

IN THE SUPREME COURT OF BELIZE, A.D. 2008

ACTION NO. 50 OF 1999

LUTHER CARL RICHEE

Plaintiff/Respondent

BETWEEN AND

**TROPICAL AIR SERVICES LTD
and
OSCAR FLORES**

Defendants/Applicants

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. E. Andrew Marshalleck for the defendants/applicants.
Ms. Jaseth Jackson for the plaintiff/respondent.

—

DECISION

The issues raised for determination in this application arose out of facts which can be stated within a short compass.

2. The claimant, Mr. Luther Carl Richee, was a passenger on Tropic Air Services Ltd's Flight 280 on 8 March 1995 bound from Belize City to San Pedro, Ambergris Caye. The aircraft was owned by the first defendant and piloted by the second defendant. The aircraft was involved in an accident on landing in San Pedro as a result of which Mr. Richee claimed he sustained injuries.

3. On the 3rd February 1999, nearly some four years later, Mr. Richee commenced the present action against the defendants seeking compensation for personal injuries and expenses and damages.
4. In their defence, the defendants deny Mr. Richee's claim but more importantly for this decision, claimed instead that the flight on which Mr. Richee was involved in was a non-international carriage which was subject to the provisions of the Convention for the Unification of Certain Rules relating to International Carriage by Air (the Warsaw Convention) as amended, which govern non-international carriage. This is referred to hereafter as the Warsaw Convention.
5. After an exchange of pleadings between the parties, the defendants then made applications, first by summons dated 27 May 1999 seeking an order from the Court that the action be dismissed as frivolous, vexatious and an abuse of the process of the Court. The fate of this summons remains indeterminate. Secondly, by a notice of motion dated 14th January 2003 by the attorney for the defendants (presumably with the agreement of the attorneys for the claimant), the following issues were set down for trial as preliminary issues:

(1) *Whether the Convention for the Unification of Certain Rules Relating to International Carriage by Air as amended (the Warsaw Convention) is in Contravention of Article (sic) 6 of the Belize Constitution?*

(2) *If the Warsaw Convention is found to be in contravention of Article (sic) 6 of the Belize Constitution whether the same shall be declared void, or whether it can be construed with such modifications, adaptations, qualifications or exceptions as are necessary to bring it into conformity with Article (sic) 6?*

6. Inexplicably, the motion was never heard by the original judge before whom it was set down. It was eventually set down before me on 2nd March 2005. The delay therefore in rendering a decision only now is much regretted, but again this was due mainly to the lack of sufficient judges and the increasing workload of the Court. In fact, the record shows that the matter itself was heard after a continuing trial in another case on the same day.

Also, the change of attorneys on both sides did not conduce as well to a timely disposition of this matter.

7. The issues for determination are therefore the compatibility or otherwise of the Warsaw Convention with section 6(1) of the Belize Constitution and if it is not compatible, whether pursuant to section 134 of the Constitution, it can be construed, modified or adapted with any necessary qualification so as to bring it in conformity with the Constitution.
8. However, the real issue that has agitated the instant application is about the limitation of the period within which an action may be brought to claim damages in the circumstances of this case. From the brief recital of the facts giving rise to the claim as recounted in paras. 2 and 3 above, it arose out of an incident involving one of the aircrafts owned by the first defendant and operated at the material time by the second defendant. In this accident, the claimant has claimed that he sustained injuries.
9. It is common ground between the parties that the air carriage in which Mr. Richee was involved was a **non-international carriage**. It is the position that the provisions of the Warsaw Convention of 12th October 1929, as amended at The Hague in 1955 and the provisions of the Guadalajara Convention of 1961 apply to carriage by air not being international carriage – see generally **2 Halsbury's Laws of England 4th Ed.** by

Hailshan, at para. 1312. The question therefore for determination is not the nature of the air carriage in which Mr. Richee was involved. But rather about the limitation period provided under the Warsaw Convention vis-à-vis that provided for under the Limitation Act – Chapter 170 of the Laws of Belize, Revised Edition 2000 and the compatibility or otherwise of the former with section 6(1) of the Constitution of Belize.

10. Mr. Richee, the claimant, brought the present action on 3rd February 1999, nearly some four years after the incident on 8th March 1995 involving the aircraft on which he was a passenger.
11. Against Mr. Richee's claim, the defendants have pleaded that, pursuant to Article 29 of the Warsaw Convention, his claim is time barred.

Article 29 of the Warsaw Convention provides as follows:

“(1) The right to damages shall be extinguished if an action is not brought within 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.”

