarkation and that had proceedings been brought in time, she would have been entitled to judgment against the carrier regardless of fault. The court therefore held that the Convention applied and provided the exclusive remedy for the accident.

[40] This decision was also applied in *Luis Jarvis et al v. American Airlines HCVAP 2005/026* where the Eastern Caribbean Court of Appeal had to determine whether the Warsaw Convention applied in circumstances where the claim was brought outside the limitation period provided in the Convention. The court held that the claim was commenced outside the two year period specified in the Convention and Article 29 of the Convention therefore extinguished the Claimant's action.

[41] In order for the international treaty such as the Warsaw Convention to be recognized as law, it must be ratified into domestic law. The United Kingdom, on behalf of Barbados, signed the Warsaw Convention on the 12 October, 1929. The Carriage by Air (Colonies, Protectorates and Trust Territories)

Order 1953 extended the provisions of the Warsaw convention of 1929 to Barbados.

[42] Amendments were made to the Convention. The Hague Protocol 1955 modified the Warsaw Convention but to date it has not been adopted by Barbados. However, in 1999 the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal 1999) replaced and further clarified the protections the Warsaw Convention offered to travelers. It came into force in Barbados on 4th November, 2003.

[43] It should also be noted that there is a rule of statutory interpretation that a general provision in a statute does not derogate from a specific provision in the same or another statute. The rule is expressed by the Latin maxim *generalalia specialibus non derogant*. In his book “Bennion on Statutory Interpretation”, Fifth Edition (2008) Francis Bennion explains the maxim at page 306 as follows:

“Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.”

[44] Therefore the general provisions of the Limitations Act cannot derogate from the specific provisions on limitation in the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 which extended the provisions of the Warsaw Convention of 1929 to Barbados and is the relevant statutory

regime with respect to the limitation period for bringing a claim for personal injuries, which occur while on board, embarking or disembarking aircrafts.

[45] In support to this, attention is drawn to the *National Insurance Board v. Grannum Magisterial Appeal No. 6 of 2010* where the Court of Appeal had to determine whether **section 43(7)** of the National Insurance Act, Cap. 47 created a limitation period which governed a claim under **section 43(1)** of the said Act on an application for summary recovery of national insurance contributions. Pursuant to **section 43(7)** the National Insurance Board is given a three year period to recover outstanding contributions. The cause of action arose in 2004 but the claim was filed on 13th May, 2009. At the hearing of the application in 2010, the Defendant raised the limitation defence noting that the claim ought to have been brought by 2007. The Court of Appeal agreed with the magistrate and held that **section 43(7)** had the effect of creating a limitation period which governs a claim made under **section 43(1)** for summary recovery of national insurance contributions.

[46] The court noted that:

“The Limitation Act does not repeal the limitation period provided for in the National Insurance Act. On the contrary, the Limitation Act saves the limitation period in the National Insurance Act.”

[47] The court referred to **section 61** of the Limitation Act which saves limitation periods prescribed by other enactment. It states

“61. This act does not apply

(a) To any action...for which a period of limitation is prescribed by or under any other enactment;”

- [48] In the instant case the cause of action alleged is for damages for personal injuries sustained in the course of embarking the Second Defendant's airline due to its negligence and/or negligence of its agents, the accident occurring on the 27th May, 2012. Applying the principles expounded above, this action is subject to the provisions of the Warsaw Convention and a two year limitation period applies from the accrual of the cause of action. The cause of action accrued on the 27th May, 2012, the action should have commenced on or before the 28th May, 2014 but in fact commenced on the 22nd May, 2015.
- [49] However, given the draconian nature of striking out applications, counsel for the Claimant is asking the court to consider the overriding objectives of the Civil Procedure Rules, 2008. In support of this he cited the case of *Paradise Beach Limited and Paradise 88 v. Edghill and Patel (Barbados) supra* where the Court of Appeal noted that before a court strikes out a case regard must be given to the overriding objectives in that cases are to be dealt with justly and the "dealing with cases justly included, so far as practicable saving expense; dealing with a case in a way which is proportionate to the amount of money involved, ensuring that it is dealt with expeditiously and fairly; and importantly allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases." But what has to be noted here is that what is sought to be corrected does not arise out of any procedural irregularities or technical errors in which an order can be made remedying the error.

[50] In my view it is clear that the signatories to the Warsaw Convention intended that at the expiry of the two year period, all claims under the Convention would be extinguished, so that the only determination for the court would be determination of the dates and whether the action was brought within the two year period. The words of the article are clear and unambiguous and clearly shows “that the two year period is not subject to suspension; interruption or extension in any circumstances” – see *Laroche v. Spirit of Adventure (UK) Ltd., supra.*

Costs

[51] Generally the rule is that the unsuccessful party pays the costs of the successful party, however this is always subject to the court’s discretion.

Rule 65.11 provides:

- “(1) On determining any interlocutory application except at a case management conference, pre-trial review on the trial, the court must:
 - (a) decide which party, if any, should pay the costs of that application;
 - (b) assess the amount of such costs; and
 - (c) direct when such costs are to be paid...
- (4) In assessing the amount of costs to be paid by any party, the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.
- (5) A party seeking assessed costs must apply to the court and to all other parties a brief statement showing:
 - (a) the disbursements incurred;

- (b) the attorney-at-law's fees incurred;
and
- (c) how that party's attorney-at-law's costs are calculated....

(7) The costs allowed under this rule may exceed one tenth of the amount of the prescribed costs appropriate to the principal application unless the court considers that there are special circumstances of the case justifying a higher amount.”

[52] Counsel for the Second Defendant submitted that there are special circumstances here justifying a higher amount of costs as calculated by her pursuant to the table in Appendix B of Rule 65. She noted that the amount would be grossly insufficient given the nature and circumstances of this case and the substantial preparation required in making the application.

[53] Notwithstanding the rules on costs, the court may nevertheless exercise discretion when making a cost order. In Michael Wilson and Partners Limited v. Termyin International Limited et al, BVIHCV 2006/0307 the judge disagreed with submissions by counsel that where the 10 percent cap is removed in special circumstances then the court can only award costs between 10 percent and 100 percent of the prescribed costs. **Hariprashad-Charles J** stated that there is “no reason why a successful party cannot be awarded costs of 200 percent of the prescribed costs appropriate to the claim if the court determines that that is fair and reasonable in the circumstances.”

CONCLUSION

[54] For all the above reasons, I find that in Barbados, any action for damages for personal injuries which occur while embarking, disembarking or on board an

aircraft, can only be brought subject to the conditions of the Convention, since the Convention sets out the limits of the regime within which the claim is made and the carrier's liability is governed.

[55] I therefore accept the submissions of Counsels for the Defendants that the time for bringing the action is clearly two years. The contract between the Claimant and the Defendants began on the 27th May, 2012. She therefore had until the 27th May, 2014 to commence any action against the Defendants. Failure to do so means that her action is statute barred and should therefore be struck out, because as stated by **Margot Warner JA** in *Rattansingh v. The Attorney General et al TT 2002 CA 22*, "harsh though it may appear to be, the purpose for enacting limitation periods is to ensure that genuine claims are prosecuted without dispatch and to relieve potential defendants from defending 'stale' claims, which they were entitled to assume, had been put to rest."

DISPOSAL

[56] The Claimant's claim is therefore struck out.

[57] In relation to costs, I also accept the submissions of Counsel for the Second Defendant and will hear the parties on this issue.

PAMELA A. BECKLES
Judge of the High Court