12. It was however, vigorously argued on behalf of Mr. Richee, whose action is clearly outside the two-year limitation provided for in Article 29 that this period was well short of that provided for, in the circumstances, by section 4 of the Limitation Act. And that to insist upon or therefore uphold the two-year limitation in Article 29 of the Warsaw Convention as against the six year limitation period, would amount to a denial to Mr. Richee of the

equality of all persons before the law and its equal protection to every one without discrimination.

13. Section 4 of the Limitation Act provides as far as is material as follows:

“4. The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued:

(a) actions founded on simple contract on tort.”
(Emphasis added).

14. Section 6 of the Constitution so far as it is material provides as follows:

“6(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

15. The principal argument for Mr. Richee therefore is that because the Limitation Act provides a period of **six years** after which any claim founded in tort would no longer be viable and that Article 29 of the Warsaw Convention prescribes a period of only **two years** within which to bring action, after which any right to damages would be extinguished, the latter instrument is discriminatory and that it fails to afford equal protection of the law as is stipulated in section 6(1) of the Constitution.

16. Section 6 of the Constitution itself is extensive and has more provisions as parts of its detailed subsections (12 in all) than any other section of the Constitution devoted to the protection of fundamental rights and freedoms. But most of its provisions deal, in the main, with the criminal process and the criminal justice system. However, its subsection (1) which is prayed in

Mr. Richee's aid in this case, like its subsections (7) and (8) deal with the **civil** as well as the criminal processes.

17. The heart of section 6(1), in my view, is to secure for everyone, in both civil and criminal cases, what can compendiously be called the **due process of the law**: that is, the equality of all persons before the law and without any discrimination, the equal protection of the law.

Does Article 29 of the Warsaw Convention offend section 6(1) of the Belize Constitution?

18. Does the difference in the limitation period (two years) in Article 29 of the Warsaw Convention as against the period (six years) in section 4 of the Limitation Act, offend section 6(1) of the Constitution?
19. I listened carefully to the arguments and submissions of the attorneys for the parties and carefully read their written submissions in this matter. At the end of the day, I am not convinced or persuaded that the shorter period of limitation provided for in Article 29 of the Warsaw Convention offends section 6(1) of the Belize Constitution.
20. I have come to this conclusion for the following reasons:
21. In the first place, Article 29 of the Warsaw Convention is a provision of an international treaty the object of which, as stated in the chapeau of the Convention is **For the Unification of Certain Rules Relating to International Carriage by Air**. (Although as I have stated at para. 9 above, it is generally accepted that the Convention does apply to non-international carriage by air). This, of course, is not to say that a treaty provision may never transgress a country's Constitutional provisions. It is however a remote proposition. And for further reasons I shall state, I am

not convinced that Article 29 of the Warsaw Convention transgress the provisions of section 6(1) of the Constitution of Belize.

In the second place, the Limitation Act, in particular, section 4 thereof, which is urged on Mr. Richee's behalf, is a general Act, applicable to the generality of torts; whereas Article 29 of the Warsaw Convention is a special provision dealing with claims for damages under Chapter III of the Warsaw Convention dealing with the liability of an air carrier.

22. In the third place, the right to damages under Article 29 is not dependent necessarily on proof of tortious liability of the air carrier. It is a right to damages but only within two years after the conclusion of the flight in which the passenger was. This is unlike a claim for damages under the general law of torts, such as for example, negligence, to which section 4 of the Limitation Act is undoubtedly applicable. Proof of fault of the tortfeasor and resultant damage are generally required, except in cases of **res ipsa loquitur**, in which the thing or the damage speaks for itself.
23. Article 17 of the Warsaw Convention on the other hand provides:

“The carrier is liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operation of embarking or disembarking.”

This provision, importing almost strict liability for the air carrier, is only attenuated by Article 21 which provides that:

“If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court

may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.”

24. Also, to underscore the specialist nature of the Warsaw Convention, its Article 22 places limitations on the liability of air carriers in the case of the carriage of persons and registered baggage and cargo, with elaborate provisions for the calculation of the necessary quantum of damages. By Article 25 the limits of liability of the carrier shall however not apply if it is proved that the damage resulted from the intentional or recklessness with knowledge that the damage would probably result from the act or omission of the carrier, his servants or agents. In the case of claims based on any of the heads of nominate torts, such as trespass to the person or land, negligence or defamation, subject to proof of special damages, if any, damages are generally at large and in appropriate cases, can be exemplary as was explained in **Rookes v Bernard (1964) AC 1129**. Further, unlike the position under the tort of negligence, for example, Article 29 of the Warsaw Convention is expressly stated as not applying to any proceedings for any contribution between tortfeasors – see Order 5 of the Carriage by Air (Overseas Territories) Order, 1967 in UK, S.I. No. 809 of 1967. On the other hand, in proceedings against one or more tortfeasors generally, contribution between them may be a feature of the case.
25. These considerations persuade me that the Warsaw Convention is a specialized regime applicable only to carriage by air of a non international character such as the one Mr. Richee was involved in. This specialist regime is distinct and separate from general provisions of law, including limitation periods, applicable ordinarily to the general run of torts.
26. The difference between Article 29 of the Warsaw Convention and section 4 of the Limitation Act, I find, does not in and of itself offend section 6(1) of the Constitution. Both provisions assure in their respective domains the

equality and protection of the law. The former with a shorter limitation period, operates in the domain of air carriage whereas the latter operates in the domain of the generality of torts.

27. However, the novel point in this case, unlike other cases where section 6(1) and kindred provisions have been considered by the courts is that here it is not being alleged that some public official, body or authority endowed with coercive power is meting out different or unequal treatment to Mr. Richee; but that rather the limitation period governing his situation (Article 29 of the Warsaw Convention), is different from that provided for under the Limitation Act (section 4) relating to claims founded on torts. That is to say, if I understand aright the contention urged on behalf of Mr. Richee, it is the law itself that is affording a different treatment to him. Consequently it was plausibly submitted on his behalf that that law is contrary to section 6(1) of the Constitution.
28. I am however of the view that this line of argument and submissions based on it are unsustainable in the light of the situation and circumstances of Mr. Richee. As the Privy Council recently stated in the Trinidad and Tobago case of **Mohanlal Bhagwandeem v Attorney General of Trinidad & Tobago** (2004) 64 WIR 402, at para. 18 of its judgment delivered by Lord Carswell:

“18. A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom

is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. The appellant in the present case relied on an actual comparator, Sergeant Fitzgerald George, who was promoted some seven and three quarter months after his reinstatement following a long period of suspension. That interval of time is the only real similarity between their cases. In his affidavit sworn on 28 December 1999 the Commissioner compared the history and record of the appellant and Sergeant George in some detail, which it is not necessary to set out in detail in this judgment. Their Lordships are satisfied on this evidence, which was not controverted, that the Court of Appeal was correct in rejecting Sergeant George as a true comparator. Since the appellant had to concede that none of the other officers to whom he referred in his affidavit sworn on 5 August 1999 as having been promoted following periods of suspensions was similarly circumstanced to himself, he is left without a foundation for his claim of unequal treatment.”

29. Yes, Mr. Richee was involved in an accident but this was in the context of an air carriage. He is therefore not in a material sense, a comparator with others who may be victims of one kind of one tort or the other. For the latter section 4 of the Limitation Act would apply. But in the case of persons in Mr. Richee's position, that is, victims of air incidents, accident or mishaps, resulting from air carriage the law provides a special regime through the provisions of the Warsaw Convention. Surely this cannot be said to deny them the law's equal protection or equality before the law. The Warsaw Convention is designed and intended to meet their special situation. It relates, in my view, to both the subject-matter and persons involved in air carriage.

30. What section 6(1) guarantees in my view, is that among equals the law should be equal and that laws should be equally administered. Mr. Richee is not in the same position as victims of any other tort. His claim results from an air accident. Section 6(1) guarantees that like any other victim of an air accident, the provisions of Article 29 of the Warsaw Convention and indeed of any of its other provisions would apply and be equally administered. This can't be a denial of the guarantees of section 6(1). Absent any other victim of an air carriage incident being given a different treatment than Mr. Richee, there is no real comparator between him and victims of any other tort for the purposes of the limitation period. I am of the considered view that Article 29 of the Warsaw Convention and not section 4 of the Limitation Act is applicable to his situation.

Conclusion

31. It is for all these reasons that I am not persuaded that Article 29 of the Warsaw Convention offends section 6(1) of the Belize Constitution. The Article speaks clearly to claimants like Mr. Richee involved in a carriage by air incident. Section 4 of the Limitation Act address the position of claimants generally under any head of any of the nominate torts. It does not apply to the special circumstances of carriage by air.
32. In the light of this finding I think it is not necessary to address the other issue of interpretation, adaptation or modification of Article 29 of the Warsaw Convention pursuant to section 134 of the Constitution in order to bring it into conformity with the latter. I find no conflict between it and section 6(1) of the Constitution. I am satisfied that within its provisions, Article 29 assures equal treatment and the protection of the law to all persons who may be involved in incidents involving carriage by air, in this case of non-international carriage.

In the result, I uphold the arguments and submissions on behalf of the defendants that Article 29 of the Warsaw Convention is not violative of section 6(1) of the Constitution. Consequently, I find that Mr. Richee's claim pursuant to Article 29 of the Warsaw Convention was extinguished after the lapse of two years since the air incident he was involved in at San Pedro on 8th March 1995.

The costs of these proceedings are awarded to the defendants to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 3rd December 2008.